

**Mahanarain Vs. Emperor**

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**Court :** Allahabad

**Decided On :** Jan-19-1945

**Reported in :** AIR1946All19

**Appellant :** Mahanarain

**Respondent :** Emperor

**Judgement :**

**Verma, J.**

1. The appellant, Mahanarain, who is a resident of village Dadraul in the district of Shahjahanpur, has been convicted under Section 302, Penal Code, and has been sentenced to death. The charge against the appellant was that he on 7th February 1944, early in the afternoon, committed the murder of one Malkhan - who was also a resident of village Dadraul - by stabbing him with a knife at Paintapur in the Har - which apparently means a field in which no crops are standing or land which is used for grazing cattle-and thereby committed an offence punishable under Section 302, Penal Code. Mahanarain has appealed against his conviction and the sentence of death passed on him and the record has also been submitted to this Court for the confirmation of the death sentence. As has been indicated above, the appellant Mahanarain as well as the deceased Malkhan were residents of village Dadraul. Paintapur is a hamlet of Dadraul and is situated to the east of that village. It appears from the evidence that there is a sugar factory at Rosa, which is

situated at a distance of three miles from Dadraul, and that there is what is called the Rosa Co-operative Development Union which is connected with the factory. The 'gate supervisor' (Mohammad Usman Ghaznavi) and the Assistant Secretary (A.N. Chishti) of the Union were examined by the defence. It further appears that this Union has organised a system by which the various cultivators of sugar-cane are enabled to bring to the factory their sugar-cane on specified days and at specified times. The object of this system appears to be to eliminate confusion and waste of time and, possibly, also corruption which are likely to result if a large number of cultivators assemble at one and the same time, each clamouring for his sugar-cane to be weighed and taken delivery of. For this purpose the Union arranges to have 'slips' distributed to the various cultivators by which the date and the time are fixed for each cultivator to bring in his sugar-cane. These slips are distributed by men employed by the Union who are called 'distributors.' The appellant Mahanarain was one of such distributors, but Dadraul was not in his circle. It was in the circle of one Bulaqi Ram, who is also a witness for the defence. The deceased Malkhan, and his brother, Gokul, are stated to have been growers of sugarcane. So far as the incident which was the basis of this prosecution was concerned, the case of the prosecution was as follows : It was alleged that on the morning of the day in question, viz., Monday, 7th February 1944, the deceased had taken his cattle to Paintapur to graze them; that he was grazing them at a spot situated at a short distance to the west of a sugarcane field of his own; that to the south of this field of his lay a vacant field of one Mehi Kisan, and that one Lallu Bhurji, was also grazing his cattle at the same place, at a distance of a few paces from the place where the deceased was. It was next alleged that shortly after midday the appellant came to that place on a bicycle and, seeing the deceased, called out to him and told him that someone was plucking his (deceased's) sugar-cane; that thereupon the deceased went to his sugar-cane field; that the appellant also went in the same direction; that shortly afterwards Lallu Bhurji and three other men Lochan, his brother, Jawahir, and his son, Murli who were digging their sugar-cane field, lying to the south of Mehi Kisan's vacant field at a distance of about 350 paces, heard the deceased as well as the appellant cry out; that, on looking in that direction, these four men saw the appellant and the deceased grappling with each other in Mehi Kisan's field; that thereupon they (i.e., the four men mentioned

above) rushed towards the spot in question; that when they had covered about half the distance-or possibly a little more - all these four men saw that the appellant took out a knife and struck at Malkhan; that Malkhan began to bleed and ran to the east until he reached a neem tree, situated in village Natpura, where he fell down and died almost immediately, and that the appellant, after causing the injury to Malkhan went away on his bicycle towards Dadraul, which, as already stated, is to the west of Paintapur.

2. The prosecution case with regard to motive was as follows. It was said that, on the night preceding the day of the occurrence in question (i.e., on the night of Sunday, 6th February 1944), the deceased, his brother Gokul, and some other persons were warming themselves at the fire in front of the deceased's house about 10 o'clock when certain boys in two batches one after the other came and told the deceased that Mahanarain wanted him to go and show card tricks; that the deceased declined to go; that thereupon, Mahanarain came himself but that the deceased still refused and then the appellant went away uttering threats.

3. The first information report was lodged at 7-20 P.M. on 7th February by the deceased's brother, Gokul, at police station Kant, which is said to be situated at a distance of four miles from Paintapur. This report opens with a narration of what, according to Gokul, had happened at 10 o'clock on the previous night and gives a detailed account of how the appellant sent for the deceased and ultimately came himself and, on the deceased's persisting in refusing to go and show card tricks, threatened the deceased. It then states that about 2 P.M. on the day of occurrence one Jhabbu Kisan, had come and informed Gokul that the appellant Mahanarain had killed Malkhan. It recites that Gokul went to the place where Malkhan was lying dead and that he learnt the facts of the incident from Lochan, Jawahir, Murli and Lallu Bhurji. Gokul also stated in this report that the deceased had told certain persons, whose names were mentioned, that he had been stabbed by the appellant. Learned Counsel for the appellant has argued that there was delay in lodging the report and that this fact leads to the conclusion that the appellant has been falsely implicated. I agree that there was delay in the making of the report. The incident in question took place shortly after midday and the report was not made until 7-20 P.M., although the police station is at a distance of only four miles.

I have, however, come to the conclusion, for reasons to be presently stated, that the delay was due, not to the fact that Gokul and his advisers did not know who had caused the injury to Malkhan and held a consultation to decide who should be mentioned as Malkhan's assailant and ultimately decided falsely to implicate the appellant, but to the fact that they did not know what motive the appellant could have had for causing that injury and a consultation was held in order to invent a motive and ultimately the story as to the appellant's sending for the deceased to show card tricks on tire previous night, the deceased's persistent refusal and the appellants' coming and uttering threats, was invented.

4. As has already been stated, the prosecution has produced four men as eye-witnesses of the actual occurrence, viz., Lallu Bhurji, Lochan, Jawahir and Murli. The prosecution has also examined five witnesses - three Nats of Natpura, one Nat of Karimahwapur and a Kisan of Nausara - to prove that the deceased, before his death, had said in the presence of these witnesses that he had been stabbed by Mahanarain. Upon a careful consideration of the evidence, I have come to the conclusion that the finding of the Court below that the appellant, Mahanarain, had caused the death of the deceased, Malkhan, is correct. The occurrence took place in broad daylight and there is no improbability in the allegation of these witnesses that they were at the places where they say they were. Having carefully gone through the evidence given by these witnesses and having considered all that has been urged by the learned Counsel for the appellant, I see no reason for doubting the truth of the version given by the four eye-witnesses as to the main facts of what occurred. There is also no reason for holding that the five witnesses, who have proved what may be called the dying declaration of the deceased, have given false evidence. It is true that Lallu Bhurji, although he admitted that the school at the Panchayatghar was closed on Sundays, supported Gokul's story as to the alleged incident of the appellant's sending the boys to call the deceased and the deceased's refusal on Sunday night. That, however, cannot, in my opinion, be considered to be a sufficient ground for discarding the evidence of Lallu Bhurji as to the occurrence which resulted in Malkhan's death. It was also suggested that there was some enmity between the appellant and Lochan's family in connexion with the irrigation of a field belonging to the latter. In my opinion this allegation of the defence is not established. Furthermore, no enmity has even been suggested

between the appellant or his family, on the one side, and any of the five witnesses who have proved the dying declaration, on the other. I am not forgetting that Tula Ram, P.W. 12 is a son of Lochan. But that by itself is no reason for holding that he is falsely implicating the appellant. It must also be noted that he does not live with his father but left Paintapur five or six years ago. For all these reasons, I have come to the conclusion that the appellant has been rightly held to have caused the injury which resulted in Malkhan's death.

