

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No. 182 of 2017

Rajendra Kumar Arya

.... Appellant

Vs.

State of Uttarakhand

....Respondent

Present:

Mr. Arvind Vashistha, Senior Advocate, assisted by Mr. Rachit Manglik, Advocate for the appellants.
Ms. Manisha Rana Singh, D.A.G. for the State.

JUDGMENT

Coram: Hon'ble Ravindra Maithani, J.
Hon'ble Alok Mahra, J.

Per: Hon'ble Ravindra Maithani, J.

Instant appeal is preferred against the judgment and order dated 28.06.2017/30.06.2017, passed in Sessions Trial No. 107 of 2014, State Vs. Rajendra Kumar Arya, by the court of First Additional Sessions Judge, Haldwani, District Nainital. By it, the appellant Rajendra Kumar Arya has been convicted under Section 302 and 224 IPC and sentenced as hereunder:-

- (i) Under Section 302 IPC:- to undergo life imprisonment with a fine of Rs.10,000/-. In default of payment of fine, to undergo simple imprisonment for a further period of six months.
- (ii) Under Section 224 IPC:- to undergo rigorous imprisonment for a period of two years.

2. According to the prosecution case, on 27.05.2014, the appellant was detained at Reporting Out Post ("ROP") Mukhani, Police

Station Haldwani with regard to the FIR No. 276 of 2014, under Section 379, 411 IPC. He was under the supervision of the deceased Constable Police 234 Surendra Singh. At about, 3:25 in the morning, on 28.05.2014, the appellant tried to run away from the custody of police and when the deceased Surendra Singh tried to apprehend him, the appellant hit the deceased with iron *sariya*, due to which, the deceased died. The deceased was apprehended and iron *sariya* recovered. The report of the incident was lodged by PW2 SI Lalit Mohan Joshi, who was In-charge of ROP Mukhani at the relevant time, which is Ex. A3. Based on which, chik FIR Ex.A13 was recorded at Police Station Haldwani at 05:55 a.m. on 28.05.2015 and Case Crime No. 277 of 2014, under Section 302 and 224 IPC was lodged. The extract of General Diary ("GD") entry is Ex. A14. The inquest of the deceased was done on 28.05.2014, after 08:10 a.m.; the report is Ex. A8; post mortem of the deceased was done on 28.05.2014 at 11:40 a.m. The doctor conducting post mortem found injuries on the person of the deceased. According to the post mortem report, the cause of death was shock and hemorrhage, as a result of stab injury of heart, as described in the injury no.1 of the post mortem report caused by pointed blunt weapon. The clothes worn by the appellant, the witnesses and iron *sariya* were sent for forensic examination. The report confirms that all those articles contain blood of Group "O".

3. On 04.12.2014, charge under Section 224 and 302 IPC was framed against the appellant, to which, he denied and claimed trial.

4. In order to prove its case, prosecution examined fifteen witnesses, namely, PW1 Dr. C.P. Bhaisoda, PW2 SI Lalit Mohan Joshi,

PW3 SI Laxman Singh Jagwan, PW4 Amit Chandra Joshi, PW5 Harveer Singh, PW6 Umesh Chandra Joshi, PW7 Head Constable, Amar Singh Adhikari, PW8 Constable Ravi Kumar, PW9 Satyajeet Singh Rana, PW10 Constable Dalip Kumar, PW11 SI Umed Singh Danu, PW12 Constable Navindra Kumar, PW13 Constable Tarun Pandey, PW14 Constable Nirmal Singh Latwal and PW15 SSI Trilok Ram Bagretha.

5. After prosecution evidence, the appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 ("the Code"). According to him, he has been falsely implicated. The appellant has stated that on 27.05.2014, in the evening at about 6:30, police had taken him to the police station and at about 9:30, he and the owner of the Scooty were released by the police. The police took his clothes 2-3 days after the incident.

6. After hearing the parties, by the impugned judgment and order, the appellant has been convicted and sentenced, as stated hereinbefore. Aggrieved, the appeal.

