IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 527 of 1996

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE A.S. SUPEHIA Sd/
and
HONOURABLE MR. JUSTICE M. R. MENGDEY Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**Yes**
2	To be referred to the Reporter or not ?	**Yes**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**No**
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	**No**

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STATE OF GUJARAT
Versus
PRAKASH @ PIDDU MITHUBHAI MULANI & 1 other(s)

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Appearance:
MS. KRINA CALLA, APP for the Appellant(s) No. 1
DR. HARDIK K RAVAL(6366) for the Opponent(s)/Respondent(s) No. 1,2
HCLS COMMITTEE(4998) for the Opponent(s)/Respondent(s) No. 1,2
NON BAILABLE WARRANT NOT RECEIVED BACK for the Opponent(s)/Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE A.S. SUPEHIA**
and
HONOURABLE MR. JUSTICE M. R. MENGDEY

Date : 07/12/2023

ORAL JUDGMENT
(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)

1. Vide order dated 04.09.2023, after hearing the learned Advocates for the respective parties and on analysis of the evidence, oral as well as documentary and on perusal of the judgment and order of the trial Court, we had recorded the guilt of accused No.1 - Prakash @ Piddu Mithubhai Mulani. We had set aside the judgment and order passed by the trial Court acquitting the accused and the matter was kept for hearing on the question whether the conviction should be recorded under Sections 302, 304 Part-I or 304 Part-II of the Indian Penal Code, 1806 (IPC). Today, we have again extended the opportunity to the learned advocate Dr.Hardik K. Raval appearing for the accused no.1 to make his submissions.

2. On 04.09.2023, the following order was passed:

> "1. The present appeal has been preferred by the appellant - State under Section 378 of the Code of Criminal Procedure, 1973 (herein after referred to as the "Cr.P.C") challenging the judgment and order dated 08.04.1996 passed by Additional Sessions Judge, Kachchh-Bhuj in Sessions Case No.93 of 1994, whereby the respondents have been acquitted for the offence punishable under Sections 302 and 114 of the Indian Penal Code, 1860 (herein after referred to as the "IPC").
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> 2. It is reported that accused no.2 – Raju Mithubhai Mulani has already passed away, and therefore, the appeal has abated qua him. Thus, the appeal is only confined to the accused no.1-Prakash @ Piddu Muthubhai Mulani.
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> 3. At the outset, learned APP has submitted that the judgment of the Trial Court recording the acquittal of the accused is perverse and suffers from the vice of non-application of mind since the Trial Court has failed to appreciate the dying declaration of the deceased as well as the evidence of the Executive Magistrate and the Doctors. While referring to the deposition of P.W.6 Chaitanyakumar Somalal Kansara, who was examined at Exh.21 on behalf of the prosecution, she has submitted that he has supported the case of prosecution and has categorically deposed that after recording the statement of the deceased implicating the accused, he has recorded the dying declaration. She has submitted that depositions of P.W.6 as well as P.W.11 Dr.Dayalbhai Mavjibhai Bhadra, who was examined at Exh.34 on behalf of the prosecution would reveal that the deceased was in fit state of mind and conscious. It is submitted that the accused no.1 had inflicted a blow on the vital part of the deceased on his neck, cutting the vital vein, which supplies

the blood which resulted into death and hence, the Trial Court, without appreciating the aforesaid evidence, has committed an error in acquitting the accused.

4. Learned APP has further referred to the dying declaration at Exh.22, wherein the deceased had categorically named the three accused including the accused no.1 by his nick name Piddu. she has further referred to the complaint given by the deceased Exh.51 on 19.05.1994 naming the accused and the manner in which he was assaulted.

