

A F R

Court No. 10

Reserved

(1) Case :- CRIMINAL APPEAL No. - 2104 of 2007

Appellant :- Ashwani Kumar

Respondent :- State of U.P.

Counsel for Appellant :- Rana Mritunjay Singh, Rajendra Prasad Mishra,
Rishad Murtaza, Udai Pratap Singh

Counsel for Respondent :- G.A,R. N.S.Chauhan

And

(2) Case :- CRIMINAL APPEAL No. - 2078 of 2007

Appellant :- Atul Kumar And 2 Ors.

Respondent :- State of U.P.

Counsel for Appellant :- Rana Mritunjay Singh,Rajendra Prasad
Mishra,Rishad Murtaza,Udai Pratap Singh

Counsel for Respondent :- G.A

Hon'ble Attau Rahman Masoodi,J.

Hon'ble Manish Kumar,J.

A. Subject Matter

1. Under challenge in the present appeals is the judgment and order dated 22.08.2007 passed by learned Additional District and Session Judge in Sessions Trial No.216 of 1999 arising out of case crime no. 50 of 1999 under Sections 148, 302, 149, 404 IPC at Police Station Bangarmau District Unnao and Sessions Trial No. 217 of 1999 arising out of case crime no.51 of 1999 under Section 3 r/w 25 Arms Act at Police Station Bangarmau district Unnao whereby the appellants were convicted under Section 302 read with Section 34 Indian Penal Code, 1860 and were sentenced to imprisonment for life and fine of Rs.5000/- only with default stipulation of additional imprisonment of six months. Appellant Ashwani Kumar was further convicted under Section 404 IPC

and was sentenced to undergo rigorous imprisonment for a term of one year and fine of Rs.1000/- with default stipulation of additional imprisonment of three months. Moreover, he was convicted under Section 3 r/w Section 25 of Arms Act and sentenced to undergo rigorous imprisonment for a term of two years and fine of Rs.1000/- with default stipulation of additional imprisonment of three months.

B. Facts and Evidence

2. The case of the prosecution, as unfolds from the FIR dated 17.02.1999 arising out of Case Crime No. 50/99 under Sections 302, 307, 396 IPC, P.S. Bangarmau District Unnao, is that the informant Anand Mohan son of Ram Shanker Gaur gave an application in the Police Station Bangarmau on 17.02.1999 that his uncle Ram Naresh Gaur son of Sri Pal and uncle's son Anil Kumar son of Ram Naresh were killed by the appellants and Sanad Kumar son of Ram Swaroop, Avnish Kumar son of Ram Avatar and Parsu son of Pohkar Pasi. On 16.02.1999 appellant Ashwani Kumar and his brothers had intentionally taken their tractor full of potatoes through the fields of informant breaking its Khahee in consequence of which a verbal exchange had taken place between them. On 17.02.1999, while the informant, his father, his uncle Ram Naresh, uncle's son Anil Kumar and daughter Vasundhara Devi were digging potatoes in the field of Ram Naresh, the armed accused tried to repeat the act to which he objected. Ashwini Kumar fired a shot at Ram Naresh which he missed. Ram Naresh also made an air shot with his licensee gun in exercise of right of private defense. The second shot by Ashwani hit Ram Naresh and he fell. Anil

Kumar who tried to pick the gun of his father was immediately shot by Rajesh Kumar, Mithlesh Kumar and Atul Kumar. He died on the spot. The accused then attacked the informant and his other family members present, but they fled to save their lives. Ashwani Kumar took away the licensee gun of Ram Naresh with him.

Injured Ram Naresh, informant and Vasundhrara Devi went to police station to lodge an FIR. Ram Naresh died on the way to hospital from ante-mortem injuries.

3. On 18.02.1999 the police arrested the accused persons from Hanuman Mandir before village Vasiyat Kheda. Upon search, a single barrel gun, factory made, gun no.6382 and four live cartridges(12 bore red colour), out of which three were of No.1 and one was of No.2, in the leash kept on shoulder were recovered from the possession of appellant Ashwani Kumar. In furtherance of this recovery, the FIR dated 18.02.1999 arising out of Case Crime No. 51/99 under Section 25 Arms Act, P.S. Bangarmau, District Unnao was registered.

