REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No. 1838 of 2019

AJMAL **APPELLANT(S)**

VERSUS

THE STATE OF KERALA **RESPONDENT(S)**

WITH

Criminal Appeal No. 1839 of 2019

AND WITH

Criminal Appeal No. 1840 of 2019

J U D G M E N T

Vikram Nath, J.

1. The present set of three appeals filed by accused-appellants namely, Biju (accused no.1), Ashique Salam (accused no.2) and Ajmal (accused no.3) assail the correctness of the judgment and

order dated 30th May, 2019 passed by the High Court of Kerala in Criminal Appeal Nos. 91, 238 and 564 of 2014, whereby the aforesaid appeals were partly allowed. The conviction of these three appellants under sections 143, 147, 148 IPC[1] read with section 149 IPC was set aside, however, their conviction and sentence under sections 341, 323, 324, 427 and 302 read with section 34 IPC as awarded by the Trial Court was confirmed.

2. At the outset, it may be pointed out that there were 10 (ten) accused, who were charge-sheeted. The present appellants are accused nos. A1, A2 and A3. Four accused namely accused nos. 4, 5, 7 and 10 were acquitted of all the charges by the Trial Court. Further High Court acquitted three accused namely accused nos. 6, 8 and 9 of all the charges. Thus, out of 10 (ten) accused, the present three

1 IPC – Indian Penal Code, 1860

accused-appellants A1, A2 and A3 stand convicted by the High Court and, as such, are before this Court.

3. According to the prosecution case the entire transaction was in three parts. It is briefly stated as under:

3.1. In the last week of January, 2008, there were festivals going on in the Church located at Thidanadu and Variyanikkadu. The deceased-Varkeychen @ George Thomas along with his friends initially went to Thidanadu Church in a Scorpio Car, which was driven by Saji Joseph (P.W.-1) to attend a musical festival *(gana mela)*. The deceased along with his friends watched the programme for about half an hour and, thereafter, proceeded towards another Church at Variyanikkadu to enjoy the festival going on

there. At about 9:00 p.m., they were returning to Thidanadu Church, when two motor-bikes driven by accused no.9 (Sabeer) and accused no.3, Ajmal were moving in front of their Car and blocked their way. Accused no.6 (Razique Jalal @ Razee) was sitting as a pillion on the motor-cycle, driven by A3 (Ajmal). At that time, a verbal altercation took place between Saji Joseph (PW-1) and A3 (Ajmal) regarding the bikes not giving way to their vehicle (four wheeler).

3.2. At around 10:45 p.m., deceased along with his friends were returning, when their Car reached the place called Veyilukanampara Junction in Thidanadu Kara, they saw accused no.9 (Sabeer) waiting for them by the side of the road and soon thereafter the other accused also

joined him on different bikes. All the ten accused-persons formed an unlawful assembly and in prosecution of a common object wrongfully restrained the deceased and his friends and compelled them to alight from their vehicle. Once, they were out of the vehicle, they were attacked by the accused-appellants. The accused no.1 (Biju) hit the deceased with a stick of casuarina tree (marked as MO-2). Whereas accused no.2 (Ashique Salam) hit on the back of his neck with a brick (marked as MO-3), as a result of these two injuries, deceased fell on the road. Accused no. 3 (Ajmal) assaulted Saji Joseph (PW-1) with a stick of casuarina tree (marked as MO-1) causing injuries on his head and other parts of the body. As by this time,

public had started gathering, the accused left the place of occurrence.

3.3. Further, when the deceased was being taken in the car by his friends towards the hospital, once again, the vehicle was stopped by the accused-persons near Chennadu Junction, where accused no.3, Ajmal threw stones at the car causing damage to the wind screen and other glasses.

3.4. The injured-deceased was taken to IHM Hospital, Bharananganam and from there, he was referred to the Medical College Hospital at Kottayam. His condition was deteriorating, as such, he was shifted to Medical Trust Hospital, Ernakulam, where he succumbed to the injuries on the following day at about 4:45 a.m. The First Information Report was lodged by Peter (PW-2)

on his statement, which was registered as FIR (Ext.P.-1).