7. Heard learned counsel for the parties and perused the record.

8. Learned senior counsel for the appellant submits that the entire prosecution case is false; the appellant has been falsely implicated. He submits that if the appellant was arrested in a theft case, it has not been established by the prosecution as to when he was brought to ROP Mukhani? When was the FIR under Section 379 IPC lodged? The GD of lodging of the FIR, under Section 379 IPC

against the appellant has not been proved by the prosecution. Learned senior counsel also raised the following points in his submission:-

- (i) How could *sariya* be lying in the premises of ROP Mukhani?
- (ii) If the appellant was handcuffed in a theft case, how could he escape? How could he open the handcuffs? And how the keys of the handcuffs were found by the appellant?
- (iii) The inquest report also doubts the prosecution case. It records that at 08:10 a.m. on 28.05.2014, PW3 SI Laxman Singh Jagwan informed about the death. It is argued that prior to it at 05:55 a.m., on 28.05.2014, FIR was already lodged. Why FIR number was not recorded in the inquest report?
- (iv) If PW2 SI Lalit Mohan Joshi was in the hospital, when the deceased Surendra Singh died, what was the need for the hospital to send ward boy memo about the death of the deceased Surendra Singh at ROP Mukhani.
- (v) ROP Mukhani is in the residential area adjoining the main pathway. In such a situation, why independent witnesses were not interrogated by the Investigating Officer?
- (vi) The conviction is also based on the material that was placed in a theft case against the appellant. The material, which was placed in the theft case and which was not put to the appellant under Section 313 of the Code cannot be read into evidence.

(vii) The dying declaration is not reliable because it is not possible that a person who has a wound on his chest could speak as to how did he die?

9. Learned senior counsel also submits that if prosecution case is also believed, it reveals that the appellant was brought at ROP Mukhani with regard to the theft of a Scooty and the appellant had then stated that he had taken it with the help of one Aslam. The appellant was at ROP Mukhani and in an attempt to escape, when he was chased by the deceased Surendra Singh, the deceased was hit with a *sariya*, which was lying in the premises of ROP Mukhani. It is argued that even if the prosecution case is believed, the offence does not fall under Section 302 IPC, instead it falls under Exception 4 to Section 300 IPC. It reads as follows:-

“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.”

10. It is argued that as per prosecution also, the act was without premeditation in a sudden fight and heat of passion upon a quarrel. The appellant did not take any undue advantage and did not act in any cruel or unusual manner. Therefore, it is argued that this act falls under Section 304 Part-II IPC.

11. On the other hand, learned State counsel submits that the appellant has committed a grave offence, while in the custody of the police, he tried to run away and when deceased Surendra Singh tried to apprehend him, he hit the deceased Surendra Singh with a *sariya*

due to which, deceased Surendra Singh died. It is argued that multiple witnesses have proved this incident. There is immense material to show that the appellant was at ROP Mukhani with regard to a theft case. There are GD entries with regard to his interrogation, departure from ROP Mukhani in search of Aslam as well as return of the appellant with police party at ROP Mukhani at 02:55 on 28.05.2014. It is argued that these factors establish that the appellant was in the police custody in an FIR relating to theft. Learned State counsel also raised the following points in her arguments:-

- (i) It is not necessary that inquest should contain the FIR number.
- (ii) PW3 SI Laxman Singh Jagwan has categorically stated about the incident. He had informed the higher officers and it is proved by GD Report No. 9, 04:20 a.m. of 28.05.2014 of ROP Mukhani, (Ex. A26) that SDM will be informed about the death. It is argued that it is this information, which is recorded in the inquest report. In support of her contention, she had relied upon the principles of law, as laid down by the Hon'ble Supreme Court, in the case of Radha Mohan Singh alias Lal Saheb and others Vs. State of UP, (2006) 2 SCC 450. In the case of Radha Mohan Singh (*supra*), the Hon'ble Supreme Court observed as follows:-

“14. The language of the aforesaid statutory provision is plain and simple and there is no ambiguity therein. An investigation under Section 174 is limited in scope and is confined to the ascertainment of the apparent cause of death. It is concerned with discovering whether in a given case the death was accidental, suicidal or homicidal or caused by

animal and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted. It is for this limited purpose that persons acquainted with the facts of the case are summoned and examined under Section 175. The details of the overt acts are not necessary to be recorded in the inquest report. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted or who are the witnesses of the assault is foreign to the ambit and scope of proceedings under Section 174. Neither in practice nor in law is it necessary for the person holding the inquest to mention all these details.”

