$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on*: *3rd September, 2024
Date of Decision: 29th October, 2024

\+ **CRL.A. 498/2023**

RAHUL .....Appellant
Through: Ms. Inderjeet Sidhu, Advocate, DHCLSC.

versus

STATE GOVT OF NCT DELHI .....Respondent
Through: Mr. Ritesh Kumar Bahri, APP for the State with Insp. Robin Singh, P.S. Gandhi Nagar.

CORAM:
JUSTICE PRATHIBA M. SINGH
JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. The present appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (for short, 'CrPC') has been filed assailing the judgment of conviction dated 25.07.2022 and order on sentence dated 02.09.2022 passed by Mr. Reetesh Singh, learned ASJ-02, Karkardooma Courts, Delhi, whereby the Appellant has been convicted in SC No. 1523/2016, arising out of FIR No. 979/2014, under Sections 302/307 of the Indian Penal Code, 1860 (for short, 'IPC') and Section 25 of the Arms Act, 1959, registered at Police Station Gandhi Nagar.

2. *Vide* the aforesaid impugned judgment of conviction and order on sentence, the Appellant was convicted for the offences punishable under Sections 302 and 307 of the IPC and Section 25 of the Arms Act. The

Appellant has been sentenced to undergo imprisonment for life along with a fine of Rs. 25,000/-, and in default of payment of fine, to undergo further simple imprisonment for a period of six months for the offence punishable under Section 302 of the IPC. The Appellant has also been sentenced to undergo rigorous imprisonment for 10 years along with a fine of Rs. 10,000/- and in default of payment of fine, to undergo further simple imprisonment for a period of six months. The Appellant has also been sentenced to undergo rigorous imprisonment for 7 years along with a fine of Rs. 10,000/- and in default of payment of fine, to undergo further simple imprisonment for a period of six months. All these sentences were directed to run concurrently.

BRIEF BACKGROUND

3. Brief facts necessary for the disposal of present appeal are as follows:

i) On 16.12.2014 at around 19:25 hrs, an information was received *vide* DD No. 33-A, which stated that "one boy has been shot in Seelampur *Gali* No. 4, School *Wali Gali*, Ajeet Nagar and one boy has been caught". This information was communicated by PW-11 to SI PS Rawat (PW-15). In pursuance thereof, SI Rawat (PW-15) along with Constable Pradeep (PW-14) went to the said address and found that there were a lot of people gathered and one person named Mustafa was in the custody of the public. They were informed that the victim has been taken by his employer to some government hospital. PW-15 found blood spilled on the floor of the shop.

ii) *Vide* DD No. 35-A, on the same day at around 08:30 P.M., it was informed that Mumtaz resident of *Gali* No. 8, Old Seelampur, who was brought to the hospital in a serious condition by Manish Sharma (PW-1), has been declared brought dead by CMO *vide* MLC No. A-2737/14 (Ex. PW-8/A). PW-11 again communicated the same to PW-15. Thereafter, on the

instructions of PW-15, Constable Sandeep (PW-13) went to the hospital to get the corpse of the deceased preserved at Subzi Mandi Mortuary.

iii) Then, SI Rawat (PW-15) met the eye-witness of the incident Manish Sharma (PW-1) and recorded his statement on the basis of which FIR being No. 979/2014 (Ex. PW-11/C) was registered in the present case.

iv) PW-1/Complainant stated that, at around 07:15 P.M. in the evening on the same day, when he and his mechanic (Mohd. Mumtaz) were working in his shop, two boys started fighting in front of his shop at a chowk and when one of them overpowered the other then, the latter took out a pistol from his pant and fired a shot at the former. However, the bullet instead of hitting the aimed person got shot to his mechanic (Mohd. Mumtaz), who on being shot fell down and blood started coming out of his head. Then, people around there tried to get hold of those two boys but one of them, who had fired the shot, was able to escape from the spot. The boy who was caught disclosed his name as Mustafa (PW-3) s/o Muslim Ansari.

v) PW-1 further stated that thereafter, he called the police helpline at 100 and informed them regarding the happening of this incident and also took his mechanic (Mohd. Mumtaz) to Jag Pravesh Chandra Hospital, Shastri Park. The doctors over there declared him brought dead. PW-1 further provided the description of the boy who had fired the alleged shot on PW-15. PW-1 further stated that the said boy had fired the shot towards Mustafa with the intention of killing him, however, bullet got hit to his mechanic (Mohd. Mumtaz).

vi) Thereafter, PW-15 along with PW-1 reached the spot where the said incident had taken place and found that people had kept Mustafa in their custody. Thereafter the crime spot was inspected by the crime team on the directions of PW-15 and *rukka* (Ex. PW-15/A) was prepared and sent to police

station on the basis of which FIR (Ex. PW-11/C) in the present case was registered for the offence punishable under Sections 302, 307 of the IPC and Section 27 of the Arms Act, 1959. Then, PW-15 took few articles into his possession from the crime spot and sealed it in an envelope with his stamp. Further investigation in the present case was handed over to Inspector Braj Mohan, PW-24.

vii) On 17.12.2014, the corpse of the deceased was identified by PW-6 (Shamshad Ansari) and PW-7 (Shehnaz Begum) *vide* memos Ex. PW-6/A and Ex. PW-7/A respectively on 18.12.2014. Post-mortem of the deceased (Mohd. Mumtaz) was conducted by PW-9 at Aruna Asaf Hospital and the corpse of the deceased was handed over to his relatives. Report of the post-mortem (Ex. PW-9/A) was obtained as per which the death was caused due to a fire arm injury which was fresh in duration. It was further opined that the time of death was 36 to 48 hours prior to conducting of post-mortem.

viii) Thereafter, on 21.12.2014, the present Appellant, who had escaped from the crime spot on the said day, was arrested (*vide* arrest memo Ex. PW-16/B) on the basis of a secret information received by the main Investigating Officer (PW-24). It is pertinent to note that, as per the case of the prosecution, endeavours were made to associate independent witnesses to add authenticity to the proceedings; however, none agreed. The Appellant was interrogated whereby he admitted his complicity in the said incident and gave a disclosure statement (Ex. PW-16/C). He disclosed the location of the place where he had concealed the murder weapon. Further investigation in the case was conducted, in pursuance of which, the pistol which was used to fire shot in the present case along with empty cartilages (Ex. P-7 colly) were recovered, *vide* seizure memo Ex. PW-16/D dated 21.12.2014, at the instance of present

Appellant from his home. Apart from these, from the same place, two more country-made pistols (*kattas*) (seized *vide* Ex. PW-16/E and Ex. PW-16/F), three knives (Ex. PW-16/G to Ex. PW-16/I), one steel rod (Ex. PW-16/J) and four live-cartilages (seized *vide* Ex. PW-16/G; Ex. P-4 colly) were also recovered at the instance of present Appellant and after recording the descriptions of articles recovered and taking them into custody, the pistol used in the present case and empty cartilage was sent to FSL, Rohini for obtaining ballistic report.

ix) On 16.01.2015, on an application (Ex. PW-10/A) moved by main IO/PW-24, Test Identification Parade (for short, 'TIP') of the Appellant was conducted by JP Nahar (ACP/East, PW-10) wherein, *vide* Ex. PW-1/B the Appellant was identified by PW-1, on the basis of whose statement FIR in the present case was registered. However, PW-3-Mohd. Mustafa, with whom Appellant had quarrelled, failed to identify the present Appellant in the said TIP proceedings.

x) On completion of investigation, chargesheet was filed on 20.03.2015 arraying the present Appellant as main accused in the present case. After the ballistic report (Ex. PW-25/B) from FSL was received, the same was filed by way of supplementary chargesheet before the Court of competent jurisdiction.

