

**Rakesh vs.state**

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**SooperKanoon Citation :** [sooperkanoon.com/1216469](http://sooperkanoon.com/1216469)

**Court :** Delhi

**Decided On :** Jul-26-2018

**Appellant :** Rakesh

**Respondent :** State

**Judgement :**

§~7 \* + RAKESH STATE IN THE HIGH COURT OF DELHI AT NEW DELHI  
CRL.A. 125/2003 ..... Appellant Through: Mr.Haneef Mohammad, Advocate.  
versus Through: Mr.Hirein Sharma, APP. .... Respondent CORAM: JUSTICE  
S.MURALIDHAR JUSTICE VINOD GOEL JUDGMENT2607.2018 VINOD GOEL,  
J.:

1. This is an appeal under Section 374 of the Code of Criminal Procedure, 1973 (Cr PC) against the impugned judgment dated 27th January, 2003, passed by the Court of learned Additional Sessions Judge, Delhi, (ASJ), in Sessions Case No.55/1998 arising out of FIR No.1304/1997 at Police Station (PS) Janak Puri, Delhi registered under Section 3 of the Indian Penal Code, 1860 (IPC) convicting the appellant and the co-accused i.e. Sanjeev Sharma for the offences punishable under Section 3 of the IPC for committing the murder of Lal Mohd. and the order of sentence dated 28th January, 2003. Crl.A. 125/2003 Page 1 of 29 2. The factual matrix of the case as taken note of by the Ld. ASJ in the opening paragraphs of the impugned judgment are as under:-

"The case of the prosecution is that on 28th November, 1997 Mohd. Amil, Mohd. Munna, Muzibur Rehman, Imtiyaz, Guddu and Lal Mohd. went to see night show of movie at Janak Cinema. Lal Mohd., Guddu and Munna stood in the queue to buy tickets. Both the accused Sanjeev Sharma and Rakesh were also in the queue ahead of Lal Mohd. At about 8.45 pm Lal Mohd. received push from behind there being a crowd and he fell on accused Sanjeev Sharma. On this both accused gave fist blows to Lal Mohd. Mohd. Amil and Majibar Rehman intervened and separated them and then Mohd. Amil offered to buy the tickets for his companions. After the quarrel both accused persons had also come out of the queue. Mohd. Amil purchased six tickets of Rs.18 each and came out of the queue. At about 9.00 pm both accused reached near Mohd. Amil etc. and started giving them fist blows. When Mohd. Amil etc. tried to catch hold of both accused to save themselves then accused Rakesh caught hold of both hands of Lal Mohd. and told Sanjeev that he was to be killed because he had given the push. On this Sanjeev took out a knife Page 2 of 29 CrI.A. 125/2003 from right pocket of his pant and saying Saale Tera Kaam Tamam Kar Deta Hun gave knife blows below left ear on the neck. Mohd. Amil etc. overpowered both the accused persons with difficulty and snatched knife from Sanjeev. Lal Mohd. started bleeding and Munna arranged to take him to the hospital in a rickshaw, but a person present with a car asked him to use his car for taking Lal Mohd. to the hospital. Munna took Lal Mohd. to hospital in the ambassador car, whereas remaining four kept both accused in their custody. The police on duty also reached the spot and someone informed police station. The information was recorded in DD register and copy of the same was handed over to SI Sita Ram for investigation who with Const. Jawahar reached the spot and recorded statement of Mohd. Amil. Then he made an endorsement on the same and got a case registered under Section 3 IPC after information was received that Lal Mohd. had died. Mohd. Amil also produced the blood stained knife before SI Sita Ram who prepared sketch of the knife and sealed it and seized. CrI.A. 125/2003 Page 3 of 29 2. Thereafter investigation was taken over by Addl. SHO Insp. Vir Singh who also reached at the spot. All the documents prepared by SI Sita Ram along with knife were handed over to Addl. SHO. During investigation site plan was prepared, the spot was photographed, cinema tickets were seized and earth control was lifted and sealed.

Both the accused persons were arrested. Then inquest proceedings were conducted and SI Ram Kishan was deputed to get post mortem examination of Lal Mohd. conducted. After completion of investigation final report was prepared and filed in the Court of Metropolitan Magistrate who committed the same to the Court of Sessions for trial. 3. On 19th September, 1998, the learned ASJ framed charges against the Appellant and the co-accused i.e. Sanjeev Sharma under Section 3 of IPC to which they pleaded not guilty and claimed trial.

