

Tajinder Singh @ Kaka Vs. State

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Court : Delhi

Decided On : Mar-20-2013

Judge : Sanjiv Khanna

Appellant : Tajinder Singh @ Kaka

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + Crl. Appeal No. 796/2012
Reserved on:

28. h February, 2013 Date of Decision:

20. h March, 2013 % TAJINDER SINGH @ KAKAAppellant Through Mr. Sumeet Verma, Advocate. Versus STATE .Respondent Mr. Sanjay Lao and Ms. Richa Kapoor, Additional Public Prosecutors. Through + Crl. Appeal No. 738/2012 BHUPINDER SINGH @ RAJAAppellant Through Mr. R.K. Dikshit, Advocate. Versus STATE Through .Respondent Mr. Sanjay Lao and Ms. Richa Kapoor, Additional Public Prosecutors. CORAM: HONBLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE SIDDHARTH MRIDUL SANJIV KHANNA, J.

The appellants Bhupender Singh and Tajinder Singh impugn their conviction under Section 302 read with Section 34 of the Indian Penal Code, 1860 (IPC) for murder of Amarjeet Singh on 19 th November, 2007. By order of sentence dated 14th November, 2011, the two appellants have been sentenced to life imprisonment

and fine of Rs.5,000/- each. In default of payment of fine, they have to undergo Simple Imprisonment of one year each.

2. Homicidal death of Amarjeet Singh aged about 17 years cannot really be disputed and has been established beyond doubt by Dr. B.N. Mishra (PW-14), and Ranjeet Singh (PW-3). PW-14 had along with Dr. Sushil Kumar Chaurasia conducted post mortem on the dead body of Amarjeet Singh and proved the post mortem report (Ex.PW-14/A), which was signed by him as well as Dr. Sushil Kumar Chaurasia. Cause of death as opined was cardiogenic shock (haemorrhagic shock) caused by rupture of heart consequent upon stabbing by a sharp pointed weapon like knife.

3. Ranjeet Singh (PW-3), father of Amarjeet Singh has deposed that his son was murdered on 19th November, 2007 and he identified the dead body of his son at DDU Hospital Mortuary. His statement was marked Ex.PW-3/A. MLC (Ex.PW-21/A) of deceased Amarjeet Singh was proved by Dr. Ajay Sharma (PW-21). The MLC records that the patient was brought dead by his brother Tirlok Singh with history of assault on 19th November, 2007 at about 9.00 P.M. in DDU Hospital. The MLC was prepared by Dr. Sanjeev Kumar, who had left service, but his signatures and handwriting were identified by PW-21 as Dr. Sanjeev Kumar had worked under his supervision.

4. On the question of the involvement of the two appellants, the prosecution relies upon the testimony of Tirlok Singh (PW-1), Amar Singh (PW-6) and to a limited extent statements by Vikram (PW-2) and Deepak Sahdev @ Vicky (PW-4).

5. PW-6 has deposed that he was a driver by profession and on 19 th November, 2007 at about 8.15 P.M. when he was going to his house via Dharampuri Road on foot from the side of Nala, he saw the two appellants, whom he identified, along with two others, were running towards the Nala from the side of Dharampuri Road. He knew all four of them. Bittoo, who faced trial before the Juvenile Justice Board, was carrying a knife in his hand. When PW-6 reached at the corner of the street, he found that Amarjeet Singh was lying injured in a pool of blood. Amarjeet Singh was rushed to the DDU Hospital by Vicky in his van. PW-6 knew the two appellants prior to the incident. In his cross-examination, he has admitted that his

statement was recorded between 11 A.M.-12.00 noon on 20th November, 2007. He did not apprehend the appellants as he did not know what had happened till then. Tirlok Singh, he deposed, was his distant relative, but he denied the suggestion that he has deposed falsely being a relative of the deceased.