5. The question, however, remains whether the Court below was right in holding that the offence committed by the appellant amounted to murder. The sections of the Penal Code which are relevant for our present purpose are Sections 299, 300, 302 and 304. The killing of a human being by a human being is in law known as homicide. Felonious, or - to use the expression adopted in the Indian Statute - culpable homicide, is the killing of a human creature without justification or excuse. Culpable homicide may either amount to murder or may not amount to murder. In order to decide whether culpable homicide in any given case does or does not amount to murder, we have to be guided by the law as explained in Section 300, Penal Code. It is sufficient for our present purpose to say that culpable homicide is not murder if any one of the exceptions laid down in that section is applicable. It may be noted here that in the present case we are not concerned with any of the exceptions mentioned in Ch. 4, Penal Code, under the heading 'General Exceptions.' There can be no doubt, upon the evidence that the appellant is guilty of culpable homicide. The only question is whether the facts and circumstances of this case entitle the appellant to rely on any of the exceptions given in Section 300 so as to have his offence reduced to one of culpable homicide not amounting to murder. The first question which, in my opinion, is of importance in this connexion is the question of motive. The learned Sessions Judge has made the following observations with regard to this matter:

A good deal has been said about the absurdity of the alleged motive and I agree that this is the least satisfactory part of the case. A mere refusal to come and display card tricks is not what one would call a convincing motive for a murder. It is also pointed out by the defence that one of the little boys, who claims to have been sent by the accused to call the deceased, says that he was studying in the

Panchayatghar when the accused sent him on the errand, though the day in question was a Sunday, and the school master, Raghunandan Prasad (D.W. 1) has testified that no school is ever held in the Panchayatghar on Sunday. Another of the boys Raghubar (P.W. 23), has also given a very unsatisfactory statement and has given two completely contradictory accounts of how and where the accused met him when he sent him on the errand.... I agree with the defence that all this evidence about the alleged motive is highly unsatisfactory.

I entirely agree with these observations of the learned Sessions Judge. I may add that not only the school master, Eaghunandan Prasad, testified that no school was held in the Panchayatghar on Sundays but that this fact was admitted by some of the prosecution witnesses also (vide Lallu Bhurji, P.W. 6, Ram Chandar, P.W. 19, and Dori, P.W. 22). The learned Sessions Judge, however, proceeded to observe as follows:

But at the same time I am not prepared to conclude that the whole story is false and without foundation, as it seems to me that any one wishing to make up a false story would produce something much more normal and reasonable than this one.

This conclusion of the learned Sessions Judge is, in my opinion, wholly wrong. In the first place, the reason given by him for his conclusion is not a sound reason, for it amounts to this that in order to have a false story believed one has only to invent something which is not normal and not reasonable; in other words, the more absurd the story, the greater the reason for believing it. I cannot accept this. In the second place, a careful consideration of the story and an examination of the evidence led in support of it leaves no room for doubt in my mind that the story is entirely false. The learned Sessions Judge further remarked:

It is, however, not necessary to go further into the question of motive as motive is always a subsidiary consideration when there is direct evidence of the crime, and I have already shown that there is ample direct evidence in this case that it was the accused who committed the murder.

It is, of course, true that if there is direct evidence to show what the accused did, it is not necessary to consider the motive which impelled him to do it. It is necessary,

however, to consider what the facts established by the direct evidence are and not to assume that the offence necessarily amounts to murder. I propose to examine the evidence bearing on both the matters, namely, the motive as well as the actual occurrence. I have already stated briefly what the story as to the motive is. Coming to its details, it was alleged that the appellant first sent two boys, Din Dayal, son of Nand Lal - carpenter, and Chandarwa (or Ram Chander), son of Ujja barber, with a message that the appellant wanted the deceased to go to him and that the deceased said that he would not go at that time of the night. Those two boys then went back. After some time two other boys, Dori son of Nanhey, gadaria, and Baghubar, son of Nand Lal, carpenter (or blacksmith, as shown at the top of p. 27 of the paper book) came with the same message and the deceased again declined to go. Then the appellant came himself and asked the deceased to accompany him, but the deceased did not agree and the appellant then threatened the deceased by saying that he would settle with him next morning. It was not stated in the first information report that the appellant wanted the deceased to show card tricks. What was stated there was that the deceased was required to show tamasha. The nature of the tamasha, viz., card tricks, was introduced in the evidence. Gokul deposed in support of this story and so did Lallu Bhurji. Neither of the two boys, who were alleged to have come in the first batch, Din Dayal and Ram Chander, was examined by the prosecution in the Court of Session. They were both 'tendered for cross-examination only as hostile.' The defence did not consider it necessary to cross-examine Din Dayal. Ram Chander was cross-examined and he made the important admission that there is a holiday in the school on Sunday. Both the boys who were alleged to have come with the message in the second batch - Dori and Raghubar - were examined. Their statements, in my opinion, have only to be read to see that the whole of this part of the prosecution case is untrue. Both of these boys agree in stating that Dori was actually studying in the school and that the appellant came there and called him. Dori states that there were 10-12 boys studying there and Raghubar states that there were 10-25 boys besides Dori. Dori admitted that the school was closed on Sundays but boldly stated that the day on which the appellant sent him to call the deceased was not a Sunday. He also stated that he did not know if his name was in the attendance register of the school and that he did not attend the school after

that day. There was also a contradiction between the statements of Dori and Raghubar on the point whether Dori resumed his studies after returning from the errand on which he had been sent to the deceased or whether he went away home after telling the appellant that the deceased had declined to come. Raghubar admitted that he was not studying but 'was just sitting there.' He stated that he could not say why he had gone there. He then had to admit that the story related by him in the Court of Session was materially different from that stated in the Court of the Committing Magistrate. This is what he said:

I did say in the lower Court that I had been easing myself at the pond and as I was coming back Mahanarain called me. That is correct and what I have just said about being at the school is a mistake. Mahanarain was standing in the road and called me.