4. The Charge-sheet was filed against the accused under Sections 302,307 and 396 IPC and Section 3/25 Arms Act, 1959. The case was committed to the Session Court, Unnao for trial. The trial court framed charges under Sections 148 and 302/149 against all the 8 accused namely Ram Lakhan, Ashwani Kumar, Mithlesh Kumar, Atul kumar, Sanad Kumar, Awanish Kumar, Rajesh Kumar and Parshuram and under Section 404 IPC against Ashwani Kumar in Sessions Trial No. 216/99 and also under Section 25 Arms Act, 1959 in Sessions Trial No. 217/99.

5. In order to prove its case the prosecution had testified P.W.-1 the informant, P.W-2 Vasundhara Devi, daughter of deceased Ram Naresh and eye witness of the incident, P.W-3 Aakil Husain, Head Constable who prepared the chik and proved Ext.2 FIR, Ext. 3 general diary Ext.4 G.D report no.31, injury report/medical report/majroobi chitthi as Ext.5 and Ext.6 i.e. special report, P.W-4 Jai Singh constable who was posted at police station Bangarmau on the relevant date and took the body of the deceased Anil Kumar for postmortem, P.W-5 S.I Shiv Narain Upadhyaya who proved Ext.7 i.e. panchnama of deceased Anil Kumar, Ext.8 and 11 i.e. cover letter to CMO and letter R.I photographs of dead body, Ext.12 i.e. inspection report of site Ext. 13 i.e. soil samples-plain and blood stained, Ext.14 i.e. blood stained tehmat and Ext.15 i.e. recovered shrapnels(chharre), P.W.6 Dr. Dinesh Kumar who proved the postmortem report of deceased Ram Naresh and Anil Kumar i.e. Ext.16 and 18 respectively, P.W-7 S.I. Chandra Bhan Singh who proved the site plan of case crime no.51 of 1999 i.e. Ext.19, prosecution sanction i.e Ext.20 and charge-sheet under Section 3 r/w 25 of Arms Act i.e. Ext 21, P.W-8 Vishwanath Sonkar, Head Moharrir who proved the recovery of licensee gun and the cartridges i.e. Ext.22 and 1 to 5, the FIR and G.D report of case crime no.51 of 1999 as Ext.23 and 24 respectively, P.W.9 Awadhesh Kumar who proved on oath that he took seal bound dead body of Ram Naresh Gaur for postmortem, P.W.10 Avinash Kumar Dixit who is the first Investigating Officer of the case and proved the panchnama of deceased Ram Naresh and documents relating thereto as Ext. Nos.25 to 29 and P.W.11 Inspector Omraj Singh who is the chief Investigating Officer of the case and proved Ext.22 as above, Ext 30 i.e.

charge-sheet dated 30.04.1999 against accused persons and the Exts 31 and 32 i.e. forensic reports of the recoveries.

6. In his examination under Section 313 Cr.P.C, the appellant Ashwani Kumar had denied the charges against him and alleged that he is being falsely implicated due to political animosity. Other appellants Rajesh Kumar, Atul Kumar, Mithlesh Kumar and co-accused Parshuram, Ram Lakhan and Sanad Kumar took the same instance. Co-accused Avnish Kumar, in his examination under Section 313 Cr.P.C, took a plea of alibi that he was, at the time of incident, studying at Subhash Inter College Bangarmau where he was admitted in Class XI as Avnindra Kumar.

