A.F.R.

Reserved

Court No. - 44

Case :- CRIMINAL APPEAL No. - 5765 of 2011
Appellant :- Lakhan @ Babblu
Respondent :- State of U.P.
Counsel for Appellant :- Vivek Kumar Singh,Ajay Kumar Singh,Atul Tej Kulshrestha,Neeharika Singh,Vinay Singh Khokher,Vivek Dhaka
Counsel for Respondent :- Govt. Advocate,Niraj Tripathi,Raj Kumar Dhama

With

Case :- GOVERNMENT APPEAL No. - 6752 of 2011

Appellant :- State of U.P.
Respondent :- Jagat Singh And Others
Counsel for Appellant :- Govt. Advocate
Counsel for Respondent :- Rr Pandey

Hon'ble Dr. Kaushal Jayendra Thaker,J.
Hon'ble Ajai Tyagi,J.

(Per Hon'ble Ajai Tyagi, J.)

1. The first appeal (Criminal Appeal No. 5765 of 2011) has been preferred by the appellant-Lakhan @ Babblu against the judgment and order dated 19.08.2011, passed by learned Additional Sessions Judge (Special), Baghpat in Session Trail No. 306 of 2009 (State of UP vs. Lakhan @ Babblu and Others), arising out of Case Crime No.192 of 2009, under Section 302 Indian Penal Code (IPC), Police Station- Khekhara, District Baghpat whereby the appellant is convicted and sentenced for the offence under Section 302 IPC for life imprisonment with a fine of Rs.10,000/- and in default of payment of fine, further imprisonment for two months.

2. The appeal (Government Appeal No. 6752 of 2011) has been preferred by the State of U.P. against the same judgment and order dated 19.08.2011, passed by learned Additional Sessions Judge (Special), Baghpat in Session Trail No. 306 of 2009 (State of UP vs. Lakhan @ Babblu and Others), arising out of Case Crime No.192 of 2009, Police Station- Khekhara, District Baghpat whereby the accused persons Jagat Singh, Ramesh and Suresh @ Lala were acquitted for the offence under Sections 307, 504 I.P.C. and Section 7 of Criminal Law Amendment Act and in Session Trial No.365 of 2009 (State of U.P. Vs. Suresh @ Lala), arising out of Case Crime No.196 of 2009, Police Station Khekhara, District Baghpat whereby the accused-Suresh @ Lala was acquitted for the offence under Section 25 of Arms Act, 1959.

3. Brief facts of the case giving rise to this appeal are that a First Information Report was registered at Police Station Khekhara, District Baghpat, in which the complainant alleged that on 14.05.2009 at about 10:00 AM, the informant informed that Krishna Pal, his wife Rajesh, younger brother-Indrapal and his nephew-Praveen were uprooting the bricks of their old house. At that time, accused Lakhan @ Babblu, Jagat Singh, Suresh and Ramesh came there, holding the country made pistol in their hands and started abusing the person who were present. Jagat Singh, Suresh and Ramesh caught hold Rajneesh in their arms and Lakhan @ Babblu fired at Rajneesh from close range, rather putting the barrel of Tamancha on his left upper arm. Rajneesh fell on the ground and died.

4. As per the informant, they shouted and due to that all the four accused persons fired towards them also and they saved

their lives by hiding behind the wall. The First Information Report was registered immediately within 40 minutes of the occurrence. The investigation was taken up by the Investigating Officer, during the course of investigation, I.O. recorded the statement of witnesses, collected the sample of plain and blood stained earth. Inquest report of the deceased was prepared. After that, post-mortem was conducted and its report was prepared by the doctor. Investigating Officer arrested the accused persons. At the time of arrest, a country made pistol of 0.315 bore was recovered from the possession of accused Suresh and its recovery memo was prepared. After completion of investigation, a charge sheet was filed against Lakhan @ Babblu, Jagat, Suresh and Ramesh under Sections 302, 307, 504 I.P.C. another charge sheet was also submitted against the accused-Suresh under Section 25 of Arms Act,1959.

5. Learned Trial Judge framed the charges against the aforesaid accused persons under Sections 302, 307, 504 I.P.C. and Section 7 of Criminal Law Amendment Act, another charge was also framed under Section 25 of Arms Act against the accused-Suresh. Accused persons denied the charges and claimed to be tried.