He further admitted that he had gone with Gokul to give his statement before the police. It has not been shown to us what justification there was for the allegation of the prosecution that Din Dayal and Ram Chander had turned hostile. That being the nature of the evidence led in support of this story, I find it impossible to agree with the learned Sessions Judge's conclusion that the story was not wholly false and without foundation. There is no reliable evidence to prove that the deceased knew how to perform card tricks or that he had ever before performed such tricks or any other tamasha, at the appellant's bidding. I have already stated that there was delay on the part of Gokul in making the first information report. In my opinion that delay was due to the fact that Gokul and his associates and advisers in the village, knowing of no enmity or ill-feeling between the appellant and the deceased and being unaware of any fact which could explain what had occurred, and considering it necessary to supply a motive for the appellant's act, put their heads together and invented this story. The fact that they were not able to invent a better story is no ground for believing what is, on the evidence, clearly a false story. The result is that the motive alleged by the prosecution never existed. No other motive has even remotely been suggested. Gokul definitely admitted in cross-examination that he and his brother 'had no previous enmity with Mahanarain.' We thus arrive at the conclusion that, so far as is known, the appellant had no motive for committing the murder of the deceased. We now come to the occurrence on

Monday, 7th February 1944. I shall quote certain sentences from the statement of each of the eye witnesses to show what the facts, according to the prosecution evidence itself, are. Jawahir stated as follows:

I saw Malkhan and Mahanarain having a fight (kushti) close by. Malkhan cried out and I ran to the spot. When I was a short distance away Mahanarain (accused) stabbed Malkhan.... The fight was in a field belonging to Mehi Kisan. The road is 4 to 5 paces from the scene. There was no crop in the field where the incident occurred.... I was at my field when I heard the cry. There was abuse and hot words. Malkhan was not stronger than Mahanarain. Malkhan fell and then cried out. Then he got up again and they fought (mukka bazi hone lagi).

Obviously this mukka bazi must have taken place before the appellant took out a knife and struck at the deceased. Lochan made these statements:

I heard Malkhan cry out. I and others ran up. I saw Mahanarain accused stab Malkhan.... The fight was in a field with no crop in it.... It was two fields from the road-small fields.... I was half way from my field to the scene when I saw the knife blow.

It is thus apparent that the appellant and the deceased had been grappling with each other and fighting for some time before the appellant struck the deceased with a knife. Lallu Bhurji stated that the deceased, on being told by the appellant that someone was plucking his sugarcane, went towards the sugar-cane field. The appellant also went in the same direction on his bicycle, and, putting it down, 'began to beat Malkhan.' He also made the following statements:

I and Malkhan had sticks. I was 10 to 12 paces from Malkhan when Mahanarain came on the cycle near the sugar cane field. He called out from 50 paces while still on his bicycle. Malkhan took his stick with him when he went towards the sugarcane. The grappling was just outside the sugarcane field, about 4 to 5 paces from the road. I saw the grappling and heard Malkhan cry out. I do not know the original cause of the quarrel.

The statements of Murli which need be quoted are as follows:

I heard cries of Mahanarain and Malkhan. I, Lochan, Jawahir went to the spot. I saw Mahanarain (accused) stab Malkhan in an open field near Malkhan's sugarcane field.... Mahanarain slapped Malkhan twice. I saw this from 2 to 4 paces distance. Malkhan was grazing cattle 2 to 4 paces from the scene. He had no stick in his hand.... There was grappling between Mahanarain and Malkhan.

Certain things are thus established by the evidence adduced by the prosecution. In the first place, it is clear that the appellant came openly in broad daylight to a place where, not only the deceased, but at least one other person, viz., Lallu Bhurji, was grazing his cattle and told him, from a distance of 50 paces, that someone was plucking sugar-cane from his (deceased's) field. He must have said it in a very loud voice as he was at a distance of 50 paces. The learned Government Advocate suggested that the appellant's statement to the deceased that someone was plucking the latter's sugar-cane was false and that the appellant had made that statement with the object of 'decoying' the deceased away from the place, as Lallu Bhurji was present there-There is really no foundation for this suggestion. The true position is that there is nothing to show whether the appellant's statement to the deceased that someone was plucking the latter's sugar-cane was-true or false. For aught we know to the contrary, it might have been true. In any event, even if that statement was false, there is nothing to show what the object of the appellant was in making that false statement. It appears to me that it could not have been to create an opportunity to murder Malkhan as it is impossible to believe that the appellant would in that case have made the statement from a distance of 50 paces,, which made it necessary for him to shout in the presence of a witness - Lallu Bhurji - and, having thus induced the deceased to accompany him, would then, a few minutes later, have murdered Malkhan in a vacant field situated at a distance of a few paces from a road. It cannot, therefore, in my opinion, be said that the appellant, in telling the deceased that someone was plucking the latter's sugar-cane had necessarily a sinister object in view. It follows that the appellant did not go there with the premeditated intention of causing the death of Malkhan. I do not, of course, say that premeditation, or intention to cause death, must be found to have existed before culpable homicide can be held to be murder. I am not losing sight of Clause 2, 3 and 4 of Section 300 before the Exceptions begin. The fact that the evidence of the eye witnesses shows at least

that the appellant could not have gone to the place in question with any intention of causing death of Malkhan or of committing such an assault on him as was likely to cause fatal injuries, is however important.

6. In the second place, the evidence clearly shows that the appellant did not at once give the knife blow to the deceased. At first some conversation took place between the appellant and the deceased; then there were hot words and abuse; then they grappled with each other and fought; then the deceased fell down and cried out and got up again and then there was a further fight. It was after all this had happened that the appellant was seen to take out a knife and to give a blow with it to the deceased. 'What the conversation was about no one knows. It appears to me that something was said by one of the two men in the course of that conversation which led to a quarrel and then to a fight. There is the statement of Lallu Bhurji : 'I do not know the original cause of the quarrel.' The report of the post-mortem examination shows that there was only one injury, viz., an incised wound on the right side of back, outer portion, penetrating the cavity of the abdomen. It is hardly necessary to say that I am not laying down the proposition that the offence of an accused person cannot amount to murder if he has inflicted only one injury. But the number, along with the nature and the position of the injury and other circumstances of the case, may be important in certain cases, and the present in my opinion, is one of those cases. The argument put forward on behalf of the appellant is that, in these circumstances, Exception 4 to Section 300 is applicable. That Exception runs as follows:

Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation. - It is immaterial in such cases which party offers the provocation or commits the first assault.

7. As I have shown above, in the present case there was no premeditation, the fight was clearly sudden and it had obviously been the result of a sudden quarrel. In these circumstances, I have no hesitation in holding that the knife blow was inflicted in the heat of passion. It has been argued on behalf of the Crown that

