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A.F.R.

Reserved on 29.11.2023

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Reserved
Case :- CRIMINAL APPEAL No. - 651 of 1989
Appellant :- Durga Prasad
Respondent :- State
Counsel for Appellant :- S.H.Ibrahim,Angad Kumar Vishwakarma,G.R.Chhabra,Moti Chand Yadav
Counsel for Respondent :- V.K.Misra,G.A,O.P.Dwivedi

Hon'ble Rajan Roy,J.
Hon'ble Mrs. Jyotsna Sharma,J.

(Per Mrs. Jyotsna Sharma,J.)

1. Heard Sri Moti Chand Yadav, learned counsel for the appellant no. 2, who is the only surviving appellant and Sri O.P. Dwivedi, learned AGA for the State and perused the material on record.

2. The appellants-Durga Prasad and Bhawani Prasad have preferred this criminal appeal, challenging the judgment and order dated 12.09.1989 passed by Additional Session Judge, Sultanpur in Session Trial No. 74 of 1985 whereby the appellants were convicted under section 302 read with 34 IPC and sentenced to undergo rigorous imprisonment for life.

3. The facts relevant for the purpose of this case are as under:-

The first informant-Jagdish Prasad Sharma submitted a written report before the police station concerned stating therein that at about 3 in the afternoon of 29.06.1981, his father was clearing a drain. The accused persons Durga Prasad and Bhawani Prasad came using foul words. When his father protested, he was attacked with pieces of bricks. The incident was witnessed by the first informant- Jagdish Prasad and witnesses Ram Kalp, Devkali, Gayabaksh Singh. They rescued him, otherwise they would have killed his father. This information was given to the police station concerned, on the basis whereof NCR under

section 323 IPC was registered on 01.07.1981 at about 09.45. The injured Babu Lal Sharma was medically examined on 30.06.1981 at 8.00 AM at District Hospital, Sultanpur. Later on he died of injuries and his postmortem examination was done. The case came to be converted into section 302 IPC. After completion of investigation both the accused persons were chargesheeted. The case was committed to the Court of Sessions. The accused persons were charged for the offence under section 302 read with section 34 IPC. They denied the charge and claimed trial.

The prosecution produced Jagdish Prasad as PW1. Ram Kalp as PW2, Constable-Laljit Singh as PW3, Radhey Shyam Tiwari as PW4 and Dr. T.N. Sharma as PW5. The statement of the accused persons under section 313 Cr.P.C. were recorded. No evidence in defence was produced. After hearing both the sides the accused persons were convicted under section 302/34 I.P.C. and sentenced to undergo rigorous imprisonment for life.

4. Before the contentions of the accused persons are taken up, we find it appropriate to briefly refer to the evidence produced by the prosecution for proving its case.

- The gist of the statement given by **PW1-Jagdish Prasad** is that the accused persons were his first cousins and that they have been staying in separate portions of the same house after mutual partition. There had been incessant rain on the day of occurrence. Both the sides had a common drainage which was closed by the accused persons, therefore, the rain water had collected in his *'aangan'*. His father went for clearing the drain (*naali*). Both the accused persons stopped him from doing so and they had an argument. Accused threw pieces of bricks causing injuries to his father on his head, right shoulder and the lower lip. His father fell down. His mother Devkali, uncle Ram Kalp, witness Sharmajeet and Gayabaksh and he himself witnessed the incident and rescued Babu Lal. He has further stated that he went to police station next day. When rain stopped, he got his father

admitted to civil hospital. From their, he was referred to Medical College, Lucknow. Later on, he died.

- **PW2-Ram Kalp** is another witness of fact produced by the prosecution, who has subsequently narrated the same story as PW1.
- **PW3-Laljit Singh (Constable)** is a formal witness, who has stated that S.I.-Ram Ashrey conducted inquest. Thereafter the dead body was sent for postmortem. The postmortem was done at 1.30 on the day, on 08.07.1981. Babu Lal died on 07.07.1981 at about 12 in the afternoon.
- **PW4-Radhey Shyam Tiwari** is a witness, who has proved that the NCR was written by constable-Shyam Narayan Dubey in his own handwriting. He has further stated that on the basis of the information, as regards death of Babu Lal, the case was converted into section **304 IPC** and the investigation was entrusted to him. He visited the place of occurrence at about 6 pm on 26.07.1981. The statements of the eye-witnesses were recorded on 05.10.1981. He prepared the site map. On his transfer, the investigation was handed over to S.I. Dharmraj, who submitted the chargesheet.
- **PW5-Dr. T.N. Sharma**, is the witness who conducted the postmortem on the dead body. He has stated that he noted down the ante-mortem injuries and gave an opinion that Babu Lal died of shock and haemorrhage, as a result of ante-mortem injuries. He has also stated on oath that the injuries were sufficient to cause death.

