

Dalip Tripathi vs State on 27 March, 2025

Author: Dharmesh Sharma

Bench: Prathiba M. Singh, Dharmesh Sharma

* IN THE HIGH COURT OF DELHI AT NEW DELHI
% Judgment reserved on: 10 March 2024
Judgment pronounced on: 27 March 2025
+ CRL.A. 277/2020
DILIP TRIPATHI ...Appella
Through: Ms. Anu Narula, Adv.
versus
STATE (NCT OF DELHI)Respond
Through: Mr. Ritesh Kumar Bahri, APP
with Ms. Divya Yadav and Mr
Lalit Luthra, Adv. with SI
Pravesh, PS Mundka.
AND
+ CRL.A. 484/2020 & CRL.M.A. 26309/2024
RAJU TIWARI ...Appella
Through: Mr. S.S. Ahluwalia and Ms.
Saniya Zehra, Adv. (M:
9650160444)
versus
STATE (GNCT OF DELHI)Respond
Through: Mr. Ritesh Kumar Bahri, APP
with Ms. Divya Yadav and Mr
Lalit Luthra, Adv. with SI
Pravesh, PS Mundka.
CORAM:
MS. JUSTICE PRATHIBA M. SINGH
MR. JUSTICE DHARMESH SHARMA

JUDGEMENT

DHARMESH SHARMA, J.

1. This judgment shall decide upon the aforementioned two appeals filed under Section 374(2) of the Criminal Procedure Code, 1973 ["Cr.P.C."], assailing the judgment dated 15.01.2020 passed by the learned Additional Sessions Judge-02 (West), Tis Hazari Court ["trial Court"], whereby the appellants/accused, Dilip Tripathi (hereinafter referred to as 'A-1') and co-accused/co- appellant Raju Tiwari (hereinafter referred to as 'A-2'), were convicted under Section 302 read with Section 34 of the Indian Penal Code ,1860 ["IPC"]. Consequently, by the order on sentence dated 18.01.2020, both A-1 and A-2 were sentenced to undergo rigorous imprisonment for life and to pay a fine of

Rs.5,000/- each, with a further stipulation that, in the event of default, they shall undergo an additional three months of rigorous imprisonment. Considering the similarity of the issues involved, both matters are appropriately heard and adjudicated together. FACTS OF THE CASE:

2. In brief, the prosecution's case is that on 17.03.2014, DD1 No.42A Ex. PW-20/A was recorded regarding a murder near Sombir Property, Village Tikri, Rohtak Road, which information was relayed telephonically to SI 2 Kuldeep Singh PW-25, who, accompanied by Constable Sudhir PW-21, proceeded to the scene of the incident at Drall Properties, Main Bahadurgarh Road, Mundka, Delhi, where they were Daily Diary Sub-Inspector joined by the SHO 3 of PS 4 Mundka, along with Inspector Sanwar Mal PW-26, IO5. They discovered a deceased male lying on a heap of building material (bajri), who was identified as Bharat (hereinafter referred as the 'deceased') son of PW-1 Sat Narain Choudhary. Bloodstains were observed on the deceased's clothing, and injury marks were visible on his head. Further inspection of the premises revealed bloodstains on the floor inside Drall Property Shop, with traces indicating that the deceased had been dragged from inside the shop to the exterior. A bailcha and a kassi (fawda) bearing bloodstains were also discovered within the premises. Consequently, a crime team was summoned, which proceeded to document the scene through photographs Ex. PW-13/ B-1 to B-14 and prepared a report accordingly Ex.PW-14/A.

3. The IO/ PW-26 recorded the statement Ex.PW-4/A of Satbir Singh PW-4, the proprietor of Drall Property at P.No. 547, Main Rohtak Road, where the incident had occurred. He stated that his property shop also dealt in building materials at the rear side of the shop. According to PW-4, on 17.03.2014, at approximately 6:30 PM, his servant, PW- 17 Ram Brij Paswan @ Ranbir, informed him telephonically about a violent altercation between the deceased and two individuals, namely Dilip Tripathi (A-1) and Raju Tiwari (A-2), resulting in grievous injuries to the deceased. PW-4 further stated that all four individuals Station House Officer Police Station Investigating Officer were neighbours residing within the property shop. Upon arriving at the scene, PW-17 was examined by the IO/PW-26 who reiterated that a scuffle had occurred between the deceased and both A-1 and A-2, who subsequently fled, switching off their mobile phones. On the basis of PW-4's statement, the IO/PW-26 made the Rukka endorsement Ex.PW- 4/A, which was handed over to PW-21 Constable Sudhir, leading to the registration of FIR No. 125/2015 Ex.PW-20/B on 17.03.2014 at PS Mundka under Sections 302 and 201 read with Section 34 IPC.

4. In furtherance of the investigation, IO/PW-26 prepared the site plan Ex. PW-4/B and needless to state the blood-stained earth samples and control earth samples were collected and seized vide memo Ex.PW- 4/C from the vicinity of the deceased's body, as well as from within the office of Drall Properties. Additionally, two blood-stained fawras and a belcha without wooden handles Ex. PW21/P-3 & 1 respectively were seized vide Ex.PW-4/E. A dark blue Samsung mobile phone bearing IMEI No. 351841/05/474029/7, model GT-E-122OT Ex.PW-4/F, containing an Idea SIM card No.8991048408-1193659116 H2, was recovered from under a bed in the office of Drall Properties. Furthermore, a bunch of hair found near a wall inside the office was collected, sealed, and seized vide memo Ex.PW4/D. The deceased's body was subsequently sent to SGM Hospital for preservation and post- mortem.

