IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

TUESDAY, THE 1ST DAY OF AUGUST 2023 / 10TH SRAVANA, 1945

CRL.A NO. 467 OF 2017

AGAINST THE JUDGMENT DTD 28/2/2017 IN SC 919/2012 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT - IV, KOLLAM

CP 107/2012 OF JUDICIAL MAGISTRATE OF FIRST CLASS -I, PUNALUR

APPELLANT/ACCUSED:

SHAJU, C.NO.1673,
CENTRAL PRISON, TRIVANDRUM.

BY ADVS.P.MOHANDAS (ERNAKULAM)
K.SUDHINKUMAR
S.K.ADHITHYAN
SABU PULLAN
GOKUL D. SUDHAKARAN

RESPONDENT/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY DGP, HIGH COURT OF KERALA.
BY ADV.E.C.BINEESH, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 21/07/2023, THE COURT ON 01/08/2023 DELIVERED THE FOLLOWING:

"C.R."

P.B.SURESH KUMAR & C.S.SUDHA, JJ.

Crl.Appeal No.467 of 2017

Dated this the 1st day of August, 2023

J U D G M E N T

C.S.Sudha, J.

This appeal under Section 374(2) Cr.P.C. by the sole accused in S.C.No. 919/2012 on the file of the Court of Session, Kollam has been filed through the Superintendent, Central Prison, Thiruvananthapuram under Section 383 Cr.P.C. challenging the conviction entered and sentence passed against him for the offence punishable under Section 302 IPC.

2. The prosecution case as stated in the charge sheet is as follows – the deceased Vishnu is the son of the accused and PW7. On 21/07/2012 the accused had a quarrel with PW7, his wife, in which quarrel Vishnu intervened. This resulted in a scuffle between the accused and his son. Due to this enmity, the accused, with the intention of murdering his son, at 08.15 p.m., stabbed Vishnu with MO.1 tapping knife on the left side of his neck causing a grievous injury. The accused then pulled out MO.1 knife and beat Vishnu on the top of his head causing another injury. Vishnu thereafter

succumbed to the grievous injuries sustained by him. The place of occurrence is the steps leading to the house where the accused was residing with his family.

3. Based on Ext.P1 FIS of PW1, crime no.799/2012, Thenmala police station, that is, Ext.P1(a) FIR for the offence punishable under Section 302 IPC was registered by PW10, the then Sub Inspector of the aforesaid station. PW12, the then Circle Inspector Kulathupuzha, the Investigating Officer (I.O.) in the case conducted the investigation and submitted the charge sheet before the court.

4. On the final report being submitted, the jurisdictional magistrate, after complying with the statutory formalities, committed the case against the accused to the Sessions Court, which court took the case on file as S.C.No.919/2012. On the appearance of the accused before the Court of Session, he was furnished with the copies of all the prosecution records. On 23/09/2015, the trial court framed a charge for the offence punishable under Section 302 IPC, which was read over and explained to the accused to which he pleaded not guilty.

5. The prosecution examined PWs.1 to 12 and got marked Exts.P1 to P18 and MO.1 to MO.6. After the close of the prosecution evidence, the accused was questioned under Section 313(1)(b) Cr.P.C. regarding the

incriminating circumstances appearing against him in the evidence of the prosecution. The accused denied all these circumstances and maintained his innocence.

6. As the Sessions Court did not find it a fit case to acquit the accused under Section 232 Cr.P.C., he was asked to enter on his defence and adduce evidence in support thereof. No oral or documentary evidence has been adduced by the accused. Exts.D1 to D5 are the contradictions brought out in the testimony of the prosecution witnesses.

7. On a consideration of the oral and documentary evidence and after hearing both sides, the trial court by the impugned judgment found the accused guilty of the offence punishable under Section 302 IPC and hence has sentenced him to imprisonment for life and to a fine of ₹25,000/- and in default of payment of fine, to undergo rigorous imprisonment for a period of four months. The accused has been granted the benefit of set off under Section 428 Cr.P.C.

8. The only point that arises for consideration in this appeal is whether the conviction entered, and sentence passed against the accused by the trial court is sustainable or not.

9. Heard Sri.K.Sudhinkumar, the learned counsel for the appellant and Sri.E.C.Bineesh, the learned Public Prosecutor.

10. The fact that Vishnu, the son of the accused and PW7 died in the incident is not disputed. The dispute is regarding the way he sustained the injuries. PW12, the I.O., deposed that on 22/07/2012 he had taken over the investigation in the case, proceeded to the place of occurrence at 08:00 a.m. and had prepared Ext.P7 inquest report. PW6 is an attestor to Ext.P7 inquest report.

10.1. PW3, Associate Professor, Forensic Medicine and Deputy Police Surgeon, Medical College Hospital, Thiruvananthapuram conducted post mortem examination of the deceased, and issued Ext. P3 certificate. According to PW3, the injuries noted are-

"INJURIES (ANTE-MORTEM):-

1. Incised punctured wound 4.5x1cm, horizontally placed on left side of neck, 7cm below left ear lobule, where both of its ends were square shaped and showed an upward vertical cut 0.4x0.3cm, extending from either ends at the upper margin. The wound track was seen directed inwards, downwards and to the right for a depth of 5.5cm, completely severing all soft tissues including the carotid artery and internal jugular vein and terminated by cutting the transverse process of sixth cervical vertebra over an area of 0.7x0.3x0.2cm. Air embolism could be demonstrated in the heart during dissection.