4. *Vide* order dated 04.11.2015, charges in the present case were framed against the Appellant by the learned Trial Court for the offence punishable under Section 302 of the IPC for causing death of Mohd. Mumtaz and for offence punishable under Section 307 of the IPC for attempting to murder Mustafa (PW-3) and Section 25 of the Arms Act to which the Appellant pleaded not guilty and claimed trial.

5. Prosecution has examined 27 witnesses in order to prove the charges

levelled against the Appellant. Learned Trial Court, after analysing the testimonies of the prosecution witnesses, other material evidences placed on record and the statement of the Appellant to the Court recorded under Section 313 of the CrPC, convicted and sentenced the Appellant accordingly, as noted hereinabove. Hence, the present appeal has been filed challenging the impugned judgment of conviction and order on sentence.

SUBMISSIONS ON BEHALF OF THE APPELLANT

6. Learned Counsel for the Appellant has submitted that learned Trial Court has not correctly appreciated the evidence led by the prosecution inasmuch as it has erred in placing reliance on the testimonies of PW-1 and PW-3 as the same suffer from various infirmities and inconsistencies. It is further submitted that PW-1 was able to identify the Appellant during the TIP proceedings only at the instance of Investigating Officer whereas PW-3 was not able to identify the Appellant in the said proceedings at all. However, both of these witnesses have correctly identified the Appellant in the Court. It is also the case of the Appellant that, the inconsistencies in the identification of the Appellant by PW-1 and PW-3 could be a case of mistaken identity cannot be ruled out. Therefore, in view of these glaring inconsistencies in the testimonies of PW-1 and PW-3, learned Trial Court has wrongly placed reliance on their testimonies to convict the Appellant.

7. Attention of this Court has been drawn towards the testimony of PW-1 and it is submitted that the latter, in his cross-examination, had stated that the police had shown him the photographs of the Appellant in the police station prior to the TIP proceedings and he had identified the present Appellant in the said proceedings only at the instance of the Investigating Officer. Hence, it is argued that the presence of the Appellant at the spot of occurrence in the

present case at that relevant point in time cannot be satisfactorily proved by the prosecution. Reliance has been placed on **Mahabir Singh v. State of Delhi, AIR 2008 SC 2343**, in support of this contention and it is contended that much evidentiary value cannot be attached to the identification of the accused in Court in case wherein identifying witness was a total stranger who had just a fleeing glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in Court.

8. Learned Counsel for the Appellant has further submitted that all the recoveries, as per the case of the prosecution, in the present case have been made on the basis of disclosure statement of the Appellant. It is pointed out that no independent witness was associated by the Investigating Officer while effecting the said recoveries and the same have been made in the presence of police witnesses only. Therefore, the probabilities of those recoveries being planted so as to falsely implicate or procure false evidence against the Appellant cannot be ruled out.

9. It is further the case of the Appellant that it is not safe to solely rely on the ballistic report (Ex. PW-25/B) rendered by PW-27 since the direct evidence in the present case is unreliable and unsustainable.

10. In alternative, without prejudice to the aforesaid submissions, it is submitted that the incident in the present case had occurred without any premeditation and at the spur of moment. It is further the case of the Appellant that the learned Trial Court has also erred in not taking into consideration the plea of self-defence taken by the him as he had also received injuries when the present incident had taken place. Reliance has been placed on **Dev Raj & Anr. v. State of Himachal Pradesh, AIR 1994 SC 523**, to contend that plea

of self-defence taken by the Accused cannot be lightly ignored when the prosecution fails to explain injuries received by the accused person(s) during the occurrence and if two views are possible accused should be given benefit of doubt.

11. It is the case of the Appellant that the latter neither had intention to kill the deceased nor to cause any injury to PW-3. It is further submitted that the Appellant had fired the shot on PW-3 while he was having an altercation with the latter and the deceased was shot accidently. It is also submitted that the Appellant does not have any history of prior enmity with either the deceased or PW-3. The Appellant and PW-3 were having an altercation over a trivial issue and it is in the spur of moment, the former had fired the shot, in a heat of passion, which lead to the present case. The Appellant neither had intention to kill the deceased nor had the intention to settle score with PW-3 and after firing the said single shot the Appellant had run from the spot of the incident. Reliance has been placed on **Ankush Shivaji Gaikwad v. State of Maharashtra, (2013) 6 SCC 770**, **Pulicherla Nagaraju alias Nagaraja Reddy v. State of A.P., (2006) 11 SCC 444, Surinder Kumar v. Union Territory, Chandigarh, (1989) 2 SCC 217, State of Madhya Pradesh v. Ghanshyam Singh, (2003) 8 SCC 13**, to contend that in case(s) wherein on a sudden quarrel, without any premeditation, a person in a heat of the moment picks up a weapon which is handy and causes injuries, which proves to be fatal, then, such a person would be entitled to the benefit of Exception 4 to Section 300 of the IPC and his conviction is to be converted to culpable homicide not amounting to murder. It is further submitted that the question of intention or knowledge is to be determined from the combination of circumstances of each case.

12. It is further submitted that, even as per the doctrine of transfer of malice, as envisaged under Section 301 of the IPC, the conviction of the Appellant is to be converted from offence punishable under Section 302 of the IPC to offence punishable under Part II of Section 304 of the IPC. Reliance has been placed on **Kashiram & Ors. v. State of Madhya Pradesh, (2002) 1 SCC 71**, to support this contention and it is submitted that in case of accidental injury thereby attracting the doctrine of malice under Section 301 of the IPC and wherein the Court having held that the act of the accused falls under Section 304 of the IPC, the Court should lean in favour of convicting the accused for the offence punishable under Part II of Section 304 of the IPC, if there is doubt as to which one of the said two parts of Section 304 of the IPC would be attracted.

SUBMISSIONS ON BEHALF OF THE STATE

13. Learned APP for the State submitted that the learned Trial Court has convicted the Appellant after duly appreciating the evidence placed on record by the prosecution and testimonies of the witnesses recorded before it during trial. He further submitted that, as per the testimonies of PW-1 and PW-3, the Appellant had fired the said shot after aiming at PW-3 and the deceased was shot. Therefore, as per Section 301 of the IPC, the Appellant has rightly been convicted by the learned Trial Court for committing the murder of the deceased and for attempting to commit murder of PW-3.

14. Regarding the discrepancy of stand of PW-1 and PW-3 in respect of the identification of the Appellant during TIP proceedings, and in Court, it is submitted that both the witnesses had identified the Appellant in the Court, irrespective of the fact that PW-3 was not able to identify the Appellant during the said TIP proceedings. He has further submitted that identification of the

Appellant as the perpetrator of crime in the Court has much more evidentiary value as TIP proceedings form part of investigation and are not considered as substantive piece of evidence.

15. He has further submitted that FSL/ballistic report in the present case affirms that the shot which was fired in the present case was from the same country made pistol which was recovered from the house of the Appellant at his instance. It is further the case of the prosecution that the ocular as well as forensic evidence in the present case clearly establishes the guilt of the Appellant and the impugned judgment of conviction passed by learned Trial Court is to be upheld.