unless some weapons are used, there can be no 'fight' and it is pointed out that all that the evidence shows is that the appellant and the deceased were merely grappling with each other, in other words, that they were merely using their hands and, possibly their feet. I am unable to accept this argument. I see no reason for holding that the 'fight' contemplated by the Exception must necessarily be with weapons. According to the Oxford English Dictionary, one of the meanings of the word 'fight' 'is a combat between two or more persons.' It is explained in that dictionary that the word is not now usually applied, except rhetorically to a formal duel, but suggests primarily either the notion of a brawl or unpremeditated encounter, or that of a pugilistic combat. According to another standard dictionary (Ogilvie's Imperial Dictionary, edited by Annandale), the word 'fight', as an intransitive verb, means : 'to attempt to defeat, subdue, or destroy an enemy either by blows or weapons', and opposite that word, as a noun, there is the remark; 'see the verb' and one of the meanings given is : 'a struggle for victory, either between individuals, or between armies....' The word 'blow' is shown in that dictionary as meaning : 'a stroke with the hand or fist, or a weapon; a thumb; a bang;....' I am unable, therefore, to agree that weapons must be used before there can be a 'fight'. The last question that remains to be considered in this connexion is whether, on the facts established by the evidence in this case, the appellant took undue advantage or acted in a cruel or unusual manner. The facts, in my opinion, being as stated above, it appears to me that what happened was this. Something was said in the course of the conversation between the two men - the nature of which is not known - which led to a sudden quarrel, and that led to a sudden fight and in the course of this sudden fight, the appellant, in the heat of passion, took out a knife which happened to be with him and struck out without aiming at any particular part of the body. It unfortunately landed on a part of the deceased's body which was not far removed from a vital organ, namely, the liver, and caused an injury to that organ which brought about the death of the deceased. The mere fact that an accused person has done an act which has caused the death of another cannot lead necessarily to the conclusion that the accused took undue advantage or acted in a cruel or unusual manner for, in that case, the Exception would be meaningless. I am unable to hold on the facts established in this case, that the appellant took undue advantage or acted in a cruel or unusual manner.

8. To put it at the lowest, there is, in my judgment, at least a doubt as to whether the offence committed by the accused in this case was murder or was only culpable homicide not amounting to murder. The benefit of such a doubt also should, in my opinion, go to the accused. The only rulings cited at the bar were the Full Bench decision of this Court in *Emperor v. Parbhoo* : AIR1941 All402 , and the decision of the House of Lords in *Woolmington v. Director of Public Prosecutions* (1935) 1935 A.C. 462. Those cases, however, are really not directly in point. I have examined some of the cases mentioned in the annotated editions of the Penal Code. I consider it sufficient to refer to two of them. The first one is a decision by a Bench of the Lahore High Court and is reported in *Karam Singh v. Emperor* ('26) 13 A.I.R. 1926 Lah. 219. The headnote is as follows:

Exception 4 to Section 300, Penal Code, is meant to apply to cases wherein, in whatsoever way the quarrel originated, the subsequent conduct of both the parties puts them upon an equal footing. Where there is no sufficient reliable evidence to come to a conclusion as to how a fight commenced, it should be presumed that it took place suddenly.

It will be noticed that the weapon used in that case was a far more dangerous weapon, namely, a pistol. The other case is an old English case, (1776) *Leach Cases in crown Law The King v. William Snow* (1776) *Leach Cases in Crown Law* (1730-1815) Vol. I. The headnote runs thus:

If on any sudden quarrel, blows pass, without any intention to kill or injure another materially, and in the course of the scuffle, after the parties are heated by the contest, one kill the other with a deadly weapon, it is only manslaughter.

It will be noticed that the case had been referred by the trial Judge to the twelve Judges and that the decision was by the twelve Judges. I have looked up the Digests and there is nothing to show that the decision has ceased to be good law. It may also be added that the knife used in the present case does not appear to have been of a very dangerous character. It may be pointed out here that the statement of Jawahir, P.W. 2, that 'Malkhan was not stronger than Mahanarain', is of no importance. The appellant did not plead the right of private defence and the question which of the two was stronger than the other is immaterial for the

purposes of Exception 4 to Section 300.

9. It appears to me that there is one feature in this case which is rather peculiar. I refer to the attitude adopted by the prosecution towards their own witnesses. I have already stated above that neither of the two boys (Din Dayal and Chander or Ram Chander), who were alleged to have come first with the appellant's message on the previous night, was examined by the prosecution in the Court of Session. They were both merely tendered for cross-examination on the allegation that they had turned hostile. It is, of course, open to the prosecution - or, for the matter of that, to any party to any legal proceedings - to refrain from examining any witness whom they might have originally intended to examine. This being a criminal case, fairness to the accused re-quired that the witnesses be tendered for cross-examination. All this is true, but the fact remains that the statement of Gokul and Lallu Bhurji, that Din Dayal and Ram Chander had brought a message from the appellant, remained uncorroborated by the testimony of the messengers themselves. Further more the allegation that these boys had turned hostile was a mere statement of which there was no proof. Then, again, the prosecution examined, a witness called Lalman (P.W. 14). This witness stated that Ex. P-7 and certain slips had been made over to him by Daya Shanker, uncle of the appellant, on the evening of the day of occurrence and that he (the witness) gave them to Girwar the next morning in the presence of the Sub-Inspector. He also stated that he had no connexion with the distribution of these slips and that he was not an employee of the Rosa factory. Counsel for the accused put questions to this witness in cross-examination to show that he had been involved in various criminal cases and that there was enmity between him and the appellant's family. He admitted that he had once been fined under Section 182, Penal Code, but stated that he had been let off by the High Court. The case had arisen out of an accusation that he had got the houses of the appellant's father and uncle searched on false allegations. He stated, however, that this had happened 25 years ago and that he had not been on bad terms with the appellant over this matter. He next admitted that there had been a murder case against him and that he had confessed. He further admitted that Barati Lal, uncle of the appellant, and Bhagwati Prasad, cousin of the appellant, had given evidence for the prosecution in that case. He admitted that he was sentenced to five years' E. I. He next

admitted that he had a mutation case with one Tota Ram and that Debi Dayal, another uncle of the appellant, had given evidence against him in that case. It was put to him in cross-examination that he had taken part in the running of the present case against the appellant, but he denied it. It was also put to him that the appellant's uncle, Daya Shanker, was a respectable man and sarpanch, and he admitted it. No allegation appears to have been made by the prosecution, while the witness was in the box, that he had turned hostile and no permission appears to have been sought to cross-examine him on that ground. It appears from the judgment of the learned Sessions Judge that, in the course of arguments, it was contended by the defence that the Natpura witnesses should not be believed as they were under the influence of this Lalman and that Lalman was hostile to the accused. The learned Sessions Judge makes the following observations in connexion with this argument of the defence:

This Lalman is P.W. 14 and is produced by the prosecution simply to give evidence that certain slips which should have been distributed to the cultivators by the accused in the course of his duties in the co-operative society were actually handed over by the accused's relation Daya Shankev, to Lalman himself; thus proving that the accused had left his duty on the day of occurrence. The prosecution has strenuously denied that this man has been giving them any help, and suggest on the contrary that he is really hand in glove with the accused and for this reason has made all sorts of admissions in cross-examination about alleged enmities between him and the accused in other words, he is deliberately offering himself for the role of alleged instigator of the prosecution case, though in actual fact he is trying to help the licensed all the time.

This was, in my opinion, a remarkable contention on the part of the prosecution. Simply because a witness has to admit a number of facts in cross-examination, he cannot be said to be 'hand in glove' with the opposite side. The learned Judge expressed no opinion on the validity or otherwise of the argument put forward by the prosecution but, immediately after the observations quoted above, he observed as follows:

It is certainly true that this man seemed to be talking with the accused's agent in Court, and I am not prepared to believe that he had anything to do with bringing this case against the accused, and even if it were assumed for a moment that he had, then there is really still no evidence that he has any influence over the Natpura witnesses.