5. In the statement given under section 313 Cr.P.C., the accused persons denied their involvement and said specifically that no injuries were caused by them and that they have been falsely implicated because of enmity with the informant's side. Both the accused persons said that the injured sustained injuries because he had fell down after having slipped in his house and that they are innocent.

6. No witness has been examined by the defence.

7. The prosecution case is based on oral evidence of two witnesses of fact i.e. PW-1 Jagdish Prasad, son of the deceased and PW-2 Ram Kalap, brother of the deceased and further on the evidence of medical officer who conducted post-mortem. Rest of the two witnesses are formal in nature.

8. Considerable jurisprudence has evolved, on the basis of the myriad of cases decided by the Supreme Court and the High Courts with regard to medical evidence. More often then not the injuries, the nature and dimensions thereof, the seat of the injuries and the weapons used to inflict them, may occupy a key position for deciding the actual intent or the knowledge and may hold a pivotal place in a criminal case involving offence under section 302 or 304 I.P.C. This may not be a sweeping statement that when the Court is faced with a question that which section defining the offences affecting life within Chapter XVI of I.P.C., a particular act is covered, the discussion may revolve around the medical evidence. Presence of injuries, matters incidental thereto or related to them or even lack of injuries may hold a centre stage in a criminal case.

9. In the instant case, PW-5, the medical officer testified that he found following ante mortem injuries at the time of post-mortem.

*(i) A 7cm long **stitched wound** with seven stitches on right side of head, 3 cm above the left eyebrow.*

(ii) A swelling 15cm x 10cm at the back of left side head, 3cm above the left ear and 4cm above the left eyebrow.

(iii) Abraded contusion 1.5cm x 1cm on top of right shoulder.

(iv) Abrasion 6cm x 5cm right side of chest, 1.5 cm below right scapula bone.

The doctor found a burr hole 4cm x 3cm membrane deep, below injury no.(i) and a **linear facture 17cm on frontal/temporal and occipital bones** and a **haematoma** of 17cm x 16cm under the membrane, below injury no. (i) and (ii), on opening.

10. PW-5 has given an opinion that deceased died of shock and haemorrhage due to ante mortem injuries. He has further given an opinion that injuries were sufficient to cause death. In his cross examination, he said that injury no.(ii) was only a swelling and was caused as a consequence of injury no.(i). He further said that the injuries may be caused, if deceased had slipped and fell down on bricks and that he cannot say that the swelling was because of post-mortem staining or not.

11. Before I compare and discuss the medical evidence given by the Doctor who conducted the post-mortem with the injuries shown in the medical examination of the deceased done earlier (conducted seven days before the post mortem), I find it appropriate to refer to certain evidence which has come in the testimony of witnesses of fact, in the background of the prosecution story.

12. The indisputable facts are that the incident occurred on 29.06.1981 at 3 in the afternoon inside the house, where both the sides used to reside after partition. The prosecution story is that deceased was trying to open a drain to release the rain water which had collected in his *aangan.* The accused persons Durga Prasad and Bhawani Prasad started hurling abuses and they asked him not to open the drain. An altercation ensued, and the accused persons started throwing pieces of bricks from above, causing him injuries. It is not disputed that the first informant had earlier gone to police station and an N.C.R. under section 323 and 504 I.P.C. was written on the basis of his written complaint. This N.C.R. was registered on 01.07.1981 i.e. about two days after the incident. This is also not disputed that injured Babu Lal died on 07.07.1981 in medical college. Subsequently a written complaint was given by his son. The CO directed for registration of an F.I.R. Therefore, the case got converted into Crime No. 163 of 1981 under section 304 I.P.C. vide G.D. entry of 22.07.1981. Earlier the injured Babu Lal had been medically examined on 30.06.1981 privately at 8.00 AM at District Hospital Sultanpur and the post-mortem was done on 07.07.1981.