4. The investigation was taken over by the Circle Inspector (PW-20), who prepared the inquest report (Ext.-P2). The dead body was sent for post-mortem, which was conducted by Assistant Professor of Forensic Medicine and Deputy Police Surgeon, Medical College Hospital, Kottayam (PW-13) at about 2:05 p.m. on 28.01.2008. He prepared the post-mortem report (Ext.P-10) mentioning the following ante-mortem injuries:

> "(1) Contusion of scalp 10 X 8 c.m. involving the full thickness of left occipital region, its lower extent 3 c.m., above root of neck and 2 c.m. outer to midline.
> (2) Contusion of right cheek 5 X 4 c.m. X 0.5 c.m.
> (3) Abraded contusion 8 X 1 c.m.-2 c.m. X 1 c.m. horizontally oblique involving right side of neck and fact, its lower outer extent 7 c.m. above root of neck and 10 c.m. outer to midline.
> The skull showed fissured fracture 8 c.m. long involving the occipital bone of left side of posterior

cranial fossa, 1-1.5 c.m. outer to midline, corresponding to injury No.1. Dura was intact had a bluish tint and tense, subdural clots were seen overlying right frontal and temporal lobe of brain with bilateral subarachnoid haemorrhage. The pons on sectioning showed haemorrhagic area 1.5 c.m. x 1 c.m. The right frontal pole of brain had contusion 3 x 2 x 0.5 c.m. Brain showed fattened gyri and narrow sulci. The anterior cranial fossa a right side showed fissured fracture 4 c.m. long.

(4) Contusion 5 x 4 x 0.5 c.m. long.

(5) Abrasion 2 x 1 c.m. on front of left knee."

5. After completing the investigations, the police report under section 173(2) Cr.P.C.[2] was submitted, whereupon, cognizance was taken by the Magistrate and the matter committed to the Sessions Court for trial. The Trial Court framed charges under sections 143, 147, 148, 341, 323, 324, 427 and 302 read with section 149 IPC. The charges were read over to the accused, who pleaded not guilty and, as such, were put to trial.

2 Cr.P.C. – Code of Criminal Procedure, 1973

6. The prosecution examined 21 witnesses as PW-1 to PW-21 and exhibited as many as 74 documentary evidence marked as Exts:P-1 to P-74 and further produced 19 material objects marked as MO-1 to MO-19. After the close of the prosecution evidence, the accused were examined under section 313 Cr.P.C. and the incriminating material was put to them. They denied all such circumstances and reiterated their innocence. The Investigating Officer also conducted a test identification parade.

7. After considering the material evidence on record and after hearing the learned counsel for the parties, the Trial Court acquitted four accused namely, accused nos.4, 5, 7 and 10 namely, Nijas, Naseebulla @ Nazeeb, Seenaj and Shihab. It further convicted the rest of the 6 (six) accused nos. 1, 2, 3, 6, 8 and 9, namely, Biju, Ashique Salam, Ajmal,

Razique Jalal @ Razee, Salim Basheer @ Saly and Sabeer respectively.

8. Aggrieved by the conviction, all the 6 (six) accused preferred appeals before the High Court. Criminal Appeal No.87 of 2014 was filed by the accused nos.6 and 8 namely, Razique Jalal @ Razee and Salim Basheer @ Saly, whereas Criminal Appeal No.132 of 2014 was filed by accused no.9-Sabeer. As already recorded above, the other three appeals bearing nos.564, 238 and 91 of 2014 were filed by the accused nos.1, 2 and 3 respectively namely, Biju, Ashique Salam and Ajmal. As already recorded above, the High Court allowed Appeal Nos.87 and 132 of 2014 acquitting the three accused nos.6, 8 and 9 of all the charges, whereas it partly allowed the appeal nos.564, 238 and 91 of 2014 of the present three appellants. Aggrieved by the judgment

of the High Court, the three appellants are before this Court.

9. The prosecution has established:

(i) that the death of deceased-Varkeychen @ George Thomas was homicidal;

(ii) that PW-1, PW-2 and PW-4 suffered simple and grievous hurt which took place at the date, time and place stated in the FIR.

(iii) that the FIR was promptly lodged;

(iv) the ante-mortem injuries suffered by the deceased is in consonance with the report registered by PW-2 and also established from the statements of PW-1, PW-2 and PW-4, who are the injured eye-witnesses.

(v) The recovery of the material objects (MO nos.1, 2 and 3) used by the three

appellants in causing the fatal injuries to the deceased as also the injuries to PW-1, PW-2 and PW-4.

10. Insofar as the test identification parade is concerned, the same has not been found to be very reliable by the courts below, however, as the witnesses and the injured knew the accused, their identification in Court has been found to be sufficient by the Courts below. They were all residents of neighbourhood and knew each other.

11. We are, thus, satisfied that the occurrence in the manner as set up by the prosecution has been duly established. The deceased died due to the injuries caused by accused nos.1 and 2 by using a stick (MO-2) and a brick (MO-3), whereas, the injuries caused to the PW-1, PW-2 and PW-4 is on account of the assault by accused no.3 by using a

stick (MO-1). The only question which requires consideration is whether it was a culpable homicide amounting to murder punishable under section 302 IPC as has been held by the courts below or it was a culpable homicide not amounting to murder punishable under section 304 of IPC as submitted by the Counsel for the appellants.