5. Suffice to state the police led by IO/PW-26 along with the complainant PW-4 Satbir Singh on receiving secret information, proceeded to a store/plot owned by PW-10 Bhim Singh, located on Bahadurgarh, Jhajjar Road, Haryana, and inside, both A-1 and A-2, were found sleeping on a bedsheet. Bloodstains were visible on their hands and clothes. Both A-1 and A-2 were overpowered, interrogated, and subsequently arrested vide arrest memos Ex.PW4/H and Ex.PW4/G and personal search memos were duly prepared vide Ex.PW4/I and Ex.PW4/J. Both A-1 and A-2 then made disclosure statements vide Ex.PW4/K and Ex.PW4/L.

6. During interrogation, A-2 retrieved a chocolate and silver, Samsung made mobile phone Ex.PW21/F. The said mobile device bore IMEI Nos. 357078/05/059764/5, 357079/05/059764/3 and was identified as model GTC-3322, equipped with dual SIMs--Airtel SIM No. 899198000070-1628519 and Idea SIM No. 89910434081384737565H2. The appellants identified the said mobile phone as the property of the deceased Ex. PW-21/P-1, which was duly seized. Additionally, a cloth bag containing the appellant's clothing was discovered. Their blood-stained garments were replaced and seized vide Ex.PW21/B and Ex.PW21/A. Blood swabs were collected from the hands and legs of both A-1 and A-2 using wet cotton swabs, which were placed in separate plastic containers, sealed, and seized vide Ex.PW21/C and Ex.PW21/D.

7. In pursuance of their disclosure statements, both A-1 and A-2 led the police behind Drall Properties, where, from a vacant plot on the southern side, A-2 retrieved a broken wooden handle of a fawra, which was blood-stained. Both the A-1 and A-2 confessed to using the wooden danda, Ex.PW21/E, approximately two feet in length, to cause injuries to the deceased. Following the recovery, both A-1 and A-2 were taken to the police station, and the seized items were deposited in the Malkhana for further proceedings.

8. Both A-1 and A-2 were then produced before the court, where a one-day police custody remand was granted. During this period, they were sent to SGM Hospital through Constable Sudhir PW-21 and Constable Anil PW-19 for medical examination and collection of blood samples which were duly sealed and seized vide Ex.PW21/G and Ex.PW19/A.

9. Acting in accordance with the procedural requirements, the IO/PW-26 on 19.03.2014, accompanied by the deceased's father, PW- 1 Sat Narayan Choudhary and uncle, PW-2 Ramu Chaudhary, proceeded to SGM Hospital, where the post-mortem examination was conducted. As part of the inquest proceedings, the IO/PW-26 prepared the necessary documents, including the request for post-mortem Ex.PW26/B, the brief facts of the incident Ex.PW26/C, and Form 25.35 Ex.PW27/D. The PM 6 examination was carried out by Dr. Vivek Rawat and PW-12 Dr. Manoj Dhingra, who subsequently issued PM Report No. 271/14 Ex.PW-12/A, dated 19.03.2014. As per the medical opinion, the cause of death was determined to be shock associated with a head injury (identified as injury no. 9), which was fresh and ante-

Post-Mortem mortem in nature. The said injury was opined to be sufficient in the ordinary course of nature to cause death. Furthermore, all injuries observed on the deceased's body were found to be ante-mortem, caused by blunt force trauma.

10. Upon completion of the PM proceedings, the deceased's body was formally handed over to his family against receipt Ex.PW1/B. The IO also recorded the statements of the deceased's father, PW-1 Sat Narayan Choudhary Ex.PW1/A, and uncle, PW-2 Ramu Chaudhary Ex.PW2/A, confirming the identification of the body.

11. Subsequently, forensic exhibits were deposited at FSL 7, Rohini, for expert analysis. CDRs 8 of the deceased and the appellants were also obtained. Statements of various witnesses involved in different stages of the investigation were recorded. Upon completion of the investigation, a charge sheet dated 15.06.2024 was prepared and filed before the competent court for judicial adjudication.
PROSECUTION WITNESSES

12. On completion of investigation, formal charges were framed against both the appellants on 18.05.2015 for committing offence punishable under Section 302 read with Section 34 IPC to which they pleaded not guilty and claimed trial. During the course of the trial, the prosecution examined a total of 26 witnesses.

12.1 The main witnesses for the prosecution were: PW-17, Ram Braj Paswan, who was employed alongside the deceased as well Forensic Science Laboratory Call Detail Records as A-1 & A-2, was an eyewitness to the incident. PW-4, Satbir Singh, the employer of deceased and complainant of the incident.

12.2 Public Witnesses were: PW-1, Satyanarayan Chaudhary, father of deceased. PW-2, Ramu Chaudhary, uncle of deceased. PW-5 Smt. Sunita, sister of deceased, who confirmed that deceased used an Idea SIM card registered in her name Ex. PW5/A, PW5/B. PW-6, Ram Sakal Chaudhary, the brother-in-law of the deceased, deposed that he spoke to the deceased on the day of the incident, i.e., 17.03.2014, at approximately 6:00 PM. During this conversation, the deceased informed him about a dispute that had arisen between himself and A-1 and A-2 regarding drinks and snacks. PW-9, Subhash Chand, stated that he reported the incident telephonically to the police between 6:30 PM and 7:00 PM on 17.03.2014, after being informed by a dhaba worker that Raju had killed Bharat. PW-10, Bhim Singh, the former employer of A-2, deposed that A-2 was employed under him until November 2013. He further assisted in the arrest of A-