13. PW-1 the first informant has stated that when his father went to ask for opening the drain, the accused persons refused to do so. His father protested and said that he should be permitted to open the same. The accused persons started throwing pieces of bricks on him causing him injuries. As there was continuous rain, therefore, he did not go to the police station. The next day, he took his father to a hospital in Sultanpur, where he was medically examined on 30.06.1981 at 8.00 A.M. at District Hospital, Sultanpur and was referred to Medical College, Lucknow.

In his cross-examination, he stated that when his father was digging open the drain, the accused persons climbed on the rooftop of their kitchen and started throwing brick pieces. When asked, he said that he does not remember that accused persons threw one or two, 10 or 20 , 50 or 100 pieces of bricks. He stated that his father sustained an injury on the back of his head from which blood came out.

14. PW-2 Ram Kalap has stated that when the accused did no permit Babu Lal to open the drain, he started doing it himself. Both the accused persons started throwing brick pieces from their rooftop. Babu Lal fell in his *aangan* and became unconscious. Falling is an admitted fact. He has testified that because of heavy rains, he could not be brought to the hospital or the Thana, the same day and was instead given treatment by some local Doctor. It was only next day, when Babu Lal was brought to civil hospital at Sultanpur and from there he was referred to medical college.

Giving description of the acts done by the accused persons, this witness testified that the accused persons threw only four to five pieces of bricks.

15. It is established that the incident was preceded by an altercation as regards opening of drain. This too is established that the accused persons threw pieces of bricks from the rooftop. They were standing on their rooftop and the deceased was in his aangan. This too is undisputed that deceased was brought to civil hospital Sultanpur. He was examined the next day of the incident. The genuineness of medical examination report dated 30.06.1981

has been admitted by the defence side, therefore this is an admitted fact that deceased was medically examined at 8 AM on 30.06.1981.

16. This medical examination describes three injuries having been found on the person of the deceased:

"*(i)* ***Lacerated wound 3.5cm x 0.4 cm scalp deep*** *over left occipital region, 10cm away from left ear.* ***No fresh bleeding****. Kept under observation.*

(ii) Abrasion 1cm x 0.5 cm over right shoulder, 3.5 below from tip of shoulder, scab found.

(iii) Abrasion 1cm x 1.5cm over middle of lower tip inner aspect.

General condition was low, unconscious, Admitted to hospital, X-ray skull advised.

Remark- Injury No. 1 kept under observation. Rest injuries are simple. Injury No.1 caused by blunt object and rest by friction.

Duration is about half day old."

17. In this case the patient was advised X-ray, but no X-ray has been produced. The doctor gave opinion that injury no.(i) was caused by blunt object and rest by friction. His general condition was low and he was unconscious and was admitted to hospital.

18. The prosecution has not explained the reasons for non production of papers like reference slip or discharge certificate or x-ray report etc. No question has been put to the I.O. in this regard by either of the parties. Definitely it was duty of I.O. to collect those papers to prove that the deceased was in fact referred to medical college and was put to X-ray examination. However, this missing link may not have any bearing on the prosecution case and is a defect for which only the I.O can be blamed, not the prosecution. This defect does not seem to have any far reaching consequence and is liable to be ignored in the facts and circumstance of the case, in view of the discussion to follow in the body of the judgment. The prosecution further relies on pre-mortem medical examination and on post- mortem report. Now, this Court has before it a medical examination done on

30.06.1981 and a post mortem report done on 08.07.1981 to draw appropriate inferences.

19. As per the medical examination report, there is only one injury worth mentioning i.e. a lacerated wound on occipital region. The dimensions were 3.5cm x 4 cm. This injury was only scalp deep. At that time there was no fresh bleeding. Rest of the two injuries were quite minor, of the nature of abrasions. The dimensions too were quite petty.

20. The doctor, who conducted post mortem examination, opened the body and found a linear fracture 7cm covering frontal, temporal and occipital bone. It was situated 1cm above the occipital bone to above the left eyebrow. He also found haematoma under the membrane below injury no.(i) and (ii). This evidence establishes that there was a long linear fracture on the bones of his head and this caused an internal bleeding. The blood had collected and therefore, the doctor had to drill through the bones to take out the blood collected below the injuries. The burr holes are drilled into skull to release the pressure which collected fluid may build up.