6. Prosecution examined following witnesses:

1.	Krishna Pal	P.W.-1
2.	Praveen	P.W.-2
3.	Smt. Rajesh	P.W.-3
4.	Satya Narayan Dahiya	P.W.-4
5.	Dr. Ashok Kumar	P.W.-5
6.	Laxi Narayan	P.W.-6
7.	Vindhyachal Tiwari	P.W.-7
8.	Vinod Kumar Tyagi	P.W.-8

9.	Anil	P.W.-9
10.	Khadak Singh	P.W.-10

7. Apart from aforesaid witnesses, prosecution submitted following documentary evidence, which was proved by leading the evidence:

1.	FIR	Ex.ka-2
2.	Written report	Ex.ka-1
3.	Recovery memo of arrest of accused	Ex.ka-10
4.	Recovery memo of plain earth	Ex.ka-13
5.	Recovery memo of blood stained earth	Ex.ka-14
6.	Post-mortem report	Ex.ka-4
7.	Panchayatnama	Ex.ka-5
8.	Charge sheet	Ex.ka-15
9.	Order of District Magistrate	Ex.ka-18
10	Site plan with index	Ex.ka-11

8. After completion of prosecution evidence, the statement of accused persons were recorded under Section 313 of Criminal Procedure Code,1973(Cr.P.C.), in which they denied their involvement in the crime and told that false evidence was led against them. The accused persons have not examined any witness in defence.

9. Heard Mr. Vivek Dhaka, learned counsel for the appellant, Mr. Raj Kumar Dhama, learned counsel for the original complainant and Mr. N.K. Srivastava, learned A.G.A. for the State. Perused the record and Paperbook.

10. Learned counsel for the accused-appellant, Lakhan @ Babblu made his submissions challenging the conviction. It is submitted by the learned counsel and appellant that in this case,

learned Trial Court has acquitted three accused persons on the same set of evidence while only Lakhan @ Babblu was convicted, which is bad in eye of law and requires interference by this court. It is next contended that all the witnesses of fact are of the same family, there was no independent public witness of the occurrence and no undue reliance could not be placed on the evidence of interested witnesses. Deceased was having a long criminal history and he was a member of a gang, on whose arrest reward of amount of Rs.50,000/- was declared. The deceased was killed by someone else and on the basis of previous enmity, accused-appellant, Lakhan @ Babblu has been implicated falsely.

11. Learned counsel for the accused-appellant has further submitted that occurrence of this case had taken place at 10:00 AM and First Information Report was lodged at 10:40 AM while the distance of police station from the place of occurrence is about 4 kilometres. It is also submitted that no FIR could have been registered so promptly unless the false implication of the named accused persons is in the mind of informant. There are several improvements in the evidence of P.W.-1, P.W.-2 and P.W.-3. Place of occurrence is also not fixed by the prosecution because P.W.-1 and P.W.-3 have deposed that deceased fell on the spot where he was shot while P.W.-2 says that deceased ran from the place after sustaining bullet injuries and fell in the '*Gher'* of Charan Singh, which is 10-15 steps away from the place of firing.

12. It is further submitted by counsel for appellant that plain and blood stained earth was collected by the I.O. but it is not mentioned in the recovery memo from which place or where

the earth was collected. It is also submitted that acquitted accused persons were rightly acquitted by the learned trial court because their presence was not proved. It is further argued that as per the prosecution case and testimony of so called eye witnesses, they were also fired at them by the accused persons but no one sustained any injury, which goes to show that the witnesses were not on the spot and they had not seen the occurrence or the accused were named in FIR due to previous enmity.

13. With regard to the medical evidence, learned counsel for the accused-appellant and acquitted accused has submitted that according to the version of the F.I.R. only a single fire was shot by the accused while ante mortem injuries in post-mortem go to show that there were **two entry wounds of fire arm on the body and one exit wound,** which was not possible by one fire. Learned counsel for the accused-appellant and acquitted accused drew our attention to the recovery memo and country made pistol, said to be recovered from the possession of the accused Suresh, who had admitted to the I.O. that he had fired two round at deceased while as per the First Information Report only one gun fire was mentioned by placing the barrel on the arm of the deceased and post-mortem report shows that the wound was on left hand of the deceased.

14. With regard to the acquitted accused persons, learned counsel for the accused-respondents has submitted that they were rightly acquitted by the learned trial court because their presence on the spot was doubtful. According to the prosecution version, the acquitted accused had also fired at the witnesses but there is no injury to anyone, nor any other weapon is

recovered. It is also submitted that catching hold of the deceased by three persons was also not possible. Gun fire were opened by all accused on persons present.