5. Learned APP has further invited attention of this Court to the observations made by the Trial Court in its judgment and submitted that the Trial Court has incorrectly observed that P.W.11 – Dr.Dayalbhai Mavjibhai Bhadra and P.W.14. Dr.Jethalal Govind Padshubiya were required to be examined in affirming the complicity of the accused. She has submitted that such observation is incorrect on the face of record, as P.W.14 - Dr.Jethalal Govind Padshubiya was examined at Exh.46 on behalf of the prosecution, whereas P.W.11 – Dr.Dayalbhai Mavjibhai Bhadra was examined at Exh.34 on behalf of the prosecution. Thus, it is submitted that in fact, recording of the evidence by the Trial Court itself is perverse hence, the acquittal is required to be reversed.

6. In support of her submissions, learned APP has placed reliance on the judgment of the Apex Court in the case of ***Bhajju @ Karan Singh Vs. State of Madhya Pradesh*** reported in ***(2012) 4 SCC 327*** and the recent judgment of the Apex Court in the case of ***Irfan @ Naka Vs. State of Uttar Pradesh*** reported in ***2023 SCC OnLine SC 1060*** and asserted that if the dying declaration has been recorded in accordance with law and is reliable and gives cogent and plausible explanation of the occurrence of the events, then such dying declaration can certainly be relied upon by the Court and could form the sole piece of evidence resulting in the conviction of the accused. Thus, it is urged by learned APP that the impugned judgment and order may be quashed and set aside and the respondent no.1, who has inflicted fatal blow on the deceased may be convicted for the offence punishable under Section 302 of the IPC.

7. In support of her submissions, learned APP has placed reliance on the judgment of the Apex Court in the case of ***Shivaji Sahabrao Bobade & Anr. Vs. State of Maharashtra*** reported in ***(1973) 2 SCC 793*** and submitted that the Trial Court should not have acquitted the accused for a serious offence like murder and such acquittal would tend to lead to a cynical disregard of the law.

8. Learned APP has further submitted that the Trial Court, while recording the acquittal of the accused, was also impressed upon the compromise arrived at between the accused and sister of the deceased. She has submitted that for a serious offence like the offence under Section 302 of the IPC, a compromise, which is arrived at between the parties cannot be considered and the same cannot dilute such a heinous offence.

9. Mr.Hardik Raval, learned advocate for the respondent no.1 has opposed the present appeal inter alia contending that the acquittal of the

Trial Court does not require any interference since the same is precisely passed by the Trial Court after appreciating the evidence.

10. Learned advocate for the respondent no.1 has submitted that the dying declaration recorded by the Executive Magistrate is not required to be believed since there is a dispute with regard to putting of the finger print on such dying declaration. While referring to the FIR produced at Exh.51, which has given by the deceased and to the evidence of the Executive Magistrate (Exh.21), it is submitted by him that there is discrepancy with regard to the putting of signature by the deceased by his left thumb. Thus, he has submitted that such dying declaration should be discarded, as the same has been precisely discarded by the Trial Court.

11. Learned advocate for the respondent no.1 has further referred to the deposition of P.W.11 Dr.Dayalbhai Mavjibhai Bhadra, who was examined at Exh.34 and submitted that his deposition also does not implicate the accused in any manner. While referring to the dying declaration of the deceased, he has submitted that in fact, the deceased has only referred to the nick name of the accused no.1 as Piddu and there is no evidence to suggest that the accused no.1 is in fact known as Prakash @ Piddu Mithubhai Mulani. He has also invited attention of this Court to the observations made by the Trial Court and urged that the acquittal may not be entertained, as the only evidence is the dying declaration and the same cannot be considered for convicting the present respondent no.1- accused no.1 – Prakash @ Piddu for the offence punishable under Section 302 of the IPC.

12. We have heard the learned advocates for the parties at length and perused the material available on record. The evidence is also scaled by us threadbare. Before we examine the evidence further, it would be apposite to refer to the dying declaration given by the deceased at Exh.22. The same is recorded by the Executive Magistrate (P.W.6). The translated version is incorporated as under:-

> "Question:- What has happened to you and why have you come to the hospital?
>
> Answer:- Kali, piddu and Raju were making fun of my sister at eight o'clock at night today and as I prevented them from doing so, Kali and Raju caught hold of me and piddu inflicted knife blow on my throat. I did not have any dispute with them earlier nor I had any altercation. Kali has also threatened to kill me.
>
> The above declaration is read over to me and it is true and correct as stated by me. I have made signature on the declaration to that effect. While recording this statement, no one is standing near my cot.
>
> Recording of dying declaration got over at 23.55."