21. From all the medical facts taken together, the only inference which can be drawn is that injury no.(i) was outwardly, merely a lacerated wound but had in fact caused linear facture of the three bones. The dimension of 17cm shows that the blow had a deep impact on the bones causing fracture. This injury caused an accumulation of blood below it. The injury no.(ii) i.e. swelling of 15cm x 10cm on the right side head was nothing but accumulation of fluid/blood caused by internal bleeding and therefore, the doctor had to burrow a hole of 4cm x 3cm to release the pressure created by the fluid collected in the skull.

The prosecution case is that the deceased sustained injury from the pieces of bricks and fell down. Act of falling down explains the rest of the injuries which were in the nature of abrasions. In the medical examination dated 30.06.1981, the doctor found his general condition as low and he was unconscious at that time too.

All these facts cumulatively show that the deceased died of the injury caused on his head by a piece of brick.

22. The contention of the defence is that that the prosecution has failed to demonstrate that how many pieces of brick were thrown and what was their size. No pieces of brick were collected by the I.O. It may be noted that the only defence which has been taken by the accused is that the deceased sustained injuries while he slipped in the rain. If injury no.(i) is excluded and rest of the injuries which are in the nature of abrasions, are considered, this statement appears to have substance that he fell down and therefore, sustained those injuries but as far as injury no.(i) is concerned, it may confound and compel the Judge to think over whether the same was caused by the impact of a blunt object thrown from above or just by slipping down on a solid surface.

23. In these circumstances, the seat of the injury, the nature thereof assumes great significance and to draw a conclusion undoubtedly this court has to depend upon the testimony of the witness of fact coupled with other circumstances of the matter. For this purpose the Court has no resources except to rely upon the evidence produced by the prosecution. P.W.-1 Jagdish Prasad who has supported prosecution story, has stated in unambiguous terms that the accused persons started throwing pieces of bricks which hit his father's head from the rooftop of their kitchen. PW.2 -Ram Kalap is another eyewitness, who admittedly happens to be uncle of P.W.1 and resided in the third portion of the same house after its partition, has supported the prosecution. P.W.-2 has testified that because of excessive rain, water had collected in their *angan* and that when his brother i.e. deceased Babu Lal asked the accused persons to clear the drain, they did not pay any heed and therefore the deceased started digging the drain himself for release of water. Annoyed over this act of the deceased, the accused persons started throwing pieces of brick from their rooftop.

24. The prosecution has examined two witnesses of fact. Both are eyewitnesses, whose presence on the spot is nothing but

natural. The accused and the witnesses are closely related. There appears no good reason why they should falsely implicate the accused persons when they had already accepted the partition of the house at least 6 to 7 years before this incident. In our view, the Court is not expected to go about the prosecution story with an air of disbelief from the very beginning. In our opinion, unless, the defence has been able to demolish the prosecution case by impeaching the credibility of the witnesses or by demonstrating probability of false implication or by demonstrating the inherent weakness or by at least creating reasonable doubts in any other manner, of course by producing some evidence or from the prosecution evidence itself, the Court would ordinarily believe the statements given by prosecution witnesses. This is not to say that the prosecution witnesses have to be believed blindly. Of course, the evidence has to be scrutinised for finding out the grains of truth in it. The defence may dismantle the prosecution case by demonstrating the falsity thereof which may emanate from inherent infirmities in the story or because the evidence of the witnesses are shaky in material particulars or because the witnesses are likely to falsely implicate the accused persons for certain objectives to be attained or where witnesses are not found reliable for any other good reason or their evidence is found deficient. The factors enumerated herein definitely do not lay down any strict formula for prosecution to stand on its own legs. The only point this Court wants to impress upon is that the Court has to depend upon the evidence which has been led by the prosecution or by the defence for inferring whether the charges stand proved or not. The Court cannot depend upon conjectures and surmises or entertain doubts without having good reasons to have them. In the instant case, the Court do not find substance in the alternative theory given by defence that injury was not caused by their act and rather it was a result of his slipping down in the rain. My view is fortified by the fact that the fatal injury was on his skull with a 17cm fracture right from frontal to temporal to occipital bone. In our opinion there is a strong probability that injury of such nature and

dimension is caused by the impact of a blunt object thrown with strong force, therefore, this Court is of the view that injury no.1 on the head of the decease was caused by throwing of brick piece and not just by slipping down.