2. Incised wound 1.5x0.3x0.3 c.m shaped on left side of face, its horizontal limb being placed 2cm outer to outer

angle of eye.

3. Lacerated wound 2x0.5cm, bone deep on middle of top head 14cm above root of nose

4. Abrasion 7x7cm, vertical on right side of back of trunk 10cm outer to midline and 16cm below top of shoulder.

5. Abrasion 3x0.5cm, vertical on left side of back of trunk 10cm outer to midline and 13cm below top of shoulder.

6. *Multiple small abrasions over an area of 9x9cm on middle of chest 1cm below root of neck*

7. Abrasion 8x0.1 to 0.3cm, vertical, on left side of chest 5cm outer to midline and 11cm below the collar bone.

8. Multiple small abrasions over an area of 3x0.3cm, placed in a straight oblique line on left side of chest, its upper outer end 0.3cm outer to lower end of previous injury.

9. Abrasion 4x2cm, vertical, on front of left hip.

10. Two linear contusions 5x0.2cm and 2x0.2cm, placed 0.7cm apart side by side and parallel to one another on left side of abdomen, lower outer end of the outer one being 8cm above top of hip bone.

11. Multiple small abrasions over an area of 6x5cm on tip of left shoulder.

12. Contusion 6x1x0.2cm, horizontal, on left side of back of chest 2cm below tip of shoulder.

13. Abrasion 6.5x1cm vertical on front of left thigh 13cm above knee.

14. Multiple small abrasions over an area of 5x5cm on front of left knee.

> *Brain was pale and oedematous. Air passages pale and contained blood stained fluid. Lungs were pale and oedematous. Stomach contained soft rice and other unidentifiable food particles having a sour smell, its mucosa was congested at places. Urinary bladder was empty. All other internal organs were pale, otherwise appeared normal. A sample of blood was sent for chemical analysis. Blood group of the deceased was determined at Blood Bank, Medical College Hospital, Thiruvananthapuram and found to be A Rh positive.*
>
> *OPINION AS TO CAUSE OF DEATH-*
>
> *Death was due to incised punctured wound sustained to the neck (injury number 1)."*

PW3 deposed that the cause of death was due to the punctured wound sustained on the neck, that is, injury no.1 referred to in Ext.P3, a fatal injury. PW3 also deposed that injury no. 1 and 2 could be caused by MO1; that injury no.3 could be caused by the blunt portion of MO1 and that injury no. 10 and 12 could be caused by the the body coming into contact with a rough surface.

11. It was submitted by the learned defence counsel that MO1, a rubber tapping knife, square bracket in shape, is having a width of only 02.9 cms. As per authorities on the topic, the length of the wound will be slightly less than the width of the weapon due to stretching of the skin. However,

injury no.1 is having a length of 4.5 cms, which is 1.6 cms more than the width of MO1. This according to the counsel would show that MO1 is not the weapon that was used for injuring the deceased.

12. PW3 in the cross-examination was questioned with specific reference to the authorities relied on by the accused. According to PW3, in a stab wound, the length of the wound need not always be slightly less than the width of the weapon. He admitted that in Dr. K.S. Narayan Reddy's Medicolegal Manual and in Lyon's Medical Jurisprudence and Toxicology, it is stated that the length of the wound would be slightly less than the width of the weapon due to stretching of the skin. To a question by the court as to what would be the extent of the difference, PW3 stated that it would be approximately 3mm. There is no reason to disbelieve PW3. Moreover, the definite case of the prosecution is that the accused after inflicting injury no.1, had pulled out the knife and beaten the deceased on the top of his head with the knife. When the knife is softly and carefully pulled out, it may not further increase the length of the wound. But if the knife is roughly and crudely pulled out of the piercing or incised wound, that may result in increase in the length of the incision. It is true that there is no evidence regarding the manner in which the knife had been pulled out. But evidence has certainly come on record that after inflicting the first wound, the

accused did pull out the knife and beat the deceased on the top of his head resulting in injury no.3. So, the pulling out of the knife, was apparently not done softly or carefully to avoid further damage. This must have resulted in increasing the length of the incision. Further, referring to injury no.2 it was argued that none of the prosecution witnesses have a case that the accused had inflicted a second incised wound on the deceased with MO1 knife. Injury no.2. is an incised wound 1.5x0.3x0.2 c.m. shaped '⌟ ' on the left side of face, its horizontal limb being placed 2cm outer to outer angle of eye. The shape of injury no.1 and 2 are different. There is no case that the accused had used two weapons for the assault. Therefore, the argument is that it cannot be believed that injury no.1 was also caused by MO1 knife especially when the knife has the shape of a square bracket.

13. It is true that none of the prosecution witnesses refer to the accused causing any injury apart from a stab wound on the neck and an injury on top of the head of the deceased with MO1 knife, which injuries correspond to injury no.1 and injury no.3. in Ext.P3. There is also no evidence or material to show that there was anyone else apart from the accused involved in the incident. Injury no.2 may have been caused during the course of causing the first and second injury. The testimony of PW3 shows that injury no.1 was the fatal injury. In such circumstances, though

there is no evidence as to the manner in which the second injury was caused, it may not be of much consequence. The testimony of PW2, whom we find no reasons to disbelieve, coupled with Ext.P3 establishes that the death of Vishnu was in fact a case of homicide.