16. Learned APP for the State has drawn the attention of this Court towards the Involvement Report of the Appellant (SCRB Form) and submitted that the latter is also an accused in various other cases wherein offences of robbery and theft have been alleged against him and in one of those cases being FIR No. 483/2017, under Sections 392/397/411/34 of the IPC and Sections 25/27 of the Arms Act, registered at PS Gandhi Nagar, he has been convicted by the concerned Trial Court. Therefore, this shows that Appellant does not have clean antecedents and even as per the merits of the present case, there is nothing to show that the Appellant is not guilty of the offences of which he has been convicted by the learned Trial Court.

ANALYSIS AND FINDINGS

17. Learned Trial Court, while passing the impugned judgment, has primarily relied on the following evidences to convict the Appellant: -

a) Oral testimonies of PW-1 and PW-3;

b) Recovery of country made pistol (*desi katta;* Ex. P-7 colly) at the instance of the Appellant from his home;

c) Ballistic report (Ex. PW-25/B) stating that the bullet by which the death of deceased (Mohd. Mumtaz) had taken place could have been fired from the said country made pistol which was recovered at the instance of the Appellant from his home.

18. PW-1/author of the FIR was examined before the learned Trial Court for the first time on 15.12.2015. For the sake of completeness, testimony of PW-1 as recorded on the said date has been reproduced as under: -

> "I have, been residing at the given address alongwith my family members since my birth and having running a TV repairing shop at the ground floor in the said premises. Sh. Mohd. Mumtaz Ansari (since deceased) had been working with me at my TV repairing shop as a mechanic for the last about four years. On 16.12.2014 at about 7.20 PM, I alongwith Sh. Mohd Mumtaz Ansari were present in the said shop. At that time, I saw that two boys were quarreling with each other in front of my shop at the chowk, and one of the boy who was over powered by the other took out something from his pocket or from his back side and assaulted the over powered boy with the same on his head and at that time there was huge noise of firing. I hide myself and in the meantime, I saw that a bullet had hit on the head of Sh. Mohd. Mumtaz and he had fallen down on the floor of the shop and blood started oozing out from his head. The boy who had assaulted the over powered boy, had ran away from the spot in the gali and the over powered boy was apprehended but I forgot his name. I called the police at 100 number. The injured Mohd. Mumtaz was taken to hospital by me in TSR at Govt. Hospital, Shashtri Park, Delhi. I was taken to police station by police officer and my statement was recorded. I had told the police officer the hight of the boy who had ran away from the spot as 5' and 3-4 Inches, wheat colour and age between 20-22 years. He was wearing a jeans of blue colour and I do not remember as to what cloth he was wearing on his portion of upper body. My statement was recorded which is Ex. PW 1/A, bearing my signature at point 'A' and I had signed the statement after going through its contents.
> Later on, I had accompanied with IO to the spot and told him about the place where the incident had taken place. IO had prepared the site plan at my instance. Later on on 16.01.2015, I had accompanied with IO to Tihar Jail where I had Identified the accused Rahul as the offender and told Ld. Magistrate that accused Rahul was the person who had fired at

the spot and caused injuries with the bullet to Sh. Mohd. Mumtaz Ansari who died due to the same. I had also told the said facts to the IO. I can identify my statement recorded by Ld. MM concerned at the time of TIP proceedings.

At this stage, one sealed envelope sealed with seal of 'JPN' which is already on record is opened and the TIP proceedings are taken out and shown to the witness. Witness has identified his statement and the same is Ex. PW 1/B and witness has also identified his signature at point 'A'.

Accused Rahul is present in the court today who is correctly identified by the witness.

At this stage, Ld. APP for state wants to cross-examine the witness, as he is resiling from his previous statement.

Heard. Request of Ld. APP for state is allowed

XXXXX by Ld. APP for the State.

It is correct that I had stated in my statement Ex.PW 1/A that two boys were quarreling each other and one boy had over powered the another boy and he had given fist blows to the over powered the another boy and he had given fist blows to the over powered boy due to which he had fallen down on the road and thereafter, he took out a pistol from his back pocket of pant and fired from the same on the said boy who had given fist blow and the said boy

saved himself from the bullet and the bullet hit mechanic Sh. Mohd. Mumtaz Ansan due to which fell down and blood-started oozing out from his head. I had also stated in the said statement that public persons had caught one of the boy at the spot and his name was known as Mustafa S/o Muslim Ansari and that the boy who had fired had ran away from the spot and that Mohd. Mumtaz was declared dead in the hospital. I had also stated in my said statement that the boy who had ran way was wearing cream colour jacket and blue colour jeans and that I could identify him if he comes before me and that he had fired-upon Muftafa S/o Muslim Ansari with intention to kill him and that Muftafa Ansari fortunately saved himself from the bullet and it hit on the head of Mohd. Mumtaz my mechanic who died due to the same and that proper action be taken as per law and that my statement was recorded, read over to me which was understood by me and was admitted by me to be correct. It is correct that the said facts as told by me in cross-examination were not told in chief-examination due to lapse of time and the same have not been concealed by me intentionally.

XXXXX by Sh. Nishant Rajora, Proxy Counsel for Sh. Vipin Choudhary, LAC for accused.

((Cross-examination of witness is deferred at the request of

proxy counsel for accused on the ground that main counsel, who is to cross-examine the witness is not available today).

Thereafter, PW-1 was called for cross-examination on 18.04.2016. Testimony of PW-1 as recorded on the second occasion, i.e., 18.04.2016, has been reproduced as under: -

"XXXXXX by Sh. Vipin Choudhary, LAC for accused.

I was alone at my shop at the time of incident and no any employee was present at that time. The deceased Mumtaz had gone to washroom at first floor and he had come down at the time of incident. The size of my shop is about 8 x10. My shop is situated in a commercial area. The distance between the place where the two boys were quarreling is about 10 to 12 feet. It was about 07.30 pm, when the incident took place and there was darkness. I was called by the police at PS Gandhi Nagar several times in connection of this case. My statement was recorded in PS. Prior to TIP of the accused, I was called by the police in the PS. The police had shown me the photographs of the accused in the PS before TIP proceedings. I had identified the accused in Tihar Jail at the instance of IO I had not seen the face of the accused at the spot at the time of incident.

At this stage, Ld. Addl. PP wants to re-examine the witness on the ground that he has today introduced the new fact in cross examination. Heard and allowed

XXXX by Ld. Addl. PP for the State.

It is correct that on 16/01/2015, I had correctly identified the accused in Tihar Jail before the Ld. MM concerned. It is correct that I had not stated before the Ld. MM during the TIP that I was already shown the photographs of the accused.by the police.

It is wrong to suggest that I am deposing falsely today as I have been won over by the accused and given false statement to save him.

XXXXXX by Sh. Vipin Choudhary, LAC for accused.

Nil. Opportunity given."

18.1 Learned counsel appearing on behalf of the Appellant had strenuously argued that PW-1 in his cross-examination has admitted the fact that he was shown photograph of the Appellant in the Police Station prior to the TIP proceedings and had identified the Appellant at the instance of the IO. It was

argued that the Appellant was a complete stranger to this witness, even as per the case of the prosecution, the Appellant had fled from the spot, and therefore, such an identification would be doubtful. It was further submitted that the said witness has again admitted in his cross-examination that he had not seen the face of the Appellant at the spot at the time of the incident.