- (iii) The *sariya* was lying in the premises of the ROP Mukhani and the appellant, while running away, picked it up and stabbed the deceased Surendra Singh.

12. How the handcuffs were escaped? With regard to it, learned State counsel could not give any explanation.

13. Learned State counsel also submits that when the deceased Surendra Singh died in the hospital, the hospital authorities, as a normal procedure, informed about the death to ROP Mukhani, which is Ex. A26. It is argued that it does not doubt, in any manner, the prosecution case. With regard to the interrogation of the independent witnesses, it is argued that in the odd hours, the killing of the deceased Surendra Singh was done. There are reliable witnesses to it. Mere absence of independent witnesses does not doubt the prosecution case. Learned State counsel also argued that admittedly, in a theft case, the appellant has been convicted. He was brought at the ROP Mukhani in a theft case. Therefore, reference to any material

of a theft case, in any manner, does not doubt the prosecution case. With regard to the dying declaration, learned State counsel states that when the deceased was approached by the witnesses, the deceased revealed that he was hit by the appellant. It is argued that it cannot be said that the kind of injury the deceased sustained, would have made it impossible for him to speak, what he did.

14. Before the arguments are appreciated, it would apt to examine as to what the witnesses have stated.

15. PW1 Dr. C.P. Bhisoda has conducted post mortem of the deceased on 28.05.2014 at 11:40. According to him, he found the following injuries on the person of the deceased:-

- “(1) Stab wound of size 1.5 x 1.1cm present over left side of the chest oval and irregular in shape 16 cm below from the clavicle and 5 cm left from the mid line, margin of wound irregular and Abraded, blood with blood clots present on exploration of the wound Perforating the chest walls, Pericardial sac and wound reaching inside the left ventricle of the heart and pericardial sac and all chambers of heart full of Blood with blood clots and left thoracic cavity filled with blood and blood clots depth of the wound 6.6 cm.
- (2) Stab wound of size 1.4 x 1 cm present over front of chest on right side, 14 cm below from the clavicle and 8 cm right from the mid line margin of the wound, irregular, abraded and blood with the blood clots present over the margin on exploration of the wound it is muscle deep only and infiltration of the blood present oval and irregular in shape.”

According to him, the injuries could have been caused by iron *sariya*.

16. PW2 SI Lalit Mohan Joshi is the star witness. He is the informant. According to him, on 27.05.2014, he was In-charge of ROP

Mukhani. On that date, PW4 Amit Chandra Joshi alongwith PW6 Umesh Chandra Joshi and others brought the appellant alongwith Scooty Activa black in colour bearing Registration No. UK04F281 (“the Scooty”) at ROP Mukhani and told that the Scooty was stolen from the Base Hospital Haldwani on 06.05.2014 and on 27.05.2014, when these persons were returning, they spotted the Scooty at 9:30 near Laldaat. The appellant was holding that Scooty, therefore, he was brought to ROP Mukhani. Thereafter, according to PW2 SI Lalit Mohan Joshi, PW4 Amit Chandra Joshi gave an FIR with regard to the Scooty. Based on which, FIR No. 276 of 2014, under Sections 379, 411 IPC was lodged at ROP Mukhani against the appellant and an investigation was entrusted to PW3 SI Laxman Singh Jagwan, who interrogated PW4 Amit Chandra Joshi. The appellant was kept at ROP Mukhani under the supervision of PW12 Constable Navindra Kumar. On 28.05.2014 at 12:30 in the midnight, the appellant was interrogated by this witness and PW3 SI Laxman Singh Jagwan. Then the appellant pleaded guilty and said that he alongwith one Aslam had stolen the Scooty on 06.05.2014 from the Base Hospital campus. Thereafter, according to PW2 Lalit Mohan Joshi, the police party left ROP Mukhani in search of Aslam at 12:40, but they did not find him. They returned at ROP Mukhani at 02:55 a.m. in the morning. Thereafter, the appellant was given in the supervision of Constable 234 Surendra Singh. He was handcuffed. He was made to sit in the office. This witness directed PW3 SI Laxman Singh Jagwan, Constable Keshar Singh and PW8 Constable Ravi Kumar to have another round of patrolling in the city and return at about 3:30, so that again Aslam may be searched. At that time, PW14 Constable Nirmal Singh Latwal was also in the ROP Mukhani campus.