14. Before the trial court, the accused took up a case of complete denial and had canvased for an acquittal. In the alternative, an argument that the case would fall under Section 304 IPC and that the fourth exception to Section 300 IPC would be attracted is seen advanced. The said argument was rejected, and the learned trial judge has found that the injury caused by the accused falls under 'thirdly' of Sec.300 IPC and thus a case of murder punishable under Section 302 IPC. Let us examine the evidence to determine the provision of law that is attracted in this case.

15. The overt acts of the accused are deposed to by PW2, PW7 and PW8. Before we deal with their testimony, a quick reference to the testimony of PW1, the father of the accused and the paternal grandfather of deceased Vishnu. Ext. P1 FIS is seen recorded on 21/07/2012 @ 23:00 hours. In Ext.P1, PW1 states thus - the accused is his eldest son. The accused lives with his wife Nirmala (PW7) and 2 children, namely, Vishnu (the deceased) and Vishnupriya (PW8) in the quarters of AVT Estate, Chaliyakkara, where the former works as a rubber tapper. He was informed

by someone residing nearby that at about 08.15 pm, the accused had stabbed Vishnu to death at the estate. He immediately proceeded to the place, and when he reached Chaliyakkara, he saw a big crowd in front of his son's quarter. The wife and the daughter of the accused were found loudly wailing. He was told that on the said day by 07:00 pm, the accused and Vishnu had quarrelled and by 08.15 pm, on hearing noises, residents of the adjacent quarters came running to the quarters of accused to find the deceased lying in front of the quarters drenched in blood, and the accused walking away with a rubber tapping knife. The people who gathered there, took Vishnu to the Government Medical College Hospital, Punalur, where Vishnu breathed his last. The body was cremated at his place. The accused many a time quarrels with his wife. On all such occasions, Vishnu used to intervene. Likewise, on this occasion also, Vishnu intervened and then the accused had stabbed the former with the tapping knife. The incident took place at 08:15 p.m. He has also stated that PW8, his grand daughter and other neighbours have seen the incident. After the incident, he does not know where the accused went.

16. PW1 when examined does not support the prosecution case. According to him, in a day in July, at about 09:00 pm, someone informed him over phone that the accused and Vishnu had quarrelled; that Vishnu

tried to beat the accused in the course of which Vishnu tripped and fell down. In the fall, Vishnu hit some metal (കമ്പിയോ മറ്റോ) and sustained injuries. PW1 denied having given any statement to the police. According to him, as instructed by the police he had affixed his signature on a blank paper. As PW1 did not support the prosecution case, permission was sought by the Prosecutor under Section 154 Evidence Act read with the proviso to Section 162 Cr.P.C. to put questions as put in cross examination, which request was granted. The contradictions have been marked as Exts.P2 and P2(a). PW1 admitted his signature in FIS and hence it was marked as Ext.P1. In the cross examination PW1 deposed that the body of the deceased had initially been brought to the quarters of the accused and thereafter to his house, where it was cremated. In the light of the testimony of PW1, Ext.P1 FIS cannot be looked into. Even otherwise PW1 is not an eyewitness and he has only hear say knowledge about the incident.

17. PWs. 2, 7 and 8 are eyewitnesses to the incident. PWs. 7 and 8 are none other than the wife and daughter respectively of the accused. PW2, a neighbour, deposed that on 21/07/2012, at about 07.30 pm, while he was having dinner, he heard loud conversation from the house of the deceased. Hearing this, he went there. The accused and Vishnu were on the floor following a scuffle. He took Vishnu outside the house. The accused

came after them with a tapping knife. When he saw Vishnu and the accused tugging for the knife, he tried to pull them away, during the course of which his right hand was slightly injured. He then stood back. His parents were standing nearby and so they along with Vishnu bandaged his wound with a piece of cloth. Then, the accused went inside the house and closed the door. Vishnu, in order to take him to the hospital, went inside the house to get dressed. When Vishnu reached the third step leading to the house, the accused opened the door and stabbed Vishnu on the left side of his neck with MO1 tapping knife and with the same knife the accused stabbed Vishnu on his head. Vishnu then sat on the firewood stacked at the place. The wound on the neck of Vishnu was bandaged with a shawl taken from the house of Vishnu. The accused dropped the knife there and walked away. He then took Vishnu in a pickup van to the Taluk Hospital, Punalur. The doctor examined Vishnu and declared him dead. They had reached the hospital by 08.15 p.m. He was present during the time of the inquest. He showed the place of the occurrence to the police. In the cross-examination, PW2 deposed that when he took Vishnu to the hospital, the wound that he sustained had bled. His wound was dressed at the hospital. PW2 also deposed that afer the scuffle at the courtyard, the accused entered his house and closed the door. The accused had later opened the door and stabbed

Vishnu. The incident was over by 10 to 15 minutes. He was present from the beginning of the quarrel. He does not remember whether the blood of Vishnu had splashed on the dress of the accused. He had not seen Vishnu assaulting the accused. He had also not seen Vishnu fisting the accused on his face and under his eyes while inside the quarters. He had also not seen any injuries on the accused. According to PW2, he had bandaged the wound of Vishnu. He denied having stated to the police that somebody had brought a piece of cloth and had bandaged the wound. This contradiciton is seen marked as Ext.D1. The incident took place at 07.45 pm. The pickup van arrived by 08.00 p.m. He further deposed that the incident took place between 07.30 and 07.45 p.m. According to him, no incident happened after 08.00 p.m. He denied having stated to the police that the incident had taken place at 08.15 p.m. This contradiciton has been marked as Ext.D2. On the date of incident, he had not gone for work. He denied having stated to the police that he had returned to his quarters from work by 08.00 pm. The said contradiction has been marked as Ext.D3. He denied the defense version that Vishnu who was drunk, tried to attack the accused during the course of which the former fell down and was injured by some weapon like sword or iron rod/piece.

