

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM: NAGALAND: MIZORAM & ARUNACHAL PRADESH)

ITANAGAR BENCH

Crl. A. No.05(AP)/2014
WITH
Crl. A. No.06(AP)/2014

In Crl. A. No.05(AP)/2014

Smti Sanya Lamra,
W/o Rai Lamra,
Village of Lamra, PO & PS-Chayang Tajo,
District of East Kameng, A.P.

..... **Appellant**

By Advocate:
Ms. D. Yoka,

- Versus -

- 1. The State of A.P. represented by
Govt. of Arunachal Pradesh.**
- 2. Shri Neelam Taram,**
S/o Late Neelam Teri,
PO-Yazali, District-Lower Subansiri,A.P.

.....**Respondents**

By Advocates:
Mr. K. Tado, P.P., A.P,

WITH

In Crl. A. No.06(AP)/2014

Shri Neelam Taram,
S/o Late Neelam Teyi,
Mouza-Deed, P.S.-Yazali,
District-Lower Subansiri,
Arunachal Pradesh.

..... **Appellant**

By Advocate:

Mr. AM Buzurbaruah, sr. counsel
assisted by Ms. Y. Kiri.

- Versus -

- 1. The State of Arunachal Pradesh.**
- 2. Sri Rai Lamra.**
S/O Loma Lamra, Vill-Lamra,
PO/PS-Chayang Tajo, District-East Kameng,
Arunachal Pradesh, now serving sentence in
District jail at Jollang, District- Papum Pare,
Arunachal Pradesh.
- 3. Sri Sai Lamra,**
S/o Late Kopin Lamra,
Vill-Lamra, PO/PS-Chayang Tajo,
District-East Kameng, Arunachal Pradesh,

.....**Respondents**

By Advocates:

Mr. K. Tado, P.P., A.P,

BEFORE

THE HON'BLE MR. JUSTICE MANOJIT BHUYAN
THE HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

Date of Hearing : 25-01-2016

Date of Judgment and Order: 28-01-2016

JUDGMENT & ORDER (CAV)

(Michael Zothankhuma, J)

Heard Ms. D. Yoka, learned counsel representing the appellant in CrI. A. No.05 (AP) 2014 as well as Mr. A.M. Buzurbaruah, learned senior counsel representing the appellant in CrI. A. No. 06 (AP) 2014 assisted by Mr. T. T. Tara. Also heard Mr. K. Tado, learned Public Prosecutor, Arunachal Pradesh.

2. By way of this judgment and order, Criminal Appeal No.05 (AP) 2014 filed by the convict appellant Rai Lamra and Criminal Appeal No.06 (AP) 2014 filed by the informant are being disposed of by a common judgment and order.

3. The Criminal Appeal No. 05 (AP) 2014 has been filed on behalf of the convict appellant (Rai Lamra), who has been convicted and sentenced under Section 304 (Part-II) IPC to undergo rigorous imprisonment for 8 years and to fine of Rs.25,000/-, in default, further rigorous imprisonment for 6 months vide judgment and order dated 08-09-2014 passed by the learned Sessions Judge, West Sessions Division, Yupia, in Sessions Case No.49(YPA) 2010 in NLG. P.S. Case No. 98/2009.

4. The informant, who is the father of the deceased, has filed Criminal Appeal No.06 (AP) 2014 under Section 372 of the Code of Criminal Procedure, against the judgment and order dated 08-09-2014 mentioned above, for enhancing the quantum of punishment of imprisonment of 8 years and fine of Rs.25,000/-, in default of payment of fine, rigorous imprisonment for 6 months awarded to the convict appellant Rai Lamra to life imprisonment under Section 302/34 IPC.

5. The informant, in Criminal Appeal No.06 (AP) 2014, has also prayed for enhancing the quantum of punishment of imprisonment of one year given to the accused Sai Lamra under Section 323 IPC to life imprisonment under Sections 302/34 IPC.

6. The facts of the case are that the informant filed an FIR dated 18-10-2009 to the Officer-in-Charge, Naharlagun Police Station informing him that on 18-10-2009 at about 0106 hours the informant got information that his son, Neelam Maj, was lying on the upstairs near Gurudwara. On rushing to the spot, the informant found the dead body of his son in a pool of blood. The informant suspected that his son might have fallen and died. However, on taking the dead body of his son to his house, and on removing his clothes, he found a bullet injury on his left leg, which was hit from short range from where blood was oozing out. Suspecting that murder had taken place, he lodged the FIR dated 18-10-2009.

