Budhi Singh

v.

State of H.P

(Supreme Court Of India)

HON'BLE MR. JUSTICE SWATANTER KUMAR HON'BLE MR. JUSTICE MADAN B. LOKUR

Criminal Appeal No. 1801 Of 2009 | 13-12-2012

Swatanter Kumar, J.

1. The present appeal is directed against the judgment dated 23rd August, 2004 vide which the appeal preferred by the accused, against the judgment of conviction and order of sentence for life was dismissed and the same was affirmed by the High Court of Himachal Pradesh at Shimla. The facts giving rise to the present appeal in brief can be usefully noticed. Ganga Ram and Budhi Singh were sons of Bala Ram. Ganga Ram along with two minor sons Ramnath, aged about 11 years and Mohan Lal was living in a room in a house owned by Bala Ram in Village Chowki, District Kullu. Budhi Singh was living with his parents in a separate room of the same building. Ganga Ram was married, but his wife Smt. Indra Devi had deserted him – had settled with one Dolu Ram as his wife.

2. On 9th November, 2000, Bala Ram, who was examined as DW1 was grazing sheep and goats in the field adjoining his house. Ramnath, who was examined as PW9, was washing clothes in the courtyard of the house. At about 4 p.m., Ganga Ram came to the house under the influence of liquor. As he entered the house, he started pelting stones on the roof of the house and abused his father, DW-1. A quarrel took place between Ganga Ram and his father. During the fight between the father and the son, DW1 struck a danda blow to Ganga Ram, then he shouted for help and called his son Budhi Singh who was inside the house. On hearing the shouts of his father, Budhi Singh came to the spot armed with a tobru (small axe) in his hands. Budhi Singh inflicted tobru blow on the skull of Ganga Ram as a result of which Ganga Ram suffered injuries on his head and fell down in the field. The wounds of Ganga Ram were profusely

bleeding. Budhi Singh, accused and his father, DW1 went to their house leaving Ganga Ram in the injured condition in the field. After some time they came back to the field and carried Ganga Ram to the verandah of their house, but by that time, Ganga Ram had died due to injuries inflicted upon him. This incident occurred at about 4 p.m. After some time, PW9 son of the deceased went to the nearby house of PW1, Surat Ram and narrated the incident of killing of his father by his uncle namely Budhi Singh. PW1 and some other residents of the village gathered in the house of Bala Ram and found the dead body of the deceased lying there. In the night, some of the persons who had come to the house of Bala Ram also informed Khimi Ram, Member Zila Parishad, who was examined as PW2, of the occurrence. He telephonically passed the information of murder of Ganga Ram to the Police Post, Bhunter. The information was recorded by PW6, Head Constable, Ram Swarup in the Roznamcha, Ext. PW6/A at Police Chowki, Bhunter. PW6 also informed the SHO Roshan Lal of Police Station, Kullu in regard to the occurrence. Upon receiving directions from PW6 investigation was started and police officials were deputed at the place of occurrence. When the Investigating Officer, PW10 reached the place of occurrence, DW1 disclosed to him that Ganga Ram was murdered by him with Danda blow though PW9, the minor son of the deceased, informed PW10 that his father, Ganga Ram, was murdered by the accused with tobru blows. PW10 recorded the statement, Ext. PW9/A, of PW9 under Section 154 of the Code of Criminal Procedure, 1973 (for short "the CrPC") and sent the same to the police station. On the basis of this, the First Information Report (FIR), Ext. PW7/B, was recorded at about 2.45 p.m. on 10th November, 2000 by Muharrar Head Constable Bhagat Ram, PW7. PW10 inspected the spot, took blood stained earth and bunch of hair of the deceased from the spot vide Ext. PB prepared in the presence of PW1. PW10 prepared the inquest report, Ext. PA and took the photographs of the dead body of Ganga Ram. Then the body of Ganga Ram was sent to District Hospital for post mortem. The post mortem of the body was performed by Dr. Bhupender Chauhan, PW5 and he prepared his report Ext. PW5A. According to the post mortem report, injuries found on the body of the deceased and the cause of death as declared by the PW5 reads as follows:-

"First wound was sharp edged wound extending from tragus of right ear to the centre of head to the junction of frontal and parietal bone. Underlying bone was also cut. The wound was 17 cm long and brain was also visible.