18. PW7, the wife of the accused and mother of deceased Vishnu,

deposed that on 21/07/2012 at 07.30 pm, the accused started quarreling with her about the dinner she had prepared. Her son heard this. When the accused attempted to physically assault her, her son questioned the accused. This resulted in an altercation between the two. A scuffle ensued. At this juncture, PW2 came and took her son outside the house. According to her, she also joined them and went outside. The accused then came with a tapping knife and started quarrelling with her son. PW2 tried to wrest/wrench the knife from the accused, in which attempt, he sustained an injury on his hand. The parents of PW2 brought a cloth for bandaging the wound. They were engaged in bandaging the wound of PW2, at which time the accused went inside the house. By then PW2 had wrested the knife from the grasp of the accused. When Vishnu was about to go inside the house to get dressed to take PW2 to the hospital, the accused stabbed Vishnu on his neck and beat him on the head with a tapping knife. Vishnu fell back. The accused dropped the knife there and left the place. Vishnu was taken to the hospital in a mini lorry and before he reached the hospital, she was told that he died. She also deposed that she had handed over a cloth to PW2 to bandage the wound of Vishnu. PW7 identified MO1 as the knife used by the accused to stab her son. In the cross examination PW7 deposed that on the said day when the accused came home, she was cutting vegetables.

Time was approaching/nearing for lighting the lamp (അന്നേ ദിവസം വിളക്ക് കത്തിക്കാനുള്ള സമയമായി വരുന്നുണ്ടായിരുന്നു.). Her daughter lit the lamp. There was no quarrel/altercation relating to the same. According to PW7, her husband quarrels with her when he is drunk (ഭർത്താവ് മദ്യപിച്ചു കഴിഞ്ഞാൽ എന്നോട് വഴക്കിടും). On earlier occasions also, whenever the accused used to quarrel with her, her son used to intervene and question the accused. On the date of the incident, the accused did not like the fish she had bought. This started the quarrel. Her son arrived at the scene seeing the accused assaulting her. There was a scuffle between her son and the accused in the kitchen. The quarrel that happened in the courtyard was ended and the accused sent away (മുറ്റത്ത് വച്ച് വഴക്കുണ്ടായത് പറഞ്ഞു തീർത്ത് വിട്ടു). Vishnu, after being stabbed sat on the firewood stacked on the eastern side. She admitted that her son is healthier and stronger than the accused. She denied the suggestion that like every other household there was a minor quarrel in the family; that in the quarrel the son intervened and assaulted the father and during the assault, her son fell and got injured. She denied having stated to the police that the accused on the said day had picked up a quarrel with her regarding the food cooked, abused her and beat her. This contradiction has been marked as Ext.D4. In the re-examination she deposed that she also goes for tapping and that there were other tapping knives also in her house.

19. PW8 is the sister of the deceased and daughter of the accused and PW7. According to her, on 21/07/2012 at 07.30 pm, there was a minor altercation between her father and her mother about food. After some time, her father started abusing her mother. The intensity of the quarrel increased (വഴക്ക് മൂർച്ഛിച്ചു). Her brother, the deceased, came to the house hearing the quarrel. Her brother questioned her father about the quarrel, which was not to the liking of the latter who was drunk. Her father and her brother started quarreling. A scuffle ensued, during the course of which both fell down several times. PW2 came to the scene and tried to separate the two. PW2 took her brother outside the house. Her father with a knife came outside. At the courtyard a quarrel again started between her father and brother. PW2 was injured by the knife in the hand of her father, when the former tried to wrest the knife from the latter. Her father went inside the house. All were engaged in bandaging the wound of PW2. Her brother was about to enter the house. When he was about to get on to the third step leading to the house, her father stabbed her brother on the left side of his neck. Her father then pulled out the knife and beat her brother on the head with the knife. Her brother came to the back of the house and fell. Her mother gave water to her brother. The time then was 08:00 to 08.15 pm. The wound was bandaged. People gathered there, called a vehicle and took her brother to

the hospital. She came to know about the death of her brother by 10.00 pm. PW8 identified MO.2 lungi worn and MO.3 bathing towel of her brother. She also identified MO.1 as the knife used by her father to stab her brother. In the cross-examination PW8 deposed that she had seen blood from the wound of PW2 falling on the floor. She did not see it falling on his clothes. She had not seen her father physically assaulting her mother. She went to the scene hearing the sound of beating. By then, her brother was already there. She went to the scene on hearing her brother talking to her father about the quarrel and asking the latter to stop the quarrel. Her father assaulted her mother as well as her brother. PW8 denied the suggestion that because of her ill feeling towards her father and as instructed by her mother she was deposing falsehood in the court.