7. Informant Anand Mohan who was examined as P.W.1 reiterated the version of FIR in the Examination- in-Chief. He further stated that his father Ram Shanker, sister (cousin) Vasundhara, Shrawan Kumar, Mashook Ali and others were eyewitnesses to the incident. After the incident he came running to his village and took a tractor to take Ram Naresh to Bangarmau. He identified the Ext.1 as the application written by him on the way upon which the FIR was registered when he reached the police station at 15.00/ 15.15 hrs. He missed the name of Ram Lakhan in haste and anxiety. Injured Ram Naresh was sent to hospital from police station. Later, he got to know that his uncle died on the way to Unnao hospital. He also admitted that accused Ashwani Kumar had, about 8 years ago, prosecuted him, his father Ram Shanker and witness Shrawan Kumar (not examined) for an offence under Section 307 IPC, in

which accused Ashwani Kumar and Parshuram had given evidence against him.

In the cross examination, P.W.1 denied having any political animosity with the appellants. However he changed his statement to the extent that the appellants had taken their tractor through the orchard (Bagh) of Ram Naresh and not potato field, a day before and the incident also took place in the said orchard and not potato field. He clarified that he had mistakenly understood the orchard as a potato field. On the date of incident , the deceased Ram Naresh and Anil Kumar left for the field after taking their meals. After 10 to 15 minutes, the informant, his father Ram Shanker and P.W.2 left for the fields and reached around 10.15 hrs. About a sack of potatoes were dug out and not collected before the incident took place. Upon first sight, the tractor was 10-15 steps away from the south Khahee of the orchard. Ram Naresh protested against the tractor being driven through the orchard, having a gun in his hand then. Departing from his examination in chief, he admitted that when appellants did not pay any heed to his protest, fire was first made by the deceased Ram Naresh in the air towards west, while Ashwani was on his tractor. After this Ashwani Kumar fired at Ram Naresh, but it did not hit him. At this, he moved 8-10 steps ahead and not towards the field out of fear. Ram Naresh fell after getting injured by Ashwani's second shot. He was 2-3 arms away from the place Potatoes were being dug out. He fell after moving a little west. His gun fell as well. Rajesh, Atul and Mithlesh who were standing three steps apart from each other, fired from north of the orchard, aiming at Anil Kumar who was trying to pick the gun of Ram Naresh. The accused took the gun and left, leaving their tractor behind. Shrawan Kumar whose field

is in towards the west of the place of occurrence had witnessed the incident himself and came running from his field thereafter. The witness admitted that the tractor through which he went to the police station was being driven by the son of Har Govind Mishra (Ex. Pradhan), Pramod and he was hence accompanied by Pramod, Ram Naresh, Vasundhara and Ramesh Kumar who also belong to the family of Har Govind Mishra. He did not accompany Ram Naresh to hospital and came back to the village with police. According to him, the body of Anil Kumar which they left at the orchard was found by him in-front of Mashook Ali's home and was covered with a tehmat (Mashook Ali is a batai-gir who accompanied the informant at the field). The dugout potatoes which they left in the field were not present when they reached back. His statement was recorded by the police at the place where Anil Kumar's body was found around 17.30 hrs., the same day.

8. P.W-2 Vasundhara Devi is the daughter of deceased Ram Naresh and claims to be eye-witness of the incident. In her examination-in-chief, she affirmed that her father Ram Naresh and brother Anil Kumar were killed by Ashwani Kumar and other accused on 17.02.1999. She stated that the first fire was made by Ashwani Kumar aiming at Ram Naresh which he missed. Ram Naresh had a licensee gun from which he air-fired in the exercise of right of private defense. Ashwani Kumar, then fired again at Ram Naresh and he fell. Ashwani Kumar then dared other accused to kill others and fulfill the purpose they were brought for. Thereafter, Rajesh, Atul and Mithlesh fired at Anil with their gun and *addhis* respectively. Other accused had *addhis* as well. All four accused fired at them but they saved their lives by running away. She supported the

version of P.W.1 in the later part as well, adding that she came back from the police station by the same tractor they went there. Ram Shanker, brother of Ram Naresh accompanied him to the hospital by Jeep after the first aid at Bangarmau.