12. Learned counsel for the appellants have led great emphasis on the manner, in which the incident occurred. According to them,

(i) there was no pre-meditation of committing murder.

(ii) the accused, admittedly, when they accosted the vehicle and compelled the deceased and the injured to come out of the vehicle, were not armed with any weapons.

(iii) It was only when they alighted from the vehicle and some heated arguments took place as a result of the earlier verbal altercation in not giving a pass to the Scorpio vehicle to overtake the motor-bikes, that the accused-appellants picked up the stick of casuarina tree from the decorations, which had been made at that place and also the brick from the side of the road and assaulted with it.

(iv) both these weapons used could not be said to be deadly weapons but could have definitely caused grievous hurt and may be injuries, which could result into death.

(v) it is true that the injuries noted in the post-mortem report of the deceased were on the vital part i.e. the head and neck and which, according to the medical evidence, was

sufficient in ordinary course to cause death, but the same was unintentional.

(vi) only one blow each was given by accused nos. 1 and 2 to the deceased. There was no repeated assault.

(vii) there was no *mens rea* to commit murder, therefore, the same would fall within the exception of section 300 IPC.

(viii) On the own findings of the High Court, it was not a case of culpable homicide amounting to murder.

(ix) Our attention has been drawn to paragraph nos.27 and 28 of the judgment of the High Court, which took into consideration the evidence led by the eye-witnesses and injured namely, PW-1, PW-2 and PW-4, according to which, the charge under section 302 ought to

have been converted to section 304 IPC. The appellants ought to have been acquitted under section 302 IPC and at best could have been convicted under section 304 IPC.

(x) Paragraph Nos.27 and 28 of the judgment of the High Court are reproduced below:

> "27. We have no dispute with the proposition that common object may be formed at the spur of the moment, and that prior meeting of minds or a formal assembly consisting of the members of the unlawful assembly to commit a particular crime may not be essential. The precedent on the point referred to earlier would indicate that the knowledge of the members of the assembly that the act which actually occurred was very likely to be caused by their acts, is sufficient to make them vicariously liable for the ultimate consequences. But, in the instant case, wheat we see from the evidence is that the first part of the occurrence at Chemmalamattom was only an altercation between P.W.-1 and A3 in the presence of A6 and A9 with regard to the bikers not giving way and passage to the car driven by P.W.-1 for overtaking. The altercation also did not last long enough so as to form a vengeance

in the mind of A3, A6 and A9 so as to garner support of the remaining accused to form an unlawful assembly with the common object of committing murder, particularly of the deceased, because the altercation was only with A3 and P.W.-1 and the deceased had nothing to do with the altercation. Under the circumstances, we are of the opinion that the accused definitely did not have a common object of murdering the deceased. It is also relevant to note that had the accused entertained the common object to commit murder or even previous act, they would have been lying in wait for the Scorpio car armed with deadly weapons.. None of the prosecution witness has a case that the accused had accosted them at the scene of occurrence armed with deadly weapons. It is only after the witnesses alighted from the car, P.W.-1 had a conversation with A9 and accused nos.1, 2 and 3 picked up the weapons which were available there and attacked the passengers in the car, including the deceased. Even if A3 had called for others to kill, it could not have been the deceased because he only had a vengeance against P.W.-1, and, therefore, the entire occurrence as appeared to us from the oral testimony of witnesses would indicate that it is only a chance encounter without any

premeditated motive in prosecution of common object.

28. It is also pertinent to note that P.W.-1 had testified that he had a friendly conversation with A9 in the beginning after he alighted from the car at the scene of occurrence. It is also testified that when the accused went to attack the passengers of the car, including the P.W.-1, A9 had prevented others from causing injuries. This particular statement in the testimony of P.W.-1 clearly exonerated A9 of the allegations of having acted in prosecution of common object of committing murder. He was not even wielding any weapon in his hands. In fact, except A1, A2 and A3, none of the other accused had picked up any weapon from the scene of occurrence. Even A1 and A3 had picked up sticks, which were hanging at the scene of occurrence as part of the decoration done in connection with the Church festival. MO3 brick was picked up by A2 from the side of the road abruptly during the scuffle that ensued in consequence of the passengers of the car alighting. Under the circumstances, we are of the considered opinion that apart from A1, A2 and A3, none of the other accused could be guilty for attacking the deceased, P.W.-1 and P.W.-2. The prosecution has not succeeded in establishing that there was formation of an unlawful assembly acting

in furtherance of common object. The finding of the learned Sessions Judge roping in all the appellants resorting to section 149 is therefore not held good. It is also pertinent to note that none of the accused were earlier armed with deadly weapons and therefore it cannot be said that they were guilty of committing riot armed with deadly weapons, an offence punishable under section 148 of the IPC."