20. It was argued by the learned counsel for the accused that in the light of the contradictions, omissions and embellishments brought out in the testimony of PWs. 2, 7 and 8, their testimony is not creditworthy and hence on the basis of the same the trial court could not have concluded that the accused had stabbed his son. Emphasis was laid on the testimony of PW2 who stated in his cross-examination that nothing had transpired after 08.00 p.m. and that everything had taken place before 08.00 p.m. This stand of PW2 is not supported by the testimony of PW7 and PW8. The definite case

of the prosecution is that the incident took place at 08.15 p.m. However, if PW2 is to be believed, no incident happened after 08.00 p.m. and therefore the entire prosecution story will have to fall to the ground, argues the defence counsel.

21. It is true that there are certain discrepancies and inconsistencies in the testimony of PWs. 2, 7 and 8. However, those are minor discrepancies and contradictions which have not in any way affected the core prosecution case of the accused stabbing his son. A factor that needs to be kept in mind is that PWs 2, 7 and 8 are rustic witnesses. Admittedly the accused herein is a rubber tapper. From the testimony of PW7 she also appears to be engaged in rubber tapping. PW2 is their neighbour. All of them were residing in different quarters situated inside the rubber estate. As observed by the Apex court in **Shivaji Sahebrao Bobade v. State of Maharashtra, AIR 1973 SC 2622,** when the scene of murder is rural, and the witnesses to the case are rustics, their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and

embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered. The trial judge who has seen the witnesses depose, has a great advantage over an appellate judge who reads the recorded evidence in cold print, and regard must be had to this advantage enjoyed by the trial judge of observing the demeanour and delivery, of reading the straightforwardness and doubtful candour, rustic naivete and clever equivocation, manipulated conformity and ingenious unveracity of persons who swear to the facts before him. The sluggish chronometric sense of the countryside community in India is notorious since time is hardly of the essence of their slow life, and even urban folk make mistakes about time when no particular reason to observe and remember the time exist.

22. Further, as held in **Sivaprasad v. State of Kerala, 1969 KHC 181**, courts have to be certainly careful when dealing with the oral evidence glibly given by unscrupulous witnesses and to avoid acting upon treacherous testimony resulting in miscarriage of justice. Imperfect as the human machinery of administration of justice is, we cannot push these frailties to a point where every witness should be discarded as untrustworthy merely because there is some discrepancy or taint. In such cases, the

observations of the Apex Court to the effect that hardly one comes across a witness whose evidence does not contain a grain of untruth, exaggeration, embroidery or embellishment and that, confronted by such difficult situations, the Court has to scrutinise vigilantly the evidence placed before it and try to separate the grain from the chaff as best as it may, lay down the correct guide line. If the basic fabric of the prosecution case is sound, on these tests, the story must be believed.

23. In this case, though PWs.2, 7 and 8 were extensively cross-examined, nothing has been brought out to discredit their testimony. Therefore, we do not find any reasons to disbelieve them or discard their testimony. The testimony of these witnesses show that it was in fact the accused who had caused the injuries to the deceased with MO.1 knife.

24. PW4, Scientific Assistant (Biology), FSL, Thiruvananthapuram deposed that on 23/07/2012 she visited the place of occurrence, collected blood stains found on the door, steps, floor and courtyard and handed the samples to the I.O. The MOs. forwarded by the I.O. were examined by her and Ext.P4 is her report relating to the same. As per the report, items 1 to 4, 5(a), (b) & (c), contained human blood belonging to 'A' group. Item no.4 is MO.1 knife and item no.5(a), (b) and (c), samples taken from the bloodstain seen at the place of occurrence. PW4 identified MO.1 and stated that the

same had been examined by her. In the re-examinaiton PW4 deposed that she had also seen a blood-stained shawl and a bath towel at the scene of occurrence. Ext.P5 is the report prepared by her when she collected samples from the scene of occurrence.

25. It is true that no material has been brought in to show that the blood group of the deceased was also 'A'. But the omission, oversight or mistake committed by the I.O. in not taking steps to check the blood group of the deceased cannot go to the benefit of the accused in the light of the testimony of PWs.2, 7 and 8 who have no reasons to depose falsehood. The accused in his 313 statement has a case that his wife is inimical terms with him. According to him, his wife never used to take care of his needs and that she would not even cook food for him when he returned home from work. This attitude of his wife resulted in disputes and quarrels between them. On the date of the incident when he came home from work there was an altercation with his wife about not lighting the lamp. At that time, he was drunk. While he and his wife were quarreling, his son intervened and without giving any consideration to his status of a father, abused him by calling obscene words and assaulted him. His son fisted him on his right eye, above nose and left ear. His son pushed him down, kicked and beat him on several parts of his body. His wife was also supporting these acts of

his son. When he fell, he had been disrobed by his son pulling off his dhoti. He does not know what ensued thereafter. During the course of the assault, his son must have somehow sustained injuries. The police have registered a false case due to the pressure exerted by his wife and relatives and have fabricated evidence against him. He has not been arrested in the case. While he was at home after the last rites of his son were performed, PW11 came to his house, took him to the station, kept him under illegal detention and registered this false case. He is completely innocent.

26. Accused had no such case when PW7, his wife, was examined. Even assuming that PW7 was in inimical terms with him we still have the testimony of PW8, his daughter. The accused has no case that PW8 also is in inimical terms with him. The story put forward by the accused is not made out from the testimony of PW2, PW7 and PW8.