4. To bring home the guilt of the accused persons, the prosecution examined 24 witnesses. Separate statements of the accused were recorded under Section 313 Cr PC by the Ld. ASJ wherein they denied all the allegations and pleaded having been falsely implicated. Two defence witnesses; Gajender Pal (DW1) and Lala Ram (DW2) were examined by the co-accused Sanjeev Sharma. Crl.A. 125/2003 Page 4 of 29 5. Appreciating the evidence on record, the Trial Court found the appellant and the co-accused to be guilty of offences under Section 3 of the IPC. The co-accused and the appellant were accordingly sentenced to undergo imprisonment for life along with a fine of Rs.100/-, and in case of default of payment to undergo RI for three months.

6. Crl.Appeal No.371/2003 filed by the co-accused Sanjeev Sharma was taken up on 24th May, 2018 by this Court when a status report was filed by the SHO of PS Janakpuri to the effect that the appellant therein was not found at the given address and his appeal was dismissed with the directions that as soon as he is apprehended and sent to jail, the learned APP shall mention the appeal for revival of the hearing.

7. Learned counsel for the appellant submits that all the prosecution witnesses i.e. Majibar Rehman (PW9), Naushad (PW13), Mohd. Amil (PW15), Imtiyaz (PW16) and Mohd. Munna (PW18) have deviated from their statements recorded by the Investigation Officer under Section 161 Cr PC and they did not support the case of the prosecution. He submits that there are a lot of improvements in their depositions. He submits that Mohd. Amil (PW15) has completely resiled from his earlier statement. He submits that PW13 and PW15 have not attributed any role to the appellant in the incident in question. Crl.A. 125/2003 Page 5 of 29 He submits

that the learned APP has cross-examined all the witnesses in order to fill up the lacuna in the case.

8. The Ld. counsel submits an alternative argument to plead that the incident in question took place on the spur of the moment and there was neither any intention on the part of the appellant to kill the deceased nor was there any knowledge that the alleged stab injuries would cause his death. He urges that this unfortunate incident took place without premeditation upon a sudden quarrel that erupted in the heat of the moment. He submits that its not Section 302 of the IPC but Section 304 Part I of the IPC which is attracted.

9. Per contra, it is submitted by the learned APP for the State that the Trial Court had passed the judgment after due appreciation of the evidence on record and there is no infirmity or illegality in the judgment. He submits that the appeal is liable to be dismissed.

10. We have heard the learned counsel for the appellant as also the learned APP for the State.

11. Mohd. Amil (PW15) testified that more than two years ago when it was Friday, he along with Imtiyaz (PW16), Munna (PW18), Majibar Rehman (PW9), Guddu/Naushad (PW13) and the deceased Lal Mohd., had gone to Janak Cinema for a movie show from 9 pm to midnight. He deposed that the deceased was standing in the queue, CrI.A. 125/2003 Page 6 of 29 waiting his turn to purchase movie tickets. He was standing behind the appellant. During this time due to a sudden push from behind, he fell on the appellant. This started a verbal altercation between them, which eventually turned into a physical one with the appellant and the deceased throwing punches at each other. He testified that after this he intervened and asked Lal Mohd. to leave the queue. Thereafter, he joined the queue to purchase tickets. The accused also came out of the queue. While purchasing the tickets, he heard screams from the side of the compound and upon reaching there, he saw the deceased Lal Mohd. lying on the ground and Munna (PW18) holding the appellant. He saw the co-accused flee the spot with a knife in his hand. He tried to chase the co-accused who crossed the road. He came back and produced the appellant before the Gatekeeper. He requested Munna (PW18)

and Guddu @ Naushad (PW13) to take the injured to the hospital and told them that he was going to the factory to arrange for money. However, he could not say as to how the deceased Lal Mohd. was taken to the hospital but claimed that blood was oozing out from the neck of Lal Mohd. near the ear.

12. In his cross-examination by the Ld. APP, PW15 denied that Naushad (PW13) and Munna (PW18) stood in the queue to purchase tickets. He could not say if Lal Mohd. had fallen on the co-accused. He denied that Lal Mohd. was assaulted by the co-accused and the appellant or that he along with Majibar Rehman (PW9) intervened to save him. He denied the suggestion that he had purchased six tickets Crl.A. 125/2003 Page 7 of 29 and not five. He denied that both the accused had assaulted them with fists and knife blows. He admitted that the deceased Lal Mohd belonged to the village near his village and was known to him for the last five years. He denied that the co-accused Sanjeev took out a knife from the right pocket of his pant and assaulted Lal Mohd. saying Saale Tera Kaam Tamam Kar Deta Hun. He denied that they apprehended the co-accused Sanjeev Sharma or that they snatched the knife from the hands of the co-accused. He reiterated that the appellant was apprehended at the spot. He stated that he had left the place before the arrival of the police.