18.2 A perusal of the aforesaid testimony of the PW-1 would reflect that in his cross-examination, which was recorded after a gap of four months after recording his examination-in-chief, he has given testimony which is completely contrary to what he has stated in his examination-in-chief. The aforesaid witness was re-examined by the learned APP for the State as he had introduced new facts in the cross-examination. In the re-examination of this witness, he, again, admitted that he had correctly identified the Appellant on 15.01.2015 in the TIP proceedings before the learned Metropolitan Magistrate. It was further admitted by this witness that he had not stated anything before the learned Metropolitan Magistrate during the TIP that he had already been shown the photographs of the Appellant. The evidence of such a prosecution witness who chose to resile from his previous statement given in examination-in-chief cannot be rejected on all accounts and be treated as effaced or washed off from the record altogether and can be relied upon in the facts and circumstances of the given case. The Hon'ble Supreme Court in **Selvamani v. State Rep. by the Inspector of Police, 2024 SCC OnLine SC 837: 2024 INSC 393**, while dealing with a case of gang rape wherein the prosecutrix/survivor (PW-1), her mother (PW-2), her aunt (PW-3) had not supported the case of the prosecution in their cross-examination, which was recorded three and a half months after the recording of the examination-in-chief, observed and held as under: -

"9. A 3-Judge Bench of this Court in the case of *Khujji @ Surendra Tiwari* v. *State of Madhya Pradesh*[6], relying on the judgments of this Court in the cases of *Bhagwan Singh* v. *State of Haryana*[7], *Sri Rabindra Kuamr Dey* v. *State of Orissa*[8], *Syad Akbar* v. *State of Karnataka*[9], has held that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. It was further held that the evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.

10. This Court, in the case of *C. Muniappan* v. *State of Tamil Nadu*[10], has observed thus:

"81. It is settled legal proposition that : (*Khujji case*, SCC p. 635, para 6)

'*6.* … the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.'

82. In *State of U.P.* v. *Ramesh Prasad Misra*, (1996) 10 SCC 360] this Court held that (at SCC p. 363, para 7) evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in *Balu Sonba Shinde* v. *State of Maharashtra*, (2002) 7 SCC 543], *Gagan Kanojia* v. *State of Punjab*, (2006) 13 SCC 516], *Radha Mohan Singh* v. *State of U.P.*, (2006) 2 SCC 450], *Sarvesh Narain Shukla* v. *Daroga Singh*, (2007) 13 SCC 360] and *Subbu Singh* v. *State*, (2009) 6 SCC 462.

83. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.

84. In the instant case, some of the material witnesses i.e. B. Kamal (PW 86) and R. Maruthu (PW 51) turned hostile. Their evidence has been taken into consideration by the courts below strictly in accordance with law. Some omissions, improvements

in the evidence of the PWs have been pointed out by the learned counsel for the appellants, but we find them to be very trivial in nature.

85. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses. Vide *Sohrab* v. *State of M.P.*, (1972) 3 SCC 751, *State of U.P.* v. *M.K. Anthony*, (1985) 1 SCC 505, *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat*, (1983) 3 SCC 217, *State of Rajasthan* v. *Om Prakash*, (2007) 12 SCC 381, *Prithu* v. *State of H.P.*, (2009) 11 SCC 588, *State of U.P.* v. *Santosh Kumar*, (2009) 9 SCC 626 and *State* v. *Saravanan*, (2008) 17 SCC 587"

11. In the case of *Vinod Kumar* v. *State of Punjab*[11], this Court has observed thus:

"**51.** It is necessary, though painful, to note that PW 7 was examined-in-chief on 30-9-1999 and was cross-examined on 25-5-2001, almost after 1 year and 8 months. The delay in said cross-examination, as we have stated earlier had given enough time for prevarication due to many a reason. A fair trial is to be fair both to the defence and the prosecution as well as to the victim. An offence registered under the Prevention of Corruption Act is to be tried with all seriousness. We fail to appreciate how the learned trial Judge could exhibit such laxity in granting so much time for cross-examination in a case of this nature. It would have been absolutely appropriate on the part of the learned trial Judge to finish the cross-examination on the day the said witness was examined. As is evident, for no reason whatsoever it was deferred and the cross-examination took place after 20 months. The witness had all the time in the world to be gained over. We have already opined that he was declared hostile and re-examined.

52. It is settled in law that the testimony of a hostile witness

can be relied upon by the prosecution as well as the defence. In re-examination by the Public Prosecutor, PW 7 has accepted about the correctness of his statement in the court on 13-9-1999. He has also accepted that he had not made any complaint to the Presiding Officer of the court in writing or verbally that the Inspector was threatening him to make a false statement in the court. It has also been accepted by him that he had given the statement in the court on account of fear of false implication by the Inspector. He has agreed to have signed his statement dated 13-9-1999 after going through and admitting it to be correct. It has come in the re-examination that PW 7 had not stated in his statement dated 13-9-1999 in the court that recovery of tainted money was not effected in his presence from the accused or that he had been told by the Inspector that amount has been recovered from the accused. He had also not stated in his said statement that the accused and witnesses were taken to the Tehsil and it was there that he had signed all the memos.

53. Reading the evidence in entirety, PW 7's evidence cannot be brushed aside. The delay in cross-examination has resulted in his prevarication from the examination-in-chief. But, a significant one, his examination-in-chief and the reexamination impels us to accept the testimony that he had gone into the octroi post and had witnessed about the demand and acceptance of money by the accused. In his cross-examination he has stated that he had not gone with Baj Singh to the Vigilance Department at any time and no recovery was made in his presence. The said part of the testimony, in our considered view, does not commend acceptance in the backdrop of entire evidence in examination-in-chief and the re-examination.

*** *** ***

12. Relying on the aforesaid judgments, this Court has taken a similar view in the case of *Rajesh Yadav* v. *State of Uttar Pradesh*[12].

13. In the present case also, it appears that, on account of a long gap between the examination-in-chief and cross examination, the witnesses were won over by the accused and they resiled from the version as deposed in the examination-in-chief which fully incriminates the accused. However, when the evidence of the victim as well as her mother (PW-2) and aunt (PW-3) is tested with the FIR, the statement recorded under Section 164 CrPC and the evidence of the Medical Expert (PW-8), we find that there is sufficient

corroboration to the version given by the prosecutrix in her examination-in-chief."

(emphasis supplied)

18.3 In the present case the TIP proceedings were conducted on 16.01.2015 and the aforesaid witness had clearly identified the Appellant (Ex. PW-1/B). It is pertinent to note that PW-3 with whom the Appellant had quarrelled and at whom, as per the case of the prosecution, the fatal shot was alleged to have been fired did not identify the Appellant in the TIP proceedings conducted on the same date, i.e., 16.01.2015.

18.4 In these circumstances, it can be reasonably inferred that if the IO had shown the photograph of the Appellant to PW-1 before the TIP proceedings, then, why would he not show the same photograph to PW-3. It can further be deduced that if the photograph would have been shown to PW-3 at the time of TIP proceedings why would he choose not to identify the present Appellant by whom the fatal shot was fired at him. Thus, in view of the consistent statement made by PW-1 till his examination-in-chief with respect to the identification of the Appellant, the same cannot be discarded because he chose to resile from his previous testimony in his cross-examination which was conducted after a period of four months.

18.5 In view of the above, the identification of the Appellant by PW-1 cannot be doubted.

19. PW-3-Mustafa, who was the person with whom Appellant had quarrelled, was examined before the learned Trial Court on 18.04.2016. Testimony of PW-3 as recorded on the said date has been reproduced as under: -

"I have been doing the work of computer embroidery at H- No. 47/48, School wali gali, Gali No. 4, Jasraj building, purana Seelampur

Delhi.

