

**Criminal Appeal**  
Present: **The Hon'ble Justice Ashim Kumar Banerjee**  
**AND**  
**The Hon'ble Justice Kishore Kumar Prasad**  
Judgment on: 26.02.2010  
**CRIMINAL APPEAL No. 221 of 1990**  
**WITH**  
**REV. 882 OF 1990**  
**SUBAL MAJHI @ HEMBRAM AND ANOTHER**  
**VS**  
**THE STATE OF WEST BENGAL**

**Point:**

**Murder:** On a sudden quarrel, a person in the heat of the moment picks up a handy weapon and causes injuries, one of which proves fatal- He has not acted cruelly- whether he would be entitled to avail the benefit of exception 4 to Section 300 of the Indian Penal Code - Indian Penal Code, 1860 Ss. 300, 302, 303, 304

**Fact:** Being aggrieved by the judgment, order of conviction and sentence passed by the Ld. Additional Sessions Judge, 3<sup>rd</sup> Court, Burdwan, arising out of Sessions Case whereby the appellants were convicted under Sections 302 of Indian Penal Code / 201 read with Section 34 of Indian Penal Code, the appellants preferred the instant appeal. It was contended that the appellants and the deceased were under the influence of liquor at the time of incident and that there was altercation between them and the assault was given by a bamboo lathi in course of altercation without any premeditation and there was no intention on the part of the appellant Subal Majhi for the purpose of committing murder to the deceased. It was also urged that from the materials produced by the prosecution, the appellant Subal Majhi can at best, be convicted for the offences punishable under Section 304 Part II of Indian Penal Code as also under Section 201 read with Section 34 of Indian Penal Code.

**Held:**

Recovery of one 2 and ½ cubit bamboo lathi, stained with blood from the house of accused Mongla pursuant to the statement of the present appellant during interrogation by the Investigating Officer is also a fact. Such recovery is not wiped out merely because of the fact that recovery was not preceded by a recorded statement under Section 27 of the Evidence Act. Even though there was no recorded statement, the recovery is admissible under Section 8 of the Indian Evidence Act.

(Paragraph – 30)

In the scheme of IPC culpable homicide is the genus and ‘murder’ its specie. All ‘murder’ is ‘culpable homicide’ but not vice-versa. Speaking generally, ‘culpable homicide’ sans special characteristics of murder is culpable homicide not amounting to ‘murder’. For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, ‘culpable homicide of the first degree’. This is the gravest form of culpable homicide, which is defined in Section 300 as ‘murder’. The second may be termed as ‘culpable homicide of the second degree’. This is punishable under the first part of Section 304. Then, there is ‘culpable homicide of the third degree.’ This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

(Paragraph – 33)

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. (Paragraph – 34)

To invoke this exception four requirements must be satisfied, namely, (i) it was sudden fight ; ii) there was no premeditation ; iii) the act was done in a heat of passion ; and iv) the assailant had not taken any undue advantage or acted in a cruel manner . The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. 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. 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. (Paragraph – 35)

The material on record in our opinion is insufficient to warrant an inference that the appellant had formulated a deliberate intent to commit an offence, punishable under Section 302 of Indian Penal Code. But the appellant certainly had the knowledge that the injury was likely to cause death. (Paragraph – 39)

When the background facts and special feature of the instant case are considered on the touchstone of the legal principle as set up above, we feel that proper section under which the appellant should have been convicted was under Section 304 Part II of Indian Penal Code and not under Section 302 of Indian Penal Code. (Paragraph – 40)



years as also to pay fine of Rs. 2,000/- each, in default of payment of fine to suffer rigorous imprisonment for six months each for the offence punishable under Section 302 of Indian Penal Code. They were also sentenced to suffer rigorous imprisonment for three years as also to pay fine of Rs. 500/- each, in default of payment of fine to suffer rigorous imprisonment for two months each for the offence punishable under Section 201 read with Section 34 of Indian Penal Code.

3. The substantive sentences awarded to the appellants were ordered to run concurrently.

4. Another co-accused Mantu Marandi was also charge-sheeted but he fled from the law prior to commitment of the case to the Court of Sessions and as such the case against him was split up on 20.6.1989 by the learned Committing Magistrate as he was absconding.

5. Being aggrieved by the orders of conviction and sentence passed by the learned Trial Judge, the two appellants facing the trial had preferred the present appeal.

6. Finding illegality and impropriety in the order of the learned Trial Judge imposing substantive sentence for eight years on the appellants for the offences punishable under Section 302 of Indian Penal Code, a Division Bench of this Court vide order dated 17.5.1990 in exercise of revisional jurisdiction issued a rule suo motu for enhancement of the sentence of the appellants and the said rule was registered as Revision No. 882/1990.

