

**AFR**

**Court No. - 43**

**Reserved On.- 21.5.2019**

**Delivered On.- 5.7.2019**

Criminal Appeal No.**3150/2004**

**Appellants :-** 1. Vijay Kumar Gupta, &  
2. Muneshwar Dayal

**Respondent :-** State of U.P.

**Counsel for Appellants :-** Vimlendu Tripathi, Amicus

**Counsel for Respondent :-** A.N. Mulla, A.G.A.

**Hon'ble Pankaj Naqvi, J.**

**Hon'ble Umesh Kumar, J.**

**(Delivered by Hon. Pankaj Naqvi, J)**

This criminal appeal arises out of the judgment and order dated 4.6.2004, passed by the Addl. Sessions Judge, Shahjahanpur in S.T. Nos.715/ & 716, of 2003, convicting / sentencing appellant no. 1 under Section 302 IPC to life and appellant no. 2 under Section 323 IPC to 3 & ½ months R.I.

1. The prosecution case was set into motion by P.W.-1 / the informant with a written report dated 13.10.2002 (Ext. Ka-1), comprised in two parts. The first part alleged that in the earlier part of the day, a verbal dual and an assault had taken place between his younger brother Ram Niwas (victim), and accused Vijay Kumar Gupta and his father Muneshwar Dayal Gupta over monetary transactions. The second part alleged that on the

same day at about 6.00 PM while the victim was returning from the market to his house, reached near the alley in front of the house of accused Vijay Kumar Gupta, who was armed with country-made pistol along with his father Muneshwar Dayal Gupta with SBBL gun (licensed), latter started assaulting the victim, with his gun from the butt side, victim shouted, over which accused Vijay Kumar Gupta, fired at the victim, who sustained injuries. The occurrence attracted the arrival of Vikesh Gupta, Kamlesh Kumar. P.W.-1 (informant) along with other residents of the area exhorted the accused who fled away from the scene. The injured was rushed to the hospital but died en-route.

2. On above allegations, an FIR as Case Crime No.343/2002 was initially registered against accused Vijay Kumar Gupta and Muneshwar Dayal under Section 304 IPC on 15.10.2002 at 7.30 AM at the police station, at a distance of 2 kms.

3. P.W.-3 / the Investigating Officer after reaching the scene, carried out investigational formalities including preparation of the site plan including recovery of the empty cartridge (315 bore) in his presence along with other witnesses, and that of empty (315 bore) as Ext. Ka-9. He effected the arrest of both the accused and at their pointing out, recovered

the offending weapons from their custody, prepared memo (Ext. Ka-10), authenticated under his signatures, a copy of which was also furnished to the accused after obtaining their signatures. On the recovery of the incriminating arms on 15.10.2002 at 7.30 AM, an FIR (Ext. Ka-18), under Section 25 of the Arms Act also came to be registered against Vijay Kumar Gupta.

4. P.W.-6, the subsequent Investigating Officer, after receipt of the autopsy, converted the case into Section 302 IPC and the list of articles sent for forensic analysis as paper no. 10 / ka. After investigation, he submitted a charge-sheet (Ext. Ka-14) under Section 302 IPC against both the accused persons. P.W-5 submitted a charge-sheet against accused Vijay Kumar Gupta under Section 25 of the Arms Act.

5. The prosecution in order to establish its accusations, examined P.W.-1, the sole eye-witness and the rest as formal witnesses.

6. The defence examined D.W.-1 who had registered an NCR on 23.5.2002 at the instance of accused Vijay Kumar Gupta but in cross-examination, admitted that the same did not relate to the informant.

7. The trial court finding P.W.-1, the sole witness wholly reliable and the formal witnesses having proved their respective roles, convicted and sentenced the appellants as above.

8. No appeal against acquittal under Arms Act is reported.

9. Learned counsel for the appellants canvassed two submissions, i.e, the presence of P.W-1 / the sole eye-witness at the time of occurrence is highly doubtful and that the offence would not traverse beyond Section 304 IPC.

10. The houses of the informant and that of the accused are in the same mohalla. Site Plan (Exbt. Ka-8) along with the testimony of PW-1 indicates that the alleged occurrence relating to assault took place at "point A" in front of the house of the accused and the old house of the informant is to the west to the house of the accused. PW-1 has 3 brothers including the deceased, who all were engaged in the business of selling spices separately even though no partition had taken place. All the brothers stay together in the old house near the place of occurrence and have a common kitchen. P.W.-1 also has another house in the town area, where also there is a working kitchen but otherwise boarding, lodging and kitchen facilities are availed from the old house. The deceased like his brothers also had his independent business, of selling spices in the village

market on certain days, but on Tuesday, Thursday and Sunday, he used to assist PW-1, at his shop. On the day of occurrence, the deceased was at the shop of PW-1, went back to the house for lunch around noon to come back again at the shop. The deceased had left the shop earlier at about 4:00 P.M. PW-1 closed his shop to come back home around 5:30 P.M, along with purchased vegetables, where he met the deceased. When both the factions are residing in a close vicinity, it is not unusual for either of them to be at the doors of the other which falls in a common passage. The presence of PW-1 is questioned on the ground that since he had a running house (new) in the town area, he had no occasion to be present at the old house. The defence did not dispute that the informants also have a house (old) near the place of occurrence. P.W.-1 established that he is availing both fooding and lodging in the old house.