6. Tirlok Singh (PW-1) has testified that on 19th November, 2007, he had gone to the house of his relative Amarjeet Kaur to deliver vegetables and at about 8.15 P.M. he came back and was in the street (gali). He noticed that the two appellants, Deepu and Bittoo (the last two have faced or are facing trial before the Juvenile Justice Board) were escorting his brother Amarjeet Singh towards the gali. Thereafter, he saw that the appellant-Tajinder, Deepu and Bittoo had caught hold of his brother and Bhupinder inflicted an injury on the left side chest of his brother with some pointed object. His brother shouted for help and fell down on ground. He raised an alarm. The accused persons ran away from the spot. PW-1 took his brother to the DDU Hospital, but his brother was declared as brought dead. The police recorded his statement (Ex.PW-1/A) in the hospital. The police prepared site plan at his instance on 5th February, 2008. PW-1 correctly identified the two appellants, who were present in the trial court. He further deposed that Bhupender had given the pointed object blow to Bittoo while they were running.

7. Learned counsel for the appellants has submitted that statement of PW-1 should be disbelieved because he is an interested witness being a relative of the deceased. Reference is made to the crossexamination of PW-1 wherein he has accepted the position that there were many houses in the street (gali); it was not recorded in Ex.PW1/A that PW-1 had gone to the house of his Aunt for delivering vegetables; PW-1 had seen Bittoo inflicting injury on the left side chest of his brother. We do not think that statement of PW-1 lacks credibility or should be disbelieved. Presence of PW-1 at the spot has been proved by the statement of Vikram (PW-2) and Deepak Sehdev (PW-4). PW-2 stated that on 19th November, 2007, when he was present in his house, he heard noise in the street (gali) and on coming out he saw his neighbour Tirlok Singh, who told him that the two appellants had inflicted knife injury on Amarjeet Singh, who was lying in a pool of blood. PW-2 along with Tirlok Singh and Deepak Sehdev removed Amarjeet Singh in a Maruti 800 car to the DDU Hospital. PW-2s statement was recorded by the

Investigating Officer. In the cross-examination, he deposed that he had reached the hospital at about 9 P.M. and remained there for about 10 minutes. Similarly, Deepak Sahdev (PW-4) has deposed that on 19th November, 2007, on hearing noise in the street he came out and Tirlok Singh (PW-1) told him that the two appellants and Deepu had stabbed his brother Amarjeet Singh with a knife. Amarjeet Singh was lying in a pool of blood and was taken to the DDU Hospital in the car of Vicky. In the cross-examination he deposed that PW-4s statement was recorded on the next day and he remained in the hospital for about an hour. It is clear from the statements of PW-2 and PW-4 that Tirlok Singh (PW-1) was present at the spot in the street (gali). He had at that time informed and named appellants as the perpetrators of the crime to PW-2 and PW-4. The MLC (Ex.PW-21/A) gives name and parentage of the deceased Amarjeet Singh. It records that Amarjeet Singh had been brought to the hospital by Tirlok Singh, his brother. The MLC was recorded at 9 P.M. on 19th November, 2007 and records that the patient was declared as brought dead. Soon thereafter PW-1 made a statement (Ex.PW-7/A) to the police and on this basis at about 11.30 P.M. rukka was recorded and tehrir was sent to the police station Tilak Nagar by ASI Madan Lal (PW-15). DD Entry No.32A was recorded at 11.50 P.M. on 19th November, 2007 and FIR No.745/2007 under Section 302/34 IPC was registered at police station Tilak Nagar. The FIR (Ex.PW7/A) specifically mentions and records the name of the two appellants as assailants along with Deepu. At this stage, we only notice that the name of Bittoo was not specifically mentioned in Ex.PW-1/A and the FIR. His name was mentioned and recorded in the purported statement made by PW-1 and statement of PW-6 made on the next date i.e. 20th November, 2007. In the examination-in-chief PW-1 has categorically stated that he had seen the appellant Bhupender inflicting injury on the left side chest of his brother Amarjeet Singh with a pointed object, while Tajinder, Deepu and Bittoo had caught hold of his brother. He has further deposed that Bhupender had given the pointed objected to Bittoo, when they were running. In the cross-examination PW-1 has I had stated to the police that accused Bittoo had inflicted injury on the left side chest of my brother. Confronted with Ex.PW1/A where only chest is mentioned. I do not know if one Deepu had beaten my brother in the year 2007 and accused Raja had saved him. I am not on talking terms with accused persons. It is incorrect to suggest that I had

not seen the accused persons escorting my brother or that accused Raja had not inflicted injury on the left side of chest of my brother with some pointed object or that my brother was having enmity with Deepu and Bittoo who had murdered him. I cannot say if Raja lived in the same gali but I have often seen him there or that I have got the accused persons falsely implicated.

