

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

Present:

Mr. Justice Syed Mahmud Hossain, *Chief Justice*
Mr. Justice Hasan Foez Siddique
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan

CRIMINAL APPEAL NO.18 OF 2012

(From the judgment and order dated 22.07.2008 passed by the High Court Division in Criminal Appeal No.3701 of 2004)

Abdus Samad @ Md. Abdus :Appellant
Samad

Versus

The State :Respondent

For the appellant : Mr. Abu Siddique, Advocate-on-Record.

For the respondent : Mr. Biswajit Debnath, Deputy Attorney General, instructed by Mr. Md. Shamsul Alam, Advocate-on-Record.

Date of hearing and judgment : The 5th day of January, 2021.

JUDGMENT

Obaidul Hassan, J. This Criminal Appeal arises out of leave granted in Criminal Petition for Leave to Appeal No.187 of 2009 on 27.11.2011 against the judgment and order dated 22.07.2008 passed by the High Court Division in Criminal Appeal No.3701 of 2004 dismissing the same and thereby affirming the judgment and order dated 25.08.2014 passed by the learned Additional Sessions Judge, Sherpur in Sessions Case No.83 of 2001 convicting the present appellant under Sections 302/148 of the Penal Code, 1860 (shortly, the Penal Code) and sentencing him thereunder to suffer imprisonment for life and also to pay a fine of Tk.10,000.00, in

default to suffer rigorous imprisonment for a further period of 2(two) years.

Facts necessary for the disposal of the appeal are that one Behula Khatun, wife of the victim Khurshed Ali, as an informant lodged First Information Report (shortly, F.I.R.) at Nalitabari Police Station on 19.11.1999 alleging, *inter alia*, that on 17.11.1999 at about 4:00 p.m. the convict, herein the appellant, and other accused persons being armed with deadly weapons entered into the house of the victim Khurshid Ali. Upon the order of accused Majam Ali, accused Barek ignited fire at the house of the informant and while the informant and others tried to resist the accused persons, accused Barek dealt a '*ram dao*' blow aiming the head of the informant. As the informant tried to save her head with her hand, the dao blow hit her finger of the left hand which caused serious bleeding cut injury. The accused-appellant Abdus Samad @ Md. Abdus Samad dealt '*shabol*' blow on the head of the victim Kurshed Ali. The head of the victim was broken and he fell down on the ground. The other accused persons indiscriminately physically assaulted the victim, the informant, his daughter and his son-in-law. As the witnesses rushed to the place of occurrence, the accused persons ran away. The witnesses then took the victim and other injured persons to the Nalitabari Hospital. The victim Khurshed Ali succumbed to his injuries on 19.11.1999 and hence the case.

The police after investigation submitted charge sheet against 12 persons including the appellant on 28.04.2000 under Sections 148/149/323/435/302/144 of the Penal Code, 1860.

Upon the aforesaid allegations, the accused persons including the appellant were put on trial before the Additional Sessions Judge, Sherpur (hereinafter referred to as the trial Court) to answer the charges under Sections 148/149/323/435/302/144 of the Penal Code to which they pleaded not guilty.

At the trial, the prosecution has examined 17 witnesses in support of its case and the defence examined none.

After closing the recording of evidence of the prosecution witnesses, the appellant and co-accused were examined under Section 342 of the Code of Criminal Procedure, 1898 during which they repeated their innocence.

The defence case, as it transpires from the trend of cross-examination of the prosecution witnesses, is that the convict-appellant Abdus Samad and co-accused Barek are innocent and that they have falsely been implicated in this case out of enmity.

The learned Additional Sessions Judge, Sherpur by its judgment and order of conviction and sentence dated 25.08.2004 convicted the present appellant under Sections 302/148 of the Penal Code and sentenced him to suffer rigorous imprisonment for life and also to pay a fine of Tk.10,000.00, in default to suffer rigorous imprisonment for a further period of 2 (two) years and

also convicted co-accused Abdul Barek under Section 436 of the Penal Code and sentenced him to suffer rigorous imprisonment for 2 (two) years and to pay a fine of Tk.1,000.00, in default to suffer imprisonment for a further period of 3(three) months and acquitted other co-accused from the charges leveled against them.

Being aggrieved by the said judgment and order of the trial Court, the present appellant and co-accused Abdul Barek preferred Criminal Appeal No.3701 of 2004 before the High Court Division upon surrendering voluntarily on 16.10.2004, but the appeal was dismissed vide judgment and order dated 22.07.2008, wherein the judgment and order passed by the trial Court was affirmed.