Upon being cross examined by the defense counsel, the witness had refuted the plea of alibi taken by accused Avanish Kumar. Moreover, the description of the place of occurrence given by P.W-2 is identical to the one given by P.W.1 to a large extent. She deposed that accused Ashwani Kumar did not make the first fire from the tractor, but came down for it. At this point, Ram Naresh had his gun in his hand but not loaded. He loaded his gun thereafter and made an air fire in the exercise of right of private defense, facing east. The second fire made by Ashwani hit Ram Naresh, when he had stepped 2-3 steps ahead from his position.

Differing from her examination by police under Section 161 Cr.P.C, she stated that when Ram Naresh fell, Anil was standing near him and not on the 'Medha' near her. She added, when Anil picked the gun of Ram Naresh, it was not loaded. After the incident, she reached the police station at 15.20 hrs., her statement was not recorded there. According to her, Ram Naresh was sent to hospital within 10-15 minutes. She left for the village around 17.30 hrs. Anand Mohan had already gone to the village with police. She reached the village at 18.00 hrs. Her maternal uncle Sripal and maternal cousins Kamlesh and Rakesh reached by 19.00 hrs. Police remained at the place of occurrence till 18.45 hrs. Body of Anil (deceased) was sent for examination at 18.45 hrs.

9. In his examination, PW3., who was posted as head Moharir at the P.S. Bangarmau on the said date, has certified the chik FIR prepared by him at 15.20 hrs. [Exhibit 2], the Majrubi Chitthi with which injured Ram Naresh was sent to community health centre, Bangarmau with constable Avadhesh Kumar Singh (CP525) and attached thereto, the referral letter of Doctor to Sadar Hospital, Unnao (Exhibit 5) and the special report prepared by him (Exhibit 6) which was sent to authority by Constable Ramakant Tiwari (CP 579).

In the cross-examination, the witness admitted that the copy of the chik FIR with special Report was sent to C.O. Safipur on 18.02.99.

10. CP 571, Jai Singh, who was also posted as constable at P.S. Bangarmau and was testified as PW 4, affirmed on oath that he accompanied the investigating officer to the spot at village Belkheda, Majra Ranipur on the date of occurrence and that he took the body of Anil Kumar, after Panchnama, and documentation to the Mortuary and presented it before doctor on 18.02.99 duly sealed and accompanied with all documents, for postmortem.

11. PW 5, Shiv Narayan Singh was then posted as SSI at PS Bangarmau. He certified before the trial court his signature on FIR, Panchayatnama and the letter to Chief Medical Officer, letter R.I. photograph of dead body, and the challan of the dead body. He admits to have recorded the statement of P.W. 1 and thereafter he proceeded to the spot with a police party. He carried out the panchayatnama of deceased Anil Kumar. At the instance of the informant, he inspected the spot and prepared the site plan, which is in accordance with the revenue map. He

also affirmed to have recorded the soil samples, blood stained tahmat and 11 cartridges, 1 bullet, 3 tiklis and two corks and prepared memo thereof in his writing and signature. Further, he recorded the statement of P.W. 2 the same day. The investigation was then taken up by SHO Omraj Singh on the same day at 22.00 hrs.

In the cross examination, the witness affirmed to have left for the spot at 15.30 hrs. with the informant on his bike. Regarding the Sections mentioned and then crossed in panchnama, he clarified that he wrote Sections 147/148/149 on the basis of the number of accused involved but crossed them after tallying with the F.I.R. But the witness vehemently denied the F.I.R. and other documents being ante timed. He admitted that the body of the deceased Anil Kumar was recovered about half a k.m. away from the said place of occurrence, while the tahmat was recovered from spot E indicated in the site plan.

12. Dr. Dinesh Kumar examined as P.W. 6 had conducted the postmortem of deceased Ram Naresh and deceased Anil Kumar and had proved the report before the trial court. In respect of the postmortem of Ram Naresh he stated that the body had four injuries of the description given. In the internal examination, two metal shrapnels were recovered. In his opinion, the death might have occurred between 16.00-17.00 hrs a day before examination due to antemortem firearm injuries. In respect of the deceased Anil Kumar's medical examination, he stated that the deceased died of blood loss and shock around 13.00 hrs. on 17.2.1999.