(xi) As there was no intention to commit murder or a pre-planned attempt to commit murder, section 302 IPC, charge could not have been sustained.

(xii) that appellants are in jail and have suffered incarceration of several years.

13. On behalf of the State of Kerala, it is submitted that the entire transaction took place in three parts. The first incident took place when a verbal altercation took place in overtaking the vehicles. The second incident took place, in which the

physical assault occurred causing fatal injuries to the deceased and causing simple and grievous hurt to the three witnesses namely, PW-1, PW-2 and PW-4. The third incident took place when the injured was being taken to the hospital; stones were pelted by accused no.3 causing damage to the vehicle.

14. Learned counsel for the State further submitted that there was clear motive to commit murder as after the first episode of verbal altercation took place, it was only with an intention to commit murder that all the accused joined together by forming an unlawful assembly accosting the vehicle in which the deceased was travelling with his friends compelling them to come out of the vehicle and thereafter it was an open assault with sticks and bricks, which were used with such force causing fatal injuries to the deceased and,

therefore, it was nothing short of committing a pre-planned murder. Even after having caused the fatal injuries, the accused further tried to prevent the deceased from being taken to the hospital and the intention was to stop the vehicle and cause enough delay so that the deceased, who was still alive may ultimately die. The judgment of the High Court does not suffer from any infirmity and the appeal, acco

rdingly deserves to be dismissed. Learned counsel has placed reliance upon a judgment of this Court in **Gulab vs. State of U.P.**[3]

15. Having considered the submissions and having perused the material on record, we do not find any infirmity in the prosecution establishing the incident as set up in the First Information Report. For the said conclusion, we have taken note of the following:

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3 2021(12) JT 134

(i) First Information Report was promptly lodged.

(ii) The prosecution story as set up in the FIR appears to be probable.

(iii) The medical evidence fully corroborates the prosecution story.

(iv) PW-1, PW-2 and PW-4, the three eye-witnesses have fully supported the prosecution story and have narrated the same incident as it occurred.

(v) Formal witnesses have discharged their burden by proving the police papers and other documentary evidence placed on record by the prosecution.

(vi) The material objects recovered have also been duly proved.

(vii) According to the medical evidence, the material objects alleged to have been used in

the commission of crime could have been actually used in causing the injuries.

16. The only question which falls for our consideration is as to whether the manner in which the entire transaction took place in particular relating to the physical assault, would amount to culpable homicide amounting to murder or culpable homicide not amounting to murder.

17. The distinctive features and the considerations relevant for determining a culpable homicide amounting to murder and distinguishing it from the culpable homicide not amounting to murder has been a matter of debate in large number of cases. Instead of referring to several decisions on the point reference is being made to a recent decision in the case of **Mohd. Rafiq vs. State of M.P.**[4]**,** wherein **Justice Ravindra Bhatt,** speaking for the Bench,

4 (2021) 10 SCC 706

relied upon two previous judgments dealing with the issue as narrated in paragraph nos.11, 12 and 13 of the report which are reproduced below: -

> "11. The question of whether in a given case, a homicide is murder 3, punishable under section 302 IPC, or culpable homicide, of either description, punishable under section 304 IPC has engaged the attention of courts in this country for over one and a half century, since the enactment of the IPC; a welter of case law, on this aspect exists, including perhaps several hundred rulings by this court. The use of the term "likely" in several places in respect of culpable homicide, highlights the element of uncertainty that the act of the accused may or may not have killed the person. Section 300 IPC which defines murder, however refrains from the use of the term likely, which reveals absence of ambiguity left on behalf of the accused. The accused is for sure that his act will definitely cause death. It is often difficult to distinguish between culpable homicide and murder as both involve death. Yet, there is a subtle distinction of intention and knowledge involved in both the crimes. This difference lies in the degree of the act. There is a very wide variance of degree of intention and knowledge among both the crimes.
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> 12. The decision in State of **Andhra Pradesh v Rayavarapu Punnayya & Anr**[5] notes the important distinction between the two provisions, and their differing, but subtle distinction. The court pertinently pointed out that: "12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice- versa. Speaking generally, "culpable homicide" sans "special

5 1976 (4) SCC 382

characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest 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.. 13. The academic distinction between "murder" and "culpable homicide not amounting to murder" has vexed the courts for more than a century. 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."