13. In his cross-examination by the appellant, PW15 admitted that he had not seen anyone assaulting the deceased Lal Mohd. He stated that the appellant was caught hold of by Munna (PW18). He admitted that he had not seen the accused Sanjeev Sharma assaulting Lal Mohd. or the appellant catching hold of the deceased.

14. Majibar Rehman (PW9) testified that he along with Mohd. Amil (PW15), Naushad (PW13), Munna (PW18), Imtiyaz (PW16) and the deceased Lal Mohd. had gone for a night show of a movie at Janak Cinema. He stated that he along with Munna (PW18) and the deceased Lal Mohd., were standing in the queue and they were pushed from behind because of which Lal Mohd. fell on the appellant and the co-accused, who were standing ahead of them in the queue. The co-accused and the appellant threw punches at the deceased after which Crl.A. 125/2003 Page 8 of 29 PW9 along with PW18 intervened and separated them.

Thereafter, the deceased Lal Mohd. purchased the tickets and the co-accused and the appellant came to Lal Mohd. who was standing by their side. He further stated that the tickets were purchased by Mohd. Amil (PW15) and after purchasing the tickets, Mohd. Amil (PW15) entered the cinema hall. He stated that thereafter the accused Sanjeev stabbed the deceased Lal Mohd. with a knife, which the co-accused took out from his purse kept in the rear pocket of his jeans. He stated that before stabbing the deceased with a knife, the co-accused and the appellant hurled abuses and threw punches at all of them. He stated that the appellant was apprehended by Munna (PW18) but the co-accused managed to escape. He stated that blood oozed out from the neck of the deceased Lal Mohd. who was taken to the DDU Hospital by Munna (PW18) and Naushad (PW13) in a Maruti van. He went to the factory to arrange for money and informed the police. In his cross examination by the learned APP, PW9 admitted that the injured was taken to the hospital in an ambassador car. He identified the knife Ex.P4 used by the co-accused Sanjeev.

15. In his cross-examination by the appellant, PW9 admitted that he had not stated before the police that the co-accused i.e. Sanjeev took out a knife from his purse kept in the rear pocket of his jeans. He was confronted with the previous statement where it was not recorded that he went to the factory to arrange for money. He admitted that the police had not seized blood stained clothes of his companions. Crl.A. 125/2003 Page 9 of 29 16. Naushad (PW13) deposed that on 28th November, 1997, he along with Munna (PW18), Amil (PW15), Imtiyaz (PW16), Rehman (PW9) and Lal Mohd. (deceased) had gone for a movie and that they were all standing in the queue to purchase tickets. Both the co-accused and the appellant were standing ahead of Lal Mohd in the queue. He stated that Lal Mohd. asked the co-accused and the appellant at about 8.45 pm to maintain distance on which they became angry. He stated that the deceased Lal Mohd. continued standing in the queue and purchased five tickets and he purchased one ticket and thereafter Lal Mohd. came out of the queue as the argument between the deceased Lal Mohd. and the accused had elevated into an altercation. Thereafter, the deceased Lal Mohd. stood at a distance of about feet from the queue and the co-accused Sanjeev approached the deceased with a knife in his hand, which he took out from the right pocket of his pant and stabbed

him. They tried to apprehend the co-accused Sanjeev but he fled the spot with the knife in his hand. He stated that the appellant did nothing and was standing separately and was apprehended and handed over to the owner of the cinema hall. He along with Munna (PW18) had taken the deceased Lal Mohd. to the hospital in a Maruti van provided by the owner of the cinema hall.

17. In his cross examination by the Ld. APP, PW13 admitted that the police recorded his statement. He identified the knife Ex.P4, which was in the hands of the co-accused Sanjeev. He admitted that the CrI.A. 125/2003 Page 10 of 29 accused threw punches at the deceased Lal Mohd. before Amil (PW15) and Majibar Rehman (PW9) intervened. He admitted that the appellant caught hold of the deceased Lal Mohd. and exhorted the co-accused Sanjeev to finish him. He denied that the co-accused and the appellant were apprehended with the knife at the spot and handed over to the police. He reiterated that the co-accused Sanjeev fled the spot but was arrested after about half an hour. He stated that the deceased Lal Mohd. was alive when they reached the hospital. He remained in the hospital from 9.30 pm to 11 pm and then returned to the factory.