The second wound was also sharp edged wound on right side of parietal nature 4 cm long. Underlying bone was also cut and brain was visible. Rest of the body was normal.

The probable cause of death was head injury, leading to cardio respiratory arrest and death."

3. The accused was arrested, put to trial and vide judgment dated 1st January, 2002, the trial court convicted the accused Budhi Singh for committing an offence under Section 302 of the Indian Penal Code, 1860 (IPC) and as a sequel to the finding recorded on merits, also passed an order of sentence, awarding life imprisonment and a fine of Rs. 2,000. In default of fine, the accused was directed to suffer further imprisonment for six months. This judgment of the trial court was appealed by the accused as already noticed. The appeal came to be dismissed by the judgment of the High Court dated 23rd August, 2004 affirming the judgment of the Trial Court giving rise to the filing of the present appeal by way of special leave.

4. The counsel appearing for the accused has not challenged the conviction of the accused on merits, but has contended that even if it is argued that prosecution has been able to establish its case beyond reasonable doubt, then also on the basis of the prosecution evidence, an offence under Section 302 IPC is not made out and the accused can, at best, be punished only for an offence under Section 304 Part II, IPC. The contention is that the accused had no intention to kill the deceased. It was not a case of pre-meditated murder. The incident took place at the spur of the moment and there was sudden and grave provocation by the deceased which resulted in inflictment of the injuries on the body of the deceased. Therefore, the case would be covered under Exception I to Section 300 and there being no intention to kill would be a case of culpable homicide not amounting to murder falling under Part II of Section 304 IPC. In support of its contention, he has relied upon State of Andhra Pradesh v. Rayavarapu Punnayya and Another [(1976) 4 SCC 382], Mangesh v. State of Gujarat [(2011) 2 SCC 123], Devku Bhikha v. State of Maharashtra [(1996) 11 SCC 641], Bonda Devesu v. State of A.P. [(1996) 7 SCC 115].

5. While refuting the contention of the appellant, it is contended on behalf of the State that there was a clear intention on the part of the accused to kill the deceased. The accused inflicted two injuries on the head of the deceased by tobru (small axe), thus it is clear from the prosecution evidence that the accused had inflicted injurieson a vital part of the body and with a sharp edged weapon, which was bound to result in his death and, therefore, the accused could not be absolved of the liabilities and consequences of committing culpable homicide amounting to murder.

6. In order to examine the merit or otherwise of this sole contention, raised before the court, let us examine the evidence that has come on record. As already noticed, there is no dispute as to the occurrence and the death of the deceased as a result of inflictment of injuries by the accused. All that has to be examined by this court is whether the offence falls within the purview of Section 302 or Section 304 Part II IPC. In light of this, we have to refer to the evidence from that limited point of view.

7. Ext. PW7/B is the FIR recorded in relation to the occurrence in question. As per the FIR which was recorded on the basis of the statement of PW9, the deceased had come from outside after getting drunk. He threw stones and started abusing Bala Ram who was just a 100 feet away in the field, grazing animals. Bala Ram told the deceased that he was a thief and used to steal his money. Then they started quarrelling with each other. Then the deceased started beating him (Mara Peeta Karna Shuru Kar Diya) upon which Bala Ram called out to his son Budhi Singh. Upon this, Budhi Singh had come and he was carrying tobru in his hands and hit it on the head of the deceased which started bleeding. PW9 when examined as a witness in the court said the same thing and also that Bala Ram had demanded money from the deceased which he had taken from Bala Ram earlier. In regard to inflicting of the injury, PW9 stated “my uncle brought tobru and inflicted injury on the head of my father.”

8. PW5, Dr. Bhupender Choudhary when examined in the court stated that there were two wounds on the side of the head of the deceased. First wound was sharp edged wound extending from tragus of right ear to the centre of head to the junction of the frontal and parietal bone. Second wound was also sharp

edged wound on right side of parietal bone, 4 cm long. Underlying bone was also cut and brain was visible. Rest of the body was normal.