7. The Police thereafter registered FIR dated 18-10-2009 as NLG P.S. Case No.98/2009 under Sections 302/34 IPC on 18-10-2009. The police, after investigation, filed their charge sheet, in which, a prima facie case, under Section 302/34 IPC was made against the convict Rai Lamra, Sai Lamra and one Paliji Sarai. Thereafter, by an order dated 22-12-2010, the convict Rai Lamra and Paliji Saria were declared juveniles and their cases were forwarded for trial before **the Juvenile Justice Board as per the Juvenile Justice (Care & Protection of Children) Act, 2000.**

8. Thereafter, charge was framed against the Sai Lamra by the Sessions Court under Section 302/34 IPC on 12-05-2011. Subsequently, by an order dated 19-07-2011 passed in Misc. Case No.09/2012 in Sessions Case No.49/2010, the order dated 22-12-2010 declaring the accused Rai Lamra as juvenile was recalled as the accused was found to be a major at the time of incident and that the certificate produced by the convict- appellant at the time of ascertaining his age, was found to be a fake certificate. The convict Rai Lamra, thereafter, surrendered before the Court and charge under Sections 302/34 IPC was framed against him also.

9. The prosecution examined 9 witnesses and after examining the convicts, Rai Lamra and Sai Lamra, under Section 313 Cr.P.C., the Sessions Court, West Sessions Division, Yupia, passed its judgment and order dated 08-09-2014 in Sessions Case No.49(YPA) 2010 convicting Rai Lamra and Sai Lamra (convict appellant) as follows:-

"27. A scrupulous scrutiny of the entire evidence adduced by PW-2, 3 and 8 coupled with the legal position of statement of the confessional statement recorded by the Magistrate 164 CrPC and statement of accused recorded u/s.313CrPC, and evidence of the I.O., I have found no any material other than to hold that on the night of occurrence, i.e. 17.10.2009 accused A1 and A2 along with Palaji Saria (Juvenile) assaulted and caused injuries to the deceased Neelam Mej with punches then stabbed with knife due to which the deceased succumbed to his injuries.

28. However, it is evident from the materials available on record that on the date of a occurrence both the deceased and the A2 first picked up quarrel. As per the confessional statement of the accused A1 and A2, u/s 164 CrPC as well as the statement recorded u/s.313 CrPC, there was a fighting between the A1, A2 and Juvenile Balji Saria on one side and deceased on the other side. The others like PW-3 tried to separate them but left when he was also assaulted by A1. And after sometime A1 also left the spot leaving only A2 and the deceased. Perhaps when A2 had gone beyond fight and did not stop, the A1 seems left the spot. Such statement of the accused A1 and A2 are found supported by the evidence of PW-2, 3 and confessional statement of Palaji Saria (juvenile). The accused denied having used a knife and stated that he did not bring his knife in the incident knife and it was the deceased who took out his knife and started stabbing him. However, the A2 did not clearly stated in which part of his body, the deceased stabbed him by a knife. He also did not indicated about whereabouts of the knife. Under the above circumstances and without any corroborating evidence, the statement of the A2 that he was stabbed by the deceased with knife is without any base. Had the knife used by the deceased, it would have been found lying i=on the spot. But the knife could not be found out by the I.O. of the case anywhere. The A2 is in consistent with his statement and tries to mislead the Court. Moreover from the evidence of PW-5 and the I.O. (PW-9) of the case, it is

understood that the c is a history shitter and he used to carry a knife with him always as he had also caused injury on PW-5 on the previous evening.

29. In view of the above, the story, so told by the accused A1, A2, Juvenile in conflict with law palaji Saria, PW-2 and PW-3 sounds highly probable, as they all corroborates with each other and the chain of sequence is well linked. The evidence of PW-7, 8 7 9 also corroborates and they are not being disputed.

32. Taking into consideration of all the relevant materials on records of the instant case, I am of the firm opinion that the offence committed by the accused Rai Larmra (A2) falls within the purview of Section 304 Part-II I.P.C. but not u/s. 302 I.P.C. Consequently, the accused Rai Lamra (A2) is held guilty of committing offence u/s.304 Part-II I.P.C. and he is convicted accordingly.

33. However, on consideration of the evidences, the A1 although had participated in assaulting the deceased and his friends along with A2 with punches, but subsequently he left the spot, and there is no any evidence to show that he took part in stabbing of knife and killing the deceased. Under the above circumstances, by giving a benefit of doubt A1 is acquitted from the charged framed against him U/S 302/34 of IPC. However, he is found guilty for commission of offence punishable under Section 323/34 IPC. Accordingly, Sai Lamra (A1) is convicted under Section 323 IPC.