13. The dying declaration (Exh.22) categorically refers three names as Kali, Piddu and Raju, who have assaulted the deceased. The role of the present applicant is specifically described by the deceased by stating that

"*Piddu has inflicted a blow on his neck by knife*". P.W.6 Chaitanyakumar Somalal Kansara, who was examined at Exh.21 on behalf of the prosecution has supported the case of prosecution. In his examination-in-chief, he has deposed that on 09.05.1994, at around 11.30 p.m., he was informed by the Aadipur Police Station to record the dying declaration in the form of Yadi and accordingly, he went to Rambaugh Hospital and in presence of the Doctor, he has recorded the dying declaration of the deceased. It is specifically deposed by the Executive Magistrate (P.W.6) that the deceased was fully conscious and he was able to interact. It is deposed that accordingly, a certificate was also obtained by him, and thereafter, he started recording the statement of the deceased on 11.45 p.m. till 11.55 p.m. He has further deposed that he has undertaken the thumb impression of the deceased. On a specific question asked with regard to thumb impression, as recorded in his evidence at Exh.21, the Executive Magistrate has specifically stated that since the accused was unable to put his signature, he has taken his thumb impression. The translated version of questions and answers are incorporated as under:-

> "Question:- Why have you obtained thumb impression?
>
> Note:- The Defense has raised objection that this is leading question. The objection is rejected as the question is for seeking clarification.
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> Answer:- I had read over the statement to him and he stated that the same was true and correct , therefore, the thumb impression was obtained to that effect. He denied to make signature and stated that he does not know to make signature and hence, his thumb impression was obtained."

14. In the cross-examination, the Executive Magistrate has clarified that he had identified the thumb impression. The Trial Court has disbelieved the evidence of dying declaration (Exh.22) as well as Executive Magistrate (P.W.6) for the reason that it was doubtful whether the thumb impression, which was made on the dying declaration, was of left hand or right hand. Since the Executive Magistrate, in his cross-examination, has stated that the Glucose bottle from which the accused was administered the glucose, the needle was administered in his left hand, whereas in the complaint at Exh.51, the deceased had mentioned that since in the right hand, glucose bottle was being administered, he could not put his signature and hence, he has put the thumb impression on left hand. In the considered opinion of this Court, merely because there is minor discrepancy coming out with regard to the thumb impression whether it was left hand or right hand, the evidence of the Executive Magistrate as well as dying declaration of the deceased could not have been discarded by the Trial Court. The deceased was being treated at the hospital by three doctors i.e. P.W.11 – Dr.Dayal Mavjibhai Bhadra, P.W.12-Vinodbhai Ganesh Bakshi and P.W.14-Dr.Jethalal Govindbhai

Padshubiya. P.W.11 – Dr.Dayal Mavjibhai Bhadra, in his evidence recorded at Exh.34, has categorically asserted that the deceased was conscious and he was well oriented. He has described his injuries on his neck and has stated that such injuries would have been caused by muddamal article no.3 – knife. He has also issued the certificate which was produced at Exh.35, wherein it is revealed that the patient was well oriented, clothes were stained with blood and the certificate further reveals that there was stab wound on the right side of neck at the level of lower end of thyroid cartiledge, stabing C Sharp cutting and injuries were received around half an hour ago. Thus, the evidence of the said doctor indubitably reveals that the deceased had received grievous injuries on his vital part, cutting of his main veins.