15. After some length of arguments, learned counsel for the convicted accused-appellant has submitted that if prosecution case is believed then also it is version of F.I.R. that accused-Lakhan @ Babblu fired at the deceased by putting the barrel of Tamancha on his body, which was left hand, as is evident from ante mortem injuries. Accidently the bullet pierced into the heart of the deceased by making exit wound after entering the hand. It shows that accused Lakhan @ Babblu had no intention to commit the murder of the deceased because if it had been the intention then he could have fired on chest directly. Hence, this case cannot go beyond the scope of Section 304 of I.P.C.

16. Mr. Raj Kumar Dhama, learned counsel for the informant and learned A.G.A. for the State has vehemently objected the submissions of learned counsel for the accused-appellant and submitted that fire-arm was recovered from the possession of accused Lakhan @ Babblu. The Investigating Officer, P.W.-7 has deposed that S.I. Laxmi Narayan copied the recovery memo of weapon, recovered from the possession of accused-Lakhan @ Babblu in C.D. It is further submitted that weapon was also recovered from the possession of acquitted -accused, Suresh and role of firing is assigned to all the accused persons. Hence, two gun shots cannot be ruled out. It is further submitted that acquitted accused persons also fired towards the family members of the deceased, which is the version of F.I.R. and all the witnesses of fact have deposed so in their testimony.

17. Learned counsel for the informant has also submitted that specific role of catching hold was assigned to acquitted accused persons and there was exhortation on their part also. Learned trial court did not consider the evidence in its right perspective and wrongly acquitted the accused persons. In support of his arguments, learned counsel for the complainant has placed reliance on the judgments of Apex Court in ***Rajendra Alias Rajappa and Others Vs. State of Karnataka, (2021) 6 Supreme Court Cases 178, (2) Phool Singh and Another Vs. State of U.P., 2022 (0) Supreme (All) 377 and (3) Gulab Vs. State of U.P., 2021(12) ADJ 271 (SC).*** It is contended that the acquittal is bad and is based on perverse finding.

18. As far as the acquittal of accused persons Jagat Singh, Suresh and Ramesh are concerned, learned trial court has held that P.W.-1, Krishna Pal, P.W.-3 Smt. Rajesh are parents of the deceased and P.W.-2 Praveen is cousin brother of the deceased and they are interested witnesses and hence then evidence must be scrutinised with care. Learned trial court has scrutinised their testimony meticulously and cautiously. Their testimony was not found,wholly reliable. There are many contradictions in their evidence which go to the root of the case.

19. We have also found various improvements in the testimony of prosecution evidence before the trial court. It is also very hard to believe that despite there being firing by accused persons on willingness but no one has sustained any injury and on analysing the evidence from the angle that three acquitted accused persons caught hold of the deceased simultaneously then also there was every possibility of

sustaining injury by them also, which has not come in ocular version of prosecution.

20. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

21. The principles, which would govern and regulate the hearing of an appeal by this Court against an order of acquittal, passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of ***M.S. Narayana Menon @ Mani vs. State of Kerala and another, (2006) 6 S.C.C. 39,*** the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

> *"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."*

22. Further, in the case of ***Chandrappa vs. State of Karnataka, reported in (2007) 4 S.C.C. 415,*** the Apex Court laid down the following principles;

> *"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:*

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

23. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

24. Even in the case of ***State of Goa vs. Sanjay Thakran and another, reported in (2007) 3 S.C.C. 75,*** the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under:

> *"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."*

25. Similar principle has been laid down by the Apex Court in cases of ***State of Uttar Pradesh vs. Ram Veer Singh and others, 2007 A.I.R. S.C.W. 5553 and in Girja Prasad (Dead) by L.R.s vs. State of MP, 2007 A.I.R. S.C.W. 5589.*** Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

26. In the case of ***Luna Ram vs. Bhupat Singh and others, reported in (2009) SCC 749,*** the Apex Court in para 10 and 11 has held as under:

> *"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye*

witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

27. Even in a recent decision of the Apex Court in the case of ***Mookkiah and another vs. State Representatives*** by the Inspector of Police, Tamil Nadu, reported in AIR 2013 SC 321, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction

or the other against an acquittal. ***[Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"***

28. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of ***State of Karnataka vs. Hemareddy, AIR 1981, SC 1417,*** wherein it is held as under:

" ... This Court has observed in ***Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124)*** *that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."*

29. In a recent decision, the Hon'ble Apex Court in ***Shivasharanappa and others vs. State of Karnataka, JT 2013 (7) SC 66*** has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

30. Further, in the case of ***State of Punjab vs. Madan Mohan Lal Verma, (2013) 14 SCC 153,*** the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of

any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

31. The Apex Court recently in ***Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219,*** has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10. It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl.