On 16/12/14, my machine had gone out of order. I had gone to market to buy the parts of the machine. At about 07.30 pm, when I reached at the main road in front of Rama Medical Store, there was lot of crowd, a bicycle passed near me. I saved myself from the bicycle but in the process I struck against an unknown boy. That boy started abusing me and showed me a katta and saying that “mujhe Bihari samajh Rakha hai.” I told him that I do not want to quarrel with him and asked him to allow me to leave. He kept back the katta (country made pistol) in his back side. After I walked 15-20 steps, that boy followed me and removed his shawl which he was wearing and told me that he would not used the katta and asked me to fight with him. That boy gave me fist blow on my abdomen. I gave him punch on his nose due to which he fell down on the road. He then got up and took out the katta and fired at me, I ducked down to save myself and escape. A boy standing at a shop behind-me suffered bullet shot injury. That boy told me "ek goli chala di hai, dusri bi chala dunga, varna bhaag ja". I then, started walking towards my shop. That boy also walked away. I heard the noise and came to know that Mumtaz, worker of Manish Sharma received gun shot injury on his ear. I saw Mumtaz lying on the floor of the shop and he was bleeding from nose and ear. Manish Sharma took Mumtaz to the hospital in a rickshaw. I did not receive any injury. I can identify the assailant who had caused gun shot injury to Mumtaz.

I identify the accused; now present in the Court who had fired at me and caused gun shot injury to Mumtaz (accused Rahul, present in Court correctly identified). I gave the statement to the police. I later came to know that Mumtaz died due to gun shot injury.

XXXXXX by Sh. Vipin Choudhary, LAC of accused.

I have been residing in gali no. 4, old Seelampur since 2012 and since then, I have been working computer embroidery of my own. On that day, I had gone to buy the parts of the machine. The shop where I am doing the embroidery work is situated at a distance of about 50 paces from the spot. I did not receive any such injury which required medical examination. It is wrong to suggest that no such incident as stated by me took place or that I have deposed falsely in this regard.

It is correct that it was night time but there were so many shops near the spot and light was sufficient to see the face of the accused. It is wrong to suggest that it was dark at the place of the incident or that due to this reason I could not see the face of the accused.

Mumtaz was at a distance of about four paces from me. It is wrong to suggest that I was not present at the spot. Police came and met me at

> the spot after about 10-15 minutes. There were 5-6 police officials. The police officials after making inquiry about the incident took me to the PS. I was kept at the PS for about 24 hours. It is wrong to suggest that I am a tutored witness of the police. It is wrong to suggest that I gave the statement today as told to me by the police in the PS. I was called trice to the PS in connection with the investigation of this case. After the accused was arrested, accused was shown, police asked me in the PS as to whether the accused is the same person who had fired at me and caused gun shot injury to Mumtaz and I identified him to be the same person."

19.1 Learned counsel appearing on behalf of the Appellant had submitted that testimony of PW-3 cannot be relied upon as he did not identify the former in the TIP proceedings, and therefore, dock identification would not be safe to rely upon for convicting the Appellant.

19.2 It is a matter of record that PW-3 failed to identify the Appellant in TIP proceedings held on 16.01.2015, however, it is also a matter of record that the said witness was, in fact, apprehended by the public at the spot when the incident took place. Therefore, his presence at the spot cannot be doubted in any manner. In his cross-examination, by the learned counsel for the Appellant during the trial, this fact of non-identification of the Appellant by PW-3 during the TIP proceedings was not put to him. Therefore, there was no occasion to explain the circumstances, by this witness, in which he was unable to identify the Appellant in the said TIP proceedings. In the considered opinion of this Court, this witness, in fact, was the person with whom the Appellant had quarrelled, and therefore, his dock identification cannot be doubted upon. The fact that the Appellant was a complete stranger to this witness would demonstrate that there can be no occasion or reason for PW-3 to falsely implicate the present Appellant. This witness in his cross-examination has also stated that although it was night time but since there were so many shops near the spot and the light coming therefrom was

sufficient to see the face to the Appellant. In view of the above, the identification of the Appellant by this witness can be safely relied upon.

20. Learned Trial Court while appreciating the evidence with regard to recovery of country made pistol (*desi katta*) from the Appellant and the subsequently obtained scientific opinion has observed as under: -

> "43. As per the evidence on the record, after apprehension on 21.12.2014, the accused Rahul led IO PW-24 Inspector Braj Mohan along with Ct. Sandeep PW-13, Ct. Kailash Yadav PW-16 and Ct. Amit Kumar PW-17 his house at Jhuggi 101/C-47, Gali no. 8, Old Seelampur, Delhi leading to the recovery of the country made pistol used in the incident and empty cartridge Ex.P7 (collectively). The evidence of PW-24 Inspector Braj Mohan along with Ct. Kailash Yadav PW-16 and Ct. Amit Kumar PW-17 regarding apprehension of the accused Rahul and recovery of the weapon of offence and empty cartridge in their examination in chief are consistent. In cross-examination PW-16 and PW-17 were unable to state the direction from which the accused was coming when he was apprehended. PW-16 arid PW-17 could not remember whether there was any other person present in the I 1 jhuggi of the accused at the time of recovery while PW-24 has deposed that family / members of the accused were present in his jhuggi. PW-16 has said that one katta and empty round were recovered from one place in the jhuggi and the other weapons from another place in the jhuggi while PW-17 in his cross-examination could not remember whether all the weapons were recovered from one single place in the jhuggi or separate places. They have however consistently deposed that the IO had tried to join public persons in the recovery proceedings but none agreed.
>
> 44. PW-16 and PW-17 were examined and cross-examined on 21.01.2017 while the accused was apprehended on 21.12.2014. PW-24 was examined on 20.02.2019 and cross-examined on 19.03.2019. There is considerable gap between the dates on which the accused was apprehended and recovery made and the dates on which they were examined in the Court as witnesses. Memory fades as time passes. PW-16, PW-17 and PW-24 are consistent regarding the recoveries. The inconsistencies in their cross-examinations are not to such an extent which could persuade this Court to cast a doubt on the recovery of the weapon of offence. Further, evidence reveals that the IO had tried to join public persons in the recovery proceedings but none came forward. As such not joining a public person in recovery proceedings in such

circumstances cannot be said to be fatal to the case of the prosecution or to persuade this Court to discard their evidence on this aspect. 45. Ex.P7 (collectively) are the country made pistol and the empty cartridge which were recovered on 21.12.2014 in pursuance of the disclosure statement of the accused Rahul. Recovery was made from his home. In addition to the said fire arm and fired cartridge, two more country made pistols (Ex.P5 and Ex.P6), three knives (Ex.P1, Ex.P2 and Ex.P8), one steel iron rod (Ex.P3) and four live cartridges (Ex.P4 collectively) had also been recovered. As per the FSL report Ex.PW25/B, the bullet recovered from the head of the deceased had been found to have been fired from the country made pistol Ex.P7 recovered at the instance of the accused Rahul and that the empty cartridge case . also recovered at the instance of accused Rahul had been fired through the same country made pistol Ex.P7. Thus, this piece of evidence proves that the country made pistol recovered at the instance of the accused had been used to fire the bullet which caused the death of Mohd. Mumtaz.