It was certainly open to the learned Judge to hold that it was not proved to his satisfaction that Lalman was an enemy of the accused or that he had any influence over the Natpura witnesses; but I do not quite understand what the learned Judge meant by saying that Lalman had 'seemed' to be talking with the accused's agent in Court. Assuming that Lalman had actually talked to the accused's agent in Court, that fact by itself could not form a safe basis for any inference to the effect that he was in collusion with the accused. It is very easy for a party, whose witness has had in cross-examination to make admissions which detract from the value of his evidence, to say that the witness is colluding with the opposite party. The Courts, however, have to be careful not to allow such allegations to influence their judgments. In the next paragraph of his judgment, when dealing with the motive alleged by the prosecution and discussing the evidence of the boys, the learned Judge observes as follows:

On behalf of the prosecution it is said that these witnesses have been deliberately introducing discrepancies and absurd statements into their evidence and it is certainly true that a third witness of this incident could not be produced owing to his having been won over by the defence.

The learned Judge does not state who this third witness was. Whoever he might have been, I am unable to see what justification there was for the conclusion that he had been 'won over by the defence.' For the reasons given above, I have come to the conclusion that the appeal should be allowed to this extent, that the conviction should be altered from one under Section 302 to one under Section 304, Para 2, Penal Code. I would sentence the appellant to rigorous imprisonment for ten years.

Hamilton J.

10. We have before us an appeal by Mahanarain aged 20 years who has been sentenced to death under Section 302, Penal Code, for the murder of a youth of 19 called Malkhan on 7th February 1944, in a field of hamlet Paintapur village Dadraul. We have also before us a reference by the learned Sessions Judge for confirmation of the death sentence. The defence was an alibi which was disbelieved by the learned Sessions Judge and, quite rightly, the learned Counsel for the appellant has not insisted on it, but he has urged that his client is entitled to the benefit of Exception 4 to Section 300, Penal Code, which is as follows:

Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

As no version of the occurrence has been given by the appellant, we have to depend for the facts on what has been stated by the witnesses for the prosecution. From the statements of prosecution witnesses it appears that on the night of 6th February, the deceased Malkhan, his brother Gokul, and three other persons, Lallu, Gannu and Mangli, were sitting in front of the house of the deceased when two boys came and told Malkhan that the appellant had sent for him. Malkhan answered that he would go in the morning. Two other boys then came with a similar message and again Malkhan refused to go. Finally the appellant himself came and asked Malkhan to come with him and show him tricks (tamasha) but Malkhan refused to go and said that he would show the tricks in the morning. On this Mahanarain became angry and said he would settle with Malkhan in the morning. There are three witnesses as to these facts, namely Gokul, Lallu and Gannu. The next morning Malkhan was tending cattle and near him was the witness Lallu. Mahanarain came on a cycle and called out to Malkhan that some one was picking the latter's sugarcane whereupon Malkhan went towards the sugar-cane field and Mahanarain went in the same direction. On a field next to the sugarcane field there was a struggle which ended in Mahanarain stabbing Malkhan in the back. Mahanarain disappeared on his cycle while Malkhan was able to walk to Natpura hamlet, some 250 paces away, where he stated to a number of villagers of whom six are witnesses that he had been stabbed by Mahanarain. There are three more witnesses, Jawahar, Lochan and Murli, who

claim to have seen the occurrence but as they were in a field some 350 paces from that where stabbing occurred it is difficult to say how much they really saw. I will deal in greater detail with the evidence of the witnesses when considering whether the appellant is entitled to the benefit of Exception 4 to Section 300.

11. Learned Counsel for the appellant has called our attention to a Full Bench decision of this Court which is reported in *Emperor v. Parbhoo* : AIR1941 All402 . As I have found that this decision has been more than once misconstrued, I feel it necessary to consider what is the force of it. That Full Bench consisted of seven Judges and the majority decision was a decision of four Judges and it is only necessary to consider the decision of the majority as it is of course on that decision that the learned Counsel relies. The question referred to the Full Bench was as follows:

Whether, having regard to Section 96, Penal Code, and Section 105, Evidence Act, in a case in which any general exception in the Indian Penal Code is pleaded by an accused person and evidence is adduced to support such plea, but such evidence fails to satisfy the Court affirmatively of the existence of circumstances bringing the case within the general exception pleaded, the accused person is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the' said general exception) a reasonable doubt is created in the mind of the Court whether the accused person is or is not entitled to the benefit of the said exception?

It should be noticed that an exception was pleaded and evidence was adduced in the case which led to the reference. Stress was laid by the learned Judges on a decision of the House of Lords in *Woolmington v. Director of Public Prosecutions* (1935) 1935 A.C. 462. That was a case where, according to the prosecution, the accused had murdered his wife with a gun but the accused made a statement alleging that it was an accident. The case was tried by a jury and it was urged that there was a misdirection in the charge. The relevant portion of the charge is as follows:

If you accept his evidence, you will have little doubt that she died in consequence of a gunshot wound which was inflicted by a gun which he had taken to this house,

and which was in his hands, or in his possession, at the time that it exploded. If you come to the conclusion that she died in consequence of injuries from the gun which he was carrying, you are put by the law of this country into this position : The killing of a human being is homicide, however he may be killed, and all homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse, or justification. In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law will presume the fact to have been founded in malice until the contrary appeareth.' That has been the law of this country for all time since we had law. Once it is shown to a jury that somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something less, something which might be alleviated, something which might be reduced to a charge of manslaughter, or was something which was accidental, or was something which could be justified.

And again, at the end of the summing up:

The Crown has got to satisfy you that this woman, Violet Woolmington, died at the prisoner's hands. They must satisfy you of that beyond any reasonable doubt. If they satisfy you of that, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident.

It was held in the House of Lords that if at the end, and on the whole of the case there was a reasonable doubt created by the evidence given either by the prosecution or the prisoner as to whether the prisoner killed the deceased with a malicious intention, the prosecution had not made out the case and the prisoner was entitled to an acquittal. The point was this: Whether the prisoner had to satisfy the jury that it was an accident, i.e., convince the jury that it was an accident in which case the Court would have disbelieved the prosecution version (which was the law as set forth by the learned Judge in the charge) or whether it was enough

for the prisoner to give a' version of the occurrence which would leave the jury in the uncertainty as to which of the two versions was correct. The decision of the House of Lords amounted to this that it was enough if the prisoner left the jury in the uncertainty whether his version of the occurrence was correct or that put forward by the prosecution.

12. The decision of the learned Judges constituting the majority of the Full Bench of this Court in *Emperor v. Parbhoo* : AIR1941 All402 is referred to as if the learned Judges had entirely disregarded Section 105, Evidence Act, which is as follows:

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence is upon him, and the Court shall presume the absence of such circumstances.