27. It was further argued that evidence has come on record that the body of Vishnu, the deceased had been brought home, that is, the place of occurrence and at that time several people had visited the place. Therefore, there was every possibility of tampering with or destruction of evidence, which is yet again a fact against the prosecution case.

28. PW12, the I.O., deposed that he had posted guards on duty at the scene of occurrence. From the deposition of PW1, it is clear that the

deceased was cremated in the former's property adjoining his residence. There is no reason to disbelieve PW4, the Scientific Assistant, who on 23/07/2012 had visited the place of occurrence and collected samples from the scene of crime, deposed that at the time of her examination she had noticed the scene was being guarded. PW8 to a question whether there was police guard at the scene after the incident, answered in the affirmative. PW11, the then ASI, Thenmala police station, deposed that on 22/07/2012 he was on scene guard duty and on the next day, the scene had been guarded by CW17 Dileep, another policeman. In the cross-examination PW11 deposed that he records the daily duty assigned to him in a notebook maintained by him. The fact that he had guarded the scene has been recorded in the notebook. When the book ran out of pages, he had entrusted it to the station writer. He had not handed over any documents relating to the scene guard duty to the I.O. To a question by the court as to what he did as part of his guard duty, PW11 answered that he had guarded the scene of occurrence, which is the courtyard of the house, by preventing strangers from entering the scene. The aforesaid evidence would establish that the scene of crime had in fact been guarded, which rules out the possibility of any tampering or destruction of evidence.

29. Another argument advanced on behalf of the accused is that no

evidence has been produced to show that PW2 had also been injured in the incident. If PW2 is to be believed, he was examined by a doctor at Taluk Head Quarters Hospital, Punalur, to whom he had explained the cause of injury also. However, neither the wound certificate has been produced nor the doctor examined which would raise suspicion regarding the prosecution story that PW2 was also injured, making the entire prosecution case doubtful, argues the defence counsel. It is true that no documentary evidence has been produced to show that PW2 had also been injured on the said day. The injury sustained by him does not appear to have been serious or grievous. It appears to have been a minor one. The fact that PW2 had also sustained an injury, is spoken to by PW7 and PW8 as well as by PW2 himself, whose testimony we find no reason(s) to disbelieve. PW2 never has a case that he had preferred a complaint to the police regarding the injury caused to him by the accused. That is no reason to disbelieve the version of the prosecution witnesses. Now even assuming for argument sake that PW2 was not injured, that would not in any way affect the prosecution case that the accused caused a fatal injury to his son Vishnu resulting in the death of the latter.

30. Yet another argument advanced is that there has been tampering of evidence in this case. According to the learned defence counsel, MO3

bath towel can only be taken as a planted piece of evidence. The description of MO3 in Ext.P11 property list and as per the testimony of PW7 and PW12 is that it is a white bath towel (തോർത്ത്) with a blue border. However, MO3 produced before the court is a white towel with a blue border. Thus, there is tampering of evidence produced before the court and therefore it is not safe to believe that the recovery was proper, goes the argument.

30.1. PW12 was asked regarding the discrepancy in the colour mentioned in Ext.P11 property list and MO3 towel produced before the court. His answer was that, when MO3 was seized, it was damp. The explanation appears to be that the colour was mistakenly recorded as the cloth was damp. This apparently cannot be accepted as a plausible explanation. However, even if MO3 towel is eschewed from evidence, the same has also not in any way affected the main prosecution case.

31. Now coming to the principal question that needs to be considered in this appeal, whether the offence disclosed by the facts and circumstances established by the prosecution against the accused, is 'murder' or 'culpable homicide not amounting to murder.' Here we refer to the dictum in **State of A. P. v. Rayavarapu Punnayya, AIR 1977 SC 45,** wherein the Apex court has explained the difference between the two thus- In the scheme of the Penal Code, 'culpable homicide' is genus and 'murder' its

specie. All 'murder' is 'culpable homicide' but not vice versa. Speaking generally 'culpable homicide' sans 'special characteristics of murder' is 'culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree.' This is the gravest form of culpable homicide, which is defined in S.300 as 'murder'. The second may be termed as 'culpable homicide of the second degree.' This is punishable under the 1st part of S.304. Then, there is 'culpable homicide of the third degree.' This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of S.304. It has been held that the safest way of approach to the interpretation and application of these provisions is to keep in focus the key words used in the various clauses of S.299 and 300. The following comparative table would be helpful in appreciating the points of distinction between the two offences-

Section 299	Section 300
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 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	(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	
(c) with the knowledge that the act is likely to cause death.	(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 without any excuse for incurring the risk of causing death or such injury as is mentioned above.

Clause (b) of S.299 corresponds with clauses (2) and (3) of S.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 intentional 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. '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. Clause (b) of S.299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under Clause (2) of S.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 S.300, instead of the words 'likely to cause death' occurring in the corresponding clause (b) of S.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 S.299 and clause (3) of S.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 S.299 conveys the sense of 'probable' 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. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature.

31.1. Referring to the dictum in **Virsa Singh v. State of Punjab, AIR 1958 SC 465,** the Apex court reiterated and explained the meaning and scope of Clause (3). It held that the prosecution must prove the following facts before it can bring a case under S.300, ‘thirdly’. First, it must establish, quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to

say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was 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. Thus, according to the rule laid down in **Virsa Singh** (*Supra*), even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature and did not extend to the intention of causing death, the offence would be murder.