15. Thereafter, P.W.12-Vinodbhai Ganesh Bakshi in his evidence at Page No.86, who was serving at Bhuj General Hospital as a Medical Officer and has treated the deceased at 1.00 O'clock in the night, has deposed that the condition of the deceased was very serious and there was excessive bleeding from his neck. After giving treatment, he refererd to the ENT Surgeon Dr.Padshubiya. Finally, the deceased was treated by P.W.14-Dr.Jethalal Govind Padshubiya, who was examined at Exh.46 on behalf of the prosecution. The deposition of this doctor reveals that the deceased was administered glucose when he was brought to his hospital at Bhuj viz. G.K.General Hospital in the early morning at 2.00 O'clock on 10.05.1994. He has also described the injuries on his neck and has stated Jagular Vein was absolutely cut and accordingly, necessary surgery was undertaken. In his cross-examination, he has deposed that the operation was undertaken in the morning at 10.00 O'clock till 12.00 p.m. He has specifically denied the suggestion that during his surgery, the Jagular Vein was cut. He has also denied due to his surgery, the deceased has passed away or his surgery has resulted into his death.

16. A combined reading of the aforesaid doctors, who had treated the deceased would reveal that he was admitted in a serious condition with fatal wound on his neck and ultimately, he succumbed to such injuries. It is also revealed that the deceased was in a fit state of mind and was well oriented and accordingly, the Executive Magistrate has also recorded that after asserting such state of mind, his dying declaration was recorded. The deceased had given a complaint on 09.05.1994 narrating the incident therein. He has specifically stated that on 09.05.1994, at around 10.00 p.m., when he was present at his home, his elder brother – Bharat informed him that when their sister - Sarla was coming at home, near the temple, there were three persons present in which the accused – Piddu, his brother Raju and Kali Mohandas were teasing her and also using abusive language and he went to the place along with Ratan Manohar (P.W.2) and at that time, when he warned the accused not to tease her sister, all of them got

agitated. It is further stated in the complaint that the accused – Raju and Kali grabbed him, whereas accused – Piddu took out his knife and inflicted blow on his neck. He has further stated that thereafter, lot of people gathered there, listening to hue and cry and he was taken to the rickshaw at Rambaugh Dispensary. Thus, as per the cause stated in the complaint, the deceased was assaulted by the accused when he confronted them not to tease his sister. Thus, complaint (Exh.51) read in juxtaposition with his dying declaration (Exh.22), the complicity of the accused no.1 is established beyond reasonable doubt. The Executive Magistrate has also stood the rigors of the cross-examination and has supported the case of prosecution.

17. The Trial Court has impressed upon the compromise arrived at between the parties. The P.W.3 Sarla Krishnamurti, sister of the deceased, who was examined at Exh.18 on behalf of the prosecution and P.W.2 – Ratan Manohar, who was examined at Exh.17 on behalf of the prosecution have not supported the case of prosecution in view of compromise. At this stage, we may also refer to glaring error committed by the Trial Court in recording the dying declaration (Exh.22) that the prosecution has not examined witnesses P.W.11 – Dr.Dayalbhai Mavjibhai Bhadra and P.W.14. Dr.Jethalal Govind Padshubiya. Such finding is not only incorrect, but perverse since the very same Trial Court has examined P.W.11 – Dr.Dayalbhai Mavjibhai Bhadra as well as P.W.14. Dr.Jethalal Govind Padshubiya and it is further recorded by the Trial Court that though P.W.11 – Dr.Dayalbhai Mavjibhai Bhadra has issued certificate at Exh.22, he was not examined as a witness. Since we find that the dying declaration of the deceased does not in any manner suffer with any infirmity and is not tainted with any vice, as per the decision of the Apex Court in the case of **Bhajju @ Karan Singh (supra)**, such dying declaration is admissible and can certainly relied upon by the Court and could form the sole piece of evidence resulting the conviction of the accused. The Supreme Court in the case of **Bhajju @ Karansingh (supra)** has has observed thus:-