However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of ***Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606,*** *which reads thus:*

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

32. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SC 750,*** has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam, (2019) 18 SCC 161*** held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with

acquittal can only be justified when it is based on a perverse view.

33. The Apex Court has held in ***Ram Swaroop and Others Vs. State of Rajasthan, 2004 (0) Supreme (SC) 314***, that if the view taken by the trial court while acquitting the accused was a possible, reasonable view of on basis of sifting the evidence, the High Court ought not to interfere with such acquittal merely because it was possible to take contrary view. Paragraph of the said judgment is relevant, which is quoted here:-

> *"Having regard to the findings recorded by the trial court and having gone through the evidence on record, we are of the view that this was not a case in which the High Court ought to have interfered with the order of acquittal passed by the trial court. It is well settled that if two views are reasonably possible on the basis of the evidence on record, the view which favours the accused must be preferred. Similarly it is well settled that if the view taken by the trial court while acquitting the accused is a possible, reasonable view of the evidence on record, the High Court ought not to interfere with such an order of acquittal merely because it is possible to take the contrary view. It is not as if the power of the High Court in any way is curtailed in appreciating the evidence on record in an appeal against acquittal, but having done so, the High Court ought not to interfere with an order of acquittal if the view taken by the trial court is also a reasonable view of the evidence on record and the findings recorded by the trial court are not manifestly erroneous, contrary to the evidence on record or perverse."*

34. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellant.

35. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

> ***"299. Culpable homicide:*** *Whoever causes death by doing an act with the intention of causing death, 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, commits the offence of culpable homicide."*

36. 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 Section 299 and 300 of I.P.C. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.

INTENTION

(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

37. Dr. Ashok Kumar, P.W.-5, had conducted the post-mortem of the body of the deceased. In post-mortem report, the following ante mortem injuries were found:-

(i) A gun shot wound of entry size 1.5 X 1.5 cm, present on posterior lateral aspect of left arm, 16.0 cm below top of shoulder, blackening present in area of 2.0 cm X 2.0 cm around wound and tattooing present in area 28.0 cm X 14.0 cm around.

(ii) A exit wound size 2.25 cm X 1.0 cm inner side of left arm and 4.0 cm below the axilla and correspond to injury no.i.

(iii) A gun shot wound of entry size 2.75 cm X 1.5 cm present on lateral aspect of left chest and 12.0 cm away from left nipple at 3.0 O' Clock position. This injury correspond to injury no.ii in continuation.

38. Evidence on record goes to show that it is the case of prosecution in First Information Report that accused-Lakhan @

Babblu made a single fire only, that too by putting barrel of the weapon on the left arm of the deceased. Ante mortem injuries in post-mortem report go to show that bullet made entry wound on the left arm of the deceased and made exit wound also and then it entered the chest of the deceased. No second fire was made, hence, it appears that appellant-Lakhan @ Babblu had no intention to commit the murder of deceased but he intentionally caused such bodily injury as was likely to cause death.

39. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of ***Tukaram and Ors Vs. State of Maharashtra, reported in (2011) 4 SCC 250 and in the case of B.N. Kavatakar and Another Vs. State of Karnataka, reported in 1994 SUPP (1) SCC 304,*** we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

40. From the upshot of the aforesaid discussion, it appears that the death caused by the accused was not intended but he intentionally caused such bodily injury, which was likely to cause death, therefore, the instant case false under the Exceptions 4 to Section 300 IPC.

41. In the light of the foregoing discussions, the appeal is liable to be allowed in part. Appellant-Lakhan @ Babblu is held guilty for commission of the offence under Section 304 (Part-I) IPC instead of offence under Section 302 IPC.

42. Hence, the conviction and sentence awarded to the appellant-Lakhan @ Babblu for the offence under Section 302 IPC is converted into the offence under Section 304 (Part-I) IPC and appellant is sentenced under Section 304 (Part-I) IPC for 10 years rigorous imprisonment and fine of Rs.10,000/-. The appellant shall undergo further simple imprisonment for one year in case of default of payment fine.

43. In our view, the view, taken by the learned trial court with regard to the acquitted accused persons was possible view, hence, there is no need to interfere with their acquittal and the appeal preferred by the State is liable to be dismissed.

44. Accordingly, the appeal preferred by appellant-Lakhan @ Babblu is **partly allowed,** as modified above. The appeal preferred by State stands **dismissed.**

45. Record be sent to trial court immediately.

(Ajai Tyagi,J.) *(Dr. Kaushal Jayendra Thaker,J.)*

Order Date :- 4-8-2022
P.S. Parihar