9. There is little ambiguity in the FIR Ext.PW7/B. The contention is that PW9 has improved upon his statement as only one injury had been inflicted by the deceased and two injuries were stated by PW9 in the court. This does not help the accused much inasmuch as the statement of PW9 in court is fully supported by the statement of PW5 who has stated that both injuries were caused by sharp edged weapon and were sufficient to cause death in the normal course.

10. Now, we may discuss the legal aspect of this submission. Section 299, IPC defines a culpable homicide. Section 299 covers classes of cases where an act is done with the intention of causing death an or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death of the other person. In all these situations, it will amount to a culpable homicide. A culpable homicide would be murder, unless it falls in any of the general exceptions (i) to (v) to Section 300 which would bring the offence outside the purview of Section 300 and make it culpable homicide not amounting to murder. Once it falls in that class of cases, then it is permissible for the Court to impose milder punishment in terms of Section 304 Part I or Part II, as the case may be. Punishment under Section 302 on the one hand, and Section 304 on the other is divided by a fine line of distinction as to when a culpable homicide would or would not be murder. The provisions of Section 304 itself form a kind of exception to the applicability of Section 302, IPC, in other words, provisions of Section 304 Part II only if it is not a murder. This scheme and distinction has been most appropriately stated by a judgment of this Court in State of Andhra Pradesh v. Rayavarapu Punnayya and Another [(1976) 4 SCC 382], where the Court upon noticing the distinction between these provisions also stated the factors which are to be considered by the court before applying those principles.

“17. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. Rajwant v. State of Kerala is an apt illustration of this point.

18. In Virsa Singh v. State of Punjab Vivian Bose, J. speaking for this Court, explained the meaning and scope of clause (3), thus (at p. 1500):

"The prosecution must prove the following facts before it can bring a case under Section 300, 'thirdly'. First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

19. Thus according to the rule laid down in Virsa Singh case of even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be "murder". Illustration (c) appended to Section 300 clearly brings out this point.

20. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general — as distinguished from a particular person or persons — being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

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. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages."

11. A Bench of this Court in the case of Thangaiya v. State of Tamil Nadu [(2005) 9 SCC 650] pointed out the distinction between the two sections and observed as under:-

"9. This brings us to the crucial question as to which was the appropriate provision to be applied. In the scheme of IPC culpable homicide is the genus and "murder" its specie. All "murder" is "culpable homicide" but not vice versa. Speaking generally, "culpable homicide" sans "special characteristics of murder is culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of the generic offence, IPC practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the gravest form of culpable homicide, which is defined in Section 300 as "murder". The second may be

termed as “culpable homicide of the second degree”. This is punishable under the first part of Section 304. Then, there is “culpable homicide of the third degree”. This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

10. The academic distinction between “murder” and “culpable homicide not amounting to murder” has always vexed the courts. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300.....”

12. Having stated the basic distinction between these offences, now we have to examine whether there was such grave and sudden provocation that would bring the case of the appellant within the ambit of exception I to Section 300. The deceased and the accused were real brothers. There was no previous animosity between the parties. It has been pointed out that the deceased used to often come drunk to the house and used to quarrel. Even on the date of the fatal incident, he had come drunk, and abused and even assaulted his father. In turn, the father had struck him with a danda and shouted for help from his other son. Seeing his father being abused, assaulted and the misbehaviour of the deceased, that too in a drunken condition, became the cause for the accused to hit the deceased. In that moment of anger, he came out of the house with a tobru which is the most commonly available weapon in houses in the hills and hit the deceased on his head. It may merely be a matter of chance that he hit the deceased from the sharper side of tobru (small axe) rather than blunt side. The injury was so severe that it fractured his skull and he fell on the ground. From the entire prosecution evidence, it is very difficult to gather that the accused had the intention to murder his brother and had gone out with the intention to kill him. The injury inflicted was the result of the impact of the weapon used rather than the force applied. Had there been excessive use of force, it would have inevitably resulted in breaking of the skull into two parts.

13. The doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of universal application. This will always have to depend on the facts of a given case. While applying this principle, the primary obligation of the Court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury.