18. In his cross-examination by the appellant, PW13 stated that about 100 people were present in the queue. He admitted that the deceased Lal Mohd. was surrounded by the mob but denied that someone from the mob had assaulted the deceased.

19. Imtiyaz (PW16) testified that on the date of the incident he along with others had gone for a movie and there the deceased Lal Mohd. and Munna (PW18) were standing in the queue to buy tickets. Due to a push from behind, the deceased Lal Mohd. fell on the co-accused Sanjeev who threw punches at Lal Mohd. and slapped him. The appellant caught hold of the deceased Lal Mohd. who was not in the line and then the accused Sanjeev took out a knife and stabbed Lal Mohd. below the ear on the left side of the neck and fled the spot. He stated that the appellant was apprehended at the spot by Munna (PW18) who handed him over to an official of the cinema hall. He CrI.A. 125/2003 Page 11 of 29 brought a rickshaw to take Lal Mohd. to the hospital. He stated that in the meanwhile one person with a vehicle came and offered to take Lal Mohd. to the hospital and accordingly Lal

Mohd. was taken to the hospital where he died. He stated that the co-accused Sanjeev was apprehended.

20. In his cross-examination by the Ld. APP, PW16 identified the clothes of the deceased. He could not tell if the co-accused and the appellant were standing in the queue and they had assaulted them with fist and stab blows. He denied having stated to the police that the appellant and the co-accused were apprehended and the knife was recovered from the possession of the co-accused.

21. In his cross-examination on behalf of the co-accused Sanjeev, PW16 admitted that the tickets were purchased by Mohd. Amil. He reiterated that the co-accused Sanjeev was brought by the police from his house whereas the appellant was apprehended at the spot. He could not tell if the knife was recovered by the police from the spot. He stated that the co-accused Sanjeev had stabbed the deceased with a knife and that he had seen the incident properly.

22. In his further cross-examination on behalf of the appellant, PW16 deposed that Mohd. Amil (PW15) had purchased five tickets and that one ticket was purchased by Naushad (PW13). He stated that he had left the spot immediately after the deceased Lal Mohd. was taken to CrI.A. 125/2003 Page 12 of 29 the hospital. He denied that the co-accused and the appellant were not present at the spot of the incident.

23. Mohd. Munna (PW18) testified that in November 1997, he along with Imtiyaz (PW16), Amil (PW15), Majibar Rehman (PW9), the deceased Lal Mohd. and Guddu @ Naushad (PW13) had gone to Janak Cinema. The show timing was 9 pm to midnight. The deceased Lal Mohd. was standing in the queue to purchase tickets for the movie. Somebody pushed the deceased Lal Mohd. from behind and as a result he fell on the accused Sanjeev. He stated that the co-accused Sanjeev slapped Lal Mohd. once or twice and the deceased fell down. He stated Amil (PW15) asked the deceased Lal Mohd. to come out of the queue and offered to stand in the queue to purchase the tickets. He stated that after purchasing the tickets they were standing on the side when the co-accused and the appellant came out of the queue and caught hold of the deceased Lal Mohd. and the co-accused Sanjeev stabbed the deceased Lal Mohd. with a knife in his neck. He

stated that after the assault, Lal Mohd. cried in pain and they rushed to help Lal Mohd. He stated that the co-accused Sanjeev escaped from the spot and he caught hold of the appellant. He stated that he with the help of Guddu @ Naushad (PW13) took the injured to the hospital in a car where the doctor declared Lal Mohd. brought dead. However, PW18 could not identify the knife when shown to him in the Court. Crl.A. 125/2003 Page 13 of 29 24. In his cross-examination by the Ld. APP, he denied having stated before the police that Sanjeev had taken out a knife from the right pocket of his pant. He denied that both the accused were apprehended at the spot. However, despite opportunity, he was not cross-examined by the appellant. Nothing material could be elicited from cross-examination of PW18 by the co-accused Sanjeev Sharma which could help the appellant.

25. Santram (PW20), Record Clerk at the DDU Hospital proved the MLC of deceased Lal Mohd. It was prepared by Dr.Sushma, Jr.Resident who had since left the services of the hospital and her present address was not available. PW20 identified the signatures of the doctor on the MLC at point X as he had seen her signing during official duties. MLC records show that the deceased Lal Mohd. was brought dead in the casualty ward at 9.13 pm on 28th November, 1997 with a history of assault.