2. PW-11, Rishipal, confirmed that he had issued a Vodafone SIM card (8860550430) to PW-17, which PW-17 used while employed at Drall Properties Ex. PW7/A and PW7/B. 12.3 Medical/Expert Witnesses were: PW-12, Dr. Manoj Dhingra, Incharge of the Mortuary at Sanjay Gandhi Memorial Hospital, Mangol Puri, Delhi, conducted the post-mortem examination on the body of the deceased and prepared the post-mortem report marked as Ex. PW-12/A. PW-27, Naresh Kumar, Sr. scientific officer (biology), FSL Rohini, Delhi, who conducted the DNA profiling. PW-24 Sh. Chander Shekhar, Nodal Officer, Bharti Airtel Ltd., 224, Okhla Phase-III, New Delhi, who brought the original record of CAF9 to mobile no. 9974342445 Ex. PW-24/A. PW-7, Sh. Israr Babu, Alternate Nodal Officer, Vodafone Mobile Services Ltd., C-45 Okhla Ph- II, New Delhi-20, who brought the original record of CAF of mobile no. 8860550430 Ex. PW-7/A and 9811945347 Ex. PW-

Customer Application Form 7/B. PW-8 Pawan Singh, Nodal Officer, IDEA Cellular Ltd, A- 26/5, Mohan Co-operative, Mathura Road, Delhi, who brought the original record of CAF to mobile no 9540816173 Ex.PW-8/A and 9540456182 Ex.PW-8/B 12.4 Formal/ Police Witnesses were: PW-25 SI Kuldeep Singh, who, accompanied by PW-21, Constable Sudhir reached the spot of incident after receiving DD no. 42A Ex.PW-20/A. PW-26/IO, Inspector Sanwar Mal, initiated the investigation of the case, collected key pieces of evidence from the scene, and handed them over to PW-22, ASI Sansar Singh, who subsequently prepared the malkhana record. PW-14, ASI Ajeet Singh, who was the incharge of the mobile crime team and prepared a report Ex.PW14/A. PW-13, Head Constable Sanjeev Kumar, was the photographer in the mobile crime team. PW-20, ASI Ram Bhagat, recorded the formal FIR and forwarded it to PW-26. PW- 23, Inspector Mahesh, who prepared the scaled site plan on 29.04.2014 Ex.PW-23/A. PW-19 Ct. Anil, who at the direction of IO took A-1 to SHM hospital for medical examination. Needless to state that we shall delve into the details of the testimonies of these witnesses later on in the judgement.

STATEMENT OF ACCUSED UNDER SECTION 313 Cr.P.C

13. Upon the completion of the prosecution evidence, the statements of both A-1 and A-2 were recorded under Section 313 Cr.P.C. to afford them an opportunity to personally explain the incriminating circumstances arising from the evidence against them. All incriminating evidence was put to both A-1 and A-2, which they denied as incorrect, asserting that a false case had been registered against them. They further claimed to have no connection with the present case, maintained their innocence, and alleged that they had been falsely implicated.

14. A-1 has taken the defence that his wife was involved in a love affair with a person named Dev, of which he was aware. He claimed that due to this relationship, his wife sought to get rid of him. However, both A-1 and A-2 chose not to present any defence evidence. IMPUGNED JUDGMENT

15. The Learned Trial Court, upon a thorough examination of the evidence presented by the prosecution, concluded that there existed a history of enmity between the deceased and both accused persons arising from work-related issues, a fact corroborated by the testimony of PW-17, a co-worker of the deceased. On the day of the incident, an altercation over snacks and drinks occurred between the accused persons, which ultimately led to the death of the deceased. The presence of A-1 and A-2 at the scene was established through their being observed opening the office shutter while in possession of a fawra and kassi. This evidence was further substantiated by the disclosure statements made by A-1 and A-2 and the findings of the FSL reports.

16. Further, learned Trial Court found that in light of the corroborative evidence provided by the prosecution witnesses, the scientific evidence in the form of the post-mortem report and the FSL report, as well as the recovery of the weapon of offence pursuant to the disclosure statements of the accused, that the prosecution has successfully established the circumstantial evidence and such evidence unerringly points to the guilt of the accused while excluding any reasonable hypothesis of their innocence. Resultantly, the appellants were convicted for committing an offence under Section 302 read with Section 34 of the IPC and sentenced accordingly for life imprisonment. ARGUMENTS ADVANCED AT THE BAR

17. Mr. Ritesh Kumar Bahri, Learned APP 10, submitted that the prosecution's case is corroborated by the prompt reporting of the incident through the PCR call made by PW-9. PW-9 deposed that on 17.03.2014, at approximately 6:30-7:00 PM, while visiting Somveer Travels, owned by his friend, an individual working at a nearby Dhaba informed him that Raju had killed Bharat and that blood was present at the scene. Upon receiving this information, PW-9 immediately dialed 100 to report the incident. The PCR form documenting this call is exhibited as Ex. PW-18/A. The testimony of PW-9, substantiates the promptness of the report and establishes the timeline of the occurrence, thereby lending credibility to the prosecution's version of events.

18. Learned APP emphasized that PW-17, an eyewitness, provided a direct and detailed account implicating the accused persons. PW-17 testified that on 17.03.2014, the day of Holi, he consumed liquor with the A-1 and A-2 during the day, after which they slept and woke up at 5:00 PM. Around 5:30 PM, the deceased, Bharat, arrived and, upon seeing A-2 lying in a nude condition, began abusing and quarreling with him. PW-17 further deposed that prior quarrel had occurred between deceased, A-2, and A-1 over work-related issues. Despite his and another worker Mohan's attempts to mediate, the altercation Additional Public Prosecutor intensified. PW-17 specifically stated that both accused subsequently pulled down the office shutter, and upon reopening it after some time, he saw deceased lying in a pool of blood with visible head injuries. He further observed Accused Raju dragging Bharat by his legs outside the office while A-1 held a belcha and A-2 possessed a kassi (fawra). This testimony, is consistent and corroborated by the Section 161 Cr.P.C. statement of Mohan, who also witnessed the incident. However, despite sincere efforts and the issuance of summons through the DCP, Mohan could not be traced, leading to the closure of the prosecution's right to examine him by Order dated 22.09.2017.