31.2. Clause (c) of S.299 and clause (4) of S.300 both require knowledge of the probability of the act causing death. Clause (4) of S.300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

31.3. From the above summary, it emerges that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder' on the facts of a case, it would be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in S.299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of S.300 IPC, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in S.300. If the answer to this question is in the negative, the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of S.304, depending, respectively, on whether the second or the third clause of S.299 is applicable. If this question is found in the positive, but the case comes within any of the Exceptions enumerated is S.300, the offence would still be 'culpable homicide not amounting to murder', punishable under the first part of S.304 IPC.

32. With the aforesaid principles in mind, we will now consider the case on hand. The first question is whether the accused had done an act by doing which he has caused the death of Vishnu. The evidence hereinabove discussed would certainly show that the accused by his act did cause the death of Vishnu. Proof of such causal connection between the act of the accused and the death, leads us to the second stage for considering whether the act of the accused amounts to ‘culpable homicide’ as defined in S.299. The act of the accused in stabbing Vishnu with MO1 knife and causing injury no.1 referred to in Ext.P3 certificate would certainly come under (b) of S. 299, that is, causing death by doing an act with the intention of causing such bodily injury as is likely to cause death. As the answer to the second question is found in the affirmative, the stage for considering the operation of S.300 IPC has reached, where we have to determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in S.300. If only the answer to this question is in the negative, the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of S.304. In this case, even if it is assumed that the accused did not intend to commit murder as contemplated under 'firstly' of Section 300 IPC, the case would certainly fall within 'thirdly' of Section 300 IPC. As this question is found

in the positive, we come to the next question as to whether the case comes within any of the Exceptions enumerated in S.300, if so, the offence would still be 'culpable homicide not amounting to murder', punishable under the first part of S.304 IPC.

33. It was submitted by the learned defence counsel that even if the entire prosecution case is believed to be true, still the case would not be a case of murder falling under S. 300 IPC, but the accused would only be liable to be punished for the offence of culpable homicide not amounting to murder punishable under part II of S. 304 IPC. According to the prosecution, there was a quarrel between the accused and PW7 regarding the food prepared by the latter by about 07:00 p.m. on the said day. Vishnu intervened to protect his mother. A scuffle ensued between the accused and Vishnu. Both parties attacked each other. The accused and Vishnu sustained injuries while they fell down in the courtyard due to the scuffle. PW7 and PW8 admit that Vishnu was well built and physically stronger than the accused. Vishnu stripped the accused by pulling off the lungi worn by the latter in front of the neighbours. The son manhandled the father and humiliated him by stripping him in front of others, which infuriated the accused, so the father lost his self-control. Due to such humiliation and grave provocation given by the son, the accused with MO1 rubber tapping

knife which was easily available at the house, attacked him with the knife. There was never an intention on the part of the accused to kill his son. Even according to PW2, the entire incident was over by 15 minutes. Moreover, the son had over-powered the accused during the scuffle and had caused serious injuries on his face, which fact is substantiated by Ext.P12 inspection memo. After PW2 was injured, the accused went inside his house, at which time Vishnu followed him. The accused under the impression that his son was pursuing him, to protect himself from any further physical assault, inflicted a single stab injury on the neck and also hit his son on the head. There was never an intention or motive on the part of the accused to kill his son and the same has not been proved by the prosecution nor can it be inferred from the given facts and circumstances of this case. There was not sufficient time for the passions to cool down and for the accused to regain control over his mind and actions as everything happened within a short span of 15 minutes. Therefore, the argument is that the act of the accused would only fall under Exception 1 to S. 300 punishable under part II of S. 304 IPC. In support of this argument, reference was made to the decisions in **Budhi Singh v. State of H.P., (2012) 13 SCC 663 ; Devku Bhikha v. State of Gujarat, (1996) 11 SCC 641 ; Prabhakar Vithal Gholve v. State of Maharashtra, AIR 2016 SC 2292 ;**

Muthu v. State, AIR 2008 SC 1 and **Dayal v. State of Madhya Pradesh, AIR 1994 SC 30**.

34. As held by the Apex Court in **State of U.P. v. Ram Swarup, AIR 1974 SC 1570**, the civil law rule of pleadings does not govern the rights of an accused in a criminal trial. Unlike in a civil case, it is open to a criminal court to find in favour of an accused on a plea not taken up by him, and by so doing the court does not invite the charge that it has made out a new case for the accused. In **Ram Swarup** (*Supra*), the accused had advanced a plea of private defence. It has been held that though the accused may not plead that he acted in self defence, yet the court may find from the evidence of the witnesses examined by the prosecution and the circumstances of the case either that what would otherwise be an offence is not one because the accused has acted within the strict confines of his right of private defence or that the offence is mitigated because the right of private defence has been exceeded. Even in such cases the burden which rests on the prosecution to establish its case beyond reasonable doubt is neither neutralized nor shifted. The prosecution must discharge its initial traditional burden to establish the complicity of the accused and not until it does so can the question arise whether the accused has acted in self defence. It is sufficient to point out under S. 105 of the Evidence Act that 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 IPC, is upon the accused and the court shall presume the absence of such circumstances. The burden which rests on the accused to prove that any of the general exceptions is attracted does not absolve the prosecution from discharging its initial burden and truly, the primary burden never shifts save when a statute displaces the presumption of innocence, indeed, the evidence, though insufficient to establish the exceptions may be sufficient to negative one or more of the ingredients of the offence, that is to say, an accused may fail to establish affirmatively the existence of circumstances which would bring the case within the general exceptions and yet the facts and circumstances proved by him while discharging the burden under S.105 of the Evidence Act may be enough to cast a reasonable doubt on the case of the prosecution, in which event he would be entitle to an acquittal. The burden which rests on the accused to prove the exceptions is not the same rigour as the burden of the prosecution to prove the charge beyond reasonable doubt. It is enough for the accused to show as in a civil case that the preponderance of probability is in favour of his plea. It is not necessary for the accused to lead any evidence to prove his defence, because such proof can be offered by relying on the evidence led by the prosecution, the