25. A question may arise that the prosecution has not been able to show that it was accused Durga Prasad alone who threw the piece of brick which actually hit him in the head, therefore, he may be given benefit of doubt. We do not find much substance in this argument. The prosecution story is that the accused Durga Prasad and one more Bhawani Prasad (whose appeal stands abated) both started throwing brick pieces. In such circumstances common intention, covered under section 34 of I.P.C. comes into play. Therefore, it is not necessary to show that who threw a particular piece of brick which hit his head leaving him injured. In our opinion, if this Court embarks upon such an enquiry that who threw that particular piece of brick which hit Babu Lal's head, it would tantamount to adding a new angle in the prosecution case. The prosecution case is that both the accused who were real brothers, climbed over their roof and started throwing brick pieces. The act of both accused speaks of their common intention. The prosecution case cannot be bifurcated as if that one of the accused was throwing brick pieces and the other just kept standing without sharing the intention of co-accused! This type of presumption is, not only not supported by the evidence of the witnesses but is like substituting one's own new story in the prosecution case. Ordinarily, in criminal cases the prosecution sets up a story from the evidence which has been collected. The courts are not permitted to add or modify or change or substitute with its own – unless the court is compelled to do so for good and strong reasons. Such a course of action, if frequently resorted to may not only prejudice the defence, may also crumble the criminal justice administration system.

26. Next important legal issue is whether prosecution has been able to prove charge of section 302/34. In **Dhupa Chamar & Ors Vs. State of Bihar, (decided on 02.08.2002), t**he Supreme

Court had to grapple with a case of death caused by single bhala blow in the neck. A question arose whether clause 'Thirdly' of section 300 I.P.C. is attracted. The Supreme Court observed as below:-

> ***" The ingredient 'intention' in that Clause is very important and that gives a clue in a given case whether offence involved is murder or not. Clause Thirdly of Section 300 of the Penal Code reads thus:-***
>
> ***"Thirdly. If it is done with the intention or 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" Intention is different from motive. It is the intention with which the act is done that makes difference, in arriving at a conclusion whether the offence is culpable homicide or murder"***

27. In the celebrated and landmark judgment given by the Supreme Court in **Virsa Singh Vs. State of Punjab AIR 1958 SC 465**, it was held as below:

> " ***To put it shortly, the prosecution must prove the following facts before it can bring a case under s. 300, 3rdly " ; (i) First, it must establish, quite objectively, that a bodily injury is present ; (ii) Secondly, the nature of the injury must be proved; These are purely objective investigations.(iii) 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. 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 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."***

28. The Supreme Court in **Dhupa Chamar (supra)**, quoted from another judgment of itself given in **Jai Prakash Vs. State (Delhi Administration), (1991) 2 SCC 32** in which the meaning of term 'knowledge' and 'intention' was elaborated as below:

> "*It can thus be seen that the 'knowledge' as contrasted with 'intention' signify a state of mental realisation with the bare state of conscious awareness of certain facts in which human mind remains supine or inactive. On the other hand, 'intention' is a conscious state in which mental faculties are aroused into activity and summoned into action for the purpose of achieving a conceived end. It means shaping of one's conduct so as to bring about a certain event. Therefore, in the case of 'intention' mental faculties are projected in a set direction. Intention need not necessarily involve premeditation. Whether there is such an intention or not is a question of fact. In Clause Thirdly the words "intended to be inflicted" are significant. As noted already,* ***when a person commits an act, he is presumed to expect the natural consequences. But from the mere fact that the injury caused is sufficient in the ordinary course of nature to cause death it does not necessarily follow that the offender intended to cause the injury of that nature***. *However, the presumption arises that he intended to cause that particular injury. In such a situation the court has to ascertain whether the facts and circumstances in the case are such as to rebut the presumption and such facts and circumstances cannot be laid down in an abstract rule and they will vary from case to case. However, as pointed out in* ***Virsa Singh's case (supra)****, the weapon used, the degree of force released in wielding it, the antecedent relations of the parties, the manner in which the attack was made that is to say sudden or premeditated, whether the injury was inflicted during a struggle or grappling, the number of injuries inflicted and their nature and the part of the body where the injury was inflicted are some of the relevant factors.* ***These and other factors which may arise in a case have to be considered and if on a totality of these circumstances a doubt arises as to the nature of the offence, the benefit has to go to the accused***."