26. PW14 Dr.L.K.Burava, who conducted the post-mortem on the body of the deceased on 30th November, 1997 at 12:30 pm found the following external injuries:-

"One incised wound on the left side of neck placed horizontally oblique size 3.5 cm x 2 cm. No other external injury mark was visible on body. On internal examination of neck left external jugular vein and other major blood vessels were found to be Page 14 of 29 Crl.A. 125/2003 cut completely which cleanse. Total length of this injury was approx.

cm. 27. In his opinion, the incised wound on the left side of the neck was ante mortem in nature caused by a sharp edged weapon and sufficient to cause death in the ordinary course of nature. He proved the post mortem report of the deceased Lal Mohd. (Ex.PW14/A) as it is in his handwriting and bears his

signatures. In his cross-examination he stated that the injuries on the person of the deceased could not have been caused by a fall on a pointed or sharp object.

28. The Ld. ASJ noticed from the deposition of PW15 that the co-accused and the appellant were present at the cinema hall and had a quarrel with the deceased Lal Mohd. He saw Munna (PW18) having caught hold of the appellant and the other accused running away with a knife in his hand. He observed that though PW15 had deviated from the statement recorded by the police yet his testimony could not be brushed aside lightly.

29. The Trial Court found that there were minor contradictions and major variations in the testimony of PW9 from the statement recorded by the police but the thread of the case of the prosecution that the appellant caught hold of Lal Mohd. and the co-accused Sanjeev stabbed him in the neck could not be impeached in the cross-examination. CrI.A. 125/2003 Page 15 of 29 30. With regard to the testimony of Naushad (PW13), the Trial Court observed that he was an illiterate person, aged about 16 years when his statement was recorded. The Trial Court found that he had unambiguously testified that the appellant had caught hold of the deceased and the co-accused Sanjeev had stabbed the deceased Lal Mohd. with a knife on the left side of his neck.

31. The Trial Court found that the testimony of Imtiyaj (PW16), an illiterate person, aged about 18 years, faulted on a sequence of events but the same cannot be brushed aside as the same does not hit the foundation of the prosecutions case that the appellant caught hold of the deceased and Sanjeev stabbed him with a knife.

32. The Ld. ASJ found that the contradictions and variations in the testimony of Munna (PW18) are inconsequential as he had deposed in clear terms that the appellant caught hold of the deceased and the co-accused Sanjeev stabbed him in his neck. He found that the testimony of Insp. Sita Ram (PW17) and Addl. SHO Insp. Veer Singh Tyagi (PW23) went unrebutted and unchallenged regarding arrest of both the accused persons.

33. We found that there are contradictions in the statements of eye-witnesses i.e. PW15, PW9, PW13, PW16 and PW18 as to who purchased the movie tickets or why the altercation started or which of CrI.A. 125/2003 Page 16 of 29 them fell down on which of the accused. However, we further found that there is consistency in the statement of Mohd. Munna (PW18) and Imtiyaz (PW16) and they have corroborated the statement of each other on the material aspects and proved the case of the prosecution beyond any reasonable doubt that it was the appellant who caught hold of the deceased Lal Mohd. at the place of the incident and the co-accused Sanjeev who took out a knife from his pocket and stabbed the deceased Lal Mohd. below the ear on the left side of the neck. The depositions of PW16 and PW18 are corroborated by PW13 who initially stated that it was co-accused Sanjeev who had stabbed the deceased on the left side of his neck with a knife which was taken out by him from the pocket of his pant but in his further statement, admitted that the appellant caught hold of the deceased and exhorted the co-accused to finish him. The testimonies of these witnesses inspire confidence and from their depositions they appear to be truthful witnesses of the prosecution on the material aspects of the case. We also found the depositions of PW15, PW9, PW13 and PW18 to be consistent to the extent that it was PW18 and PW13 who took the deceased Lal Mohd. to the hospital after the incident. Even though the deposition of Majibar Rehman (PW9) does not support the case of the prosecution in its entirety yet we find truth in his deposition that the deceased Lal Mohd. was stabbed by the co-accused Sanjeev and that the co-accused and the appellant hurled abuses and threw punches at all of them and the appellant was apprehended by Mohd. Munna (PW18). PW15 further corroborated that the appellant was CrI.A. 125/2003 Page 17 of 29 apprehended by PW18. We also found from the depositions of PW13 and PW16 that the appellant was apprehended at the spot and handed over to the owner/official of the cinema. Naushad (PW13) and Mohd. Amil (PW15) did not support the case of the prosecution so far as the appellant is concerned though they testified that the co-accused stabbed the deceased with a knife on the left side of his neck and they saw the co-accused Sanjeev flee with the knife. However, the depositions of PW15 and PW13 do not affect the case of the prosecution as it is proved beyond any reasonable doubt from the depositions of Imtiyaz (PW16) and Mohd. Munna

(PW18). In the circumstances, we are not persuaded with the arguments of the learned counsel to disagree with the findings given by the Ld. ASJ.