8. The statement of PW-1 in the cross-examination that he had seen Bittoo inflicting injury on the left side chest of his brother, it is apparent, is a mistake or an error. PW-1 after he had made the said statement in the cross-examination was confronted with Ex.PW-1/A, where only chest was mentioned and it was not recorded that the injury was inflicted on the left side of the chest. Further cross-examination on behalf of the two appellants is to the effect that the statement made by PW-1 that he had seen Bhupender @ Raja inflicting injury was not correct. This further cross-examination by the counsel for the appellants reflects and indicates that PW-1 had stated that he had seen Bhupender inflicting injury by the pointed object. In the examination-in-chief, PW-1 is clear and has in categorical terms deposed that Bhupender had inflicted the injury on the left side chest of his brother with some pointed object.

9. Learned counsel for the appellants has submitted that PW-1 in the cross-examination had stated as under: I had stated the name of Bittoo after wards to the police. I had stated to police that Raja handed over the pointed object to Bittoo on the next day.

10. It is submitted that PW-1 had stated in the cross-examination that Bhupender handed over the pointed object to Bittoo on the next day i.e. day after the occurrence. In other words, PW-1 had claimed that he had seen Bhupender handing over the pointed object to Bittoo on 20th November, 2007 after the occurrence on 19th November, 2007. Learned counsel for the appellants are misreading the testimony as PW-1 had stated that he had given the name of Bittoo afterwards and had informed the police on the next day that he had seen the appellant Bhupender handing over the pointed object to Bittoo.

11. Statement of PW-1 cannot be rejected just because he is a distant relative of the deceased and the sole eye witness. His statement is to be carefully perused

and once it is held to be credible and truthful, it can certainly be relied upon. Ordinarily a close relative would not try and protect the real culprit and falsely implicate an innocent person. However, when there is personal animosity and ill-will between two families/groups etc., there can be a tendency to drag innocent persons along with those, who are guilty. However, there should be grounds to a claim or sufficient foundation, when a plea of false implication of an innocent person is raised. Relative of a victim is normally a reliable witness and his testimony should be accepted once his/her presence at the spot of occurrence is proved beyond doubt, unless there are circumstances to show that he/she could have implicated an innocent person because of enmity or other such reasons. (see Dalip Singh v. State of Punjab, AIR 195.SC 36.and Gangadhar Behera and Others Vs. State of Orissa, AIR 200.SC 3633).

12. We do not think that the testimony of PW-1 should be disbelieved because although the occurrence had taken place in a residential area and the police could not locate any other eye witness. There is no evidence to show that some other person had witnessed the occurrence. As noticed above, Vikram (PW-2) and Deepak Sahdev (PW-4), who are neighbours, have appeared and testified that they reached the occurrence spot immediately after the injuries were caused to the deceased. Conviction even in case of murder can be based upon a single eye witness once the court is satisfied that the statement made by the said witness is credible and truthful. Law does not postulate or require that a particular number of eye witnesses should depose before conviction for murder can be sustained. (see Section 134 of the Evidence Act). Conviction is possible on the basis of statement made by a sole eye witness, when his presence at the spot of occurrence is established and proved. It is not the number but credibility which can be attached to statement that matters.

13. In the present case the weapon of offence i.e. the sharp pointed object could not be recovered, but this does not mean that the prosecution version should be disbelieved and not accepted. Tirlok Singh (PW-1) has deposed on the injuries and the MLC (Ex.PW-21/A) also mentions the injuries suffered by the deceased. Post Mortem Report (Ex.PW-14/A) records the external and internal injuries seen on the body of the deceased. J.K. Sharma, ACP Rajouri Garden, who was the

Investigating Officer and was posted as the SHO, police station Tilak Nagar at the relevant time, has appeared as PW-23. He prepared the inquest documents (Ex.PW-23/B) and had got the post mortem conducted. He has deposed that Deepu, who was tried before the Juvenile Justice Board, was arrested first and on the next day when they were searching for Tajinder, they found that 15-20 persons were beating him. Tajinder was arrested vide arrest memo Ex.PW11/A on 20th November, 2007 at 6.10 P.M. Medical examination of Tajinder was conducted in DDU Hospital and they were put in the lockup. Bhupender was arrested on 27th November, 2007 at around 6.30 P.M. vide arrest memo Ex. PW-19/A. PW-23 deposed that PW-1 had remained with them in the intervening night between 19 and 20 th November, 2007 up to 2 A.M. In these circumstances as the arrests got delayed because of abscondence, plea that failure to recover the weapon of offence, should result in acquittal has to be rejected.