19. Learned APP contended that the presence of PW-17 at the scene is further corroborated by PW-4, who was his employer. PW-4 testified that on the day of the incident, PW-17 called and informed him about the occurrence. Upon receiving the information, PW-4 immediately proceeded to the scene, where he found police officials and public persons already present. This testimony, conclusively establishes that PW-17 was employed by PW-4 and that his presence at the scene was both natural and credible. The prosecution further relied on the CDRs to support this claim. The CDR of mobile number 8860550430, registered in the name of PW-11 but used by PW-17 (as confirmed by PW-11) Ex.PW-7/E. Similarly, the CDR of mobile number 9811945347, issued in the name of PW-4 Ex. PW-7/G, with the corresponding CAFF Ex. PW-7/C.

20. It was further argued by learned APP that the prosecution has established a clear motive for the commission of the crime. PW-6, the brother-in-law of the deceased, testified that the deceased informed him about a fight with the appellants concerning drinks and dinner. Additionally, PW-17 corroborated this motive, stating that the deceased and the appellants had prior quarrels regarding work-related issues. This established history of animosity reinforces the prosecution's case that the appellants had a clear and sustained motive to commit the crime.

21. Learned APP further submitted that the PM report and the medical evidence unequivocally support the prosecution's case. PW- 12, who conducted the post-mortem, opined that the cause of death was due to shock resulting from head injury no. 9, which was fresh, antemortem, and

sufficient to cause death in the ordinary course of nature. The PM report Ex. PW-12/A, conclusively establishes that the deceased suffered a homicidal death. PW-12's testimony, affirms that all injuries were caused by blunt force impact, consistent with the belcha and kassi allegedly used by the accused persons.

22. Learned APP also relied on the arrest of the accused persons and the subsequent recoveries to further substantiate the prosecution's case. Both accused were apprehended at approximately 4:00 AM on 18.03.2014 from the shop of PW-10, which operates under the name Bhim Singh Building Material Supplier Stock, located at Dev Nagar, Opp. ITI, Jhajjar Road, Haryana. The arrest memos are Ex. PW-4/H and Ex. PW-4/G. The location and timing of the arrest further strengthen the prosecution's narrative and corroborate the events as described by the eyewitnesses.

23. In conclusion, learned APP submitted that the prosecution has proved the case beyond reasonable doubt through a cohesive and credible chain of evidence, including ocular testimony, medical reports, forensic findings, and documentary evidence. Each piece of evidence independently corroborates the other, establishing the guilt of the appellants

24. In response, Mr. S.S Ahluwalia, learned Counsel for the appellants contended that, according to PW-4, he received a telephone call from his servant, PW-17, at 6:30 PM, informing him about a quarrel between the deceased, the appellant, and the co-accused. Upon receiving this information, PW-4, whose business premises are located near the scene of the incident, immediately proceeded to the location and found the deceased lying in a pool of blood. However, during cross- examination, PW-4 provided a contradictory account, stating that he was informed about the incident not only by PW-17 but also by PW-9. This inconsistency in the testimony of PW-4 was not duly addressed or considered by the Learned Trial Court, thereby raising doubts regarding the credibility and reliability of his evidence.

25. It was further argued that the testimony of PW-17 is limited solely to having witnessed a quarrel between the deceased, the appellant, and the co-accused on 17.03.2014. PW-17 explicitly stated that he could not identify the weapons, namely kassi and belcha, which were allegedly used in the commission of the crime. This critical limitation in PW-17's evidence weakens the prosecution's case and was not adequately considered by the Learned Trial Court.

26. Learned Counsel for the appellant also emphasized that the prosecution failed to produce three key witnesses: Mohan, Subhash, and Ranbir, who were alleged to be eyewitnesses to the incident. The absence of their testimonies is a significant omission, as their evidence could have provided direct and crucial insight into the occurrence. This failure to examine material witnesses raises serious doubts regarding the completeness and reliability of the prosecution's case, which the Learned Trial Court failed to appreciate.

27. It was also urged that PW-10 testified that the appellant was arrested while he was sleeping at his godown. Despite the significance of this testimony, the Learned Trial Court overlooked this fact and failed to consider that no independent public witness was present during the appellant's arrest or the alleged recovery of his clothes and the purported weapons (kassi and belcha). Learned

Counsel relied on the legal principles established in *Raj Kumar @ Raju v. State*¹¹ and *Arun & Ors v. State*¹², wherein it was held that any recovery under Section 27 of the Indian Evidence Act must be corroborated by independent witnesses. In the present case, the absence of such corroboration renders the alleged recovery legally insufficient to establish the appellant's 2010 (169) DLT 517 2014 VI AD (Delhi) 664 guilt.

28. Learned Counsel further contended that the Learned Trial Court failed to recognize that none of the witnesses had directly seen the appellant committing the murder. The entire case of the prosecution is founded on secondary evidence, primarily the statement of PW-4, which itself is based on information relayed to him by third parties namely, Ranbir and Subhash, who were not examined as witnesses. The absence of direct evidence undermines the prosecution's narrative and casts substantial doubt on the appellant's culpability.

29. Additionally, during cross-examination, PW-17 categorically denied having seen the appellant inflicting injuries on the deceased and also failed to identify the weapons allegedly used in the crime. Despite the significance of this testimony, the Learned Trial Court did not appropriately evaluate the lack of direct evidence or the inconsistencies in PW-17's statements. As held in *Arun (supra)*, in cases involving circumstantial evidence or allegations of conspiracy, the prosecution must establish its case through evidence that is clear, cogent, and credible. The absence of such convincing evidence in the present matter weakens the prosecution's case against the appellant.