34. Since the Ld. counsel for the appellant in the alternative submits to assail the order of sentence, the question which arises for consideration is, whether the conviction of the appellant under Section 302 IPC is sustainable or whether the case of the appellant falls within the purview of Section 304 of IPC as submitted by him?.

35. In *Sukhbir Singh vs. State of Haryana* (2002) 1 SCR1152 wherein two blows were inflicted by the appellant by use of bhala on the upper body portion of the chest of the deceased, the Honble Supreme Court has opined as under:-

"CrI.A. 125/2003 Page 18 of 29 19. The High Court has also found that the occurrence had taken place upon a sudden quarrel but as the appellant was found to have acted in a cruel and unusual manner, he was not given, the benefit of such exception. For holding him to have acted in a cruel and unusual manner, the High Court relied upon the number of injuries and their location on the body of the deceased. In the absence of the existence of common object, the appellant cannot be held responsible for the other injuries caused to the person of the deceased. He is proved to have inflicted two blows on the person of the deceased which were sufficient in the ordinary course of nature to cause his death. The infliction of the injuries and their nature proves the intention of the appellant but causing of such two injuries cannot be termed to be either in a cruel or unusual manner. All fatal injuries resulting in death cannot be termed as cruel or unusual for the purposes of not availing the benefit of Exception 4 of Section 300 IPC. After the injuries were inflicted and the injured had fallen down, the appellant is not shown to have inflicted any other injury upon his person when he was in a helpless position. It is proved that in the heat of passion upon a sudden quarrel followed by a fight, the accused who was armed with bhala caused injuries at random and thus did not act in a cruel or unusual manner. (Emphasis Supplied) CrI.A. 125/2003 Page 19 of 29

36. In *Tularam vs. The State of Madhya Pradesh*, 2018 SCC OnLine SC480 wherein during the course of an altercation, Tularam killed Bhadri Lodhi by stabbing him with a ballam (a wooden bamboo stick with a spear attached at the

end) on the left side of his chest, the Honble Supreme Court held that the intention to cause death must not be readily inferred. Further, the Honble Supreme Court explained that Section 299 of IPC explains culpable homicide as causing death by doing an act with intention of causing death, or with intention of causing such bodily injury as is likely to cause death or with the knowledge that the act complained of is likely to cause death. The first two categories require the intention to cause death or the likelihood of causing death while the third category confines itself to the knowledge that the act complained of is likely to cause death. Relevant paragraphs being paragraphs 10 to 15 read as under:-

"Crl.A. 125/2003 10. Recently in Surain Singh v. State of Punjab<sup>1</sup> it was observed that: The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders 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 IPC 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 Page 20 of 29 Crl.A. 125/2003 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 a cruel or unusual manner. The expression undue advantage as used in the provision means unfair advantage.

11. The facts of the present case indicate that all the ingredients of Exception 4 to Section 300 of the IPC are present. The fight was sudden and not premeditated likely to cause death. 13. The intention to cause death must not be readily inferred. We are afraid that both the Trial Court as well as the High Court have, on the basis of the mere fact that Tularam pierced the chest of Bhadri Lodhi with a ballam, assumed that he intended to cause the death of Bhadri Lodhi. There is nothing on the record to suggest such an intention and none of the witnesses have given any indication of Tularams intention to cause the death of Bhadri Lodhi. It is quite clear

that during the altercation Tularam did pierce the chest of Bhadri Lodhi but the intention to kill him is not apparent. However, Tularam must be attributed with the knowledge that piercing the left side of the chest with a spear would result in a bodily injury that is likely to cause death.

14. In view of the evidence on record, we are satisfied that the ingredients of murder as explained in Section 300 of the IPC are missing in this case. The intention of Tularam was to cause bodily injury Page 21 of 29 to Bhadri Lodhi and piercing the chest of Bhadri Lodhi with a spear was such an injury that could possibly cause his death. This knowledge must be attributed to Tularam.