17. According to PW2, SI Lalit Mohan Joshi at about 3:25, when he was in the washroom, he suddenly heard Constable Surendra Singh shouting that the appellant is running away. At it, this witness immediately came outside the washroom and saw the Constable Surendra Singh holding hands of the appellant in front of the barrack. The appellant then told "leave me otherwise I will kill you" and suddenly picked up iron *sariya* from the ground and hit Surendra Singh, on his chest. Thereafter, the appellant ran towards the west gate of the ROP, Mukhani. This witness also ran after the appellant. Meanwhile, from the eastern gate of ROP Mukhani, PW3 SI Laxman Singh Jagwan, alongwith other police personnel and PW14 Constable Nirmal Singh Latwal reached there and the appellant was apprehended alongwith iron *Sariya* at about 03:30 a.m. The appellant was handed over to the custody of PW3 SI Laxman Singh Jagwan and Constable Keshav Singh. This witness PW2 SI Lalit Mohan Joshi alongwith PW14 Constable Nirmal Singh Latwal and PW8 Constable Ravi Kumar reached to Constable Surendra Singh, who with difficulty told that when the appellant was running, he caught hold of him and the appellant hit him with iron *sariya*. He should be rushed to the hospital. Thereafter, Surendra Singh was taken to hospital, but he was declared brought dead.

18. According to PW2 SI Lalit Mohan Joshi, he informed the incident to SHO, Haldwani. He came back to ROP Mukhani, where PW3 SI Laxman Singh Jagwan was preparing recovery memo of the arrest of the appellant and recovery of iron *sariya*, which this witness also signed. He has proved Ex. A2, recovery memo. He also proved the FIR Ex. A3, which he subsequently, lodged at Police Station Haldwani. According to him, on 04.06.2014, the Investigating Officer took the

uniform of PW8 Constable Ravi Kumar into custody, which had blood stains. The Investigating Officer also took into custody the handcuffs alongwith rope and keys, with which the appellant was handcuffed on the date of incident, by which, he released his hands.

19. PW3 SI Laxman Singh Jagwan has corroborated the statement of PW2 SI Lalit Mohan Joshi. According to him, when the appellant was apprehended, he arrested him and recovered the iron *sariya* and prepared its recovery memo Ex. A2. He also prepared other documents, including arrest memo etc. He is also a witness of inquest. According to him, he had informed Pargana Magistrate for inquest by writing a letter.

20. PW8 Constable Ravi Kumar and PW14 Constable Nirmal Singh Latwal have also corroborated the statement of PW2 SI Lalit Mohan Joshi. They both were also present when the incident took place at ROP Mukhani.

21. PW4 Amit Chandra Joshi is the person, whose Scooty was stolen on 06.05.2014 and who spotted his Scooty on 27.05.2014, when the appellant was trying to start it. According to him, they took the appellant alongwith the Scooty at ROP Mukhani and gave an application at 10:30 p.m. at ROP Mukhani on 27.05.2014. Police did all the documentation and took his signatures on it. Thereafter, he left the Scooty and the appellant in the ROP Mukhani and returned to his house.

22. PW5 Harveer Singh was working as Sub Divisional Magistrate, Haldwani. According to him, on 28.05.2024, he received a

communication from PW3 SI Laxman Singh Jagwan with regard to killing of Constable Surendra Singh. He prepared inquest report Ex. A8. He also proved other documents.

23. PW6 Umesh Chandra Joshi was also accompanying PW4 Amit Chandra Joshi, when they took the Scooty alongwith the appellant at ROP Mukhani and lodged the report and returned.