7. The appellant Mongla Besra died during the pendency of this appeal. None of the relatives of the deceased had applied for leave to continue the appeal within 30 days of the death of Mongla and as such the case against him was ordered to abate. Therefore, we are now called upon to decide this appeal with reference to the appellant, Subal Majhi @ Hembram.

8. Prosecution version as unfolded during trial in a nutshell is that the defacto-complainant, Prasanta Chowdhury brought Purna Mahali (the victim) and his wife from Bihar for harvesting his paddy. Both of them came to village Kashipur within the limits of Bhatar P.S. on 30.1.1987 and started to work under the complainant. On 2.12.1987 at about 6 a.m., the wife of Purna reported to the complainant that the accused Mantu Marandi called on her husband in the previous night and since then he (Purna) could not be traced. When Mantu was traced and interrogated by the complainant and others, he gave out a statement implicating the appellants Subal Majhi and Mongla Besra with the assault of Purna by lathi and further alleged that at the instance of both the appellants, Purna was killed and his dead body was thrown into the water of a tank. Then the complainant and villagers caught hold the appellants. On being interrogated, the appellants confessed before them that they assaulted Purna with a lathi and after killing him, Purna was buried under the earth near the ghat of a tank, adjacent to the house of appellant Subal Majhi. Thereafter, the three accused took the complainant and villagers to the ghat of the said tank and brought out the dead body of the Purna from there. Leaving the dead body near the ghat of the tank, the villagers took the accused persons to the Durgabari of their village where they were kept in a room.

9. Subsequent to that, the complainant being accompanied by Kushlal, one of his co-villagers had been to Bhatar P.S. and lodged a complaint before police. On the basis of complaint lodged by Prasanta Chowdhury, Bhatar Police Case No. 1, dated. 2.12.1987 was registered against the appellants and the accused Mantu Marandi. Investigating Agency took up investigation. In course of investigation police came to Kashipur village and took the three accused into their custody from the room where they were detained. Inquest was held on the dead body of the deceased on the embankment of a tank contiguous to the house of appellant Subal Majhi. Post Mortem was also held by Autopsy Surgeon at Burdwan Medical College Hospital. In course of further investigation, one bamboo lathi about 2 and ½ cubit in length, strained with blood (Mat Exhibit 1) was also recovered from the house of the appellant Mongla Besra (now deceased) pursuant to the statement of the appellant Subal Majhi @ Hembram, who is the sole appellant before us at present. The Investigating Officer seized the said bamboo lathi under seizure list (Exhibit 2) in presence of P.W. 3 and P.W. 6.

10. The appellants namely, Subal Majhi and Mongla Besra (died during pendency of appeal) facing the trial pleaded not guilty to the charges framed against them and claimed to be tried.

11. The prosecution in order to establish the case against the appellants examined as many as twelve witnesses. Apart from oral evidence, the prosecution also tendered and proved a large number of exhibits which were marked as Exhibit 1 to 4 and Mat Exhibit I.

12. Though the appellants were examined under Section 313 of the Code of Criminal Procedure, yet there was no adduction of evidence by them.

13. The defence version as it appears from the trend of cross-examination of P.Ws. as also from the suggestion thrown to the witnesses was denial of the prosecution case as brought out in evidence.

14. The learned Trial Judge disbelieved the defence version. The learned Trial Judge after considering the oral and documentary evidence and hearing the learned counsel for the parties passed orders of conviction and sentences against the appellants as indicated above.

15. Learned counsel for the appellant Subal Majhi @ Hembram firstly tried to assail the conviction of the appellant on the merits but realising that there was insurmountable and trustworthy evidence against the appellant, he confined his argument only towards the nature of offences allegedly made against the appellant Subal Majhi @ Hembram. It was contended by the learned counsel that the appellants, namely, Subal Majhi, Mongla Besra and the deceased were under the influence of liquor at the time of incident; that there was altercation between them; that the assault was given by a bamboo lathi in course of altercation without any premeditation and there was no intention on the part of the appellant Subal Majhi for the purpose of committing murder to the deceased. Learned counsel further urged that from the materials produced by the prosecution, the appellant Subal Majhi can at best, be convicted for the offences punishable under Section 304 Part II of Indian Penal Code as also under Section 201 read with Section 34 of Indian Penal Code.



16. Learned counsel appearing on behalf of the State-respondent was fair enough to concede the submission advanced by the learned counsel for the appellant Subal Majhi @ Hembram.

17. At the outset, it needs to be mentioned that it is not disputed that the deceased Purna Mahali died on account of injuries sustained by him and his dead body was recovered by the villagers under the earth near the ghat of a tank, adjacent to the house of the appellant, Subal Majhi, pursuant to statement made by the accused persons.