Being aggrieved by and dissatisfied with the judgment and order of the High Court Division, the appellant Abdus Samad @ Md. Abdus Samad preferred Criminal Petition for Leave to Appeal No.187 of 2009 before this Division and the leave was granted to consider the following points:-

- i. For that the learned Judges of the High Court Division have totally failed to consider that no evidence has been produced to show the ownership of the land in dispute regarding which Khurshed Ali died. Moreover, it is admitted position that Majam Ali, father of the petitioners used to cultivate that land, he grew paddy therein, but the victim and his family members forcefully entered into the paddy field and raised a hut by cutting crops only a few hours earlier to the occurrence as such, the victim and his family members

are imposters and the petitioners' action, if any, was only to defend their interest but unfortunately it caused the death of Khushed Ali. Therefore, the conviction and sentence under Section 302 is absolutely erroneous.

- ii. For that the learned Judges of the High Court Division have committed an error of law and facts as well, in not converting the conviction and sentence of the petitioner Abdul Samad from Section 302 into Section 304(B) of the Penal Code.

It may be mentioned here that the appellant Abdus Samad was absconding and the trial proceeded against him in his absence. He was provided with state defence lawyer in accordance with the law.

Abu Siddique, learned advocate, appearing for the appellant has taken us through the FIR, testimonies of the witnesses, the judgment and order passed by the trial Court and the appellate Court (High Court Division), the post-mortem report and the connected materials on record. He submits that the High Court Division as an appellate Court being the last Court of fact has totally failed to consider the facts and circumstances of the case and in total disregard of the sacred duty to scrutinize the evidence on record as well as has erroneously upheld the conviction and sentence of the appellant, which is required to be set aside for the ends of justice. He also submits that both the Courts below committed an error of law in convicting and sentencing the appellant. Moreover, their judgments suffer from non-application

of judicial mind. He further submits that both the Courts below have failed to take notice of the fact that the prosecution witnesses contradicted each other in many vital issues and the Courts below committed an error in not giving the advantage of contradiction in favour of the appellant. He again submits that the High Court Division has committed an error of law in not considering that the appellant was not properly examined under Section 342 of the Code of Criminal Procedure, 1898. Hence, he was seriously prejudiced. He next submits that the High Court Division committed an error of law in not considering that the trial Court has not complied with the provisions of Section 367 of the Code of Criminal Procedure, 1898 in convicting and sentencing the present appellant.

In reply, Mr. Biswajit Debnath, the learned Deputy Attorney General, appearing for the respondent, made his submission supporting the judgment and order of the High Court Division and prays for dismissal of the appeal.

Heard the learned advocates appearing on behalf of both the parties and examined the FIR, the testimonies of the witnesses, inquest report, postmortem report, judgment and order of conviction and sentence passed by the trial Court, judgment and order of affirmation of conviction and sentence passed by the High Court Division in appeal and the connected materials on record.

Now, to ascertain whether the prosecution has been able to prove the charge against the appellant, let us examine and analyse the depositions of the witnesses produced by the prosecution.

P.W.1, Behula Khatun is the informant of this case. Khurshed Ali is her husband. She stated that accused Barek and Samad were not on the dock, they were absconding. She, however, identified the other accused on the dock. She further stated that the occurrence took place on the 3rd of Agrahayan of the year of occurrence at 4:00 p.m. At that time the accused being armed with deadly weapons entered into the house of her husband, Khurshed Ali. At the order of accused Majam Ali, accused Barek set the house of the informant on fire and the house was burnt into ashes. There was a loss of Tk.3,000.00. She, her son-in-law, her daughter and her husband resisted. But accused Barek dealt a '*ram dao*' blow on her head. Informant tried to resist the blow with her hand and the blow hit the middle finger of her left hand. Accused Abdus Samad dealt '*shabol*' blow on the head of deceased Khorshed Ali, husband of the informant and her husband fell down on the ground. Other accused dealt indiscriminate '*lathi*' blows on the person of her husband, herself, her son-in-law Nabi Hussain and daughter Kusuma Khatun. As they raised voice the witnesses came there. The witnesses first took them to the Nalitabari Hospital, from there the victim Khorshed was taken to

Mymensingh Medical College Hospital and on the following day Khurshed Ali died at the hospital. After that the informant went to the police station and lodged the FIR. The FIR was read over to her and she put her signature therein. She proved the FIR, which was marked as exhibit-1.

In cross-examination, she stated that the accused set their hut on fire. Accused Samad dealt '*shabol*' blow on the head of her husband. The informant had enmity with the accused over the landed property. She denied the suggestion that accused Barek did not set their house on fire or that accused Samad did not inflict '*shabol*' blow on the head of her husband.