34. Let both the accused be heard on quantum of sentences on 09.09.2014."

10. Thereafter, vide order dated 09-09-2014 passed in Session Case No. 49(YPA) 2010, the Sessions Judge, passed the following sentences against the convicts Rai Lamra and Sai Lamra.

"7. Hence, the convicts Sai Lamra (AI), is sentenced for the period which he has already undergone under custody with fine of Rs.1000/-. In default S.I. for 2 months. And the convicts Rai Lamra (A1) is sentenced to suffer Rigorous imprisonment for 8(eight) years and to pay a fine

of Rs.25,000/- only and in default of payment of fine, he shall undergo further R.I. for 6 months. The period of detention already undergone by the convict during investigation and trial of the case shall be set off as per the provision of Sec. 428 Cr.P.C.

8. In case of realization of fine, the amount of Rs.20,000/- shall be paid to the family of the victim and the rest amount be deposited to the State."

11. The submission of the counsel for the convict appellant Rai Lamra is to the effect that the evidence adduced in the Trial Court does not show that any weapon was used by the convict and that there is no evidence to show that the stab injury on the deceased Neelam Maj, was caused by the convict appellant. The evidence was only to the effect that a scuffle occurred between the convict Rai Lamra and his two friends' on one side and the deceased on the other side. The counsel for the convict appellant submits that even though the doctor had opined in his evidence that the deceased had died due to haemorrhage (excessive loss of blood) and that the weapon used for causing injury could be a sharp cutting weapon like knife or dagger, no such knife or dagger was seized by the police.

12. The convict appellant's counsel submits that the evidence of PW.2 and PW.3, who were with the deceased when trouble started between the deceased and the convict-appellant and his friends, does not indicate anywhere that any weapon was used during the scuffle. The counsel for the convict appellant, thus, submits that in view of the absence of any evidence, proving that the deceased had died due to the action of the convict appellant and his friends, the judgment and order convicting and sentencing the convict appellant was bad in law and liable to be set aside.

13. In this respect, the counsel for the convict appellant has relied upon the case of the Apex Court in **Ram Narain Vs. The State of Punjab**, reported in **AIR 1975 SC 1727**, which at para-14 states as follows:-

"Where the evidence of the witnesses for the prosecution is totally inconsistent with the medical

evidence or the evidence of the ballistic expert, this is a most fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case. In Mohinder Singh v. The State, 1950 SCR 821 = (AIR 1953 415 = 1953 Cri LJ 1761) this Court observed in similar circumstances as follows:

"In a case where death is due to injuries or wounds caused by a lethal weapon, It has already been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it is doubtful whether the injuries which are attributed to the appellant were caused by a gun or by a rifle."

It is obvious that where the direct evidence is not supported by the expert evidence, then the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence. While appreciating the evidence of the witnesses, the High Court does not appear to have considered this important aspect, but readily accepted the prosecution case without noticing that the evidence of the eye witnesses in the Court was a belated attempt to improve their testimony and bring the same in line with the Doctor's evidence with a view to support an incorrect case."

14. Criminal Appeal No.06 (AP) 2014 is an appeal filed by the informant under Section 372 Cr.P.C. praying for enhancing the term of imprisonment of the convict appellant Rai Lamra from 8 years and fine of Rs.25,000/-, in default of payment of fine, further R.I. for 6 months to life imprisonment under Sections 302/34 IPC. The said Criminal Appeal No. 06 (AP) 2014 also prays for enhancing of the quantum of punishment of 1 year given to the co-accused Sai Lamra to life imprisonment under Sections 302/34 IPC.

15. The learned senior counsel appearing for the informant submits that the evidence of PW.5 and PW.6 is with regard to an event that occurred on 16-10-2009 which has nothing to do and is not related to the event that occurred on 17-10-2009, which is the subject matter of the present case. However, the evidence of PW.5 and PW.6 goes to show that the convict appellant Rai Lamra is a bad character, who carries a knife and uses it. The counsel for the informant submits that PW.5 and PW.6 were injured by a knife carried by the accused Rai Lamra on 16-10-2009. The counsel for the informant also submits that the knife wound inflicted on the deceased as reflected in the post-mortem report shows that it had gone in and out of the thigh, which infers that tremendous force was applied by the convict appellant while stabbing the deceased with a knife.

16. The counsel for the informant also submits that the evidence adduced by PW.2 and PW.3 goes to show that the convict appellant Rai Lamra and his two friends Sai Lamra and Paliji Saria had suddenly appeared in the place where the deceased and PW.2 and PW.3 were sitting. Thereafter, Rai Lamra started checking the pocket of the deceased. Thereafter, quarrel ensued and that the PW.2 and PW.3 left the scene (place of occurrence) when Rai Lamra and his friends started to attack the deceased.