30. Lastly, it was argued that no documentary evidence has been placed on record to substantiate the claim that the appellant was present with PW-4 at the time of the incident. Further, PW-17 failed to produce any documents verifying his employment with PW-4. The lack of such evidence further weakens the prosecution's case and demonstrates that the findings of the Learned Trial Court are based on conjecture rather than concrete and reliable proof.

ANALYSIS AND DECISION

31. We have given out our thoughtful consideration to the submissions advanced by the learned counsels for the appellant as also by the learned APP for the State. We have also gone through the oral as well as documentary evidence placed on the record besides the case laws cited.

32. It is pertinent to observe that the entire prosecution case delicately hinges on the testimony of PW-17 Ram Braj Paswan. According to his testimony, he was employed as a tractor driver at the godown of Dalal Properties, owned by Satbir Singh, where the deceased was also engaged as a tractor driver. It is further stated that A-1 and A- 2 were likewise employed at the adjoining cement godown and were responsible for operating a rickshaw and an auto-rickshaw for the transportation of cement bags. In his testimony, it is explicitly stated that on 17.03.2024, during the celebration of Holi, he, along with A-1 and A-2, consumed liquor and thereafter went to sleep. He further deposed that they woke up at approximately 05:00 p.m., and in the meantime, the deceased, who had been on leave for about 15 days, arrived at the site at around 05:30 p.m. Upon observing A-2 lying naked on the bed, the deceased began to abuse A-2, which led to an altercation between them.

33. His testimony suggests that, A-1 also intervened, resulting in a quarrel between the deceased on one side and A-1 and A-2 on the other side. PW-17 testified that, although he intervened and tried to pacify but neither accused persons nor the deceased listened to him and they continued to quarrel, and therefore, he came out of the office and informed his owner, which fact was corroborated by PW-4 Satbir Singh. PW-17 also testified that, one Mohan was also working in a nearby dhaba also reached the spot and tried to intervene in the matter but nobody listened to him as well. The testimony of PW-17 that A-1 and A-2 pulled down the shutter of the office and after sometime both of them opened the shutter; and that he saw deceased lying in a pool of blood with injuries on his head, has not been challenged in the cross-examination. PW-17 categorically deposed in his cross-examination that, A-2 was holding a kassi (fawra) in his hand Ex.PW-21/P-1 while A-2 was holding a belcha Ex.PW-21/P-3 and both held up the legs of the deceased and dragged him from inside to outside of the office and threw his body on the sand/bajri and thereafter ran away.

34. Much mileage was sought to be taken by the learned counsels for the appellants that, PW-17 was treated as hostile witness by the learned APP and was cross-examined, and therefore, his evidence should be discarded. Merely because a witness has resiled from his earlier statement made to the police on some facts, his entire testimony cannot be discarded. Section 145(1) of the Indian Evidence Act, 1872, expressly provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any proceedings that a witness may be cross-examined regarding any previous statement made by them in writing or reduced to writing, if such statement is relevant to the matters in issue. Furthermore, any portion of the statement that corroborates the witness's earlier testimony, if duly supported, may be relied upon as evidence. The deviation in the testimony of a witness may be a natural deviation and may be because of lapse in memory, but if read as a whole and found to be truthful, can be relied upon by the prosecution.

35. While, PW-17 in his cross-examination did say that he did not see the accused persons causing the injuries to the deceased with kassi and belcha, what was not challenged by the learned defence counsel in the cross-examination of PW-17, is both the accused persons had put down the shutter and after some time when the shutter was opened, the deceased was lying unconscious with injuries on his head and then the body of the deceased was dragged and thrown on the sand/bajri outside the office as shown in the site plan Ex.PW-4/B at point 'A'. PW-17 on being cross-examined, truthfully stated that, he did not see the accused persons beating but obviously for the fact that the shutter of the godown had been brought down.

36. The blood stained clothes of the accused persons plus blood stained belcha and kassi (fawra) besides the wooden handle proven on the record leave no scope of doubt that after the shutter was put down, enquiry, trial or other proceeding under the said Code. (2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

both the appellants gave lot of thrashing to the deceased as a result of which he sustained injuries on his head, which proved fatal. The post mortem report Ex.PW-12/A has not been assailed in any manner. It goes without saying that incident was reported to the police without any delay and the

investigation was quite prompt. Merely because one Mohan was not examined by the prosecution, is not decisive as it is not the quantity but quality of evidence that matters in appreciating the evidence led by the prosecution on the record.

37. All said and done, it is also evident from the evidence led on the record that it was the deceased, who, when came to the site, started insulting and abusing A-2 and there ensued exchange of words and lot of quarrelling between them. The question is whether the proven conduct of the appellants is such that deserves punishment under Section 302 or part II of Section 304 of the IPC.

38. At this juncture, it would be appropriate to refer to the decision by the Supreme Court in the case of Pulicherla Nagaraju v. State of A.P.¹⁴ wherein it was observed as follows:

"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 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 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. Be that as it may."