14. There is nothing in the statements of the appellants under Section 313 of the Code of Criminal Procedure, 1973, which requires consideration or creates any doubt about the prosecution evidence. The two appellants have made general statements that the statements made against them were incorrect or they did not know. They have claimed that they were innocent and have been falsely implicated.

15. The next aspect, which requires consideration, is whether Section 34 IPC has been rightly invoked viz. the appellant Tajinder as the injury by the sharp pointed object was caused by Bhupender and whether the appellants have been rightly convicted under Section 302 IPC or they should have been convicted and the prosecution has been able only to made out only a case under Section 304 Part-I or Part-II. Reliance has been placed on the judgment of the Supreme Court in Ramashish Yadav and Others v. State of Bihar, (1999)8 SCC 55.and Raju and Another v. State of Haryana, 2010 (2) SCALE 304 Learned Additional Public Prosecutor on the other hand has relied upon Ramesh Singh v. State of A.P. 2004(1) SCC 305.We have noticed the evidence on record and the testimony of PW-1. He has deposed that Tajinder, Deepu and Bittoo (though in the FIR and the initial statement of PW-1 Bittoos name is not mentioned) had caught hold of his brother and Bhupender had inflicted injury on the left side chest of his brother with

some pointed object.

16. PW-1 has not attributed any spoken words to Tajinder Singh, but it is apparent from his statement that the two appellants had acted in concert and with common intention. This is clear as the deceased Amarjeet was seen with the appellants, first being escorted to the street and thereafter Bhupinder inflicted the injury. The deceased was caught hold by Tajinder Singh. Common intention under Section 34 IPC is a matter of inference which is to be drawn from the facts. The distinct feature of Section 34 is element of participation in action which implies acting in concert, which is proved from the conduct, circumstances or from incriminating facts. Prior concert or meeting of minds may be prior to the occurrence but it can develop at the spur of the movement. These legal principles have to be applied to the facts of a particular case. Thus in *Ramashish Yadav and Ors .v. State of Bihar*, (1999)8 SCC 555.it was held that the two accused who caught hold of the deceased, did not share common intention with the two accused who had given the gandasas blows. It was noticed that the accused were ploughing their own fields and two of them who were acquitted from the charge of murder or by applying Section 34 IPC, had caught hold of the deceased. The other two accused who were convicted under Section 302 read with Section 34 IPC, came to the spot and suddenly gave gandasas blows. It is apparent that the accused who had caught hold of the deceased were acquitted from the charge under Section 302 read with Section 34 IPC, as they did not share the common intention that a third person would come and give the gandasas blows. In the said case, Section 149 IPC had also been invoked but not proved. In *Raju & Anr. Vs. State of Haryana*, 2010(2) SCALE 304 the conviction was altered from Section 302 read with Section 34 IPC to Section 304 Part I, read with Section 34 IPC. In *Ramesh Singh vs. State of Andhra Pradesh* (2004) 11 SCC 305.it was held that common intention has to be distinguished from same and similar intention as in cases where two persons, not known to each other, may fire shots at the same person but this would indicate that they would had the same and similar intention but not the common intention. It was accordingly observed as under:¹². To appreciate the arguments advanced on behalf of the appellants it is necessary to understand the object of incorporating Section 34 in the Indian Penal Code. As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the

offence and only that person who has committed the crime can be held to guilty. By introducing Section 34 in the penal code the Legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principles of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered by the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made, from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted. (See Noor Mohammad Yusuf Momin, (1970) 1 SCC 696.

13. Since common intention essentially being a state of mind and can only be gathered by inference drawn from facts and circumstances established in a given case, the earlier decisions involving almost similar facts cannot be used as a precedent to determine the conclusions on facts in the case in hand. This view of ours finds support in a judgment of this Court in Pandurang Tukia and Bhillia v. State of Hyderabad, AIR 195.SC 21. wherein while considering the applicability of Section 34 IPC this Court held thus: "But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary

is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis". (Sarkar's Evidence, 8th Edn., p. 30)." xxxx As we have said, each case must rest on its own facts and the mere similarity of the facts in one case cannot be used to determine a conclusion of fact in another."