*** *** ***

47. The FSL report Ex.PW25/B in the present case proves that the country made pistol recovered at the instance of the accused had been used to fire the bullet which caused the death of Mohd. Mumtaz. Recovery of the same has been proved by PW-24 Inspector Braj Mohan, PW-16 HCKailash Yadav and PW-17, Ct. Amit Kumar. PW-1 Manish Sharma and PW-3 Mustafa have identified the accused Rahul to be the person who fired upon PW-3 Mustafa but the bullet hit the deceased Mohd. Mumtaz. The probative value of the evidence on record when put into scales for a cumulative evaluation supports the inherent probability of the version of the prosecution. Even if a doubt arises that the accused Rahul was shown to PW-1 Manish Sharma, as held in the case of Ramjan Vs State (supra), what is material is identification in the dock. TIP proceedings are not a cast iron straight jacket legal proposition admitting of no exceptions. It is a safe rule of prudence to look for corroboration of a sworn testimony of a witness in Court regarding the identity of the person accused not previously known to the witness. In the present case, the identification of the accused Rahul in the Court by PW-1 Manish Sharma and PW-3 Mustafa stands corroborated by the recovery of weapon of offence Ex.P7 which has been proved by FSL report to have been the weapon from which the bullet recovered from the head of the deceased had been fired/ discharged.

*** *** ***

49. The probative value of the evidence on record in this case when put into scales for a cumulative evaluation supports the inherent probability

> of the version of the prosecution. In view of the evidence of PW-1 Manish Sharma, PW-3 Mustafa, recovery of the weapon of offence Ex.P7 and FSL report which confirms that the bullet which caused the death of Mumtaz had been fired from the said weapon, the prosecution has proved beyond reasonable doubt that it was accused Rahul who had fired from the country made pistol Ex.P7 on 16.12.2014 causing the death of Mohd. Mumtaz while attempting to kill PW-3 Mustafa."

In the considered opinion of this Court the aforesaid reasoning cannot be faulted with. It is also a matter of record that the Appellant has not led any evidence in defence to demonstrate that he was not present at the spot. In these circumstances, the aforesaid recovery and subsequent ballistic report (Ex. PW-25/B) corroborates the testimony of PW-1 and PW-3 as discussed hereinabove.

21. In view of the aforesaid analysis, this Court is of the considered opinion that the presence of the Appellant at the spot and his firing resulting in the death of the deceased (Mohd. Mumtaz) has been proved beyond reasonable doubt.

22. The next contention led by learned counsel for the Appellant is that the circumstances of the case would not warrant a conviction under Section 302 of the IPC but under Part II of Section 304 of the IPC.

22.1 Learned counsel appearing on behalf of the Appellant had submitted that the latter had no intention to kill the deceased (Mohd. Mumtaz) or attempt to murder PW-3. It was submitted that the Appellant had fired the shot on PW-3 while having an altercation with latter, and since there was no prior history of any enmity between them, the firing of the shot at the spur of the moment would bring the case of the Appellant under Part II of Section 304 of the IPC. It was further submitted that the Appellant had fired a single shot, and thereafter, fled away from the spot.

22.2 The present case is covered by Section 301 of the IPC attracting doctrine of malice or transmigration of motive. Section 301 of the IPC reads as under:-

> "**301. Culpable homicide by causing death of person other than person whose death was intended.—**If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause."

22.3 The Hon'ble Supreme Court in **Shankerlal Kacharabhai And Ors. v. State of Gujarat, 1964 SCC OnLine SC 131: AIR 1965 SC 1260**, while dealing with a question involving the construction of Section 34, read with Section 301 of the IPC, has observed and held as under: -

> "**10.** This section deals with a different situation. It embodies what the English authors describe as the doctrine of transfer of malice or the transmigration of motive. Under the section if A intends to kill B, but kills C whose death he neither intends nor knows himself to be likely to cause, the intention to kill C is by law attributed to him. If A aims his shot at B, but it misses B either because B moves out of the range of the shot or because the shot misses the mark and hits some other person C, whether within sight or out of sight, under Section 301, A is deemed to have hit C with the intention to kill him. What is to be noticed is that to invoke Section 301 of the Indian Penal Code A shall not have any intention to cause the death or the knowledge that he is likely to cause the death of C. In the instant case this condition is not complied with. The accused shot at a particular person with the intention of killing him though under a misapprehension of his identity. In that case, all the ingredients of Sections 299 and 300 of the Indian Penal Code are complied with. The aid of Section 301 of the Indian Penal Code is not called for. We are, therefore, of the opinion that Section 301 of the Indian Penal Code has no application to the present case."

22.4 In view of the above principle of law what has to be examined is whether the Appellant had intended to kill PW-3 by firing the fatal shot or had the knowledge that firing the shot at PW-3 would kill him. Although, no specific defence has been taken by the Appellant during the course of the trial that the shot was fired accidently or there was no intention to kill PW-3 but it is settled law that the prosecution has to establish the fact that the firing by the Appellant is covered under any of the four clauses of Section 300 of the IPC. The Hon'ble Supreme Court in **Anbazhagan v. State Represented by the Inspector of Police, 2023 SCC OnLine SC 857**, while analysing the law on converting the conviction and sentence from the offence punishable under Section 302 of the IPC to Section 304 of the IPC, has observed and held as under: -

> "66. Few important principles of law discernible from the aforesaid discussion may be summed up thus: -
>
> (1) When the court is confronted with the question, what offence the accused could be said to have committed, the true test is to find out the intention or knowledge of the accused in doing the act. If the intention or knowledge was such as is described in Clauses (1) to (4) of Section 300 of the IPC, the act will be murder even though only a single injury was caused. To illustrate:'A' is bound hand and foot. 'B' comes and placing his revolver against the head of 'A', shoots 'A' in his head killing him instantaneously. Here, there will be no difficulty in holding that the intention of 'B' in shooting 'A' was to kill him, though only single injury was caused. The case would, therefore, be of murder falling within Clause (1) of Section 300 of the IPC. Taking another instance, 'B' sneaks into the bed room of his enemy 'A' while the latter is asleep on his bed. Taking aim at the left chest of 'A', 'B' forcibly plunges a sword in the left chest of 'A' and runs away. 'A' dies shortly thereafter. The injury to 'A' was found to be sufficient in ordinary course of nature to cause death. There may be no difficulty in holding that 'B' intentionally inflicted the particular injury found to be caused and that the said injury was objectively sufficient in the ordinary course of nature to cause death. This would bring the act of 'B' within Clause (3) of Section 300 of

the IPC and render him guilty of the offence of murder although only single injury was caused.

(2) Even when the intention or knowledge of the accused may fall within Clauses (1) to (4) of Section 300 of the IPC, the act of the accused which would otherwise be murder, will be taken out of the purview of murder, if the accused's case attracts any one of the five exceptions enumerated in that section. In the event of the case falling within any of those exceptions, the offence would be culpable homicide not amounting to murder, falling within Part 1 of Section 304 of the IPC, if the case of the accused is such as to fall within Clauses (1) to (3) of Section 300 of the IPC. It would be offence under Part II of Section 304 if the case is such as to fall within Clause (4) of Section 300 of the IPC. Again, the intention or knowledge of the accused may be such that only 2nd or 3rd part of Section 299 of the IPC, may be attracted but not any of the clauses of Section 300 of the IPC. In that situation also, the offence would be culpable homicide not amounting to murder under Section 304 of the IPC. It would be an offence under Part I of that section, if the case fall within 2nd part of Section 299, while it would be an offence under Part II of Section 304 if the case fall within 3rd part of Section 299 of the IPC.

(3) To put it in other words, if the act of an accused person falls within the first two clauses of cases of culpable homicide as described in Section 299 of the IPC it is punishable under the first part of Section 304. If, however, it falls within the third clause, it is punishable under the second part of Section 304. In effect, therefore, the first part of this section would apply when there is 'guilty intention,' whereas the second part would apply when there is no such intention, but there is 'guilty knowledge'.

(4) Even if single injury is inflicted, if that particular injury was intended, and objectively that injury was sufficient in the ordinary course of nature to cause death, the requirements of Clause 3rdly to Section 300 of the IPC, are fulfilled and the offence would be murder.