> “22. The law is very clear that if the dying declaration has been recorded in accordance with law, is reliable and gives a cogent and possible explanation of the occurrence of the events, then the dying declaration can certainly be relied upon by the Court and could form the sole piece of evidence resulting in the conviction of the accused. This Court has clearly stated the principle that Section 32 of the Indian Evidence Act, 1872 (for short `the Act') is an exception to the general rule against the admissibility of hearsay evidence. Clause (1) of Section 32 makes the statement of the deceased admissible, which is generally described as a `dying declaration'.
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> 23. The `dying declaration' essentially means the statement made by

> a person as to the cause of his death or as to the circumstances of the transaction resulting into his death. The admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man's mind, the same feeling as that the conscientious and virtuous man under oath. The dying declaration is admissible upon the consideration that the declaration was made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to file a false suit is silenced in the mind and the person deposing is induced by the most powerful considerations to speak the truth.
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> 24. Once the Court is satisfied that the declaration was true and voluntary, it undoubtedly can base its conviction on the dying declaration, without requiring any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated by other evidence."

18. In the present case, there are two dying declarations in the form of FIR 09.05.1994 (Exh.51) as well as Exh.22, which is recorded by the Executive Magistrate, Gandhidham. As per the deposition of the P.W.17, the accused have surrendered themselves in the Police Station along with knife. The Investigating Officer especially deposed that accused – Prakash @ Piddu, Raju had come to the Police Station and accordingly, he had undertaken the necessary panchnama at Exh.54, which reveals the name and the first part of the panchnama records that they have stated their names as Prakash @ Piddu, aged about 19 years, Resident of Adipur and accordingly, deposited the knife used in the offence. We may also refer to the FSL report produced below Exh.60, wherein the blood of the deceased has been found on the knife. A Rampuri knife in sample no.1 shown the presence of blood group "A" which is pitch matches with the blood group of the deceased (Sample No.7). The Trial Court has ignored such vital evidence and hence, in our considered opinion, with recording a perverse finding, the Trial Court has acquitted the present respondent no.1 from the offence punishable under Section 302 of the IPC. Hence, we set aside the acquittal recorded by the Trial Court. However, whether the conviction should be recorded under Section 302, 304(I) or 304(II) of the IPC, we would like to hear the accused no.1 – Prakash @ Piddu Mithubhai Mulani. Hence, the present appeal is ordered to be listed on **26.09.2023**. Registry is directed to issue bailable warrant of Rs.10,000/- to be served through concerned Police Station on the accused no.1."

3. After the aforenoted order was passed, the matter was adjourned, as learned Advocate Dr.Hardik K. Raval appearing for the accused no.1 was not in contact with him, and hence bailable warrant was issued. After he appeared before us, he had remained absconded and hence, the Court was constrained to issue non-bailable warrant and ultimately the accused was produced before this Court. Today, the accused is present before this Court.

4. Learned Advocate Dr. Hardik K. Raval appearing for the sole surviving accused no.1, Prakash @ Piddu Mithubhai Mulani has submitted that the evidence suggests that the conviction of the accused can be confined to the provisions of Section 304 Part-II of the IPC or maximum to the provisions of Section 304 Part-I of the IPC looking to the manner in which the incident had occurred. He has submitted that there was no premeditation on behalf of the accused and the accused had no intention to commit murder of the deceased since the incident had occurred due to altercation between the deceased and the accused No.1. It is submitted that the blow was inflicted in a heat of passion due to altercation between the deceased and the accused. In support of his submission, learned Advocate Dr.Hardik K. Raval has placed reliance on the judgment of the Apex Court in the case of Anbazhagan v. State Represented by the Inspector of Police, 2023 SC 3660. It is thus urged by the learned Advocate Dr.Hardik K. Raval to give the benefit of exceptions to Section 300 of the IPC since many years from the incident have passed. It is urged by him that by invoking the provisions of Section 304 Part-II of the IPC, the accused may be sentenced to a minimum of 5 years.