14. Another test that is applied more often than not is that the behaviour of the assailant was that of a reasonable person. A fine distinction has to be kept in mind between sudden and grave provocation resulting in sudden and temporary loss of self-control and the one which inspires an actual intention to kill. Such act should have been done during the continuation of the state of mind and the time for such person to kill and reasons to regain the dominion over the mind. Once there is pre-meditated act with the intention to kill, it will obviously fall beyond the scope of culpable homicide not amounting to murder. When we consider the facts of the case in hand, it is obvious and, as already noticed, tobru (small axe) is a commonly available weapon in the houses in the hills which is used for cutting and collecting the firewood. It is also a matter of common knowledge that the cooking gas was not available in interior parts of hills 12 years back. The provocation was sudden and apparently of grave nature. It is the case of prosecution itself that the deceased was abusing and even assaulting his father and father had shouted for help and called the accused who was already in the house. The deceased was in a drunken state. As it appears that tobru was easily available which the accused picked up and went straight out and assaulted his brother, the deceased. The injuries proved fatal. There is no prosecution evidence to show that there was animosity between the deceased and the accused or there was any other motive much less a pre-meditation to kill the accused. They had been living in the same house for years. No unpleasant incident or physical fight was stated to have been reported to the Police in the past. If one examines the cumulative effect of the prosecution evidence while keeping the relationship of the parties in mind and the factum of the deceased being in a drunken state abusing and assaulting his father, it can reasonably be inferred that there was sudden and grave provocation to the accused. In our

society, a son normally would not tolerate that his father is insulted, much less assaulted. Of course, the weapon used in crime was used with the knowledge that it could cause a grievous hurt endangering the life or even cause death of the deceased but, as indicated supra, such weapon is most easily available in houses.

15. K.M. Nanavati v. State of Maharashtra [AIR 1962 SC 605] is an illustrious judgment of this Court, which dealt with and explained the concept and doctrine of grave and sudden provocation within its legal dimensions. In that case, the accused had killed a businessman having come to know from his wife of the intimacy between them. While denying the plea of culpable homicide not amounting to murder, the Court discussed the law as under :

"78. The first question raised is whether Ahuja gave provocation to Nanavati within the meaning of the exception and whether the provocation, if given by him, was grave and sudden.

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81. The question that the Court has to consider is whether a reasonable person placed in the same position as the accused was, would have reacted to the confession of adultery by his wife in the manner in which the accused did. In Mancini v. Director of Public Prosecutions Viscount Simon, L.C., states the scope of the doctrine of provocation thus:

"It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death... The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in Rex v. Lesbini so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance to (a) consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account

the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter."

Viscount Simon again in Holmes v. Director of Public Prosecutions elaborates further on this theme. There, the appellant had entertained some suspicions of his wife's conduct with regard to other men in the village. On a Saturday night there was a quarrel between them when she said, "Well, if it will ease your mind, I have been untrue to you", and she went on, "I know I have done wrong, but I have no proof that you haven't — at Mrs X's". With this the appellant lost his temper and picked up the hammerhead and struck her with the same on the side of the head. As he did not like to see her lie there and suffer, he just put both hands round her neck until she stopped breathing. The question arose in that case whether there was such provocation as to reduce the offence of murder to manslaughter. Viscount Simon, after referring to Mancini case proceeded to state thus:

"The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control, whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies."

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84. Is there any standard of a reasonable man for the application of the doctrine of "grave and sudden" provocation? No abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values etc.; in short, the cultural, social and emotional background of the society to which an accused belongs. In our vast country there are social groups ranging from the lowest to the highest state of civilization. It is neither possible nor desirable to lay down

any standard with precision: it is for the court to decide in each case, having regard to the relevant circumstances. It is not necessary in this case to ascertain whether a reasonable man placed in the position of the accused would have lost his self- control momentarily or even temporarily when his wife confessed to him of her illicit intimacy with another, for we are satisfied on the evidence that the accused regained his self- control and killed Ahuja deliberately.

85. The Indian law, relevant to the present enquiry, may be stated thus: (1) The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. (2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the First Exception to Section 300 of the Indian Penal Code. (3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. (4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation."