P.W.2, Most. Kusuma Khatun is the daughter of deceased Khurshed Ali. She stated that at the time of occurrence, she was at home and the occurrence took place on the 3rd of Agrahayan of the year of occurrence at 4:00 p.m. The accused attacked them with '*ram dao*', '*lathi*' and '*shabol*' etc. accused Barek set their hut on fire. She stated that accused Samad dealt '*shabol*' blow on the head of her father and his head was fractured. She also stated that accused Barek dealt '*ram dao*' blow on the head of her mother, but her mother resisted with her hand and the middle finger of her left hand was cut. Other accused also dealt indiscriminate blows upon them. They raised their voice and the witnesses came there. All injured persons were taken to the hospital for treatment. On the

following day at 4:00 p.m. her father died. Thereafter, her mother lodged the FIR with the police station.

In cross-examination, she stated that she saw the occurrence. Her mother also saw the occurrence. She denied the suggestion that her mother instituted false case against the accused persons.

P.W.3 is Md. Sadar Ali. He stated that at the time of occurrence, he was working in his own land adjacent to the place of occurrence. He further stated that the occurrence took place on the 3rd of Agrahayan of the year of occurrence at 4:00 p.m. He went to the place of occurrence and saw that the accused were fleeing away. He could recognize the accused. Thereafter, he found that Khurshed Ali was lying on the ground and his head was severely fractured. Witnesses Nobi Hussain and Kusuma Khatun also received injuries. Khurshed Ali died at the Mymensingh Medical College Hospital.

In cross-examination, he stated that he could not remember after how many days of the occurrence Daroga examined him. He did not see the accused inflicting blows but he saw them fleeing.

P.W.4, Chand Miah stated that the occurrence took place at about 4:00 p.m. At that time, he was ploughing his own land in the north of the place of occurrence. He saw that the accused were leaving the place of occurrence. Thereafter, he went to the place of occurrence and saw that the hut of the informant was burning. He heard that the accused set the house on fire.

In cross-examination, he stated that he did not see the occurrence.

P.W.5, Mosmt. Sanowara Begum stated that she was the neighbour of the informant, the occurrence took place at about 4:00 p.m. She further stated that at the time of occurrence, she was staying at her own house. She saw that the accused persons were passing through in front of her house with '*shabol*', '*lathi*' and other weapons. She followed them and saw that the accused Samad inflicted '*shabol*' blow on the head of Khorshed Ali. The other accused dealt indiscriminate '*lathi*' blows on the body of the wife and daughter of Khurshed Ali. The head of Khorshed Ali was fractured and he fell down on the ground. The injured persons were taken to Nalitabari Hospital for treatment.

In cross-examination, she stated that she was on the place of occurrence. She saw the accused passing through in front of her house and she followed them. Accused also set the hut of the informant on fire. She denied the suggestion that she did not see the occurrence.

P.W.6, Abu Bakkor stated that at the time of occurrence, he was at home hearing hue and cry he went to the place of occurrence and saw the body of Khurshed Ali lying on the place of occurrence. He also saw that the hut of the informant was burning. He heard that the accused Samad dealt '*shabol*' blow on the head of Khurshed Ali, as a result, his head was fractured. He

was taken to Mymensingh Medical College Hospital and he died there.

In cross-examination, he stated that he did not see the occurrence, but heard about the occurrence from the informant.

P.W.7, Abul Kashem stated that at the time of occurrence, he was in his own land which was situated 400/500 yards away from the place of occurrence. Hearing hue and cry he went to the place of occurrence and saw the body of Khurshed Ali lying on the place of occurrence and his head was fractured and blood was oozing there from. Then Khurshed Ali was taken to Mymensingh Medical College Hospital and he died there due to head injury.

In cross-examination, he stated that he saw the occurrence. The informant is his aunt. He denied the suggestions that it was a false case and that he deposed falsely.

P.W.8, Md. Abdur Rahman stated that at the time of occurrence, he was taking meal in his house. He heard hue and cry and went to the place of occurrence and saw that the accused were fleeing away. He also saw that Khurshed Ali was lying on the ground with injuries on his head. He heard that accused Samad dealt '*shabol*' blow on the head of Khurshed Ali.

In cross-examination, he stated that he could not remember from whom he heard the name of absconding accused Barek and Samad. He denied the suggestion that he deposed falsely.

P.W.9 is Md. Nabi Hussain. He is the son-in-law of the informant. Khursed Ali, the deceased, was his father-in-law. He stated that the occurrence took place at about 4:00 p.m. He stated that his mother-in-law (informant), father-in-law (deceased) and wife were at home. At that time the accused came there with deadly weapons like '*ram dao*', '*lathi*', '*shabol*' etc. At the order of accused Majam Ali, accused Samad inflicted '*shabol*' blow on the head of his father-in-law, accused Barek dealt '*ram dao*' blow on the head of his mother-in-law and the finger of his mother-in-law was cut. Accused set the house of his father-in-law on fire. All the accused dealt indiscriminate '*lathi*' blows upon him, his mother-in-law, his father-in-law and his wife. They were taken to Nalitabari Hospital for treatment, from there his father-in-law was taken to Mymensingh Medical College Hospital and he died there on the following day.