17. The counsel for the informant also submits that the presence of a knife in the incident in which the deceased was killed is clearly proven by the confessional statement made by the convict appellant Rai Lamra. The counsel for the informant, thus, submits that the chain of events starting with the checking of the pocket of the deceased by Rai Lamra, scuffle and the death of the deceased forms a complete chain, as the confessional statement of the convict appellant shows that the last man holding the knife was the convict appellant, Rai Lamra.

18. The counsel for the informant also submits that the learned trial Court erred in convicting the appellant under Section 304 (Part-II) IPC as the case against the said convict appellant was squarely covered by Section 302 IPC. The counsel for the informant submits that the learned trial Court

erred in coming to a finding that the case fell under Section 304 (Part-II) IPC in view of the Exception 4 to Section 300 IPC.

Exception 4 to Section 300 IPC provides as follows:-

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

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

19. Counsel for the informant submits that the entire incident occurred due to the checking of the pocket of the deceased by the convict appellant for the purpose of taking money. The counsel for the informant submits that this action of the convict appellant in checking the pocket of the deceased, who he did not know, is an unusual and cruel action. He further submits that as the scuffle and the eventual death of the deceased had started due to the convict appellant having acted in an unusual manner by checking the pocket of the deceased, the learned Trial Court erred in coming to a finding that the action of the convict appellant came within Exception 4 to Section 300 IPC. The counsel for the informant, thus, submits that the convict appellant having taken undue advantage and acted in a cruel and unusual manner, which eventually resulted in the death of the deceased, the action of the convict appellant comes squarely within Section 302 of the IPC.

20. The counsel for the informant also submits that the past conduct and bad character of the convict appellant is clearly apparent from the evidence given by the PW.5 and PW.6.

21. In support of his submissions, the counsel for the informant, has cited the case of **Sandhya Jadhav (Smt.) Vs. State of Maharashtra**, reported in **(2006) 4 SCC 653**, which at para 9 states as follows:-

"9. *The Fourth Exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Expedition 1 there is total deprivation of self-control, in the case of Exception 4 there is only that heat of passion which clouds men's sober reasons and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is*

not sufficient to show that here was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

22. In the cited case of **Jal Kamal Sahu Vs. State of Assam**, reported in **2004(2) GLT 63**, para 53 states as follows:-

"53. Keeping the present case, the weapon used by the accused was, undoubtedly, a deadly weapon like dagger and the interference should be that the accused wanted to cause such injuries as the weapon was capable of causing. The part of the body, which the accused selected to give blows, included a delicate and vital organ like neck, when a person uses a deadly weapon like dagger and wants to cause injury on the neck with such a deadly weapon, the selection of weapon and the selection of organ of the human body speak loud and clear that the assailment intends to cause death of his victim. Coupled with these facts, the force with which the accused dealt blows was so severe that it caused fracture of the 4th and 5th cervical vertebrae of the deceased. The fracture sustained by the said deceased is an index if the force with which the accused had dealt the blows. When all these facts are considered together, it becomes more than amply clear and leave no room for hesitation in reaching the conclusion that the accused-appellant intended to cause nothing but the death of the deceased and that the accused-appellant did, indeed, succeeded in attaining what he intended."

23. In the cited case of **Santosh Vs. State of Madhya Pradesh**, reported in **(1975) 3 SCC 727**, it has been held by the apex court at para 6, which states as follows:-

"6. The learned Sessions Judge had relied upon Kapur Singh V. State of Pepsu, to hold that as injuries were inflicted upon the limbs of the three men, who died of bleeding, but infliction of injuries on vital parts of the body was

deliberately avoided, an intention of anybody to murder was not established. The learned Sessions Judge appears to have overlooked the various clauses of Section 300 IPC. An intention to kill is not required in every case. A knowledge that the natural and probable consequences of an act would be death will suffice for a conviction under Section 302 IPC."

24. The counsel for the informant has also submits that the Trial Court should have convicted and sentenced the co-accused Sai Lamra to life imprisonment under Section 302 IPC in view of the fact that Sai Lamra was having the common intention to kill the deceased along with the convict appellant. In support of this contention, the counsel for the informant has placed reliance on the case of **Ayyangar and Others Vs. State of Tamil Nadu**, reported in **(1976) 3 SCC 779**, which at paragraphs 11 and 12 state as follows:-

"11. It is contended that A-2 cannot be held vicariously liable, with the aid of Section 34 for the act of A-4, for two reasons: firstly, he did not physically participate in the fatal beating administered by A-3 and A-4 to the deceased and thus the "Criminal act" of murder was not done by all these three accused within the contemplation of Section 34, the act committed by A-2 in regard to the beating of PW 1 being a different and separate act of A-2. Secondly, it has not been shown that the act of A-2 in beating PW 1 was committed in furtherance of the common intention of all the three, pursuant to a prearranged plan.