17. Applying the ratio to the facts of the present case as elucidated above, we feel that the appellant Tajinder Singh shared common intention with the appellant Bhupinder. To this extent, the prosecution has been able to prove the case beyond doubt.

18. However, we are inclined to and do accept the plea of the appellants that they have been wrongly convicted under Section 302 IPC and in fact conviction should be under Section 304 Part I, IPC. The difference between Section 299 and Section 304 has been elucidated and tabulated in State of U.P. v. Virendra Prasad (2004) 9 SCC 3.7. The academic distinction between murder and culpable homicide not amounting to murder has always vexed the courts. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences: Section Sectio

299. A person commits culpable homicide if the act by which the death is caused is done Subject to certain exceptions culpable homicide is murder, if the act by which the death is caused is done Intention (a) with the intention of causing death; or (b) with the intention of causing such bodily injury as is likely to cause death; or (c) with the knowledge that the act is likely to cause death. CrI. A 796/12 & 738/12 (1) with the intention of causing death; or (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or (3) with the intention of causing bodily injury to any

person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or Knowledge (4) with the knowledge that the act is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of Page 16 of 24 causing death or such injury as is mentioned above.

8. Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the intention to cause death is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by Illustration (b) appended to Section 300.

9. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist-blow intentionally given knowing that the victim is suffering from an enlarged liver or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In clause (3) of Section 300, instead of the words likely to cause death occurring in the corresponding clause (b) of Section 299, the words sufficient in the ordinary course of nature have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice.

The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word likely in clause (b) of Section 299 conveys the sense of probability as distinguished from a mere possibility. The words bodily injury ... sufficient in the ordinary course of nature to cause death mean that death will be the most probable result of the injury, having regard to the ordinary course of nature.

19. In *Virsa Singh vs. State of Punjab* AIR 195.SC 46. Supreme Court has expounded upon the requisites under clause 3, Sections 300, 302 and 304-I, IPC and observed that:

14. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 thirdly; 15. First, it must establish, quite objectively, that a bodily injury is present; 16. Secondly, the nature of the injury must be proved; these are purely objective investigations.

17. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

18. Once these three elements are proved to be present, the enquiry proceeds further and, 19. Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

20. It is clear from the said passages that the act which results in death should be as a result of injury which was intended and the said injury should be sufficient in ordinary course of nature to cause death for a conviction to fall under Section 300, clause 3.

21. A Division Bench of this Court in *Amirudin v. State* ILR (2010) 1 Del 267 has held that a single blow by a knife piercing deep into the back and causing death in

few minutes was covered under Section 302 IPC. In Jagtar Singh v. State of Punjab, AIR 198.SC 463.it was observed that clause 3 of Section 300 was not attracted as there was no malice or pre-meditation though the blow was on the chest and had pierced deep inside the chest cavity. The court observed that there was possibility that the accused never intended to cause the said injury as the quarrel was of trivial nature. In Tholan v. State of Tamil Nadu, 1984 SCC (Cri.) 164, there was an incise wound, again on the chest, of the size of 3 x 1 cms at the maximum point but the depth was not proved. The cause of death was shock and hemorrhage due to injury on the vital organs like heart and the lung. It was observed that looking at the facts of the said case, the accused did not have the requisite intention. Reference was made to the following decisions in Jagroop Singh v. State of Hayana (1981) 3 SCC 616.Randhir Singh v. State of Punjab AIR 198.SC 55.Kulwant Rai v. State of Punjab AIR 198.SC 126.Hari Ram v. State of Haryana AIR 198.SC 185.Jagtar Singh v. State of Punjab (supra). In Sasi alias Chalil Sasi v. State of Kerala, 2000 SCC (Cri.) 695, again there was a single knife blow struck on vital part of the body, but the Supreme Court converted the conviction to Part II of Section 304 IPC from Part I, observing that it was not possible to hold that the injury inflicted was with the requisite intention. We note here that the trial court had convicted the appellant under Section 302 IPC. In Rajus case (supra), the conviction under Section 302 IPC was set aside and converted to Section 304 Part I, IPC. In the said case, death had taken place on account of knife blow on the left side anterior side of the chest and there was another knife blow on the right posterior side of the waist.