16. In the case of Bonda Devesu v. State of A.P. [(1996) 7 SCC115], the accused belonged to a tribal community and the deceased had behaved in an obscene way with wife of the accused. Having regard to the socio-economic background of the accused, the Court held it to be an offence punishable under Section 304 Part I and not Section 302 IPC. Again in the case of Devku Bhikha v. State of Gujarat [1996) 11 SCC 641] where the deceased, Head Master of a school, had asked the accused to make his wife available for immoral purposes in return to give job to the accused in the school as well as charged him of impotency and the accused killed the Head Master with repeated knife injuries, the Court accepted it as an offence punishable under Section 304 Part I, holding as under :

"… Thus, from this analysis it becomes abundantly clear that the appellant was driven to the crime which was not premeditated and the occasion had sprung up at the moment, gradually leading to the point when the appellant lost his self-control, and due to grave and sudden provocation, inflicted the injuries on the

deceased, successively within seconds. We think, therefore, that the offence made out against the appellant is under Section 304 Part I IPC. Accordingly, the offence is scaled down from one punishable under Section 302 IPC to one under Section 304 Part I IPC for which we impose sentence of seven years' RI on the appellant."

17. This Court, in the case of Mangesh v. State of Maharashtra [(2011) 2 SCC 123], stated the circumstances from which it may be gathered as to whether there was intention to cause death. It included circumstances like; nature of the weapon; on what part of the body the blow was given; the amount of force; was it a result of a sudden fight or quarrel; whether the incident occurred by chance or was pre-meditated; prior animosity; grave and sudden provocation; heat of passion; did the accused take any undue advantage; did he act cruelly; number of blows given, etc..

18. In light of the circumstances which would help the Court to gather the intention of the accused, the Court also has to take into consideration the attendant circumstances. One of the very vital factors is pre-meditation and intention to kill. These are the important factors which will weigh in the mind of the Court while determining such an issue in light of the attendant circumstances. In the case of Rampal Singh v. State of Uttar Pradesh [(2012) 8 SCC 289], where the accused being related to the deceased, had shot him over a dispute in regard to construction of a ladauri this Court held as under :

"27. We have already noticed that both the accused and the deceased were related to each other. Both were serving in the Indian Army. They had come on leave to their home and it was when the deceased was about to return to [pic]the place of his posting that the unfortunate incident occurred. The whole dispute was with regard to construction of ladauri by the deceased to prevent garbage from being thrown on his open land. However, the appellant had broken the ladauri and thrown garbage on the vacant land of the deceased. Rather than having a pleasant parting from their respective families and between themselves, they raised a dispute which led to death of one of them. When asked by the deceased as to why he had done so, the appellant entered into a heated exchange of words. They, in fact, grappled with each other and the deceased had thrown the appellant on the ground. It was with the intervention of DW 1, Ram Saran and Amar Singh that they were separated and were required

to maintain their cool. However, the appellant went to his house and climbed to the roof of Muneshwar with a rifle in his hands when others, including the deceased, were talking to each other. Before shooting at the deceased, the appellant had asked his brother to keep away from him. On this, the deceased provoked the appellant by asking him to shoot if he had the courage. Upon this, the appellant fired one shot which hit the deceased in his stomach. This version of the prosecution case is completely established by the eyewitnesses, medical evidence and the recovery of the weapon of crime. The learned counsel appearing for the appellant has, thus, rightly confined his submissions with regard to alteration of the offence from that under Section 302 to the one under Section 304 Part II of the Code.

28. At this stage, it would be relevant to refer to the statement of one of the most material witnesses which will aid the Court in arriving at a definite conclusion. Smt Sneh Lata, who was examined as PW 1, is the wife of the deceased. After giving the introductory facts leading to the incident, she stated as under:

"In the meantime, Amar Singh, my uncle-in-law (Chachiya Sasur) came there and one man from Dhaniapur also came there. My husband started talking with them and by that time the accused who is present in the Court, came there. My husband told him that why's you have started using as your Goora in our land why you have demolished our ladauri which was constructed by us. On this issue, there was heated discussion in between my husband and Rampal Singh and my husband had thrown the accused on the ground. By that time, his son Ram Saran came there and thereafter he and Amar Singh separated both of them. Ram Saran made the accused understand and he started talking with him. My husband got down from the thatch and stood up by the help of pillar and he started talking with these people and in the meantime, Rampal had left for his house. Then one of the people saw that the accused present in the Court, had climbed on the roof of Muneshwar and stood towards wall which is situated towards the southern side of my house and he further told that our land which is vacant land, in the munder of the wall situated east side of the same, where he was standing, he told his brother to go aside, I will fire bullet. On this, his brother said that are you going mad. On this, my husband said that have you courage to shoot at me. On this the accused said that see his courage and saying this, the accused fired [pic]bullet which hit my husband. On the said bullet hit, my husband fell down and then the accused climbed down from the stairs and