(5) **Section 304 of the IPC will apply to the following classes of cases : (i) when the case falls under one or the other of the clauses of Section 300, but it is covered by one of the exceptions to that Section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression 'sufficient in the ordinary course**

of nature to cause death' but is of a lower degree of likelihood which is generally spoken of as an injury 'likely to cause death' and the case does not fall under Clause (2) of Section 300 of the IPC, (iii) when the act is done with the knowledge that death is likely to ensue but without intention to cause death or an injury likely to cause death.

To put it more succinctly, the difference between the two parts of Section 304 of the IPC is that under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while under the second part, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the offence punishable under the second part of Section 304 of the IPC, the accused need not bring his case within one of the exceptions to Section 300 of the IPC.

(6) The word 'likely' means probably and it is distinguished from more 'possibly'. When chances of happening are even or greater than its not happening, we may say that the thing will 'probably happen'. In reaching the conclusion, the court has to place itself in the situation of the accused and then judge whether the accused had the knowledge that by the act he was likely to cause death.

(7) The distinction between culpable homicide (Section 299 of the IPC) and murder (Section 300 of the IPC) has always to be carefully borne in mind while dealing with a charge under Section 302 of the IPC. Under the category of unlawful homicides, both, the cases of culpable homicide amounting to murder and those not amounting to murder would fall. Culpable homicide is not murder when the case is brought within the five exceptions to Section 300 of the IPC. **But, even though none of the said five exceptions are pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of Section 300 of the IPC to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any one of the four clauses of Section 300 of the IPC, namely, 1stly to 4thly, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under Section 299 of the IPC.**

(8) The court must address itself to the question of mens rea. If Clause

thirdly of Section 300 is to be applied, the assailant must intend the particular injury inflicted on the deceased. This ingredient could rarely be proved by direct evidence. Inevitably, it is a matter of inference to be drawn from the proved circumstances of the case. The court must necessarily have regard to the nature of the weapon used, part of the body injured, extent of the injury, degree of force used in causing the injury, the manner of attack, the circumstances preceding and attendant on the attack.

(9) **Intention to kill is not the only intention that makes a culpable homicide a murder. The intention to cause injury or injuries sufficient in the ordinary cause of nature to cause death also makes a culpable homicide a murder if death has actually been caused and intention to cause such injury or injuries is to be inferred from the act or acts resulting in the injury or injuries.**

(10) When single injury inflicted by the accused results in the death of the victim, no inference, as a general principle, can be drawn that the accused did not have the intention to cause the death or that particular injury which resulted in the death of the victim. Whether an accused had the required guilty intention or not, is a question of fact which has to be determined on the facts of each case.

(11) Where the prosecution proves that the accused had the intention to cause death of any person or to cause bodily injury to him and the intended injury is sufficient in the ordinary course of nature to cause death, then, even if he inflicts a single injury which results in the death of the victim, the offence squarely falls under Clause thirdly of Section 300 of the IPC unless one of the exceptions applies.

(12) **In determining the question, whether an accused had guilty intention or guilty knowledge in a case where only a single injury is inflicted by him and that injury is sufficient in the ordinary course of nature to cause death, the fact that the act is done without premeditation in a sudden fight or quarrel, or that the circumstances justify that the injury was accidental or unintentional, or that he only intended a simple injury, would lead to the inference of guilty knowledge, and the offence would be one under Section 304 Part II of the IPC."**

(emphasis supplied)

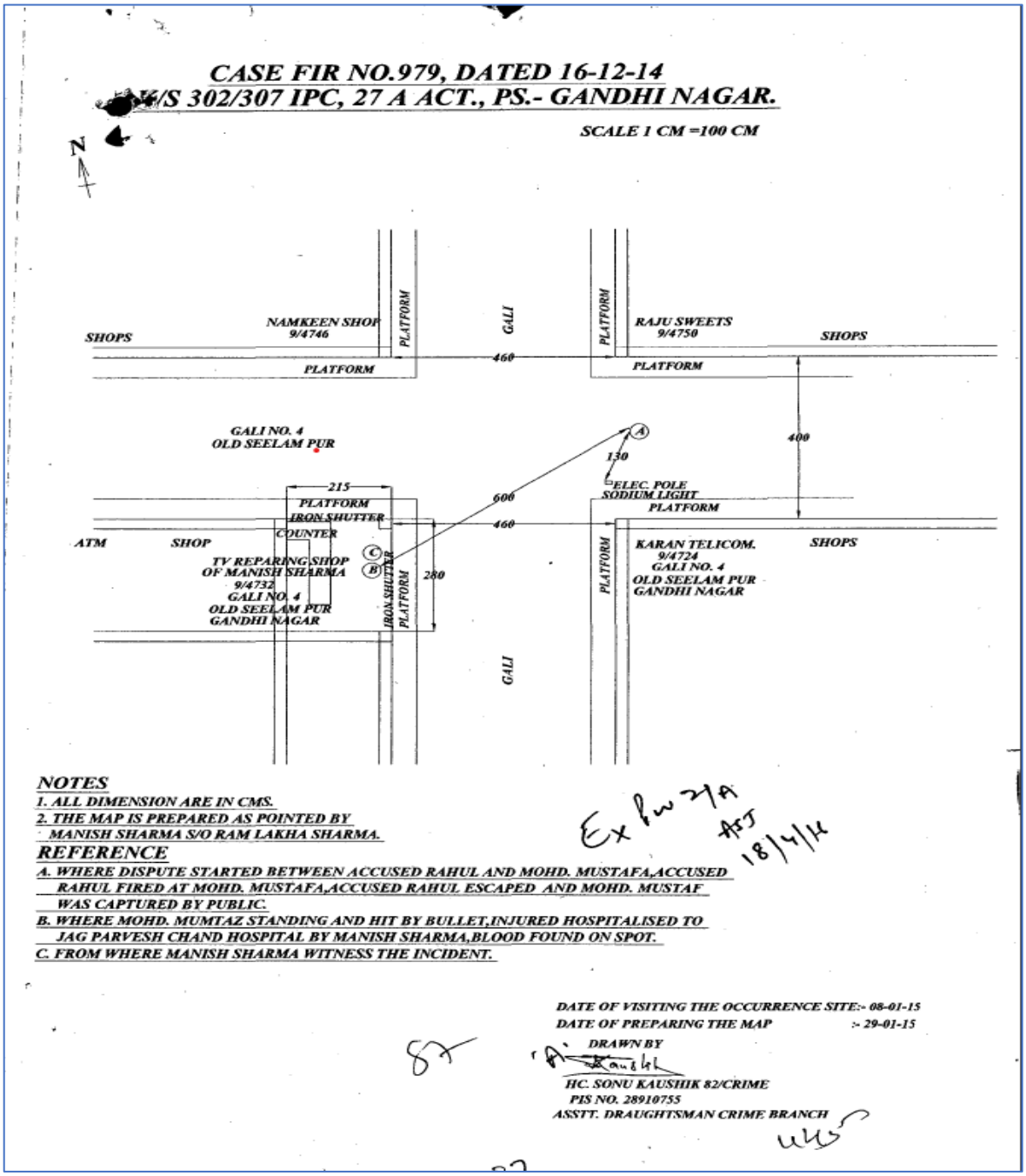
22.5 The Hon'ble Supreme Court in **Balu Sudam Khalde and Another v. State of Maharashtra, 2023 SCC OnLine SC 355**, while discussing the scope of Sections 299 and 300 of the IPC, has observed as under: -

> "**54.** At this stage, it will also be profitable to refer to the following observations of this Court in the case of State of Andhra Pradesh v. Rayavarapu Punnayya reported in (1976) 4 SCC 382 where this Court laid down the distinction between murder and the culpable homicide not amounting to murder in the following way:
>
> *** *** ***
>
> ….21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304 of the Penal Code."