22. The test, to be applied in such cases, has been clearly settled and set out in the following two paragraphs of Virsa Singh (supra):

23. The learned counsel for the appellant referred us to Emperor v. Sardarkhan Jaridkhan [(1917) ILR 4.Bom 27, 29] where Beaman, J., says that where death is caused by a single blow, it is always much more difficult to be absolutely certain what degree of bodily injury the offender intended. With due respect to the learned Judge he has linked up the intent required with the seriousness of the injury, and that, as we have shown, is not what the section requires. The two matters are quite separate and distinct, though the evidence about them may sometimes

overlap. The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.

24. It is true that in a given case the enquiry may be linked up with the seriousness of the injury. For example, if it can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial scratch and that by accident his victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the injury that he intended to inflict to be as serious as it turned out to be but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not one of law but one of fact; and whether the conclusion should be one way or the other is a matter of proof, where necessary, by calling in aid all reasonable inferences of fact in the absence of direct testimony. It is not one for guesswork and fanciful conjecture.

23. When we apply the said test/principle to the facts of the present case, it is noticed that as per the post mortem report (Ex. PW14/A), there was only one external injury suffered by the deceased which was on the left side of the chest measuring 2 x 1 cm. The size of the injury reflects that it was a small wound. The

said injury was deep to thoracic cavity. The report further records that thoracic cavity was pierced though both the sides of lungs remained intact. Cardiogenic or haemorrhagic shock was caused by rupture of heart. We also note that there is discrepancy in the deposition of PW-1 in the examination in chief and what he had stated in Ex. PW1/A. PW-1 in the court had stated that Bhupinder had inflicted injuries on the left side of the chest but this is not recorded in Ex. PW1/A, where only chest is mentioned.

24. The deceased in the present case was a young boy aged about 17 years. He suffered the fatal blow which left his family/parents in agony and pain. The cause and motive for the crime has not come on record. There was not one accused but four of them, as per the prosecution version and they did not belong to the same family. Only one blow was given and as observed above, we attribute the said blow to Bhupinder. The external injury itself is extremely small, but it appears that the injury had reached the apex of the heart. Studies suggest that in cases of thorax injuries, there are good chances of survival (see section on Thoracic Injury, South Western Sydney Regional Trauma Registry 10-year Report 1995-2004 here out of 2896 patients admitted during the ten years, where 1360 (47%) of patients had injury predominantly at thorax region, out of which 2691 (92.9%) survived while 205 (7.1%) expired. Also see C.E. Anagnostopoulos and C. Frederick Kittle, Penetrating wounds of the hearts and great vessels, Department of Surgery, Section of Thoracic and Cardiovascular Surgery, University of Chicago, Illinois 1973 and A.K. Mandal, Unusually low mortality of penetrating wounds of the chest, twelve years experience, Department of Surgery, Charles R. Drew University of Medicine and Science, 1989). The studies indicate that the danger is severe in case of blunt trauma where there are penetrating injuries or crush injuries. It is difficult to accept and believe that the appellant Bhupinder had specifically aimed and wanted to cause the injury on a particular point on the chest of the deceased. Such precision does not merit acceptance and is improbable. We also record that only one injury was given and PW-1 was also not injured. There is also an ambiguity about the weapon of offence which has not been located. In these circumstances, we feel that benefit should be given to the appellants and their conviction should be converted from Section 302 IPC to Section 304 Part I, IPC.

25. On the question of quantum of sentence, we note that it was Bhupinder who had caused injury in question. He, according to us, should be given stricter and larger sentence than being awarded to the appellant Tajinder. Bhupinder is awarded rigorous imprisonment for a period of 8 years and a fine of Rs.25,000/-. In default of payment of fine, he shall suffer simple imprisonment for a period of a further six months. Fine if collected, will be paid to the family of the deceased. Appellant Tajinder Singh is awarded rigorous imprisonment of 6 years and a fine of Rs.10,000/-. In default of payment of fine, he shall suffer simple imprisonment for a period of further three months. Fine, if collected, will be paid as compensation to the family of the deceased. The appeals are accordingly disposed of. -sd(SANJIV KHANNA) JUDGE -sd(SIDDHARTH MRIDUL) JUDGE MARCH 20 h, 2013 NA/KKB

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