24. PW7 Head Constable Amar Singh Adhikari has proved the chik FIR Ex. A13 and GD entries of lodging of the case against the appellant Ex. A14. This witness has also stated that the appellant had blood on his clothes, therefore, an information of his arrest was given to his home and his clothes were also brought from his home and he was given his clothes to change. He has proved those documents, by which the clothes of the appellant were taken into custody. He proved those articles, as well.

25. PW9 Satyajeet Singh Rana is also the person, in whose presence, the clothes of the appellant were taken into custody, which has blood stains, which has been proved by PW7 Head Constable Amar Singh Adhikari, of which, recovery memo Ex. A16 has been proved by these two witnesses. He has also proved the specimen seal, as well.

26. PW10 Constable Dalip Kumar tells that he had taken the articles of this case from the police station to the court and from there to Forensic Science Laboratory ("FSL"). He has proved the documents accordingly.

27. PW11 SI Umed Singh Danu has investigated the matter. According to him, he has interrogated the appellant, who had admitted his guilt, of which, the documentation Ex. A17 was done. It is basically a confession of the appellant that was recorded by the police. How is it admissible? A confession made before the police cannot be read into evidence. This witness has also proved the recovery memo of the plain and blood stained soil and proved those documents.

28. PW12 Constable Navindra Kumar was on Sentry duty at ROP Mukhani till 12:00 in the midnight and thereafter, the duty was changed and given to deceased Surendra Singh. This witness has stated that during his duty at about 10:30, PW4 Amit Chandra Joshi alongwith others brought the appellant and his Scooty at the police station, saying that the Scooty was stolen from the Base Hospital, Haldwani. They had spotted the appellant in the Scooty. Thereafter, based on the report of PW4 Amit Chandra Joshi, FIR was lodged. The appellant was made to sit in the ROP Mukhani in his Sentry duty. At 24:00 hours, according to him, he handed over the Sentry duty to the deceased Surendra Singh. He has stated about the GD entry of the change of duty.

29. PW13 Constable Tarun Pandey had gone to collect the FSL report. He has stated about it.

30. PW15 SSI Trilok Ram Bagretha is the Investigating Officer. He has stated about the steps taken by him during investigation. He prepared the site plan Ex. A28 of the place of incident. He also took the uniform of PW8 Constable Ravi Kumar, which had blood stains, into custody and prepared its recovery memo Ex. A20. He also took

into custody the handcuffs alongwith its keys, by which, the appellant had released himself, while committing the offence. According to PW15 SSI Trilok Ram Bagretha, he had drawn a sketch of the handcuffs on a sheet of paper, which is Ex. A30. This witness has also proved certain other articles and proved the charge sheet Ex. A31.

31. In his defence, the appellant has examined many witnesses.

32. DW1 Hukum Singh has stated that on 28.05.2014, in the morning at about 5:30, police personnel came in his house and inquired about the appellant and took him alongwith him. DW2 Geeta Verma, DW3 Tara Devi, DW4 Hansa Devi, DW5 Prema Devi, DW6 Shanti Devi and DW7 Asha Devi have supported the statement of DW1 Hukum Singh.

33. It is true that in the impugned judgment, the record of theft case against the appellant has been looked into. Reference has been made to various paragraphs in the impugned judgment, including paragraphs 24 and 41. Undoubtedly, material recorded in one case may not be considered against the accused in another case, unless the accused has been given an opportunity to cross examine a person, who has proved the material in another case. The law on that point is well settled. In fact, the statement of a person cannot be read against the accused in a criminal trial, unless the accused has an opportunity to cross examine such a person. But, fact remains that in a case of theft of the Scooty of PW4 Amit Chandra Joshi, the appellant had undergone a criminal trial and he was convicted. This is a fact. It is admitted that the judgment has been delivered by the court of

competent jurisdiction. A notice of it may always been taken by the court.

34. It is argued that the prosecution has not proved that the appellant was in custody at ROP Mukhani at the relevant time. The witnesses have stated that at ROP Mukhani Sentry duty was changed from PW12 Constable Navindra Kumar at 12:00 in the midnight and the deceased Constable Surendra Singh was given Sentry duty. Ex. A22 is GD entry of ROP Mukhani. It has been proved by PW14 Constable Nirmal Singh Latwal. He has stated about it.