In the cross examination he further stated that Ram Naresh had suffered three firearm shots. The third injury was caused from behind. The injury

which had blackness and burns (injury-1) was caused from one hand distance.

13. P.W. 7 Chandra Bhan Singh deposed that he investigated the case crime no. 51/1999 under Section 3/25 Arms Act on 19.2.1999. He deposed to have recorded the statement of informant Omraj Singh, scribe of the F.I.R. Vishwanath Sonkar and accused Ashwani Kumar. The witness certified the site plan (exhibit 19) prosecution sanction obtained dated 12.5.1999 (exhibit 20) and the charge-sheet prepared after completion of the investigation(exhibit 21) by him.

The cross examination of the witness revealed that the case diary prepared by him did not mention the time of beginning of the investigation on 19.2.1999 but reiterated that the site plan and the investigation were not fabricated.

14. P.W. 8 Vishwanath Sonkar the scribe of the F.I.R. in case crime no. 51/99 dated 18.2.1999 deposed in his examination-in-chief that he accompanied investigating officer P.W. 11 to the spot on 18.2.1999. He affirmed the recovery of a single barrel gun and four live cartridges from accused Ashwani Kumar and others at 20.00 hrs. near Hanuman temple. He identified exhibit 1, 2 3, 4 and 5 (the recovered gun and cartridges), exhibit 23 (F.I.R. written in his handwriting and signature and exhibit 22 (the recovery memo).

The cross examination of the witness revealed several gaps in the prosecution story. The witness failed to tell the time he reached the spot, whether P.w. 1 was present there or not, whether the police team visited any other house in the village, the dimensions of the platform of the

temple on which the accused were sitting at the time of arrest, the distance from which accused were spotted first, or whether any warning was given by the police team to the accused. He deposed that the police team was divided into three parts. His team consisted of constable Mahesh Pratap Verma and Inspector S.N. Upadhyaya but he could not recollect the composition of other teams or their position/direction. There is no witness of the arrest on record other than the police party and five accused themselves. No lantern or any other thing was called for to prepare the memo of recovery. The police party was stated to have been carrying the torch.

15. P.W. 9 525 CP Awadhesh Kumar Singh deposed on oath that he received the body of the deceased Ram Naresh Gaur for postmortem and kept it untouched until the postmortem took place.

16. P.w. 10 Avinash Kumar Dixit stated in his examination in chief that he carried out the inquest of the death of Ram Naresh Gaur after receiving information from P.W. 9 and reported as report no. 31. He proved the exhibit 25-panchayatnama of Ram Naresh Gaur, exhibit 26- photograph of dead body, exhibit 27 dead body challan, exhibit 28 R.I. letter and exhibit 29 letter to C.M.O.

In the cross examination the witness affirmed that the deceased was sent to PHC and then hospital by same tractor and after he died it was brought back and sent for postmortem after panchanama by the same tractor.

17. Om Raj Singh, who was then posted as Officer in charge at police station Bangaurmau and was the Chief Investigating officer of

the matter was examined as P.W. 11. He affirmed the statement of P.W. 5 that the investigation of case crime no. 50/1999 was taken up by him in the intervening night of 17.2.1999/18.2.1999 and duly received all documents and the recovery memos prepared so far. He also registered the F.I.R. under Section 3/25 of Arms Act in case crime no. 51/1999 at 22.15 hrs. 18.2.1999 recorded the statements of witnesses Ram Shankar, Ram dulari and inquest witnesses and submitted a charge sheet(exhibit 30) prepared in his handwriting under his signature.

Further in the cross examination it was revealed by the witness that he went to the village of Judai Khera for investigation with P.W. 5 at 21.00 hours and remained there till 03.30 hrs. (18.2.1999). They also made searches at the residence and other probable stations of the accused but they were not present there. The witness reiterated that all the witnesses were arrested together about 100 yards towards east from abadi of village pasiyan khera. The villagers refused to give evidence of the arrest out of fear.