29. In **Mahesh Balmiki alias Munna Vs. State of M.P. 2000 (1) SCC 319,** the Supreme Court pointed out that there is no principle that in all cases of a single blow, 302 I.P.C. is not attracted. A single blow may in some cases entail conviction under section 302 I.P.C., in some cases under section 304 I.P.C. and in some other cases under section 326 I.P.C. The Supreme Court observed as below:-

> "***Adverting to the contention of a single blow, it may be pointed out that there is no principle that in all cases of single blow Section 302 I.P.C. is not attracted. Single blow may, in some cases, entail conviction under Section 302 I.P.C., in some cases under Section 304 I.P.C and in some other cases under Section 326 I.P.C. The question with regard to the nature of offence has to be determined on the facts and in the circumstances of each case. The nature of the injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury is caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention or knowledge of the offender and the offence committed by him.***"

30. The Supreme Court of India, in **Criminal Appeal No. 2043 of 2023 Anbazhagan Vs. The State represented by the Inspector of Police,** decided on 20.07.2023, differentiated between word 'intent' and 'knowledge' observing that intention which is a state of mind can never be precisely proved by direct evidence as a fact; it can only be deduced or inferred from other facts which are proved the intention may be proved by *res-gestae*, by acts or events previous or subsequent to the incident or occurrence. The relevant consideration **may include nature of weapon used, place where injury was inflicted, nature of injury**, the opportunity available to the accused. The Supreme Court quoted from the **Kudumula Mahanandi Reddi MANU/AP/0128/1960 : AIR 1960 AP 141,** as below :-

> ***'18. … A man's intention has to be inferred from what he does. But there are cases in which death is caused and the***

> ***intention which can safely be imputed to the offender is less grave. The degree of guilt depends upon intention and the intention to be inferred must be gathered from the facts proved. Sometimes an act is committed which would not in an ordinary case inflict injury sufficient in the ordinary course of nature to cause death, but which the - offender knows is likely to cause the death. Proof of such knowledge throws light upon his intention."***

The Supreme Court further reproduced para 26 from Kudumala judgment as below:

> ***"26. …Where the evidence does not disclose that there was any intention, to cause death of the deceased but it was clear that the accused had the knowledge that their acts were likely to cause death the accused can be held guilty under the second part of sec. 304, I.P.C. The contention that in order to bring the case under the second part of sec. 304, I.P.C. it must be brought within one of the exceptions to sec 300, I.P.C. is not acceptable."***

'Knowledge' and 'intention' are essential ingredients of offence of culpable homicide as defined in section 299 of I.P.C. Section 299 I.P.C. is as below:

> "***Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.***"

31. In our opinion the aforesaid precedents set up a right background for this court to proceed, keeping in mind the real intent of law and its application to the facts of instant case. This Court has to first find out whether the act is covered under section 299 I.P.C. as defined above. The facts of this case are that in the background of a dispute which arose because of accumulation of rain water in a enclosure which is inside portion of house popularly known as '*angan*' (courtyard) of the deceased and when his brother's family refused to open the drain, he attempted to clear the same on his own which annoyed the

accused persons i.e. his real brother's sons and they started throwing brick pieces. In this case only one injury was of such nature which could have caused death. There has not been any repetition of act of throwing bricks when the deceased had slipped and fell down. The accused threw pieces of bricks (not wielded any weapon) which is enough to show that there has not been any pre-meditation. This is not the case that they had come prepared with some object which may properly fall in category of a weapon. This is not a case where after the altercation, accused persons had come again with a plan in their mind. This is not a case where they had brought some weapon. The circumstances show that there was an act which can be called rather reckless. When a piece of brick is thrown, it is difficult to say where it will hit the body, if at all it hits, unless somebody is so trained that he can exactly pin point the part of the body where he wanted to hit with the object. Unless someone is skilled enough, it is not possible to hit with a stone or brick at a target with precision. Here the act, and the intended consequence have to be considered with caution. Moreover, it has not come in evidence that accused had specifically targetted head of the deceased for inflicting injury and he was successful in doing the same.

32. Now comes another aspect that is the nature of injury actually caused. In this case, the impact of the blow by piece of brick caused fracture of skull bones. The deceased survived for seven days, thereafter he succumbed to this injury. In our view a single injury caused by throwing a piece of brick, which is not a hand held weapon, cannot be categorised as an injury likely to cause death. In our opinion the facts and circumstances exclude the proposition that the accused persons did the act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death. Further the act is not covered in the third part of section 299 I.P.C. that the act was done with a 'knowledge' that he is likely by such act to cause death.