18. The Investigating Officer (P.W. 11) performed inquest on the dead body of the deceased at the ghat of the tank, adjacent to the house of appellant Subal Majhi on 2.12.1989 at about 4 p.m. and noticed injuries on the person of the deceased. Thereafter, the dead body of the deceased was taken to hospital for the purpose of post mortem examination by P.W. 10, Constable Rabiul Haque.

19. P.W.9, Dr. S. Chakraborty, who conducted post mortem on the dead body of the deceased on 3.12.1987 at Burdwan Medical Hospital found several abrasions on different parts of the dead body of the deceased besides lacerated wounds, contusion and haemorrhage.

20. In the opinion of Dr. S. Chakraborty, death was due to the effect of injuries which were ante mortem and homicidal in nature. It was further opined by Dr. Chakraborty that the

injuries might be caused by hard and blunt substance like lathi, kicks and blows. Thus, it is amply established that the deceased met a homicidal death on account of the injuries sustained by him.

21. Now, we have to consider whether the present appellant was responsible for causing the death of the deceased.

22. On going through the evidence on record, it is found that the conviction of the accused/appellant Subal Majhi is based on extra judicial confession made by the accused persons coupled with recovery of the dead body of the deceased pursuant to their statement.

23. Learned Trial Court in the judgment impugned relied upon the following facts to find out the accused appellant guilty: -

- a) Extra Judicial Confession made by the present appellant and the two other co-accused before the villagers.
- b) Recovery of the dead body of the deceased pursuant to disclosure statement made by the appellant and the other co-accused.
- c) Recovery of one bamboo lathi about 2 ½ cubit in length stained with blood from the house of deceased appellant Mongla pursuant to the statement of the present appellant.

24. Regarding the aforesaid facts, there are adequate evidence coming through the material witnesses examined in this case. We do not think it necessary to reproduce the evidence in details since the learned Trial Judge has elaborately discussed the evidence in his judgment.

25. Prasanta Chowdhury (P.W. 1) is the defacto complainant of this case. He lodged First Information Report at police station on 2.12.1987 at 14.15 hours.

26. After going through the entire deposition of this witness, we find that he is wholly reliable witness. He had given vivid description about the entire incident before the Court. His evidence before Court regarding extra judicial confession made by the accused coupled with recovery of dead body of the deceased pursuant to the statement of the accused is substantially in conformity with his earlier version as contained in the First Information Report. That apart, the evidence of P.W.1 about the extra judicial confession made by the accused coupled with recovery of the dead body of the deceased pursuant to the disclosure statement of the accused was corroborated by P.Ws. 2 and 3.

27. Further the testimonies of P.W. 1 to the effect that P.W. 5, the wife of the deceased came to his residence and reported to him that the accused Mongla had come to their house on the previous night and called her husband from the house and thereafter her husband did not come back get support from the evidence of P.W. 5, the wife of the deceased.

28. Besides, some minor wear and tear in the evidence of aforesaid witnesses, we do not find any material infirmity which could persuade us to hold contrary. The evidence of P.W.s 1

to 3 clearly goes to show that the accused persons made extra judicial confession voluntarily; that it was not caused by any inducement, threat or promise which has reference to the charges against them and pursuant to their disclosure statement, the dead body of the deceased was recovered under the earth near the ghat of a tank, adjacent to the house of appellant, Subal Majhi. Since the evidence about the extra judicial confession comes from the mouth of P.Ws. 1 and 3, who appear to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought out which may tend to indicate that they may have a motive of attributing an untruthful statement to the accused. The words spoken by these witnesses are clear, unambiguous and unmistakably convey that the accused persons are the perpetrators of the crime and nothing is omitted to them which militate against it.

29. We have no reason to defer with the finding of the learned Trial Judge that the extra judicial confession was voluntary or truthful.

30. Recovery of one 2 and ½ cubit bamboo lathi, stained with blood from the house of accused Mongla pursuant to the statement of the present appellant during interrogation by the Investigating Officer is also a fact. Such recovery is not wiped out merely because of the fact that recovery was not preceded by a recorded statement under Section 27 of the Evidence Act. Even though there was no recorded statement, the recovery is admissible under Section 8 of the Indian Evidence Act.

31. After subjecting the evidence of the material witnesses to a rigorous test on the touchstone of credibility and on consideration of the totality of the facts and circumstances of the

case, we have no hesitation to hold that the incident did, infact take place. The case of the prosecution is well proved.

32. The crucial question is as to which was the appropriate provision to be applied in the present case.

33. In the scheme of IPC culpable homicide is the genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans special characteristics of murder is culpable homicide not amounting to 'murder' . For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in Section 300 as 'murder' . The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree.' This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304 .

34. 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.

**Exception 4 to Section 300 reads as under:**

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 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.