5. In response to the aforesaid submissions made by learned Advocate Dr.Hardik K. Raval, learned APP Ms.Krina Calla has submitted that in fact the evidence suggests that the accused had committed a cold-blooded murder of the deceased by inflicting a blow on the neck of the deceased. She has submitted that in fact the co-accused, who had passed away, caught hold of the deceased and his movement was restricted and the present accused has very precisely inflicted a blow on his neck, which is a vital part of the body. Learned APP has further submitted that in fact the evidence reveals that the accused had teased the sister of the deceased one hour prior to the incident and accordingly when he arrived at the scene of offence where the three accused persons were present and inquired about the teasing of his sister, the accused persons caught hold of the deceased and hence, the present accused cannot be given the benefit of exception to Section 300 of the IPC and it is urged that he may be convicted for the offence of Section 300 of the IPC and punished as per the provisions of Section 302 of the IPC.

6. As recorded in the abovementioned order dated 04.09.2023, the deceased succumbed to the injuries which were inflicted on the vital part of the body i.e. the neck by the present accused. The blow was inflicted with such a precision that it cut the vital vein which supplies the blood. The evidence also suggests that the other co-accused had caught hold of the deceased and thus, his movement was totally restricted and the accused, with a precise intention to inflict injury on the neck of the deceased, had inflicted a blow of knife.

7. At this stage, it would be apposite to refer to the observations of the Apex Court in case of ***Anbazhagan v. State Represented by the Inspector of Police (supra***) wherein the Apex Court, after threadbare

analysis of the provisions of Sections 299 and 300 of the IPC as well as various judgments, touched to the issue as prescribed in paragraph No.60, which are as under:

''60. Few important principles of law discernible from the aforesaid discussion may be summed up thus:-

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

(2) Even when the intention or knowledge of the accused may fall within Clauses (1) to (4) of Section 300 of the IPC, the act of the accused which would otherwise be murder, will be taken out of the purview of murder, if the accused's case attracts any one of the five exceptions enumerated in that section. In the event of the case falling within any of those exceptions, the offence would be culpable homicide not amounting to murder, falling within Part 1 of Section 304 of the IPC, if the case of the accused is such as to fall within Clauses (1) to (3) of Section 300 of the IPC. It would be offence under Part II of Section 304 if the case is such as to fall within Clause (4) of Section 300 of the IPC. Again, the intention or knowledge of the accused may be such that only 2nd or 3rd part of Section 299 of the IPC, may be attracted but not any of the clauses of Section 300 of the IPC. In that situation also, the offence would be culpable homicide not amounting to murder under Section 304 of 50 the IPC. It would be an offence under Part I of that section, if the case fall within 2nd part of Section 299, while it would be an offence under Part II of Section 304 if the case fall within 3rd part of Section 299 of the IPC.
(3) To put it in other words, if the act of an accused person falls within the first two clauses of cases of culpable homicide as described in Section 299 of the IPC it is punishable under the first part of Section 304. If, however, it falls within the third clause, it is punishable under the second

part of Section 304. In effect, therefore, the first part of this section would apply when there is 'guilty intention,' whereas the second part would apply when there is no such intention, but there is 'guilty knowledge'.

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

(5) Section 304 of the IPC will apply to the following classes of cases: (i) when the case falls under one or the other of 51 the clauses of Section 300, but it is covered by one of the exceptions to that Section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression 'sufficient in the ordinary course of nature to cause death' but is of a lower degree of likelihood which is generally spoken of as an injury 'likely to cause death' and the case does not fall under Clause (2) of Section 300 of the IPC, (iii) when the act is done with the knowledge that death is likely to ensue but without intention to cause death or an injury likely to cause death. To put it more succinctly, the difference between the two parts of Section 304 of the IPC is that under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while under the second part, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the offence punishable under the second part of Section 304 of the IPC, the accused need not bring his case within one of the exceptions to Section 300 of the IPC.