22.6 For determining, whether the case of the Appellant would be covered under Section 302, or Part II of Section 304, of the IPC following circumstances would become relevant: -

a) The site plan prepared by the prosecution is being reproduced as below:

-



Perusal of the site plan would show that the angle at which the deceased (Mohd. Mumtaz) is shown to be standing was not immediately behind PW-3. Although, the site plan was made at the instance of PW-1; however, the same

was not put to him while his examination-in-chief was recorded. The prosecution has, therefore, not been able to prove that the deceased was standing at some distance immediately behind PW-3, and on account of which, the shot aimed at PW-3, hit the deceased when the former dodged the bullet.

b) PW-1 in his examination-in-chief has stated as under: -

> "At that time, I saw that two boys were quarreling with each other in front of my-shop-at-the-chowk, and-one-of-the-boy-who was over powered by the other took out something from his pocket or from his back side and assaulted the over powered boy with the same on his head and at that time there was huge noise of firing. I hide myself and in the meantime, I saw that a bullet had hit on the head of Sh. Mohd. Mumtaz and he had fallen down on the floor of the shop and blood started oozing out from his head."

Although this witness was cross-examined by the learned APP for the State and in his cross-examination he stated as under: -

> "It is correct that I had stated in my statement Ex.PW 1/A that two boys were quarreling each other and one boy had over powered the another boy and he had given fist blows to the over powered the another boy and he had given fist blows to the over powered boy due to which he had fallen down on the road and thereafter, he took out a pistol from his back pocket of pant and fired from the same on the said boy who had given fist blow and the said boy saved himself from the bullet and the bullet hit mechanic Sh. Mohd. Mumtaz Ansan due to which fell down and blood-started oozing out from his head."

It is thus unclear as to when the Appellant fired the shot. If the testimony stated in examination-in-chief is taken to be true then, the Appellant had assaulted PW-3 with the country made pistol (*desi katta*) and on account of the same there was firing. This demonstrates that the firing could have been accidental at that particular point in time. On the other hand, if his testimony in the cross-examination by the learned APP for the State is seen, then, the case of the prosecution is that the Appellant had fallen down on the road and

had taken out the said pistol from the back, and then, fired at PW-3. In these circumstances, it is, again, not clear that if the Appellant had fired the shot while lying down. If so then, the trajectory of the bullet could have been upwards and the same could not have possibly hit the deceased who as per the case of the prosecution was standing at some distance behind PW-3 in the shop of PW-1.

c) PW-3 in his examination-in-chief had stated that the Appellant had initially shown him the *katta,* but thereafter followed him, and asked him to fight with him by saying that he would not use the *katta*. In his statement, he has further stated as under: -

> "I gave him punch on his nose due to which he fell down on the road. He then got up and took out the katta and fired at me, I ducked down to save myself and escape. A boy standing at a shop behind-me suffered bullet shot injury. That boy told me "ek goli chala di hai, dusri bi chala dunga, varna bhaagja". I then, started walking towards my shop. That boy also walked away. I heard the noise and came to know that Mumtaz, worker of Manish Sharma received gun shot injury on his ear. I saw Mumtaz lying on the floor of the shop and he was bleeding from nose and ear."

In his statement, PW-3 has stated that the Appellant had got up and then, fired the shot at him, he, however, does not say where was the Appellant aiming, i.e., head, chest, lower part of body, etc. Another fact which PW-3 has stated is that, the Appellant had said to him that, "one shot has been fired; second can be fired, if he does not run away". This would show that, after firing the first shot and realising that the same had missed PW-3 and caused the death of the deceased as claimed by PW-3, if the Appellant had the intention to kill PW-3, he would have fired the second shot at PW-3. In fact, this witness states that thereafter, he walked towards the shop and the Appellant also walked away, and subsequently, on hearing the noise, he came

to know that the deceased had received a gunshot injury on his ear. In these circumstances, it would not be safe to conclude that the prosecution has been able to prove beyond reasonable doubt that the Appellant had fired the shot at PW-3 with intention to kill.

d) It is also pertinent to note that nowhere in the testimonies of PW-1 and PW-3 it has come on record that the Appellant had realised that the shot fired by him had hit the deceased. All that PW-1 and PW-3 stated was that after the firing of the shot the Appellant ran away from the spot.

e) It is an admitted fact that PW-3 and the Appellant were strangers to each other when the incident in the present case took place. The altercation and quarrel between them was sudden at the spot and was not a premeditated one.

23. In view of the aforesaid circumstances, the manner in which the shot was fired at PW-3 and the circumstances in which it was so done, the prosecution has not been able to prove beyond reasonable doubt that the present case is covered under any of the Clauses of Section 300 of the IPC. The case of the Appellant, in the considered opinion of this Court, would fall within the purview of Part II of Section 304 of the IPC. Accordingly, the conviction of the Appellant for the offence punishable under Section 302 of the IPC is modified and he is held guilty for the commission of offence punishable under Part II of Section 304 of the IPC for causing death of the deceased.

24. Insofar as the conviction of the Appellant for the offence punishable under Section 307 of the IPC is concerned, the same is converted into conviction for the offence punishable under Section 308 of the IPC for attempting to cause culpable homicide of PW-3. The conviction of the

Appellant for the offence punishable under Section 25 of the Arms Act is upheld.

QUANTUM OF SENTENCE

25. Nominal roll dated 20.02.2024 shows that the Appellant, as on 18.02.2024, has undergone incarceration for approximately 5 years including the remissions earned by him during his custody period. As per the order on sentence dated 02.09.2022, the Appellant is an adult of 30 years of age and has a family comprising of his wife and 3-year-old daughter. In the impugned order on sentence, it is also recorded that he was also expecting another child at that time. He was sole earner in his family and used to work as a labourer to take care of his family.

26. Therefore, in totality of the facts and circumstances of the case, the impugned order on sentence awarded to the Appellant is modified as follows:-

i) For the offence punishable under Part II of Section 304 of the IPC, the Appellant is sentenced to rigorous imprisonment for 8 years along with fine of Rs. 15,000/-, and in default of payment of fine, to undergo further simple imprisonment for 2 months;

ii) For the offence punishable under Section 308 of the IPC, the Appellant is sentenced to period already undergone along with fine of Rs. 5,000/-, and in default of payment of fine, to undergo further simple imprisonment for 1 month;

iii) For the offence punishable under Section 25 of the Arms Act, the Appellant is sentenced to period already undergone along with fine of Rs. 5,000/-, and in default of payment of fine, to undergo further simple imprisonment for 1 month;

27. All these sentences are directed to run concurrently. Benefit of Section

428 of the CrPC be provided to the Appellant.

28. The impugned judgment of conviction dated 25.07.2022 and impugned order on sentence dated 02.09.2022 stand modified in the aforesaid terms.

29. The present appeal is partly allowed and disposed of accordingly.

30. Pending application(s), if any, also stand disposed of accordingly.

31. Copy of this judgment be sent to concerned Jail Superintendent for necessary information and compliance.

32. Judgment be uploaded on the website of this Court *forthwith*.

AMIT SHARMA, J.

PRATHIBA M. SINGH, J.

OCTOBER 29, 2024*/sn*