18. On behalf of the defence, two witnesses were examined in support of their case.

19. D.W. 1 Baijnath Tiwari supported the plea of alibi taken by accused Avanish Kumar. D.W. 1 was posted as Lecturer and class teacher of class 11 (science) at Subhash Inter College Bangarmau at the relevant time.

20. D.W. 2 Ram Bahadur Singh who was Principal of Gram Awasiya Vidyalaya, Takiya produced the attendance register of teachers of school and deposed that Shrawan Kumar Gaur whom P.W. 1 and P.W. 2

claimed to have witnessed the incident of 17.2.1999, was present in school between 09:45 to 16.00 hrs. The distance between the school and village Ashayas is 10-11 km. The witness remained consistent in his cross examination.

21. After the completion of the evidence from both the sides the trial court, taking into consideration the oral and documentary evidence and considering the arguments of prosecution as well as defence and duly examining all the papers convicted the appellant as above. Accused Sanad Kumar, Awanish Kumar and Ram Lakhan were given Benefit of doubt and acquitted. Accused Parshuram died during the trial.

C. The case framed by prosecution and defence:

22. The appellants have been convicted and sentenced to life imprisonment. There is no appeal of the State against the acquittal of co-accused viz. Awanish Kumar, Sanad Kumar and Ram Lakhan. Parshuram yet another co-accused died during the course of trial.

23. The sum and substance of the case framed by the prosecution is that on 16.2.1999 the appellants took their tractor through the land/orchard belonging to the deceased while they were digging out potatoes in their field and some altercation took place. Next day on 17.2.1999 the appellants again made an attempt to repeat the same and on the protest of Ram Naresh, they opened fire and caused the death of Anil Kumar and Ram Naresh both by using lethal weapons i.e. fire arms and the occurrence was witnessed by as many as five eye witnesses viz. Anand Mohan (complainant) PW-1, Vasundhara Devi PW-2, Ram Shankar, Mashook Ali and Shrawan Kumar. Out of five eye witnesses

the prosecution produced Anand Mohan (PW-1) who was the nephew of Ram Naresh (deceased) and the cousin of Anil Kumar (deceased) whereas the other witness Vasundhara (PW-2) was the daughter of Ram Naresh (deceased) and the real sister of Anil Kumar (deceased).

24. The post mortem reports support the case of prosecution which were proved. The cause of death is the loss blood on account of fire arm injuries insofar as Anil Kumar is concerned, whereas Ram Naresh died of ante mortem injuries received from a fire arm. Site plan was also prepared by the investigation officer as per revenue map and the inquest reports were also drawn in respect of both the persons who succumbed to the fire arm injuries. Initially Shiv Narain PW-5 stepped into the investigation which was later taken over by Chandra Bhan Singh PW-7. The recovery of the licenced fire arm belonging to Ram Naresh looted in the occurrence was also made by the investigating officer. No one except the two deceased persons received any injury.

25. The appellants were charged of committing the offences under Section 148, 302/149, 404 IPC. Ashwini Kumar was also charged of the offence under Section 25 of the Arms Act. At the stage of Section 313 Cr.P.C. the appellants denied of being guilty and it was submitted that they have falsely been implicated in the occurrence. For non-compliance of the procedure under Section 313 Cr.P.C. there is no grievance except that the applicants stated that they have been implicated falsely. The trial court went through the evidence in detail and conclusions were accordingly drawn against the appellants for holding them guilty. The plea of lack of intention and sudden

provocation attracting Section 300 Exception IV IPC was not raised during the course of trial.

26. The most significant contradiction in the ocular testimony of PW-1 noticeable in the case is that the said witness in the cross examination has clearly stated that the first fire on the date of occurrence was shot in the air towards west by Ram Naresh using his licenced gun whereas the PW-2 in her oral testimony being an eye witness has said that the first fire was made by Ashwani Kumar. According to PW-2 the first fire was shot by Ashwini Kumar on which the deceased Ram Naresh objected the assailants from entering into the orchard/potato field belonging to the deceased who in private defence fired in the air.. It was the second shot fired by Ashwini Kumar that hit Ram Naresh and he fell down and his licenced gun fell too. The other victim Anil Kumar who bent for picking up the gun was then fired at by other assailants and having received fire arm injuries died on the spot. This inconsistency between the ocular evidence of PW-1 and PW-2 according to the appellants is a material contradiction that goes to belie the case of the prosecution, as such, they are entitled to the benefit of doubt at par with the other co-accused who have been acquitted.