{Bold portions emphasized}

39. The issue of loss of self-control on receipt of sudden provocation was also discussed by the Supreme Court in the case of *Dauvaram Nirmalkar v. State of Chattisgarh*¹⁵, wherein it was held that loss of self control by sudden provocation is a question of fact, that is: (1) to be counter-balanced against mitigating factors such as cooling off period and proportionality; and (2) to be read from the lens of a 15 2022 SCC OnLine SC 955 reasonable person belonging to the same class of society as the accused and the relevant observations by the Supreme Court are as follows:

"12. The question of loss of self-control by grave and sudden provocation is a question of fact. Act of provocation and loss of self-control, must be actual and reasonable. The law attaches great importance to two things when defence of provocation is taken under Exception 1 to Section 300 of the IPC. First, whether there was an intervening period for the passion to cool and for the accused to regain dominance and control over his mind. Secondly, the mode of resentment should bear some relationship to the sort of provocation that has been given. The retaliation should be proportionate to the provocation. The first part lays emphasis on whether the accused acting as a reasonable man had time to reflect and cool down. The offender is presumed to possess the general power of self-control of an ordinary or reasonable man, belonging to the same class of society as the accused, placed in the same situation in which the accused is placed, to temporarily lose the power of self-control. The second part emphasises that the offender's reaction to the provocation is to be judged on the basis of whether the provocation was sufficient to bring about a loss of self-control in the fact situation. Here again, the court would have to apply the test of a reasonable person in the circumstances."

{Bold portions emphasized}

40. Incidentally, this Bench in an earlier case of *Raju v. State (Govt. of NCT of Delhi)*¹⁶ considered few authoritative pronouncements by this Court as well as Apex Court on the issue as to when a case under Section 302 of the IPC could be converted to part-II of Section 304 of the IPC. It would be relevant to reproduce the relevant extracts from the said judgment as under:

"23. Avoiding long academic discussion on the subject, the Supreme Court in *Kailash v. State of M.P.*[(2006) 11 SCC 420 it 16 2025 SCC OnLine Del 402] was held that the entire attending circumstances must be taken into consideration for the purpose of finding out the nature of the actual offence committed. In the said case, the accused inflicted a single blow with the help of axe on the head of victim on a sudden provocation and without any premeditation which resulted in the death of the victim; the injury received by the co-accused was not explained by the prosecution and under such circumstances the sentence under Section 302 of the Penal Code, 1860 was altered to Section 304 Part II of the Penal Code, 1860. In *Pappu v. State of M.P.*[(2006)7 SCC 391], there was a single blow on the head given by the appellant by picking up a lathi in course of sudden quarrel without any premeditation and without taking advantage or acting in a cruel manner. It was held that the appellant was liable to be convicted under Section 304 Part II and not under Section 302 Penal Code,

1860. In another case, titled *Ankush Shivaji Gaikwad v. State of Maharashtra* [(2013) 6 SCC 770], the Supreme Court dealt with a case where the death was caused by an iron pipe and due to exchange of hot words or similar circumstances and it was held that the murder would be punishable under Section 304 Part II.

24. Similarly, in *Ebadat Mondal v. State of W.B.* [2011 SCC OnLine Cal 72], where death was caused by using an iron rod that was lying near the place of occurrence, the offence was converted into conviction under Section 304 Part II of the Penal Code, 1860. In *Surain Singh v. State of Punjab*¹⁴, injuries were caused by a kirpan and the Supreme Court observed that the number of wounds would by itself not be a decisive factor, the observation of the Supreme Court is as under : (*Surain Singh* case, SCC pp. 805-806, paras 22, 23, 24 and 25) "22. The weapon used in the fight between the parties is kirpan which is used by 'Amritdhari Sikhs' as a spiritual tool. In the present case, the kirpan used by the appellant- accused was a small kirpan. In order to find out whether the instrument or manner of retaliation was cruel and dangerous in its nature, it is clear from the deposition of the doctor who conducted autopsy on the body of the deceased that stab wounds were present on the right side of the chest and of the back of abdomen which implies that in the spur of the moment, the appellant-accused inflicted injuries using kirpan though not on the vital organs of the body of the deceased but he stabbed the deceased which proved fatal. The injury intended by the accused and actually inflicted by him is sufficient in the ordinary course of nature to cause death or not, must be determined in each case on the basis of the facts and circumstances. In the instant case, the injuries caused were the result of blow with a small kirpan and it cannot be presumed that the accused had intended to cause the inflicted injuries. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. It is clear from the materials-on-record that the incident was in a sudden fight and we are of the opinion that the appellant-accused had not taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly.

23. Thus, if there is intent and knowledge then the same would be a case of Section 304 Part I and if it is only a case of knowledge and not intention to cause murder and bodily injury then the same would fall under Section 304 Part II. We are inclined to the view that in the facts and circumstances of the present case, it cannot be said that the appellant-accused had any intention of causing the death of the deceased when he committed the act in question. The incident took place out of grave and sudden provocation and hence the accused is entitled to the benefit of Section 300 Exception 4 IPC.

24. Thus, in entirety, considering the factual scenario of the case on hand, the legal evidence on record and in the background of legal principles laid down by this Court in the cases referred to supra, the inevitable conclusion is that the act of the appellant-accused was not a cruel act and the accused did not take undue advantage of the deceased. The scuffle took place in the heat of passion and all the requirements under Section 300 Exception 4 IPC have been satisfied. Therefore, the benefit of Exception 4 under Section 300 IPC is attracted to the fact situations and the appellant-accused is entitled to this benefit.

25. Thus, considering the factual background and the legal position set out above, the inevitable conclusion is that the appropriate conviction of the appellant-accused would be under Section 304 Part II IPC instead of Section 302 IPC. Hence, the sentence of imprisonment for 10 years would meet the ends of justice.