12. The contention is fallacious and cannot be accepted. Section 34 is to be read along with the preceding Section 33 which makes it clear that the "act" spoken of in Section 34 includes a series of act as a single act. It follows that the words "When a criminal act is done by several persons" in Section 34, may be construed to mean "when criminal acts are done by several persons" The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise, for

instance, one may only stand guard to prevent any person coming to the relief of the victim, or may otherwise facilitate the execution of the common design. Such a person also commits an "act" as much as his coparticipants actually committing the planned crime. In the case of an offence involving physical violence, however, it is essential for the application of Section 34 that the person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the Joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the "criminal act". The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. In the case before us, A-2 obviously, was acting in concert with A-3 and A-4 in causing the murder of the deceased. Section 34 was therefore fully attracted and under the circumstances A-2 was equally responsible for the murder of the deceased. Under the circumstances we think High court was justified in convicting A-2 for the offence of murder of Kaliaperumal with the aid of Section 34 of the Penal Code. There was no difficulty in maintaining the conviction of A-3 and A-4 for the murder of Kaliaperumal with the aid of Section 34 because both had mercilessly assaulted him with aruvals on the vital parts of the body. In the case of A-2 also it is quite legitimate to hold that he had shared the common intention of A-3 and A-4 in the commission of the murder of Kaliaperumal."

25. The informant's counsel also submits that just because the co-accused Sai Lamra had left the place of occurrence does not mean there was no common intention to kill the deceased. To support his contention, he has relied upon the case of **Lallan Rai and Others Vs. State of Bihar**, reported in **(2003) 1 SCC 268**, which at para 22 states as follows:-

"22. The above discussion in fine thus culminates to the effect that the requirement of statute is sharing the common intention upon being present at the place of occurrence. Mere distancing himself from the scene cannot absolve the accused – though the same however depends upon the fact situation of the matter under consideration and no rule steadfast can be laid down therefor."

26. The Public Prosecutor, Mr. K. Tado, submits that there is no infirmity in the impugned judgment and order convicting and sentencing the accused persons and accordingly, the same should be upheld.

27. We have heard the counsel for the parties.

28. The submissions made by the parties have thrown out the following issues:-

- (i) ***As the deceased had stab wounds, the question that has to be decided whether there was a knife involved during this scuffle.***
- (ii) ***If a knife is involved during this scuffle, who could have inflicted the stab wounds upon the deceased.***
- (iii) ***Whether the Trial Court was correct in convicting the convict appellant Rai Lamra under Section 304 (Part-II) IPC and not under Section 302 IPC.***
- (iv) ***Whether the Trial Court was correct in convicting and sentencing the accused Sai Lamra under Section 323 IPC, and not under Section 302/34.***

29. The informant was not an eyewitness and his evidence can only be considered to be hearsay. The evidence of PW.2 and PW.3 are reproduced below:--

PW.2 ***"Yes, I know late Neelam Maj, he was my friend. On 17/10/2009, it was Diwali day I was at Naharlagun. In the evening time I was with Ninod Nguli & Komut. All of three of us were sitting in the stairs of Gurudwara. I was eating chow-chow. It was about 8.30 when three of us sitting & eating chow-chow in the stairs of Gurudwara, late Neelam Kej along with Michi Tabyo came in the stairs from power house side and both of them joined us and were***

taking chowmin, they two my friend Vinod Nguli & Jumlo Komut went at in search of water, then we three namely myself, Maj & Tabiyo were sitting there & suddenly three bous appeared from upper side , & one of them Rai Lamra started checking pocket of Rai Lamra, which was resisted by Late Maj on which quarrel started. As quarrelling started bigger and bigger, we fled away i.e. myself & Tabiyo. Along with Rai Lamra, the other two accused had also started beating Neelam Maj, then I went to my house and Tabiyo also went to his house at G-Extension. Late Maj mobile was with me. The mobile that was lying at stairs before the incident which was picked up Tabiyo that & same was handed over the me & about 3 AM there was a phone call in the Maj Cell Phone. Thereafter, some person appeared in my house and along with them I went to late Neelam Maj house. Then, we were taken to police station in the morning itself. At police station I was interrogated by the police and police had recorded my statement. I was also taken to Michi Tabiyo house and he was also taken to police station and his statement was also recorded by police. Yes there were people in and around of place of occurrence but we did not inform to the people on we were feared in that time. WE have a band where I used to participate. I was kept in the lock-up for one day. I do not know if my two friends namely Vinod & Junlo were called by the police or not in my presence the accused had attacked to Maj by there hand. I have not feel to go and see my friend late Maj at the spot."