33. In **Anbazhagan (supra)**, the Supreme Court in para 42 of the judgment observed that it is fallacious to contend that wherever there is single injury, a case of culpable homicide is made out, irrespective of other circumstances. In the same judgment, the Supreme Court reproduced para 23 of the judgment in **Virsa Singh (supra)** with a view to impress upon that the court has to confine itself to the fact whether accused intended to inflict the injury which is proved to be present and that 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. The Supreme Court said that whether he knew of its seriousness or intended serious consequence is neither here not there.

34. In the instant case, the existence of injury is proved. Now the question is whether circumstances warrant conclusion that he intended to cause such an injury which has actually been caused or whether he had the requisite knowledge that he will cause such an injury which may ultimately cause his death. Even in cases which involved a single blow by *lathi*, the Courts have convicted accused under section 304 I.P.C. and in some cases even under section 302 I.P.C. Having said that it may be noted that *lathi* is a weapon which has to be held by hands and when a blow is caused, the accused must be presumed to have knowledge that on which part of the body, whether some vital parts like head or any other part like limbs which are non-vital, he is going to hit.

Another difference is that when an accused is using *lathi*, he must be presumed to be aware of the force he is about to use or has used and therefore, can be attributed with the necessary 'knowledge' of consequence of his act, whether accused had necessary intention or 'knowledge'. **Most fundamental formula which may be applied for deducing the requisite intention or knowledge, is whether he was aware of the consequences which shall follow or likely to follow as a direct consequence of his act**. Where such an awareness of the direct consequences or the higher degree of probability cannot be attributed to the

accused, the offence may not fall either under section 302 I.P.C. or section 304 I.P.C. In our firm opinion, in such cases the offence may be covered under section 323, 324 and 325 I.P.C. as the case may be.

35. Interestingly, the term 'intention' and term 'knowledge' form essential ingredient of section 321 I.P.C. which defines voluntarily causing hurt and section 322 I.P.C. which defines voluntarily causing grievous hurt. Broadly, when an act is done with the intention of causing hurt/grievous hurt or with a 'knowledge' that he is likely to cause hurt or grievous hurt to any person, he shall be punishable under appropriate sections. The prosecution has already been successful in showing that the deceased got injured on his head by a piece of brick thrown from above by the accused. P.W.2 has said that accused person was throwing '*addhi*' i.e. more or less half piece of a brick. Therefore, definitely he had an intention to cause hurt or that he had a '**knowledge**' that he is likely to cause grievous hurt. When he threw the brick piece, he was standing on his rooftop and the deceased was in his '*angan*'. The impact of injury was such that it caused fracture of skull bones. In our opinion, in the totality of facts and circumstances and taking into account that there was a verbal altercation (not a fight) over an issue of opening the drain for release of water and there was no pre-meditation and that the accused obviously picked up a piece of brick and that he did not come prepared and armed with any weapon at all, in our opinion an offence under section 325 I.P.C. is proved beyond reasonable doubt against accused and not the offence under section 302 or 304 I.P.C.

36. (i) The accused has been convicted under section 302 read with section 34 I.P.C. and sentenced to undergo life imprisonment. For the reasons already discussed hereinabove, the Trial Court has erred in convicting the appellant under Section 302 read with 34 IPC. Hence, the conviction of accused Durga Prasad is altered from 302 read with section 34 I.P.C. to section 325 read with section 34 I.P.C.

(ii) This Court finds that the interest of justice shall be served by sentencing the accused Durga Prasad for a term of three years and a fine of Rs. 30,000/-.

(iii) Out of the total amount of fine, Rs. 25,000/- shall be payable to the son of the deceased Durga Prasad as compensation.

(iv) In case fine is not deposited, the accused shall undergo three months simple imprisonment for default in payment of fine.

(v) The period of imprisonment already undergone shall be adjusted towards the substantive sentence of imprisonment.

37. The accused shall surrender before the court concerned immediately.

38. The bail bond and the personal bond shall stand discharged. **Accordingly, the judgment and order of sentence are modified. Appeal is allowed in part.**

39. Let a copy of the judgment be immediately transmitted to the court concerned for preparation of conviction warrant.

Order Date :- 06.02.2024
Vikram/Sumit

(Jyotsna Sharma,J.) **(Rajan Roy,J.)**