27. The second contradiction in the oral testimony of eye witness PW-2 is noticed when her version that Ram Naresh after reaching to the police station was taken to the hospital by Jeep is compared to the version of PW-10 (Awinash Kumar Dixit) who in his cross examination has deposed that Ram Naresh (deceased) was taken to the hospital by

the same tractor he was brought to the police station. The contradictions certainly shake the credibility of evidence.

28. Apart from the contradictions mentioned above, the appellants have pointed out the ambiguity in the site plan that it was prepared as per the guidance of complainant which the investigating officer has acknowledged in his cross examination, therefore, the evidence of PW-1 being the informant is the genesis of the case. The dead body of the deceased Anil Kumar was recovered at a distance of half a kilometer from the alleged fields i.e. in front of the home of Mashook Ali. It was argued that the tractor of the appellants as per site plan had not entered into potato field of the deceased Ram Naresh at all, yet in the first instance he fired in the air so as to intimidate the appellants of causing grievous injury. It is argued on behalf of appellants that reaching out to their potato field on 17.2.1999 through any objectionable route is not evident from the statement of any witness or FIR, therefore, the protection of private defence asserted by PW-2 on behalf of Ram Naresh was clearly pointless. The first fire made by the deceased (Ram Naresh) rather gave rise to the right of self defence to the appellants who were intimidated excessively and threatened of life to use the chak road passing through the field of deceased. The site plan does not show Mashook Ali or dug out potatoes lying on the field besides the alleged tractor full of potatoes which the accused left behind. The position of other witnesses is also not shown in the site plan.

29. The evidence on record also reflects some overwriting on the inquest report of Anil Kumar (deceased) but same was explained by the investigating officer to the satisfaction of trial court.

30. This Court has taken note of the contradictions mentioned above but all these lapses on the part of investigating officer according to the trial court, would not discredit the ocular testimony of PW-1 and PW-2 who are eye witnesses and their testimony merely on the basis of being close relatives to the deceased, cannot be discredited.

31. The plea of innocence notwithstanding the contradictions and the discrepancies pointed out failed, however, the appellants without formally taking the ground, at this stage, have taken the plea that it was a case of culpable homicide within the scope of Section 300 Exception IV IPC for which the sentence of life imprisonment being maximum is disproportionate. It is submitted that the evidence available on record sufficiently discloses it to be a case of culpable homicide not amounting to murder. Section 300 Exception IV IPC for ready reference is reproduced hereunder:

"300- Murder : *Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—*

2ndly.—If it is done 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—

3rdly.—If it is done 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—

4thly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

Exception 1.—When culpable homicide is not murder.

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 the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:—

First.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Illustrations

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z.

This is murder, inasmuch as the provocation was giving by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2.—Culpable homicide is not murder if the offender in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Illustration

Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's

having taken undue advantage or acted in a cruel or unusual manner.

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

Exception 5.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Illustration

A, by instigation, voluntarily causes Z, a person under eighteen years of age to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder."

32. The question as to whether the plea of self defence or an exception, when it was not asserted during the course of trial, remains open or not. In this regard reference may be made to a decision of the apex court reported in **1970 SCC (CrI) 541 (Aher Raja Ladha v. The State of Gujarat)** wherein the plea though advanced at the stage of committal was not pursued in trial, yet the apex court held that the trial court and the High Court were wrong in refusing to examine the plea of self defence taken. This Court may observe that the plea of self defence on an exception appended to Section-300 IPC on the strength of evidence available on record is open to be raised at the appellate stage for it is the duty of the trial court and the appellate court both not to ignore any relevant aspect of the case that has a bearing upon his being held guilty.