35. At Report No. 2, 00:30 Hrs on 28.05.2014, the GD entry of ROP Mukhani records that the appellant was interrogated about the Scooty with regard to the FIR No. 276 of 2014, under Sections 379 and 411 IPC, when the appellant told that on 06.05.2014, he along with Aslam took away the Scooty. This GD entry has been proved by PW14 Constable Nirmal Singh Latwal as Ex. A23.

36. GD Entry No. 4 of 00:40 Hrs of 28.05.2014 of ROP Mukhani records that in FIR No. 276 of 2014, under Sections 379 and 411 IPC, police alongwith the appellant left in search of Aslam, which is Ex. A24. Ex. A25 is GD Entry Report No. 5 of 2:55 Hrs dated 28.05.2014 of ROP Mukhani, which records that police party alongwith the appellant returned after the search of Aslam. These documents have been proved by PW14 Constable Nirmal Singh Latwal. These are GD entries of ROP Mukhani, Police Station Haldwani. These Exs. A-22, A-23, A-24 and A-25 establish beyond reasonable doubt that the appellant was in ROP Mukhani with regard to the theft of Scooty of PW4 Amit Chandra Joshi. PW2 SI Lalit Mohan Joshi and

other witnesses have also categorically stated about it. Therefore, it cannot be said that prosecution has concealed anything with regard to theft of the Scooty or lodging of FIR under Sections 379 and 411 IPC against the appellant, based on report lodged by PW4 Amit Chandra Joshi. The arguments that are made on this aspect have less force for acceptance.

37. It is argued that how iron *sariya* was lying in the ROP Mukhani, Police Station Haldwani? The answer to how, could not be established by the prosecution. It is stated by the witnesses that ROP Mukhani is adjoining the residential area without any boundary wall. If iron *sariya* was lying unattended in the premises, the prosecution need not establish its source. It has been stated by the witnesses that the deceased Surendra Singh was hit by iron *sariya*, which was lying in the premises of ROP Mukhani.

38. It is argued that the prosecution case is not reliable because the inquest report Ex. A8 records that the report was given at 08:10 a.m. to the maker of inquest and it does not record the FIR number, which was lodged much before at 05:55 a.m. at Police Station Haldwani. This argument has, in fact, no force. PW5 Harveer Singh has proved the inquest report. He has categorically stated that SI Laxman Singh Jagwan, who is PW3, had given him an information that the appellant had killed Constable 234 Surendra Singh and thereafter, he prepared the inquest report. It is true that FIR was lodged much before 08:10 a.m., it was lodged at 05:55 a.m. at Police Station Haldwani. But, fact also remains that when the deceased Constable Surendra Singh died in the hospital, the Ward Boy Rajendra Kumar gave a memo of death at ROP Mukhani, which was entered into

GD Report No.9, 4:20 Hrs at ROP Mukhani, which is Ex. A26. This Ex. A26 records that the SDM Haldwani shall be informed about the death of Constable Surendra Singh. PW3 SI Laxman Singh Jagwan, in para 13 of his statement has stated that after receiving information about the death of Constable Surendra Singh, he wrote a letter to SDM, Haldwani, PW5 Harveer Singh for inquest, who subsequently, prepared the inquest.

39. There are two separate channels. FIR was lodged at 05:55 a.m. by PW 2 Lalit Mohan Joshi. Much before it, at 04:20, the GD Entry of ROP Mukhani records that SDM, Haldwani shall be informed about the death of Constable Surendra Singh. This is what PW3 SI Laxman Singh Jagwan has stated in his statement and PW5 Harveer Singh tells in the court that he received a letter from PW3 SI Laxman Singh Jagwan with regard to killing of the deceased Constable Surendra Singh by the appellant. Thereafter, he prepared the inquest report. In the case of Radha Mohan Singh (*supra*), the Hon'ble Supreme Court has held that the purpose of inquest is to the ascertainment of the apparent cause of death. Therefore, non-mention of FIR number in the inquest report, in no manner, doubts the prosecution case.