PW.3

"On the summon of this Court, I am appearing before this Court today, Late Maj was my friend. On that evening, I came out from my house to take meat, on the way I met Neelam Maj. On our way we have met three of our friends, namely, Deep, Vinod and Junlo, who were sitting in the stairs of Gurudwara then myself and Maj also joined them. Then cell phone of Maj was lying in the stairs therefore, I was asked to pick up the mobile, accordingly I picked up the cell phone of Maj and two of our friend namely Vinod and Jumlo had left for searching water. One of them started checking pocket of Maj and I can identify all of them, which was resisted by Maj on this there was a pulling & pushing between them, ad all three of them started to attack Maj. I have tried to stop the fighting but I was also beaten up by the accused. Therefore, I alongwith Deep left for our house and on the way I handed over the cell phone of Maj to Deep. On the next day i.e. on 18th I was interrogated by the police. I have revealed everything to the police whatever I have deposed before this Court today, I have not seen any knife during the incident."

30. PW.3 in his cross-examination has stated that "I do not remember now the exact date of incident when it took place. I have seen the incident of assault by the accused on the victim but I have not seen committing murder."

31. The evidence of PW.5 and PW.6 is to the effect that they had been beaten up earlier on 16-10-2009, one day before the incident by the convict appellant Rai Lamra. PW.5 and PW.6 stated that they were injured by the use of the knife carried by convict appellant. The evidence of the Magistrate, who recorded the confessional statement of the convict appellant Rai Lamra has not been rebutted in cross-examination and the confessional statements of the accused persons were duly exhibited by the Court. An extract of the confessional statement of Rai Lamra (convict appellant) is reproduced below:-

"On Diwali night of 2009, I along with Sai Lamra & Peleyi was coming from power house side, Naharlagun that three boys were sitting in the stairs of Gurudwara drinking beer etc. One of them Deepak who is known to me hit me in a friendly manner if I won in dice game and suddenly one local boy started beating me telling why I am beating his friend Deepak and then fight started between all of us. Knife was carried by that local boy who started stabbing and injured me after few minutes of scuffle we fled away from the scene. I was also admitted in Niba Clinic, Papu Nilah. After few days I came to know that he boy we fought with had died. I snatch the knife from him it seems it caused injuries while falling down."

32. The extract of the confessional statement of accused Palyi Saria (juvenile) is reproduced below:-

"Accused Palyi Saria stated that on myself and RaiLamra had some drinks, Diwali Night 2009 and after that we were going towards Gurudwara side to play jandi-munda where Rai Lamra met one of his Nepali friend and two of his friends. My friend Lamra playfully pushed his Nepali friend asking how are you. On seeing this his accomplice friend, a local boy pushed and punched my friend Lamra telling why you are beating my friend. Then my friend Rai Lamra also started punching. As soon as the fight started, I run away from the scene and did not know what had happened later"

on. I don't know who was that Nepali friend and his local friend also."

33. The confessional statement of Sai Lamra (co-accused) is reproduced below:-

"On night of Diwali 2009, one Paleyi and Rai Lamra were coming down towards, Naharlagun power house where some boys was sitting with. After few minutes of some arguments between Rai Lamra and boys sitting there, they started fighting which I did not join. After few minutes I ran away from the scene and came back to my place at Polo Colony, Naharlagun."

34. The Investigating Officer, in his evidence, has stated as follows:

"I am I.O of the case. The incident took place on the night of 17-10-2009. An FIR was received by the O.C., P.S. Naharlagun on 18-10-2009 at about 2.06 AM. After registering a case u/s 302/34 IPC the case was endorsed to me for investigation. During the course of investigation I have visited P.O at Gurudwara steps where the dead body of the deceased was lying. Conducted inquest over the dead body and then forwarded the same to the General Hospital, Naharlagun for PME. I have also examined the necessary witnesses. From the statement of witnesses, it was found that three accused persons namely Sai Lamra, Rai Lamra and Palizi Saria were involved in the murder of the deceased Neelam Maj. They also assaulted other company of the deceased during the assault on the deceased. Both the accused Rai Lamra and Palizi Saria were arrested first. Later on accused Sai Lamra was also arrested. The two persons standing on the dock are the accused Sai Lamra and Rai Lamra. I have also recorded the statements of all the accused persons. All the accused persons admitted their guilt of commission of murder of the deceased with a knife. Since the accused were arrested after more than week of the incident, the weapon of offence used for killing the deceased i.e. knife could not seized. All the accused persons were forwarded to the

learned JMFC for recording their confessional statements u/s 164 CrPC. During the course of further investigation, the accused Rai Lamra was found to be habitual offender and he had also assaulted on two persons one day prior to the above incident."