Arguments are based on that decision which in fact would amount to this that the prosecution should satisfy the Court that the accused does not come under an Exception. In such arguments the Court is asked to hold that in the absence of evidence every presumption should be made that had there been evidence it would have been in favour of the accused. That this argument is a misconstruction of that decision appears to me clear from one passage in the judgment of Iqbal Ahmad C.J., where the learned Chief Justice takes the following hypothetical case into consideration. In a trial for the murder of B the accused A pleads that he had received grave and sudden provocation from B and produces evidence in support of that plea. The evidence is not of such quality as to justify a finding in the affirmative in A's favour. All the same it is such as leaves the Court in a state of reasonable doubt as to whether the plea of the accused is or is not well founded. In this state of the evidence the Court while holding that the burden that was on A has not been discharged, cannot proceed further and record a finding that the plea of A was wholly unfounded. It will have to content itself with the finding that the plea is 'not proved.'

13. As in *Woolmington v. Director of Public Prosecutions* (1935) 1935 A.C. 462 the reasonable doubt is created by the evidence on which the accused relies and not by the absence of evidence. Taking the whole judgment together, I understand that the learned Judge meant this and no more. There are cases in which the prosecution puts forward one version of the occurrence and the defence another. The Court is not able to say that the defence version is the correct one so that necessarily the prosecution version is incorrect, nor can it definitely say that the prosecution version is the correct one so that necessarily the defence version is incorrect. One of the versions must be incorrect but the Court cannot say which of the two is the correct one and the benefit of the doubt must go to the accused. The same appears to be the view of the other learned Judges that formed the majority. In the present case we have then to consider whether there is a version put forward by the defence on which the accused is entitled to the benefit of Exception 4 to Section 300; and, if there is, whether it is sufficiently credible to create a reasonable doubt as to whether the offence committed is murder or only culpable homicide. There is no version put forward by the appellant himself, so that we have to consider the version suggested by his counsel. That version, I understand to be as follows. The appellant and the deceased were on good terms up to 7th February when Malkhan was killed as the story that he had been called by the accused on the previous night was false. The appellant and Malkhan happened to meet and there was a quarrel. As up to that moment they had been on friendly terms the quarrel must have been sudden. The fight was immediately after the quarrel and, therefore, it was sudden. The heat of passion should be inferred from the fact that there was a fight. Malkhan had a lathi and the use of a knife by the appellant was not taking undue advantage or acting in a cruel or unusual manner.

14. So far from there being any evidence in favour of the meeting of the appellant and Malkhan being accidental, the evidence is to the contrary. I see no reason to doubt the evidence that the appellant on the previous night wanted Malkhan to go away with him and was annoyed when the latter refused to do so. It is possible that the reason why the appellant wanted Malkhan to go with him was not that of showing him tricks. The appellant may have wanted him to go for something more important seeing that he made three attempts to get Malkhan to come with him but that will not help the appellant for it would only lead one to infer that the

annoyance of the appellant must have been greater.

15. The report was made at 7-20 P.M., that is to say, five hours after, that Gokul, brother of the deceased who made the report, had come to know of the death of his brother. The thana, according to the first report, is four miles either from Paintapur which is a hamlet of mauza Dadraul or from Dadraul itself. I have examined the map of Shahjahanpur district and find that from Kant where the thana is situated to Dadraul in an absolutely straight line the distance is a little more than 4 miles. Dadraul lies to the north-east of the thana but west of the scene' of occurrence. What the distance is from the abadi either of Dadraul or of Paintapur to the scene of occurrence is not disclosed but we must remember that from the scene of occurrence the deceased went some 250 yards further to Natpura where he collapsed and died. One must put the distance which Golral had to cover at more than four miles, at least five and possibly even six, a good two hours' walk to the thana. Gokul in his own village collected Chet Bam, the mukhia, and also a cot. He found Lochan, Murli, Jawahar and Lallu Bhurji at or near the place of occurrence and many persons at Natpura for seven are actually mentioned in the first information report. These persons were all questioned, for they said what they knew, and Gokul also took the chaukidar to accompany him to the thana. In my opinion, therefore, there was no time for Gokul to agree with others as to inserting something in the first information report which was not true. That report mentioned the occurrence of the previous night and mentioned himself, Gannu, Mangli and Lallu as having been present on the previous night. Apart from the lack of time to arrange with witnesses for a story falsely alleging that something had happened the previous night, the story appears to me not such as would have been invented as a motive for a murder. The learned Judge has stated, and I agree, that a mere refusal to come and display tricks is not what one would call a convincing motive for murder. The question, however, is not whether it was sufficient motive for a murder but sufficient motive for a quarrel.

16. In the first information report, apart from the names of the persons who were present on the previous night, the names of the boys who came to call Malkhan are given. The first two are Din Dayal and Chandarwa and the second two are Dori and Eaghubar. Din Dayal is a Barhai (?) Chandarwa is a Nai, Dori is a Gadaria

and Eaghubar is a Lohar and brother of Din Dayal. There is nothing to show that they were persons who would be interested to support a false statement of Gokul and in-deed they did not do so. Din Dayal was declared hostile in the Court of the Magistrate and when he was tendered for cross-examination in the Sessions Court he was not cross-examined. Ram Chander was tendered for cross-examination only, on the ground that he was hostile and he was cross-examined. Dori and Raghubar were produced and did not favour the prosecution in cross-examination. Ram Chander when cross-examined said there was a holiday at the school in the Panchayat Ghar on a Sunday but he did not say whether in the day or at night. Dori was examined obviously within a few minutes of Ram Chander and while he was present one Raghunandan, a defence witness who was a schoolmaster, was sitting in the court room. He stated that the day that he went to call Malkhan was not a Sunday and the school is closed : on Sundays but whether it is a day school or a night school he did not say. The last boy produced was Raghubar aged 10, a brother of that Din Dayal who was only tendered for cross-examination as hostile. His evidence too was possibly broken down in cross-examination for he there stated that he was sitting at the Panchayat Ghar not studying, when Mahanarain had come to him and in the Court of the Magistrate he stated that he was coming after easing himself at the pond and Mahanarain had asked him to call Malkhan for tamasha and he and Dori both went to call Malkhan and Dori was near the Panchayat Ghar sitting. In the Sessions Court he further stated that what he had said in Sessions that he was sitting at the Panchayat Ghar was a mistake and he was really coming back from the pond. As he went with Dori, who according to him was studying in the Panchayat Ghar, there was really no discrepancy. I cannot believe that four young boys, two of whom are only produced for cross-examination as being hostile, would have been chosen to support an entirely imaginary story and the presence of Raghunandan the schoolmaster while the other two were giving evidence was certainly enough to make them nervous as to what might happen if their evidence did not fit in with that of Raghunandan. This Raghunandan, the first defence witness though he is a schoolmaster of Dadraul, is a resident of Rosa and Mahanarain was employed by the Rosa Co-operative Development Union as a distributor. Raghunandan in examination-in-chief stated that there was a Government-aided School in Dadraul in which he taught and

there were lessons both day and night and every Sunday was a holiday. Anyone would understand from this that he taught both day and night and that the school was held in the same building. In re-examination, however, he admitted that he was not a teacher of the day school and while the day school was held in the school building the night school was held, at the Panchayat Ghar. In cross-examination about the school register he said that he had brought the register of attendance of the night school and there was no register of day attendance.