fled away. Thereafter, Ram Saran, etc. helped my husband and they called the compounder from village. The compounder had made wet Aata and sealed/filled the wound of my husband and he advised to immediately take him to some big hospital and thereafter, we took my husband to Bewar. My husband said the report will be lodged on some other day, first you take me to Army Hospital, Fatehgarh. On the very same day at about quarter to nine, we had taken him to Fatehgarh Hospital where after four-five days, he died."

29. From the above statement of this witness, it is clear that there was heated exchange of words between the deceased and the appellant. The deceased had thrown the appellant on the ground. They were separated by Amar Singh and Ram Saran. She also admits that her husband had told the appellant that he could shoot at him if he had the courage. It was upon this provocation that the appellant fired the shot which hit the deceased in his stomach and ultimately resulted in his death.

30. Another very important aspect is that it is not a case of previous animosity. There is nothing on record to show that the relation between the families of the deceased and the appellant was not cordial. On the contrary, there is evidence that the relations between them were cordial, as deposed by PW 1. The dispute between the parties arose with a specific reference to the ladauri. It is clear that the appellant had not committed the crime with any premeditation. There was no intention on his part to kill. The entire incident happened within a very short span of time. The deceased and the appellant had had an altercation and the appellant was thrown on the ground by the deceased, his own relation. It was in that state of anger that the appellant went to his house, took out the rifle and from a distance i.e. from the roof of Muneshwar, he shot at the deceased. But before shooting, he expressed his intention to shoot by warning his brother to keep away. He actually fired in response to the challenge that was thrown at him by the deceased. It is true that there was knowledge on the part of the appellant that if he used the rifle and shot at the deceased, the possibility of the deceased being killed could not be ruled out. He was a person from the armed forces and was fully aware of the consequences of use of firearms. But this is not necessarily conclusive of the fact that there was intention on the part of the appellant to kill his brother, the deceased. The intention probably was to merely cause bodily injury. However, the Court cannot overlook the fact that the appellant had the knowledge that such injury could result in the death of the deceased. He only fired one shot at the deceased and ran away. That shot was

aimed at the lower part of the body i.e. the stomach of the deceased. As per the statement of PW 2, Dr A.K. Rastogi, there was a stitched wound obliquely placed on the right iliac tossa which shows the part of the body the appellant aimed at."

19. As we have discussed above, premeditation and intention to kill are two vital circumstances amongst others which are to be considered by the Court before holding the accused guilty of an offence under Section 302 or 304 IPC. At the cost of repetition, we may notice that from the prosecution evidence, it is not established that the accused had the intention to kill the deceased or it was a premeditated crime. The learned counsel appearing for the State has contended that the very fact that the accused had come out with a tobru completely establishes the intention to kill and, thus, the offence would fall under Section 302 IPC. It cannot be disputed that the accused came out with a tobru but, at the same time, it is also clear that this is the most easily available weapon in that part of the hills and is used regularly by the communities. Beyond this factor, there is no evidence of animosity, premeditation or intention to kill. The accused did give a blow by tobru on the head of the deceased which proved fatal. This was result of the grave and sudden provocation where father of both the deceased and the accused was being abused, assaulted and ill-treated by the deceased, who was in a drunken state.

20. Thus, in the facts of the present case, a sudden and grave provocation took place which would bring the offence within the ambit of exception 1 of Section 300 IPC and hence under Section 304 Part I IPC as the accused had caused such bodily injury to the deceased which, to his knowledge, was likely to cause death as he had inflicted injuries on the head of the deceased. Having held the accused guilty of an offence under Section 304 Part I IPC, we award the sentence of 10 years rigorous imprisonment and to a fine of Rs.5,000/- in default thereto to undergo further imprisonment of six months.

21. The appeal is disposed of accordingly.