35. To invoke this exception four requirements must be satisfied, namely, (i) it was sudden fight ; ii) there was no premeditation ; iii) the act was done in a heat of passion ; and iv) the assailant had not taken any undue advantage or acted in a cruel manner . The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. 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. 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.

36. The above position was highlighted by the Hon'ble Apex Court in the cases of Surinder Kumar –Versus- Union Territory, Chandigarh (1989) 2 Supreme Court Cases 217 ; Arvind Kumar-Versus- State of Uttar Pradesh 1988 Supreme Court Cases (Cri) 132 and Ravi Kumar-Versus- State of Punjab (2005) 9 Supreme Court Cases 315 .

37. In the present case, there is evidence on record to show that prior to assault both the deceased and the accused persons were under the influence of liquor and the assault was given with lathi in the course of altercation without any premeditation. The injuries found by the Autopsy Surgeon were caused by blunt weapon like lathi.

38. We may refer to the judgment in the case of Basdev –Versus- State of Pepsu reported in AIR 1956 SC 488 wherein Their Lordships held that if the accused was beside his mind altogether, for the time being, he could not be fixed with the requisite intention. Their Lordships quoted with approval the following passage from the judgment of Lord Coleridge.

“ In the first place, every one is presumed to know the consequences of his acts. If he be insane, that knowledge is not presumed. Insanity is not pleaded here, but where it is part of the essence of a crime that a motive, a particular motive, shall exist in the mind of the man who does the act, the law declares this – that if the mind at that time is so obscured by drink, if the reason is dethroned and the man is incapable therefore of forming that intent, it justifies the reduction of the charge from murder to manslaughter.”

39. There is evidence on the record to bring the case within the aforesaid exception. The material on record in our opinion is insufficient to warrant an inference that the appellant had formulated a deliberate intent to commit an offence, punishable under Section 302 of Indian Penal Code. But the appellant certainly had the knowledge that the injury was likely to cause death.

40. When the background facts and special feature of the instant case are considered on the touchstone of the legal principle as set up above, we feel that proper section under which the

appellant should have been convicted was under Section 304 Part II of Indian Penal Code and not under Section 302 of Indian Penal Code.

41. At the same time we further hold that the order of conviction of the appellant Subal Majhi under Section 201 read with Section 34 of Indian Penal Code having been well founded, we are not inclined to interfere with the same.

42. For the reasons recorded above, we allow the appeal in part by converting the conviction from Section 302 of Indian Penal Code to Section 304 Part II of Indian Penal Code and sentence the present appellant to undergo rigorous imprisonment for eight years for the offence punishable under Section 304 Part II of Indian Penal Code.

43. We are not inclined to interfere with the sentence imposed upon the appellant by the learned Trial Court for the offence punishable under Section 201 read with Section 34 of Indian Penal Code and accordingly we confirm the sentence imposed upon the appellant for the offence punishable under Section 201 read with Section 34 of Indian Penal Code. The substantive sentences for the offence punishable under Section 304 Part II / 201 read with Section 34 of Indian Penal Code shall run concurrently. The sentence of imprisonment passed upon the appellant by the learned Trial Court in default of payment of fine for the offence punishable under Section 201 read with 34 of Indian Penal Code shall run consecutively.



44. Fine, if realised, shall be paid to the wife of the deceased. The appellant Subal Majhi @ Hembram shall get the benefit of set off, out of the period of imprisonment already undergone.

45. The appellant Subal Majhi @ Hembram is now in jail. He is directed to serve out the remainder part of his sentence as indicated above.

46. The learned Trial Court is directed to issue necessary revised jail warrant as required under the Rules.

47. In view of our foregoing judgment and order converting the conviction of the appellant from Section 302 of Indian Penal Code to Section 304 Part II of Indian Penal Code, the suo motu revisional application being REV No. 882 OF 1990 for enhancement of the substantive sentence as awarded by the learned Trial Judge for the offence punishable under Section 302 of Indian Penal Code has now become infructuous and the same is disposed of as infructuous. However, we must express our strong dissatisfaction on the order of the learned Judge against the appellants for the offence punishable under Section 302 of Indian Penal Code when the offence of murder is punishable with death or imprisonment for life and fine.

48. The order of the learned Trial Court imposing sentence of eight years only against the appellant for the offence punishable under Section 302 of Indian Penal Code is wholly illegal and it shows non-application of mind on the part of the learned Trial Judge.

49. Lower Court Records with a copy of this judgment to go down forthwith to the concerned learned Trial Court for information and necessary action.

50. Urgent xerox certified copy of this judgment, if applied for, be supplied to the learned Counsel for the parties upon compliance of all formalities.

**( Kishore Kumar Prasad, J. )**

I agree.

**( Ashim Kumar Banerjee, J. )**