40. It is also argued that PW2 SI Lalit Mohan Joshi alongwith other police personnel took the deceased to hospital, where he died. In such contingencies, it is argued that there was no reason for the hospital authorities to send death memo. This argument, in no manner, doubts the prosecution case. The hospital authorities in their wisdom thought it proper to inform police by way of sending a memo about death of the deceased Surendra Singh that is what they did and

it is entered in a GD Entry Report No. 9 at 4:20 Hrs of 28.05.2014, which is Ex. A26.

41. The witnesses have been cross examined extensively. In fact, nothing has been extracted from the cross examination of the witnesses, which, in any manner, would doubt the credibility of these witnesses. PW15 SSI Trilok Ram Bagretha is the Investigating Officer. In his cross examination, he has admitted that there were many houses adjoining the ROP Mukhani. There were a colony road adjoining the ROP Mukhani, but this witness did not interrogate any witness. The incident took place at about 03:30 a.m. on 28.05.2014. The Investigating Officer did not interrogate any independent witness and there is no independent witness to the incident in the instant case. It does not doubt the prosecution case. As stated, PW2 SI Lalit Mohan Joshi and PW3 SI Laxman Singh Jagwan, PW8 Constable Ravi Kumar and PW14 Constable Nirmal Singh Latwal have categorically stated as to what had happened in the intervening night of 27/28.05.2014 at ROP Mukhani, Police Station Haldwani. The incident was unfortunate. The appellant was accused in a theft case and suddenly, while running away, he hit the deceased Constable Surendra Singh with iron *sariya*. He was caught red handed by the police personnel, when he was trying to run away. The evidence of these witnesses inspires much confidence. It is supported by the medical evidence.

42. The question of releasing from handcuffs definitely troubles this Court. The sketch of handcuffs is Ex. A30. There is no contemporary record, which could reveal that the appellant was handcuffed, when he was in ROP Mukhani. As stated, there are

multiple GD entries proved by the prosecution. Change of Sentry duty, Ex. A22, an interrogation of the appellant in a theft case is Ex. A23, according to which. in the midnight. at 12:30, interrogation was done and at 12:40 in the midnight, the police proceeded in search of Aslam, which is revealed by Ex. A24 GD entry and police party did return at 02.55 a.m. on 28.05.2014 at ROP Mukhani, which is evident by GD entry, Ex. A25. But, in these GD entries, it is not recorded that the appellant was handcuffed. The duty of the Court is to find the truth. Prosecution could not establish as to how the appellant could release his hands from the handcuffs. Even if, he could do so, where were the keys? How the keys were found because had the deceased locked the handcuffs, the keys would have been with him. Therefore, the story of releasing from the handcuffs does not inspire confidence. This Court is of the view that, in fact, the appellant was not handcuffed by the police and this is something added by the prosecution to give more strength to their cause.

43. What is proved by the prosecution is that, in fact, the appellant was at ROP Mukhani in a theft case, which was lodged at about 10:30 p.m. on 27.05.2014. Midnight at 12:30, the appellant was interrogated by the police and at 12:40, police proceeded in search of Aslam and at 02:55 a.m. on 28.05.2014, the police party alongwith the appellant returned at ROP Mukhani, Police Station Haldwani. The appellant was not handcuffed. It is, thereafter, the appellant tried to run away and when the deceased Constable Surendra Singh tried to apprehend him, he hit him with iron *sariya*, which was lying in the premises of ROP Mukhani.

44. It is the prosecution case that when the appellant tried to escape the custody and run away from ROP Mukhani, he was apprehended by the deceased Constable Surendra Singh and the appellant hit him. Thereafter, PW2 SI Lalit Mohan Joshi, PW14 Constable Nirmal Singh Latwal and PW8 Constable Ravi Kumar took the deceased to the hospital. The uniform of PW8 Constable Ravi Kumar was stained with blood. It was taken into custody. Police has proved it. The recovery memo has been proved along with the GD entries. Those articles were forwarded to the FSL and in all those articles Blood Group "O" was detected.