35. The evidence of doctor (PW.6) is reproduced below:-

"In the year 2009, I was posted at General Hospital, Naharlagun as a Medical Officer. On 18.10.2009 I have conducted a postmortem of late Neelam Maj, who is of male, 21 years age, the dead body was brought by police team of Naharlagun P.S. On the requisition of police I have conducted postmortem. On postmortem I have found following injuries on the dead body which are:

On external appearance here was stab injury on the left thigh having both entry and exit point and there was multiple bruises on the left side of the face and forehead. The weapon used for causing injuries could be a sharp cutting weapon, like small knife or dagger. The cause of death is due to hemorrhage due excessive loss of blood. There was no internal injury. The dead body was brought on 18.10.2009 at ground 11 AM. The report of postmortem prepared by me in original is available before this Court and same is exhibited as P. Exh, -4 and 4 (a) is my signature and 4 (d) is the counter signature of the CMO of Medical which I can identify it."

36. The confessional statement of the convict appellant Rai Lamra clearly goes to show that a knife was involved in the incident as the convict appellant had allegedly snatched the knife from the deceased. Thus, the last person holding the knife as per the evidence on record is the convict appellant. The convict appellant has also not retracted his confessional statement, which has been exhibited. The recording of the statement of the convict appellant under Section 313 Cr.P.C. shows that the convict appellant has replied to question No.2 as follows:-

"As state above, I do not use any weapon at the time of fighting with Maj but later on I heard that he died in the said incident"

37. The confessional statement of the convict appellant is to the effect that "I snatch the knife from him, it seems it caused injuries while falling down". This confessional statement of the convict appellant has not been denied to be false by the maker at any time. The evidence in the record does not indicate who had used the knife. However, it is clear from the evidence and the confessional statement that the convict appellant Rai Lamra was the last person holding the knife. The suggestion given by the convict appellant in his confessional statement that the deceased could have injured himself with the knife while falling down does not seem to be plausible inasmuch as, the convict appellant had already snatched the knife from the deceased. The evidence of the prosecution witnesses and the confessional statement given by the convict appellant's two friends, namely, Sai Lamra and Paliji Saria also indicates that the convict appellant is last seen together with the deceased. The evidence of the doctor is to the effect that there was stab wound on the deceased and that the deceased died due to hemorrhage (excessive loss of blood) clearly proved the case that a knife was used for stabbing the deceased. The convict appellant has stated in his confessional statement that the deceased started stabbing and injured the convict appellant and after few minutes of scuffle, he fled away. There is no evidence to show that the convict appellant sustained any injury from stabbing.

38. In the case of **Geejaganda Somaiah Vs. State of Karnataka**, reported in **(2007) 9 SCC 315**, it has been held by the Supreme Court at paragraphs 11-12 as follows:-

"11. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See [Hukam Singh v. State of Rajasthan](#), AIR (1977) SC 1063, [Eradu v. State of Hyderabad](#), AIR (1956) SC 316, [Earabhadrapappa v. State of Karnataka](#), AIR (1983) SC 446, [State of U.P. v. Sukhbasi](#), AIR (1985) SC 1224, [Balwinder Singh v. State of Punjab](#), AIR (1987) SC 350, and [Ashok Kumar](#)

***Chatterjee v. State of M.P.*, AIR (1989) SC 1890. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram v. State of Punjab* AIR (1954) SC 621 it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.**

12. We may also make a reference to a decision of this Court in *C. Chenga Reddy v. State of A.P.*, (1996) 10 SCC 193, wherein it has been observed thus:

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

39. In the case of **State of Maharashtra Vs. Suresh**, reported in **(2000) 1 SCC 471**, it has been held as follows:-

"A false answer offered by the accused when his attention was drawn to the aforesaid circumstance renders that circumstance capable of inculcating him. In a situation like this, such a false answer can also be counted as providing "a missing link" for completing the chain."