15. Under the circumstances, the conviction of Tularam of an offence punishable under Section 302 of the IPC is set aside but he is convicted of an offence punishable under the second part of Section 304 of the IPC. The appellant has been behind bars for almost 14 years. His sentence is altered to the period of incarceration he has already undergone. He be released forthwith. 37. Applying the law laid down by the Honble Supreme Court in the above said cases, we are of the considered view that the evidence adduced by the prosecution falls short to come within the ambit of Section 302 of the IPC and the offence committed by the appellant is covered by Section 304 Part I of the IPC. The prosecution failed to prove the intention of the appellant to cause the death of the deceased. It stands proved that the unfortunate incident took place on account of a sudden quarrel between the appellant and the co-accused Sanjeev with the deceased and his companions and that there was no premeditation; no animus and motive to kill the deceased. Medical evidence also supports that there was only one injury on the left side of the neck which proved fatal. The appellant has not acted in a cruel manner. He suddenly caught hold of the deceased who was stabbed on the left side of the neck by the co-accused. Therefore, in the totality of the circumstances, we have no hesitation to conclude that CrI.A. 125/2003 Page 22 of 29 the present case does not fall within the ambit of Section 302 of the IPC but under Section 304 Part I of the IPC.

38. During the course of the arguments, it is noticed that the appellant was brought to the DDU Hospital on 4th February, 1998 for age estimation. Dr.Amitabh Bhasi

(PW24) proved his report vide which the age of the appellant was estimated to be more than 17 years but less than 18 years at that time.

39. Very recently in the case of Mahesh vs. State of Rajasthan in Crl.Appeal No.459/2018, decided by the Honble Supreme Court on 27th March, 2018, where the plea of juvenility of the appellant was taken for the first time, the Apex Court found that two questions surface for determination; first being the validity/correctness of the conviction recorded by the Trial Court and affirmed by the High Court, and the second being if the conviction is to be maintained what should be the appropriate measure of punishment/sentence and whether the same should be imposed by the Apex Court or should the matter be remanded to the Juvenile Justice Board in accordance with the provisions of Section 20 of the Juvenile Justice (Care and Protection of Children), Act, 2000. The Apex Court found that the position in law is somewhat unsettled as noticed by the Apex Court in Jitendra @ Babboo Singh & Anr. vs. State of Uttar Pradesh 2013 (11) SCC193. The Apex Court adopted one of the many possible approaches that had been earlier adopted by it in the four categories of Crl.A. 125/2003 Page 23 of 29 the cases recorded in paragraph No.28 of its judgment in Jitendras case (supra). The Apex Court after perusing the material on record found no ground whatsoever to take a view different from what had been recorded by the Trial Court and affirmed by the High Court. The Apex Court observed that to cause a remand of the matter to the Juvenile Justice Board for a decision on the quantum of sentence would not serve the ends of justice, for the reason if such a remand is made and Juvenile Justice Board comes to a decision that in addition to the period of custody suffered by the appellants, they need to suffer a further period of custody, such custody can only be in a remand home or a protection home to which places the accused appellants, because of their age as on today, cannot be sent. Relevant paragraphs of the judgment read as under:-

"5. The position in law in this regard is somewhat unsettled as has been noticed and dealt with by this Court in Jitendra Singh alias Babboo Singh and another versus State of Uttar Pradesh (2013) 11 SCC193 wherein in paragraphs 24 to 27 four categories of cases have been culled out where apparently different approaches had been adopted by this Court. The net result is summed up in

paragraph 28 of the aforesaid report which explains the details of the categorization made in the earlier paragraphs of the said report. Paragraph 28 of the said report, therefore, would require a specific notice and is reproduced below:

28. The sum and substance of the above discussion is that in one set of cases this Court Page 24 of 29 CrI.A. 125/2003 CrI.A. 125/2003 has found the juvenile guilty of the crime alleged to have been committed by him but he has gone virtually unpunished since this Court quashed the sentence awarded to him. In another set of cases, this Court has taken the view, on the facts of the case that the juvenile is adequately punished for the offence committed by him by serving out some period in detention. In the third set of cases, this Court has remitted the entire case for consideration by the jurisdictional Juvenile Justice Board, both on the innocence or guilt of the juvenile as well as the sentence to be awarded if the juvenile is found guilty. In the fourth set of cases, this Court has examined the case on merits and after having found the juvenile guilty of the offence, remitted the matter to the jurisdictional Juvenile Justice Board on the award of sentence. 6. The validity of the conviction in respect of the incident which occurred almost two decades back, in our considered view, ought to be decided in these appeals and the entire of the proceedings including the punishment/sentence awarded should not be interfered with on the mere ground that the accused appellants were juveniles on the date of commission of the alleged crime. Judicial approaches must always be realistic and have some relation to the ground realities. We, therefore, adopt one of the possible approaches that has been earlier adopted by this Court in the four categories of cases mentioned above to examine the correctness of the conviction of the accused appellants under the provisions of the IPC, as noticed above. Page 25 of 29 CrI.A. 125/2003 7. In this regard, having perused the materials on record we find no ground whatsoever to take a view different from what has been recorded by the learned trial Court and affirmed by the High Court. The conviction of the accused appellants under Sections 323, 324, 325, 427, 455 read with Section 149 IPC accordingly shall stand affirmed.