33. The Court would thus proceed to examine the plea of exception-IV appended to Section 300 IPC for which the evidence of PW-1 is more reliable than PW-2. The distinction is drawn looking to the fact that PW-2 has made mismatched statement more than once as noticed above. Therefore, the credibility of her evidence does not lead

to the discovery of truth. The overriding evidence of PW-1 who helped the investigating officer draw the site place, therefore, becomes highly relevant. According to the ocular evidence of PW-1 it is clear that the first fire was opened by Ram Naresh (deceased) which, by no stretch of imagination, could be viewed less than life threatening by the appellants, who in retaliation resorted to use the fire arms and caused a fatal injury to him. The threat to life was equally imminent to the appellants, when Anil Kumar bent to pick up the gun which fell down from the hands of Ram Naresh on receiving injury. The provocation for sudden fight and quarrel was triggered by the deceased who protested by advancing towards the accused and the heat of passion multiplied on his opening the first fire and this position is well established on a prudent reading of the testimony of PW-1 (Anand Mohan).

34. It would not be prudent to import the element of common intention in a situation of sudden fight or quarrel saddled by provocation or aggression as in the case at hand, therefore, the evidence on record clearly brings the case within the field of Exception-IV appended to Section 300 IPC and the benefit of Section 304 Part-I becomes applicable. The view taken by the trial court that there existed a common intention for murder in the total act of accused persons, in our humble consideration, is overreaching the essence of evidence of which the material contradictions were wrongly ignored and attached no significance.

35. This Court may observe that the element of common intention in the commission of an offence is more a rule of procedure lack of which

may not severe the culpability but it mitigates the punishment. This Court may note that the distinction drawn between culpable homicide and murder in the case of *Reg. vs. Govinda reported in (1877) ILR 1 Bombay 342* and *Virsa Singh v. State of Punjab reported in AIR 1958 SC 465* does not lead us to any doubt that in the present case the appellants did have knowledge of the fatality of the fire arm injury but the sudden provocation and aggression suppressed the element of intention much less than common intention, therefore, benefit of Section 304 Part-II or at least lesser punishment by advancing the benefit under Part-I of Section 304 ought to have been accorded by the trial court.

36. The appellants have already served the sentence for more than 17 years which the State has not disputed besides the fact that one of the appellants (Parshuram Pasi) has died during the pendency of appellate proceedings while incarceration. The Court would equally note that the evidence of the site plan is completely silent on the objectionable course/route that was adopted by the appellants one day before nor has it been shown on the day of occurrence that would give any reason to the deceased to approach towards appellants to hurl abuses or opening first fire which gave rise to sudden provocation.

37. The investigation, evidence or site plan offers no explanation of the tractor loaded with potatoes that was attempted to be brought and driven through the land of deceased and the independent witnesses were neither produced nor their position shown in the site plan unlike appellants. The absence of Shrawan Kumar despite defence evidence having been led to prove his absence was wrongly disbelieved. Above

all the body of Anil Kumar (deceased) was recovered half a kilometer away from the place of occurrence and as per medical opinion he died of loss of blood (hemorrhage). For want of adequate justification, the State has not argued that there was any pre-meditation or the appellants had acted in any cruel or unusual manner.

38. The Court may note that the prosecution as a matter of routine does not lay emphasis on the production of independent witnesses during the course of trial or fails to record their statements during investigation. Such a lapse on the part of investigating agency must be viewed seriously by the courts of law and time is not far when the courts may have to invoke the *suo motu* powers to summon such witnesses for which there ought to exist a witness protection law.

39. For the reasons recorded above, the conviction of the appellants under Section 302 IPC is modified as conviction under Section 304 Part-I IPC and the substantive sentence of life imprisonment is reduced to the period of sentence already undergone by them and the two appeals preferred by the appellants separately as noted above, are partly allowed. Let a copy of the judgement be kept on the record of Criminal Appeal no. 2078 of 2007 as well.

40. All the accused-appellants be set at liberty forthwith if not wanted in any other case.

Dated: Dec. 21, 2021
MFA