25. In *Dauvaram Nirmalkar v. State of Chattisgarh* [2022 SCC OnLine SC 955], the court observed as to how loss of self-control by grave provocation is a question of fact and is also an exception to exclude the acts of violence which are premeditated, but not negate consideration of circumstances. The relevant portion of the judgment is set out below : (SCC OnLine SCC pp. 549, 550 and 551, paras 14, 15, 16 and 18) "14. The question of loss of self-control by grave and sudden provocation is a question of fact. Act of provocation and loss of self-control, must be actual and reasonable. The law attaches great importance to two things when defence of provocation is taken under Exception 1 to Section 300 IPC. First, whether there was an intervening period for the passion to cool and for the accused to regain dominance and control over his mind. Secondly, the mode of resentment should bear some relationship to the sort of provocation that has been given. The retaliation should be proportionate to the provocation 16. The first part lays emphasis on whether the accused acting as a reasonable man had time to reflect and cool down. The offender is presumed to possess the general power of self-control of an ordinary or reasonable man, belonging to the same class of society as the accused, placed in the same situation in which the accused is placed, to temporarily lose the power of self- control. The second part emphasises that the offender's reaction to the provocation is to be judged on the basis of whether the provocation was sufficient to bring about a loss of self-control in the fact situation. Here again, the court would have to apply the test of a reasonable person in the circumstances.

15. While examining these questions, we should not be short-sighted and must take into account the whole of the events, including the events on the day of the fatality, as these are relevant for deciding whether the accused was acting under the cumulative and continuing stress of provocation. Gravity of provocation turns upon the whole of the victim's abusive behaviour towards the accused. Gravity does not hinge upon a single or last act of provocation deemed sufficient by itself to trigger the punitive action. Last provocation has to be considered in light of the previous provocative acts or words, serious enough to cause the accused to lose his self-control. The cumulative

or sustained provocation test would be satisfied when the accused's retaliation was immediately preceded and precipitated by some sort of provocative conduct, which would satisfy the requirement of sudden or immediate provocation.

16. Thus, the gravity of the provocation can be assessed by taking into account the history of the abuse and need not be confined to the gravity of the final provocative act in the form of acts, words or gestures. The final wrongdoing, triggering off the accused's reaction, should be identified to show that there was temporary loss of self-control and the accused had acted without planning and premeditation. This has been aptly summarised by *Ashworth Kailash v. State of M.P.* (2006) 11 SCC 420 in the following words:

'[T]he significance of the deceased's final act should be considered by reference to the previous relations between the parties, taking into account any previous incidents which add colour to the final act. This is not to argue that the basic distinction between sudden provoked killings and revenge killings should be blurred, for the lapse of time between the deceased's final act and the accused's retaliation should continue to tell against him. The point is that the significance of the deceased's final act and its effect upon the accused-- and indeed the relation of the retaliation to that act-- can be neither understood nor evaluated without reference to previous dealings between the parties.' □□□

18. Following the view expressed in *K.M. Nanavati v. State of Maharashtra* [1961 SCC OnLine SC 69] , this Court in *Budhi Singh v. State of H.P.*[(2012) 13 SCC 663] observed that in the test for application of Exception 1 to Section 300 IPC, the primary obligation of the court is to examine the circumstances from the point of view of a person of reasonable prudence, if there was such grave and sudden provocation, as to reasonably conclude that a person placed in such circumstances can temporarily lose self-control and commit the offence in the proximity to the time of provocation. A significant observation in *Budhi Singh* case is that the provocation may be an act or series of acts done by the deceased to the accused resulting in inflicting of the injury. The idea behind this exception is to exclude the acts of violence which are premeditated and not to deny consideration of circumstances such as prior animosity between the deceased and the accused, arising as a result of incidents in the past and subsequently resulting in sudden and grave provocation. In support of the aforesaid proposition and to convert the conviction from Section 302 to Section 304 Part I IPC in *Budhi Singh* case, the court also relied upon *Rampal Singh v. State of U.P.*[(2012) 8 SCC 289]."

26. Winding up our discussion on the propositions of law, we lastly invite reference to the cited case of *Vijay v. State* [2025 SCC OnLine 123], wherein the appellant along with his friend was returning home after watching a movie late at midnight and while they were sleeping beneath a bridge, the deceased came to spot in an inebriated condition and picked up an altercation with the appellant who picked up a cement brick that was lying at the place of occurrence and hit the deceased on his

head and as a result of which, the deceased succumbed to head injuries. On his conviction by the trial court, an appeal was filed before the High Court which was dismissed holding the appellant guilty of the offence punishable under Section 304 Part 1 IPC and sentencing him to undergo five years of rigorous imprisonment. The Supreme Court while setting aside the judgment of the High Court held as under:

"24. In order to bring his case under Exception 1 to Section 300 IPC the following ingredients : (SCC OnLine SC paras 24, 25, 27, 28 and 29)

(i) The provocation was sudden; (ii) the provocation was grave; and (iii) loss of self-

control. These three ingredients may be considered one by one:

(i) Whether the provocation was sudden or not does not present much difficulty. The word 'sudden' involves two elements. First, the provocation must be unexpected. If an accused plans in advance to receive a provocation in order to justify the subsequent homicide, the provocation cannot be said to be sudden.

Secondly, the interval between the provocation and the homicide should be brief. If the man giving the provocation is killed within a minute after the provocation, it is a case of sudden provocation. If the man is killed six hours after the provocation, it is not a case of sudden provocation.