8. This will bring us to a consideration of the sentence to be awarded. Here again, in the four categories of cases that have been noticed 7 in *Jitendra Singh (supra)* and in several subsequent decisions of this Court in *Abdul Razzaq vs. State of Uttar Pradesh (2015) 15 SCC637* *Mohd. Feroz Khan alias Feroz vs. State of*

Andhra Pradesh (2015) 16 SCC186 Mumtaz alias Muntyaz vs. State of Uttar Pradesh (2016) 11 SCC786 and Mahendra Singh vs. State of Rajasthan (2016) 16 SCC312 different approaches have been adopted. In some cases, the question of punishment has been left to be determined by the Juvenile Justice Board in view of the provisions of Section 20 of the Act of 2000. In other cases, the issue of punishment has been dealt with by the Court having regard to the fact that on the date when the Court had considered the issue the juvenile(s) have advanced in age.

9. The present is a case where the accused appellants though juveniles on the date of commission of the alleged crime are, as on today, middle aged persons. The accused appellant - Mahesh in Criminal Appeal arising out of Special Leave Petition (Criminal) No.2934 of 2015 had undergone the custody for a period of nearly one year whereas the accused appellant - Arjun in Criminal Appeal arising out of Special Leave Petition (Criminal) No.5370 of 2015 had suffered Page 26 of 29 custody for about eight (08) months. The maximum sentence, as already noted, is three years. Having regard to the long efflux of time we are of the view that it will not be necessary, in the facts of the present cases, to cause a remand of the matter to the Juvenile Justice Board for a decision on the quantum of sentence for the reason even if such a remand is made and the Juvenile Justice Board comes to a decision that in addition to the period of custody suffered by the accused appellants they need to suffer a further period of custody, such custody can only be in a remand home or a protection home to which places the accused appellants, because of their age as on today, cannot be sent.

10. On the contrary, having regard to the period of custody suffered; the age of the accused appellants as on date; the efflux of time since the date of occurrence and all other relevant facts and circumstances we are of the view that while maintaining the accused imposed should be appellants the sentence modified to one of the period undergone. We order accordingly. the conviction of 40. It is pointed out by the learned counsel for the appellant that the appellant was ordered to be released on bail during the pendency of the appeal by the order of this Court dated 13th November, 2003 and at that time he had already undergone imprisonment for about six years.

41. Since we are of the opinion that conviction of the appellant should be altered from Section 302 to Section 304 Part I of IPC and the CrI.A. 125/2003 Page 27 of 29 appellant has already undergone imprisonment for about six years, sending the matter to the Juvenile Justice Board would not meet the ends of justice. We modify the sentence awarded to the appellant and sentence him for the period he had already undergone.

42. Appeal is therefore partly allowed and order of conviction and sentence is modified in the above terms.

43. The bail bonds and surety bonds furnished by the Appellant stand discharged. He will fulfill the requirements of Section 437A Cr PC to the satisfaction of the trial Court at the earliest. The Trial Court Record (TCR) be returned together with a certified copy of the judgment. Copy of this judgment be sent to the concerned Jail Superintendent for updating the jail record.

44. The court finds that the trial Court has not awarded any compensation to the legal representatives of the deceased under Section 357 of Cr.P.C. Meanwhile Section 357A Cr.P.C. has been incorporated w.e.f. 31.12.2009 and pursuant thereto the State Government has framed Victim Compensation Scheme.

45. Therefore, we direct the Delhi State Legal Services Authority (DSLISA) in terms of Section 357A (5) Cr.PC to forthwith undertake an inquiry and within two months award and ensure disbursal of the appropriate compensation to the family of the victim in terms thereof. CrI.A. 125/2003 Page 28 of 29 46. For this purpose, a certified copy of this judgment shall be delivered forthwith to the Secretary, DSLISA with a further direction to submit a compliance report to this Court within three months from the date of receipt of the certified copy of this judgment. If no such compliance is forthcoming within the time stipulated, the Registry will place a note before the Court for further directions. (VINOD GOEL) JUDGE (S. MURALIDHAR) JUDGE JULY26 2018 dkb CrI.A. 125/2003 Page 29 of 29