17. In re-examination he, however, said that the day school had a different register. He stated that they study at night in the Panchayat Ghar which was not a regular school and he was a master of the school for adults. He filed a list of holidays showing that every Sunday would be a holiday but that was a list of the school for adults. These boys, who were supposed to be attending the school, were not adults. In my opinion, his evidence is as unsatisfactory as was his presence in the court-room when the boys who were said to have attended the Panchayat Ghar School were giving evidence as prosecution witnesses. The whole story of these boys attending an adult school may well be untrue, put into their mouth on behalf of the defence, in order to show that there was no school on Sunday nights so that the boys could not be there and so they could not have been sent to fetch Mal-khan. Whether there was tuition of adults that Sunday night or of children or none at all I cannot decide and it follows that the evidence of these boys who were examined cannot be relied upon against the accused but that does not, in my opinion, make it believable against the prosecution so as to discredit what Gokul and Lallu say, i.e., that the boys came to call Malkhan. This occurrence of the previous night does explain why Mahanarain should have gone next morning to the deceased Malkhan. If there was any other reason, it was for Mahanarain to give it for the unfortunate Malkhan being dead could say nothing about it. Mahanarain instead of showing that he came for some reason quite unconnected with anything that had happened before in between him and Malkhan, chose to put forward an alibi and I see no reason to presume in his favour that he did come for any other reason when he himself does not choose to say that he did.

18. Why the appellant made Malkhan leave the company of Lallu Bhurji on the following morning we do not know, but the obvious inference is that it was connected with what had happened the previous night. That there was a quarrel preceding the fight is possible as Jawahar does say that he heard abuse and hot words, though he does not say who was using them. There is, however, nothing in the evidence to suggest that the quarrel was sudden, that is to say, that the appellant did not come there intending to quarrel. There was undoubtedly no interval of any length between the quarrel, if any, and what occurred subsequently, but the question is : Was there a 'fight'? If a person is attacked by another and he defends himself it is not a fight within the meaning of Exception 4:

This Exception deals with cases in which notwithstanding that a blow may have been struck or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of the guilt upon an equal footing. For, a sudden fight implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. A fight suddenly takes place, for which both parties are more or less to blame. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it could not have taken the serious turn it did. There is then mutual provocation and aggravation and it is difficult to apportion the share of blame which attaches to each fighter:' (vide H.S. Gour's Penal Law of India, Para. 3343, 'Sudden fight,' on Exception 4).

Jawahar in his examination-in-chief says that there was a struggle (kushti). In cross-examination he uses the words 'mukka bazi,' but even if Malkhan used his hands, this does not show that he did so with the intention of attacking and not that of defending himself. Lochan who was in the same field in describing the so-called fight says that he saw Mahanarain slapping Malkhan, which is a unilateral attack. Murli also says that he saw Mahanarain slapping Malkhan twice and says nothing about Malkhan attacking the appellant. How much they really could see, considering that they were some 350 paces away and their attention was drawn to the occurrence by the noise, appears to me doubtful but if their evidence is believed it does not favour the appellant. Lallu who was nearer says that

Mahanarain put down his cycle and began to beat Malkhan but as he was at a distance he did not see whether Malkhan did it first. In cross-examination he says he saw grappling, but grappling is not a fight in which Malkhan was attacking the appellant as the appellant was attacking Malkhan. In my opinion, therefore, there is no evidence on which one can say that there was a fight within the meaning of Exception 4. As regards the taking of undue advantage or acting in a cruel or unusual manner, it is established that the appellant stabbed Malkhan in the back and the injury is described as follows:

Incised wound, penetrating 2 1/2' 3/4' cavity of abdomen deep on the right side of back.' There was a cut wound 2' 3/4' 1' on the liver. The blow has, therefore, gone through all the muscles and had penetrated into the liver to the depth of one inch. Learned Counsel has talked of a penknife but there is no evidence whatsoever to show what was the weapon used beyond the medical evidence which shows that the weapon was a pointed one with a sharp blade and long enough to penetrate a considerable distance. This weapon was with the accused and he never attempted to produce it before the Court. It may have had a fixed blade or it may have been something in the nature of a claspknife, but it does not appear to have been a small penknife. According to Lallu when Malkhan left his company to go to the sugarcane field he took with him the stick which he had, but the other witnesses who were further away saw no stick there and not one of the witnesses suggests that Malkhan had it in his hands at the time that he was grappling with the appellant much less that he used it or attempted to use it on the appellant. To use a knife, as the appellant did, on a person who, if he had a stick at all at the time, never attempted to use it is, in my opinion, obviously taking undue advantage of that person and acting in a cruel or unusual manner. As to whether the appellant acted as he did in the heat of passion, I find it impossible to say anything more than that the appellant was, directly after stabbing Malkhan, in a sufficiently cool condition to mount his cycle and disappear before any witness could seize him. I find it impossible to say that the version put forward by the appellant's counsel on the evidence establishes that the appellant is entitled to the benefit of Exception 4, not because there is a version which fulfils the requirements of Exception 4 but is not credible but simply because the necessary ingredients, whether the version based on the evidence be believed or not, are not there. This being so, I agree

with the learned Sessions Judge that the offence committed is one of murder and not of culpable homicide.

19. There remains the question of what is the proper sentence. A stabbing weapon is more dangerous than a blunt weapon and the use of such a weapon shows more deliberation than the use of a lathi, for the latter will be either in the hands of the user or in front of his eyes while he has to take out a knife from his clothes or a dagger from the sheath. I, therefore, would usually hesitate to interfere with a sentence of death passed when murder has been committed with a knife or a dagger. I think, however, the use of a stabbing weapon in circumstances like those of the present case rather different from the majority of cases in which one finds murder committed with a stabbing weapon. Apparently the deceased and the appellant were on friendly terms till the night before and the disagreement was, according to the prosecution witnesses, of little importance. There is nothing to indicate that there was any premeditation and if there was any deliberation it was of a short duration. I consider, therefore, that in this case a sentence of transportation for life is sufficient.

20. Let the case be laid before the Hon'ble the Chief Justice for action being taken in accordance with the provisions of Section 429, Criminal P.C.

Iqbal Ahmad C.J.

21. This case comes before me on difference of opinion between two of my brother Judges Verma and Hamilton. Mahanarain appellant, who is a young man of 20 years of age was convicted by the Sessions Judge of Shahjahanpur under Section 302, Penal Code, and was sentenced to death. Mahanarain appealed to this Court and the record of the case was submitted by the Sessions Judge to this Court for confirmation of the death sentence. Verma J. was of the opinion that the facts proved brought the case within the purview of Exception 4 to Section 300, Penal Code, and as such Mahanarain appellant was guilty not under Section 302 but under Section 304, Penal Code. The learned Judge accordingly was of the view that the appeal should be allowed to this extent that the conviction of Mahanarain appellant should be altered from one under Section 302 to one under Section 304, Para. 2, Penal Code, and that the sentence of death should be set

aside and Mahanarain should be sentenced to ten years' rigorous imprisonment. Hamilton J. on the other hand, was of the opinion that Mahanarain was guilty under Section 302, Penal Code. He, however, considered that in the circumstances of the present case, the appropriate sentence to pass on Mahanarain was one of transportation for life. It is at times difficult to decide whether the proved facts in a particular case bring the case within the purview of Section 302 or of Section 804, Penal Code, and the present case is, to my mind, one of such cases. Indeed it appears to me that it is a case on the border line and, if I may say so with respect much can be said in support of the views adopted respectively by my brothers Verma and Hamilton. But, on a consideration of the evidence in the case, I have come to the conclusion, though not without some hesitation, that I must, in the present case, adopt the view taken by my brother Verma.