(ii) The main difficulty lies in deciding whether a certain provocation was grave or not. A bare statement by the accused that he regarded the provocation as grave will not be accepted by the court. The court has to apply an objective test for deciding whether the provocation was grave or not. A good test for deciding whether a certain provocation was grave or not is this: 'Is a reasonable man likely to lose self-control as a result of such provocation?' If the answer is in the affirmative, the provocation will be classed as grave. If the answer is in the negative, the provocation is not grave. In this context, the expression 'reasonable man' means a normal or an average person. A reasonable man is not the ideal man or the perfect being. A normal man sometimes loses temper. There is, therefore no inconsistency in saying that, a reasonable man may lose self-

control as a result of grave provocation. A reasonable or normal or average man is a legal fiction. The reasonable man will vary from society to society. A Judge should not impose his personal standards in this matter. By training, a Judge is a patient man. But the reasonable man or the normal man need not have the same standard of behaviour as the Judge himself. The reasonable man under consideration is a member of the society, in which the accused was living. So, education and social conditions of the accused are relevant factors. An ordinary exchange of abuse is a matter of common occurrence. A reasonable man does not lose self- control merely on account of an ordinary exchange of abuses. So, courts do not treat an ordinary exchange of abuses as a basis for grave provocation. On the other hand, in most societies, adultery is looked upon as a very serious matter.

So, courts are prepared to treat adultery as a basis for grave provocation.

(iii) The question of loss of self-control comes up indirectly in deciding whether a particular provocation was grave or not. So, if it is proved that the accused did receive grave and sudden provocation, the court is generally prepared to assume that homicide was committed while the accused was deprived of the power of self-control. In some cases, it may be possible for the prosecution to prove that the accused committed the murder with a cool head in spite of grave provocation. But such cases will be rare. So, when the accused has established grave and sudden provocation, the court will generally hold that he has discharged the burden that lay upon him under Exception 1 to Section 300 IPC.

25. What should be the approach of the court? The provocation must be such as will upset not merely a hasty and hot-tempered or hypersensitive person, but one of ordinary sense and calmness. The court has to consider whether a reasonable person placed in the same position as accused would have behaved in the manner in which the accused behaved on receiving the same provocation. If it appears that the action of the accused was out of all proportion to the gravity or magnitude of the provocation offered, the case will not fall under the exception. The case can only fall under the exception when the court is able to hold that provided the alleged provocation is given, every normal person would behave or act in the same way as the accused in the circumstances in which the accused was placed, acted.

□□□

27. Section 105 of the Evidence Act, 1872 casts burden of proof on the accused. Being an exception, the burden of proving the circumstances covered by Exception 1 is on the accused. Where the prosecution prima facie proves that the act was committed by the accused which had resulted in the death of the deceased and the accused pleads that the case falls within one of the exceptions, it is for him to prove that.

28. It is for the accused who seeks to reduce the nature of his crime by bringing his case under Exception 1; to prove that the provocation received by him was such as might reasonably be deemed sufficient to deprive him of self-control and that the act of killing took place whilst that absence of control was in existence and may fairly be attributed to it. (Ref. : Ratanlal and Dhirajlal's Law of Crimes, 24th Edn.)

29. If at all, the trial court and the High Court wanted to bring the case within the ambit of culpable homicide not amounting to murder, then it could have invoked Exception 4 of Section 300 IPC. We say so because the incident was not pre-planned or premeditated. The appellant and his friends had gone to watch a movie. They were returning back home in the late night hours. It appears that after the movie was over and while returning, they decided to take some rest beneath the bridge. The deceased also happened to be sleeping beneath the bridge. However, it is the case of the prosecution that the deceased was in a drunken condition. In fact, there is nothing to indicate that the deceased was drunk. However, the eyewitnesses to the incident and that too none other than the friends of the appellant who were examined by the prosecution deposed that the deceased was in a drunken condition.

27. Considering the foregoing discussion, this Court opines that the present case warrants conviction under Section 304 Part II, despite the appellants' culpability in the deceased's death. It is undeniable that the appellants likely belong to the lower socioeconomic strata, where the use of foul language is common parlance. However, something went awry during their drinking spree, leading to a heated argument that ultimately resulted in the deceased sustaining fatal injuries.

28. The nominal roll of the appellant Raju alias Chanakya would show that he has been in judicial custody for a total period of five years and nine months [counted upto 20.09.2024]. Similarly, the nominal roll of the appellant Mukesh would show that he has been in judicial custody for a period of eight years and eight days [counted upto 11.11.2024]."

41. In view of the aforesaid discussion, reverting to the instant matter, at the cost of repetition, it was the deceased who provoked A-2 due to previous animosity and started abusing them and A-1 too joined in the quarrel. The testimony of PW-6 Ram Shakal Choudhary, who was a close relative of the deceased, clearly raises an inference that deceased was unhappy with both the appellants and there had been some work related issues between them also. Be that as it may, having regard to the totality of the facts and circumstances of the matter, it cannot be said that the appellants committed the murder in a pre-planned manner. Everything happened at the spur of the moment and perhaps in an inebriated state, the parties engaged in heated conversation, exchanging abusive words, and that triggered an uncontrollable impulse in the appellants who overpowered the deceased and started hitting him with whatever material that was lying at the site, causing blows on his body and eventually head injuries were found to be sufficient in the ordinary course of nature to cause death.

42. Considering the foregoing discussion, this Court has no hesitation in opining that the present case warrants conviction under Section 304-II of the IPC despite the appellants' culpability in causing death of the deceased. It cannot be overlooked that both the appellants belong to a lower socio-economic stratum of the society and they have already suffered enough punishment of their acts. As per the nominal rolls, both A-1 & A-2 have already served their sentence for about 10 years. The interest of justice would be served by providing that they be sentenced to imprisonment for the period already undergone by them in the Jail. No fine is imposed.

43. Accordingly, both the appeals stand partly allowed and disposed of in the above terms with pending applications.

44. A copy of this judgment be sent to the Jail Superintendent concerned for necessary information and compliance. Judgment be uploaded on the website forthwith. The physical record from the trial Court be sent back and the same be weeded out in accordance with the rules.

DHARMESH SHARMA, J.

PRATHIBA M. SINGH, J.

MARCH 27, 2025 Sadiq