materials elicited by cross examining the prosecution witnesses and the totality of the facts and circumstances emerging out of the evidence in the case.

35. Exception 1 to Section 300 says culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of a person who gave the provocation or causes the death of any other person by mistake or accident. The said exception is subject to three provisos, to which we are not referring to as neither party has a case that any of them are applicable in the present case. The grave and sudden provocation pointed out in this case is the alleged act of the son in stripping the accused in the presence of the neighbours and the fact that the son without any consideration that accused is his father, severely manhandled him causing injuries. However, the materials on record do not establish this case of the accused. We have already referred to in detail the testimony of PWs.2, 7 and 8, the eyewitnesses to the incident. None of the witnesses speak of such an incident. Not even a suggestion is seen put to the said witnesses regarding the acts of the deceased which caused the sudden and grave provocation to the accused. Hence in these circumstances we find that the first exception to S. 300 is not attracted and therefore the decisions submitted are not

applicable to the facts of the present case.

36. The accused also takes up a defence that his act falls under Exception 4 to S. 300 IPC and hence is punishable only under part II of S. 302 IPC. The four ingredients of Exception 4 to S. 300 are satisfied and hence the act of the accused will not constitute murder and so will only be punishable under part II of S. 302 IPC. In support of this argument reference was made to the decisions in **State of H.P. v. Wazir Chand**, **1978 KHC 462; Patel Rasiklal Becharbhai v. State of Gujarat, AIR 1992 SC 1150; Sukhbir Singh v. State of Haryana, 2002 KHC 1191 : AIR 2002 SC 1168; Ghapoo Yadav v. State of M.P, 2003 KHC 925 ; Johny v. State of Kerala, 2010(1) KHC 585; Shankar Diwal Wadu v. State of Maharashtra, 2007 KHC 4325 ; Chinnathaman v. State Rep.by Inspector of Police, AIR 2008 SC 784; Ravi Kumar K. v. State of Karnataka, 2014 KHC 4751** and **Dilip Shaw @ Sanatan v. State of West Bengal, 2020 KHC 6228**.

37. The four ingredients to be satisfied to get the benefit of Exception 4 to S. 300 IPC are - (i) there must be no premeditation; (ii) there must have been a sudden fight upon a sudden quarrel; (iii) the act must have been committed in the heat of passion and (iv) the offender must not have taken undue advantage or acted in a cruel manner. It is not sufficient if only

some of the ingredients are established to avail the benefit of the Exception. On the other hand, all the four ingredients will have to be established from the materials on record. The evidence on record does not establish all the aforesaid four ingredients. Though the fight may not have been with any premeditation, the act of stabbing resulting in the fatal injury does not appear to have been the result of a sudden fight or upon a sudden quarrel. As noticed earlier, the defence version of the deceased offering grave and sudden provocation by severely manhandling the accused and disrobing him in public, has not been made out from the evidence on record. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is also not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated, and the offender must have acted in a fit of anger. Where on a sudden quarrel a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exemption provided he has not acted cruelly. (**Surinder Kumar v. Union territory of Chandigarh,** (**1989)2 SCC 217**).

38. The time gap between quarrel and the fight is an important consideration to decide the applicability of the Exception. If there intervenes

sufficient time for passion to subside, giving the accused time to come to normalcy and the fight takes place thereafter, the killing would be murder but if the time gap is not sufficient, the accused may be held entitled to the benefit of this exception. [**Sukhbir Singh** *(Supra)*].

39. In the case on hand there was a time gap for the passion of the accused to subside. The testimony of PWs.2,7 and 8 show that after the initial fight and scuffle inside the house between the accused and his son, PW2 had intervened and taken Vishnu outside the house. The evidence shows that the accused followed them with a rubber tapping knife and again started fighting with his son. The evidence further shows that PW2 had wrenched the knife from the accused and then, the latter had gone inside the house. It was after some time that Vishnu had attempted to go inside the house. It was then the accused came out armed with MO1 knife and had inflicted the fatal injury. The evidence on record does not make out a ground under Exception 4 to S. 300 as all the ingredients under the said Section are not established from the evidence on record. That being the position we find that the accused is not entitled to the benefit of either Exception 1 or 4 of S. 300 IPC. The trial court was therefore right in finding that the act of the accused falls within 'thirdly' of Section 300 IPC. We find no infirmity in the impugned judgment calling for an interference.

In the result, the appeal is dismissed.

Interlocutory applications, if any pending, shall stand closed.

Sd/-

P.B. SURESH KUMAR
JUDGE

Sd/-

C.S.SUDHA
JUDGE

ami/ak/Jms