11. Presence of PW-1 is also challenged on the ground that he is not shown as a witness either in the site plan or in the FIR or under Section 161 Cr.P.C. The submission may appear to be attractive but is liable to be rejected firstly on the ground that a careful perusal of the FIR lodged by PW-1 would manifest that the recital mentioned therein unequivocally indicates that the same was an outcome from the eyes of PW-1, when it alleged "I and the witnesses exhorted the accused, who thereafter fled from the scene" as also from the testimony

of PW-3 / the I.O, who was also authenticating that PW-1 had disclosed to him that he had exhorted the accused, which is only possible if he was present at the scene, also authenticated by the FIR. PW-1 established his presence as also the mode and manner of the occurrence.

12. We now proceed to examine as to whether the case of appellant no. 1 is covered under Exception (iv) to Section 300 IPC or not?

13. The Apex Court in **Pulicherla Nagaraju @ Nagaraja Reddy vs. State of Andhra Pradesh, (2006) 11 SCC 444**, culled out certain circumstances wherein a conviction / sentence u/s 302 can be altered u/s 304-I / or II, as reiterated in **Ankush Shivaji Gaikwad Vs. State of Maharashtra, (2013) 6 SCC 770**. Relevant portion of Para 23 of the Ankush (Supra) is extracted hereunder:-

**".....Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the case of murder punishable Under**

**Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable Under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (I) nature of the weapon used ; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body ; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre- meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.**

14. To attract Exception (IV) to Sec 300 IPC the following 4 essential ingredients are must, i.e. the overt act must be:-
- i) Without premeditation;
  - ii) in a sudden fight;
  - III) in the heat of passion upon a sudden quarrel and
  - IV) the offender not having taken any undue advantage or acted in a cruel or unusual manner.

15.To recapitulate, the case of the prosecution is that in the earlier part of the day, a verbal dual between the victim and accused Vijay followed by assault on the victim, had taken

place over demand of certain outstandings and the same day around 6:00 P.M, while the victim was coming from the market, he came across the accused-appellants in front of their house. Accused Vijay Kumar was armed with a countrymade pistol and his father Muneshwar Dayal with a licensed gun. As a sequel to the incident of the earlier part of the day, accused Muneshwar Dayal inflicted repeated blows from his gun from the butt side, at the deceased and when the victim shouted, accused Vijay Kumar fired at him from his countrymade pistol.

16. This first assault at the victim is by accused Muneshwar Dayal. No damage or injury was caused to accused Muneshwar Dayal (father of accused Vijay) by the deceased who was unarmed. The evidence against Muneshwar Dayal does not establish that he had any intention of causing any fatal injury to the deceased as he was using his gun like a lathi, thus his role will have to be treated distinct from that of accused Vijay. The evidence indicates use of a countrymade pistol by accused Vijay in a fit of rage, which caused fatal injury to the deceased. The evidence further indicates that prior to the overt act, there was complete absence of any premeditation to murder the deceased. The first ingredient of Exception (IV) to Section 300 IPC is established. The son (accused Vijay), retaliated with the use of a countrymade firearm in a fit of anger, when he saw his aged father (accused Muneshwar Dayal)



hitting at the victim with the butt-side of his gun. Thus, the second and third ingredients also stands established, i.e., accused Vijay fired a shot in sudden fight upon heat of passion. The prosecution has also alleged that accused fired a solitary shot also authenticated by the medical evidence that the deceased was inflicted with injury no.7 and 8 which are extracted hereunder:

**7. a gun shot wound of entry 0.8 cm x 0.7 cm, throughout chest cavity deep on the front of lower part of chest. Over above from ..... blackening an tattooing present around the wound, margins inverted.**

**8. A gun shot wound of exit 1.0 cm x 0.9 cm, covered with injury no. 7 on the back of left side of chest, 3 cm medial to left scapula. Margins evated. Direction of wound is forward to backward and upward.**

The fourth ingredient also gets established as the evidence does not indicate that accused Vijay resorted to any unfair advantage as after causing single fire-arm injury at the deceased, he did not inflict any injury after the deceased fell down.

17. We on above evidence, are of the view that the conviction of appellant no.1 / Vijay Kumar Gupta is liable to be altered to Section 304 (I) IPC and that of appellant no.2 / Muneshwar Dayal is liable to be maintained.

18.Considering the matter in totality and in particular the advance age of appellant no.2 (aged about 78 years), he is

liable to be set free on sentence undergone, but with enhanced fine to the tune of Rs.5000/-.

19. The appeal is **allowed in part**. The conviction / sentence of appellant no.1/ Vijay Kumar Gupta is altered to Section 304(1) IPC with 10 years R.I. He is on bail. His bail bonds are cancelled. He shall be taken into custody forthwith to serve the remainder sentence, if any. Appellant no.2 / Muneshwar Dayal is liable to be set free on sentence undergone but with enhanced fine to the tune of Rs.5000/- payable to the widow of the deceased or her legal heir as the case be.

Office is directed to forthwith communicate this order to the court concerned. Compliance report be submitted to this Court within two months.

Office of the Registrar General is directed to ensure a payment of Rs.15,000/- to Sri Vimlendu Tripathi, learned Amicus, for the services rendered from the appropriate head.

**Order date:-** 5.7.2019  
Chandra

*(Umesh Kumar,J) (Pankaj Naqvi,J)*