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

(7) The distinction between culpable homicide (Section 299 of the IPC) and murder (Section 300 of the IPC) has always to be carefully borne in mind while dealing with a charge under Section 302 of the IPC. Under the category of unlawful homicides, both, the cases of culpable homicide amounting to murder and those not amounting to murder would fall. Culpable homicide is not murder when the case is brought within the five exceptions to Section 300 of the IPC. But, even though none of the said five exceptions are pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of Section 300 of the IPC to sustain the charge of murder. If the 53 prosecution fails to discharge this onus in establishing any one of the four clauses of Section 300 of the IPC, namely, 1stly to 4thly, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under Section 299 of the IPC.

(8) The court must address itself to the question of mens rea. If Clause thirdly of Section 300 is to be applied, the assailant must intend the particular injury inflicted on the deceased. This ingredient could rarely be proved by direct evidence. Inevitably, it is a matter of inference to be drawn from the proved circumstances of the case. The court must necessarily have regard to the nature of the weapon used, part of the

body injured, extent of the injury, degree of force used in causing the injury, the manner of attack, the circumstances preceding and attendant on the attack.
(9) Intention to kill is not the only intention that makes a culpable homicide a murder. The intention to cause injury or injuries sufficient in the ordinary cause of nature to cause death also makes a culpable homicide a murder if 54 death has actually been caused and intention to cause such injury or injuries is to be inferred from the act or acts resulting in the injury or injuries.
(10) When single injury inflicted by the accused results in the death of the victim, no inference, as a general principle, can be drawn that the accused did not have the intention to cause the death or that particular injury which resulted in the death of the victim. Whether an accused had the required guilty intention or not, is a question of fact which has to be determined on the facts of each case.
(11) Where the prosecution proves that the accused had the intention to cause death of any person or to cause bodily injury to him and the intended injury is sufficient in the ordinary course of nature to cause death, then, even if he inflicts a single injury which results in the death of the victim, the offence squarely falls under Clause thirdly of Section 300 of the IPC unless one of the exceptions applies.
(12) In determining the question, whether an accused had guilty intention or guilty knowledge in a case where only a single injury is inflicted by him and that injury is sufficient 55 in the ordinary course of nature to cause death, the fact that the act is done without premeditation in a sudden fight or quarrel, or that the circumstances justify that the injury was accidental or unintentional, or that he only intended a simple injury, would lead to the inference of guilty knowledge, and the offence would be one under Section 304 Part II of the IPC."

8. We may also incorporate paragraph Nos.37, 38 and 39 of the said judgment, which are as under:

"37. This Court in Phulia Tudu (supra) has observed that 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 of the IPC. 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 *(b) with the intention of causing such bodily injury as is likely to cause death; or*	*(1) with the intention of causing 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; or* *(3) with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or*
KNOWLEDGE	
(c) with the knowledge that the act is likely to cause death	*(4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as is mentioned above.*

38. Clause (b) of Section 299 of the IPC corresponds with clauses (2) and (3) of Section 300 of the IPC. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This clause (2) is borne out by illustration (b) appended to Section 300 of the IPC.

39. Clause (b) of Section 299 of the IPC does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 of the IPC can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result; of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In clause (3) of Section 300 of the IPC, instead of the words "likely to cause death" occurring in the corresponding clause (b) of Section 299 of the IPC, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in

> *miscarriage of justice. The difference between clause (b) of Section 299 of the IPC and clause (3) of Section 300 of the IPC is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word 'likely' in clause (b) of Section 299 of the IPC conveys the 27 sense of probable as distinguished from a mere possibility. The words "bodily injury…..sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature."*

9. While explaining the fine distinction between the provisions of Sections 299 and 300 of the IPC, which refers to expression "*likely to cause death and sufficient in the ordinary course of nature*", the Apex Court has held that even if a single injury is inflicted and if that particular injury is found objectively to be sufficient in the ordinary course of nature to cause death, the requirements of clause Thirdly is attracted and it would be murder, unless one of the exceptions to Section 300 of the IPC is attracted.