13. The considerations that should weigh with courts, in discerning whether an act is punishable as murder, or culpable homicide, not amounting to murder, were outlined in **Pulicherla Nagaraju @ Nagaraja Reddy v State of Andhra Pradesh**[6] . This court observed that: "29. 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 cattle, quarrel of children, utterance of a rude

6 (2006) 11 SCC 444

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 cases of murder punishable under section 302, are not converted into offences 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 premeditation; (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.""

18. For the said purpose, we examined the evidence on record as narrated in the First Information Report, during investigation as per the evidence collected by the Investigating Officer and also the evidence led during the course of trial in particular by the injured eye-witnesses.

19. From the perusal of all the above material, the prosecution story as set up and as established in brief can be summarized as under:

(i) On the fateful evening of 27th January, 2008, the first incident took place around 9:00 p.m. regarding the overtaking of the vehicles of one party and the other resulting into a verbal altercation at that stage between PW-1 and A9.

(ii) Both the parties went in separate directions after the verbal altercation.

(iii) Later on, at about 10:45 p.m., when the deceased along with his other friends PW-1, PW-2 and PW-4 were returning, they were stopped by the accused 10 (ten) in number, they were wrongfully restrained, compelled to alight from their vehicle.

(iv) Again, a verbal altercation took place whereafter accused nos. 1 and 3 picked up a stick of casuarina tree from the decoration set up on the road side and accused No.2 picked up a brick from the road side. Accused No.1 hit the deceased with a stick on his head, whereas accused No.2 hit the deceased with the brick, as a result of which, the deceased fell on the ground. Accused No.3 attacked the others with a stick and caused them simple and grievous hurt.

(v) Accused Nos.1 and 2 had caused only one injury each on the deceased. It was not a repeat or a multiple assault by them.

(vi) Although, role of exhortation to kill the deceased was assigned to accused No.3, but during trial and in the cross-examination, all the three witnesses PW-1, PW-2 and PW-4 stated that they were not sure whether they have said so in their statements under section 161 Cr.P.C. Thus, apparently, there was no role assigned to exhortation to any of the accused to kill the deceased.

20. The Trial Court had acquitted 4 (four) accused namely accused nos.4, 5, 7 and 10 and the High Court acquitted three other accused namely accused nos.6, 8 and 9 of all the charges.

21. Considering the statutory provisions laid down in IPC and the law on the point, we find that the present case falls into the category of a culpable homicide not amounting to murder falling under section 304 Part-II IPC for the following reasons:

(i) There was no pre-meditation of mind to commit murder.

(ii) All the accused were admittedly not armed when they stopped the vehicle of the deceased and his friends and compelled them to alight from the same.

(iii) It was during the verbal altercation at that stage that the three accused picked up the weapon of assault namely, sticks of casuarina tree and a brick from the road side.

(iv) Single blow was given to the deceased by the accused nos.1 and 2.

(v) The case set up for exhortation to kill the deceased has not been found to be proved.

(vi) Both the groups consisted of young men.

(vii) The High Court found that there was no unlawful assembly formed with a common object and accordingly had acquitted three other accused and also the present appellants from the charge of unlawful assembly under section 149 IPC.

(viii) The appellants have been convicted with the aid of section 34 IPC.

22. The reference to the judgment in the case of **Gulab Singh (supra)** by the learned counsel for the State of Kerala, in our opinion, is of no relevance to the facts and circumstances of the present case. There was no issue involved relating to the distinction between culpable homicide amounting to

murder or not amounting to murder. The issue involved in the case of **Gulab Singh** was relating to the applicability of section 34 IPC.

23. Thus, for all the reasons stated above, we are of the view that the appellants would be entitled for acquittal under section 302 IPC but would be liable to be convicted under section 304 Part-II IPC. Rest of the conviction upheld by the High Court and the sentence for the charges under sections 341, 323, 324 and 427 read with section 34 IPC is maintained. It is ordered accordingly.

24. Now coming to the question of sentence upon conviction under section 304 Part-II IPC, we find that all the three appellants are in jail and have undergone several years of incarceration. We accordingly award the sentence for the period already undergone by all the three appellants. The

appellants would be released forthwith unless they are required in any other case.

25. Appeals stand partly allowed as above. The impugned judgment of the High Court stands modified to the aforesaid extent.

.....J.
[AJAY RASTOGI]

.....J.
[VIKRAM NATH]

NEW DELHI
JULY 12, 2022.