45. In view of the foregoing discussion, this Court is of the view that, in fact, prosecution has been able to prove, beyond reasonable doubt that on 28.05.2014 at about 03:30 in the morning, the appellant was in the police custody with regard to FIR No.276 of 2014, under Section 379, 411 IPC, lodged by PW4 Amit Chandra Joshi. At about 03:25 a.m., on that date, the appellant tried to run away from the police custody and when Constable Surendra Singh tried to apprehend him, the appellant hit Constable Surendra Singh on his chest with iron *sariya*. Prosecution has, in fact, proved beyond reasonable doubt, the offence under Section 224 IPC also.

46. The question of offence under Section 302 IPC falls for consideration. It is argued on behalf of the appellant that it is not a planned killing. In a sudden quarrel, in the process of running away from the police custody, as per prosecution, the deceased was hit. It is argued that this case falls under Exception 4 to Section 300 IPC.

47. In the case of Pappu Vs. State of M.P., (2006) 7 SCC 391, the Hon'ble Supreme Court discussed the scope of Section 300 Exception IV of IPC and in para 13 of the judgment observed as follows:-

“.....The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the “fight” occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual . The expression “undue advantage” as used in the provision means “unfair advantage”.

48. In the case of Sayaji Hanmant Bankar Vs. State of Maharashtra, (2011) 14 SCC 477, there were petty quarrel between the husband and wife and one day, the husband hit with left knee with a water pot and thereafter, threw a burning kerosene lamp upon her. The wife was wearing a nylon saree, which immediately caught fire and she subsequently dies. Under those facts and circumstances in paras 5 and 9, the Hon'ble Supreme Court observed as follows:-

“5. In our view, from the evidence on record, it does not appear that the intention on the part of the accused was to cause death or such bodily injury as would have resulted in the death of his wife. There would be much more activity on the part of the accused if his intention was to commit the murder of his wife. It seems that there was a fight as soon as he came to the house under a drunken state

and in the fight, he first hit her left knee with a water-pot and thereafter, threw a kerosene lamp on her. It is obvious from the evidence that this was done suddenly in the heat of passion. If there was any intention to commit her murder, as mentioned in Section 299 IPC, there would have been such other acts like pouring kerosene on the deceased, etc. on the part of the accused.

9. We have gone through the evidence carefully. It seems that as soon as the accused entered the house, there appeared to be some quarrel with his wife and in that fight first, he threw a water-pot and thereafter a kerosene lamp. The burning seems to be more out of the fact that unfortunately at that time, the lady was wearing a nylon sari. Had she not been wearing a nylon sari, it is difficult to imagine how she could have been burnt to the extent of 70%. In our view this was a case which clearly falls under Exception 4 to Section 300 IPC since there was a sudden fight. There was no premeditation either. Therefore the appellant-accused is liable to be convicted for the offence punishable under Section 304 Part I.”

49. In the instant case, what the prosecution has proved is that the appellant was in police custody with regard to a theft case. The appellant tried to run away; the deceased caught hold of him; in that process, to escape, suddenly, the appellant picked up iron *sariya*, which was lying at ROP Mukhani and hit the deceased on his chest, due to which, the deceased died.

50. These facts establish that, in fact, the death is caused; (a) without premeditation; (b) in a sudden fight; (c) without the appellant taking any undue advantage or acting in a cruel or unusual manner. This act, in fact, falls under Exception 4 to section 300 IPC. Therefore, this Court is of the view that the prosecution though has proved the sequence of the events, which resulted into the death of the deceased Surendra Singh, but it does not fall under Section 302 IPC. The fact,

as proved by the prosecution establishes that the appellant is liable to be convicted under Section 304 Part 1 IPC.

51. The accused was arrested on 28.05.2014 and he has been in custody since then.

52. We accordingly, alter the conviction of the appellant from Section 302 IPC to Section 304 Part-1 IPC and sentence him to the period of custody which he has already undergone in this case. Sentence of fine shall remain the same.

53. Let the appellant be released from custody forthwith unless he is required in any other case.

54. The appeal is partly allowed to the extent indicated above.

55. Let a copy of this judgment be sent to learned court below along with the original records.

(Alok Mahra, J.)

(Ravindra Maithani, J.)

07.01.2026

Jitendra