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

11. The relevant Exceptions to Section 300 of the IPC of which the benefit is being sought by the accused are as under:

> *"Exception 1.—When culpable homicide is not murder.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.*
>
> *The above exception is subject to the following provisos:—*

First.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.

12. It is contended that the accused is entitled to the benefit of Exception 4 to Section 300 of the IPC. The ingredients of Exception 4 is that Culpable homicide is not murder if it is committed without premeditation in a sudden fight in a heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner. The Explanation to Exception 4 suggests that it is immaterial in such cases which party offers the provocation or commits the first assault. We may also consider as to whether the case falls under Exception-1 to Section 300 of the IPC also.

13. In the present case, the evidence suggests that the deceased had come at the place of incident in order to inquire about his sister being teased by the accused persons and the accused and the co-accused caught hold of him and the present accused inflicted a single blow of knife i.e. on the throat, cutting of his vital vein. Thus, there was a clear intention on the part of the accused to inflict blow of knife on the neck of the decease. The evidence does not in any manner

suggests that there was a sudden quarrel or sudden fight and the provocation was not voluntary. The accused has miserably failed to establish that there was sudden and grave provocation and he was deprived of power of self-control, and he caused the death of the deceased while was still in such state of mind.

14. It is manifest from the evidence that the accused has taken undue advantage and had acted in cruel manner by inflicting a blow with such a precision to cut the vein of the deceased after his movement was totally restricted by the co-accused. The accused was already armed with the knife when the deceased had come to inquire about their act of teasing his sister.

15. In these circumstances the accused cannot be granted benefit of either of Exception-I or Exception-IV to Section 300 of the IPC and the offence would not fall either under the provisions of Part-I of Section 304 or Part-II of Section 304 of the IPC.

16. The injury definitely was inflicted in such a manner which would attract the provisions of Clauses secondly and thirdly to Section 300 of the IPC. The accused can be attributed with the knowledge that if in such circumstances in which the deceased was made helpless and the injuries inflicted on his vital part that would cut his veins of the neck, he would definitely succumb to death. The intention of causing such injuries on the vital part of the body can be gathered from the act of the accused no.1 as the physical movement of the deceased was totally restricted and confined and hence, the accused no.1 had all the opportunity to inflict the injury on the vital part i.e. on the neck of the deceased cutting of the vein.

17. On the substratum of the foregoing analysis, we reject the contention raised by the learned advocate for the accused to grant him the benefit of Exceptions to Section 300 of the IPC.

18. We therefore convict the accused - Prakash @ Piddu Mithubhai Mulani for committing the murder of the deceased and the incident satisfies the provisions of Section 300 of the IPC. As a sequel, the punishment prescribed under the provisions of Section 302 of the IPC gets attracted. The accused - Prakash @ Piddu Mithubhai Mulani is convicted for the offence of murder and is sentenced to suffer rigorous imprisonment for life. He is also imposed a fine of Rs.5,000/- and in default to undergo simple imprisonment for six months.

19. At this stage, learned Advocate Dr. Hardik K. Raval appearing for the accused has suggested that some time may be granted to the accused to surrender.

20. Since the offence is of the year 1994 and we are recording the conviction of the accused - Prakash @ Piddu Mithubhai Mulani after almost 30 years, we grant the accused - Prakash @ Piddu Mithubhai Mulani 21 days' time to surrender before the concerned trial Court within a period of 21 days.

21. In case the accused - Prakash @ Piddu Mithubhai Mulani fails to surrender before the concerned trial Court within the stipulated time period, the trial Court shall undertake necessary procedure to procure his custody.

22. The accused - Prakash @ Piddu Mithubhai Mulani shall mark his presence before the concerned Police Station once in 5 days till he surrenders before the concerned Trial Court.

23. The appeal succeeds. R&P shall be returned to trial Court.

(A. S. SUPEHIA, J)

(M. R. MENGDEY,J)

J.N.W / GIRISH