40. In the present case, the convict appellant had allegedly snatched the knife from the deceased as per his confessional statement, after being stabbed and injured. However, he has denied the use of weapon at the time of his examination under Section 313 the Code of Criminal Procedure, 1973. Though the convict appellant has denied he stabbed the deceased, the fact remains that as per the evidence, he was last seen together with the deceased and he was also the last man holding the knife. It is improbable that the deceased would have inflicted the stab wound on himself which entered one side of the thigh and came out from the other side of the thigh without the convict appellant noticing it. The convict

appellant is also conspicuously silent as to how the deceased had got a stab wound.

41. In the case of **Prithipal Singh & Another Vs. State of Punjab and Another**, reported in **(2012) 1 SCC 10**, it has been held at Paragraph No.-53 as follows:-

"53. In the State of WB V. Mir Mohammad Omar, this Court held that if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded to proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused."

42. In the present case though the knife used in the incident has not been recovered, the confessional statement of the convict appellant goes to show that he had allegedly snatched the knife during the scuffle from the deceased. As the evidence shows that the convict appellant was the last person holding the knife, circumstantial evidence points to the fact that the convict appellant has disposed of the knife in question.

43. The confessional statement of the convict appellant not having been rebutted or retracted at any time, we are satisfied that the said confessional statement was voluntary. In view of the fact that the circumstantial evidence forms a complete chain culminating with the death of the deceased, wherein, the convict appellant was the last person holding the knife and last seen together with the deceased, we are of the view that the

stab wound inflicted upon the deceased was caused by a knife used by none other than the convict appellant.

44. With regard to whether the Trial Court was correct in convicting and sentencing the convict appellant Rai Lamra under Section 304(Part-II) IPC and not under Section 302 IPC, the evidence adduced shows that the cause of the quarrel/scuffle started due to the checking of the pocket of the deceased by the convict appellant. The reason for checking of the pocket of the deceased is not clear. However, the scuffle ensued thereafter as the deceased objected to the same. There is no evidence to show that the convict appellant and his two friends had come with the intention to kill the deceased and no motive has also been attributed as to why the deceased was killed. The entire incident occurred due to provocation started of by the convict appellant. The provocation could have been for the purpose of taking money from the deceased without his permission. However, the fact remains that the evidence does not show that the convict appellant and his friends had come with the intention to kill the deceased, whom they did not know.

45. In the case of **Surinder Kumar Vs. Union Territory of Chandigarh**, reported in (1989) 2 SCC 217, the Supreme Court has held that in order to invoke Exception 4 to Section 300 four requirements must be satisfied. They are: (i) it was a sudden fight, (ii) There is no pre-meditation, (iii) The act was done, in a heat of passion, and (iv) The assailant had not taken any undue advantage or acted in a cruel manner. As for the sudden quarrel, the court said "**The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault.**"

46. In view of the facts of this case, which shows that the cause of the scuffle started with the checking of pocket of the deceased by the convict appellant, we are of the view that the sudden scuffle was due to the provocative act of the convict appellant and as there was no intention at that time to kill the deceased, we are of the view that the Trial Court has rightly held that the action of the convict appellant comes within Exception 4 to Section 300 IPC. Consequently, we hold that there is no infirmity in the

judgment and order convicting and sentencing the convict appellant to 8 years R.I. and a fine of Rs.25,000/- in default, R.I. for 6 months under Section 304 (Part-II) IPC.

47. With respect to the question whether the Trial Court was correct in convicting and sentencing the co-accused Sai Lamra under Section 323 IPC and not under Section 302 IPC, in view of Section 34 IPC, the question of whether there was common intention to kill the deceased has to be seen. The evidence of PW.2 and PW.3 shows that they had fled from the place of occurrence while the convict appellant and his two friends were still attacking the deceased. There is no evidence to show that the co-accused Sai Lamra and Paliji Saria were present till the time the deceased was being inflicted with the stab wound on his thigh. In fact, the confessional statement of the co-accused Sai Lamra and Paliji Saria are to the effect that they had fled away from the place of occurrence as soon as the fight started. Also they did not stay in the place of occurrence till the end of the fight. The scuffle having been started by the provocative behaviour of the convict appellant in checking the pocket of the deceased, we are of the view that there was no intention to kill the deceased, let alone there being any common intention to kill the deceased. No evidence has been adduced to show that there was any common intention or motive to kill the deceased.

48. In view of the reasons stated above, we hold that the Trial Court has committed no error in convicting and sentencing the co-accused Sai Lamra under Section 323 IPC.

49. For the reasons stated above, both the appeals fail and are accordingly dismissed. The judgment and orders passed by the learned Sessions Judge in Session Case No. 49 (YPA) 2010 in Naharlagun P.S. Case No.98/2009 are upheld. Send back the LCRs.

JUDGE

JUDGE