22. The incident that formed the subject of charge against Mahanarain took place in broad daylight on 7th February 1944, in Paintapur which is a hamlet of village Dadraul. The evidence shows that on 7th February Malkhan, the murdered man, had taken his cattle to Paintapur to graze them; he was grazing the cattle at a short distance from the field in which sugarcane crop was standing and one Lallu Bhurji was also grazing his cattle at a short distance from the place where Malkhan was. Shortly after midday Mahanarain appellant came there on a bicycle and got down there. Mahanarain told Malkhan that someone was plucking Malkhan's sugarcane from his field and then Malkhan proceeded towards his sugarcane field followed by Mahanarain. Very soon after quarrel ensued between Mahanarain and Malkhan and, to begin with, there was an exchange of abuse between the two. The abuse developed into a fight and the evidence for the prosecution shows that Mahanarain and Malkhan grappled with each other. Indeed it appears from the statement of one of the prosecution witnesses, viz., Jawahir, that in the course of fight there was an exchange of blows by fists between Mahanarain and Malkhan. P.W. Lallu Bhurji stated that when Malkhan proceeded towards the sugarcane field he took with him his stick. It is, however, not clear from the evidence in the case whether Malkhan did or did not use his stick in the course of the fight. During the progress of the fight and exchange of blows Mahanarain took out a knife and stabbed Malkhan with the same. Malkhan

ran to a distance of about 200 to 300 yards to a place called Natpura and there collapsed.

23. The first information report of the crime was lodged in police station Kant by Gokul, brother of Malkhan, on 7th February at 7-20 P.M. The distance between Dadraul where both Mahanarain and Malkhan resided and police station Kant is between 4 to 5 miles and, having regard to the fact that the incident had taken place at about 1 P.M. on 7th February, the conclusion is, in my judgment, irresistible that the report was lodged after considerable delay. The report is elaborate and detailed and it sets out what, according to the prosecution case constituted the motive for the commission of the crime. It was mentioned in the report that on the evening of 6th February i.e., a day before the commission of the crime Malkhan, his brother Gokul and some other persons were warming themselves at the fire in front of Malkhan's house, and that at about 10 o'clock the same night two boys came and told Malkhan that Mahanarain had called him to show tamasha. Malkhan, however, declined to go at that late hour in the night and said that he would go in the morning. Both the boys then went back. After some time two other boys came to call Malkhan. Malkhan again refused to go and the second batch of the two boys then also went back. It was further stated in the report that thereafter Mahanarain himself came to call Malkhan but Malkhan refused to show the tamasha (tricks) at that time and said that he would show the tamasha (tricks) in the morning. Mahanarain became angry and said 'I will see you in the morning properly.' In the report the names of persons who were alleged to be eye-witnesses of the occurrence that took place on 7th February were mentioned and so were the names of certain residents of Natpura and of village Nausara who testified to the fact that Malkhan named Mahanarain as his assailant before he collapsed. The eye-witnesses named in the report and most of the residents of Natpura and Nausara, who were named as witnesses in the first information report, were called at the trial and testified to the prosecution version of the facts.

24. The appellant denied his guilt and pleaded alibi. The evidence produced in support of the alibi was rightly rejected by the learned Sessions Judge and the plea of alibi does not appear to have been pressed before the learned Judges in

this Court by the defence counsel. The evidence of the eye-witnesses as also the evidence of the witnesses of Natpura and Nausara was, speaking generally, accepted both by Verma and by Hamilton JJ. The learned Judges, however, disagreed as to the evidence relating to the existence of a motive on the part of Mahanarain for the commission of the crime. Hamilton J. was disposed to accept the evidence produced by the prosecution as regards the motive set out at the inception of the report. Verma J, however, subjected that evidence to an adverse criticism and held that 'the motive alleged by the prosecution never existed,' Indeed he was of the opinion that the delay in reporting the crime at the police station was due to the fact that Gokul

did not know what motive the appellant could have had for causing that injury and a consultation was held in order to invent a motive and ultimately the story as to the appellant's sending for the deceased to show card tricks on the previous night, the deceased's persistent refusal and the appellant's coming and uttering threats, was invented.

I have been taken through portions of evidence of the witnesses who deposed about Malkhan having been repeatedly summoned by Mahanarain on the night of 6th February and, having regard to the fact that one of my brother Judges entertained doubt about the veracity of those witnesses, I am not prepared to place implicit reliance on the evidence of those witnesses. Apart from this fact, I hesitate to believe that the mere refusal by Malkhan to show card tricks would have been resented by Mahanarain to such an extent as to lead Mahanarain to have decided to murder Malkhan. In the view that I take, the consideration of the case must be approached on the assumption that no apparent motive for the commission of the crime has been made out by the Crown, and all that the evidence shows is that shortly after midday on 7th February Mahanarain and Malkhan, for some reason or other, quarrelled with each other, and that quarrel eventually developed into a fight in the course of which Mahanarain inflicted one injury by a sharp edged instrument on Malkhan. The question then arises whether these facts invite the application of Exception 4 to Section 300, Penal Code. On the facts of the present case the answer to this question must, in my judgment, be in the affirmative.

25. The origin of the fight, as already stated, is involved in obscurity. The eye-witnesses do not throw any light on the question as to who started the quarrel and as to how and why the quarrel began. As to who of the two combatants got the upper hand in the course of the fight is far from clear. Whether Malkhan did or did not attempt to use his stick in the course of the fight is not certain. Again at what stage of the fight Mahanarain caused the injury to Malkhan by the knife that he had with him is impossible to say. In these circumstances it would be, in my judgment, unsafe to hold that Mahanarain did in the course of the fight take 'undue advantage, or acted in a cruel or unusual manner,' within the meaning of Exception 4 to Section 300, Penal Code. The evidence such as it is points to the conclusion that the quarrel was sudden and so was the fight and that Mahanarain inflicted the injury with the knife in the heat of passion. As the evidence in the case has been noticed in detail in their respective judgments by my brother Judges I refrain from recapitulating that evidence in my judgment. For the reasons given above I agree with my brother Verma that the conviction of the appellant should be altered from one under Section 302 to one under Section 304, Penal Code, and in lieu of the death sentence passed on him he should be sentenced to ten years' rigorous imprisonment.

26. In view of the opinion delivered by the learned Chief Justice, who heard the case upon the reference under Section 429, Criminal P.C. the following order is passed: The conviction of the appellant under Section 302, Penal Code, is annulled and the sentence of death passed upon him is set aside. He is convicted under Section 304, para. 2, Penal Code, and is sentenced to rigorous imprisonment for ten years.