In cross-examination, he stated that at the time of occurrence, he was present at the place of occurrence. He denied the suggestions that the accused were not involved in this case and that he deposed falsely because the informant was his relative.

P.W.10, Md. Shahiduzzaman stated that the occurrence took place on 17.11.1999. He heard about the occurrence and did not see the occurrence. He was in Jamalpur at the time of occurrence.

In cross-examination, he stated that he went to Mymensingh Medical College Hospital on Thursday and came back to Sherpur with the dead body of Khurshed Ali.

P.W.11, Md. Zakir Hossen stated that on 19.11.1999, he was attached to Mymensingh Kotwali Police Station as Sub-Inspector(S.I). He prepared the inquest report of deceased Khurshed Ali. He proved the inquest report which was marked as exhibit-2 and his signature therein as exhibit-2/1.

P.W.12, Md. Toyab Ali stated that on 17.11.1999 at 4:00 p.m. the occurrence took place. He was working nearer to his house. The place of occurrence is 300/400 yards away from his house. The accused passed through in front of his house with '*lathi*', '*shabol*' etc. He went to the place of occurrence and tried to resist Majam Ali but he did not listen to him. Accused Samad dealt '*shabol*' blow on the head of Khurshed Ali. As a result, Khurshed Ali fell down on the ground. Thereafter, other accused dealt indiscriminate blows upon Nabi Hossain, Kusuma Khatun and Behula Khatun. The injured persons including Khurshed Ali were taken to the hospital and Khurshed Ali died on the following day at the Mymensingh Medical College Hospital. He stated that he saw the occurrence. Daroga also examined him.

In cross-examination, he denied the suggestion that the accused were not involved in this case and that he deposed falsely.

P.W.13, Md. Dulal Uddin stated that at the time of occurrence, he was cutting grass nearer to the place of occurrence. When he saw that the accused were going towards the house of informant, he went to the place of occurrence and saw that Khurshed Ali was lying on the ground with bleeding injuries. His wife, son-in-law and daughter also received injuries. On the following day, Khurshed Ali died at Mymensingh Medical College Hospital. Daroga examined him.

In cross-examination, he stated that he was cutting grass one mile away from the place of occurrence. He did not see the occurrence.

P.W.14, Md. Solaiman stated that the occurrence took place on 17.11.1999 at 4:00 p.m. At that time, he was coming with bundles of paddy. He saw that the accused Samad, Hakimuddin, Chand Miah were beating some persons. Accused also beat Khurshed. He heard from the wife of Khurshed that the accused also beat the wife of Khurshed Ali. He did not see who dealt blow on the head of Khurshed Ali.

In cross-examination, he stated that he did not see who beat whom.

P.W.15, Md. Umed Ali was tendered. Defence declined to cross-examine him.

P.W. 16, Dr. M. Anisur Rahman stated in his deposition that on 19.11.1999 he held the post-mortem examination of deceased Khurshed Ali and found the following injuries on his person:

“One 2” long three silk stitched wound found over the vertex.

On dissection: Depressed multiple pieces of bone found in the left temporo-parietal bone, epidurally 2” diameter hematoma found in the left temporo-parietal region and 3” diameter hematoma found in the right temporo-parietal region of the head. $1\frac{1}{2}$ ” diameter epidural hematoma found in the vertex.

Intracerebral hemorrhage found right and left temporo-parietal region of the brain substance.”

In his opinion, death was due to head injury caused by the above mentioned injuries, which were ante-mortem and homicidal in nature.

In cross-examination, he stated that he found one injury on the head of the deceased. He did not mention the age of injury. He denied the suggestion that he did not examine the dead body minutely and that he submitted a wrong report.

Md. Jasim Uddin as P.W.17 stated that on 19.11.1999 he was attached to Nalitabari Police Station as Officer-in-charge. He filled up the FIR column. He proved the FIR, which was marked as exhibit-4 and his signature therein as exhibit-4/1. He himself took up the charge of the investigation. He visited the place of occurrence, prepared the sketch map with index thereof and put his signature therein. He proved the sketch map, which was

marked as exhibit-5 and his signature therein as exhibit-5/1. He proved the index, which was marked as exhibit-6 and his signature therein as exhibit- 6/1. He also seized alamots by preparing seizure list. He proved the seizure list, which was marked as exhibit-7 and his signature therein as exhibit-7/1. He examined the witnesses and recorded their statements under Section 161 of the Code of Criminal Procedure, 1898. He also perused the medical certificate, inquest report and post-mortem report. Thereafter, he submitted charge sheet against the accused as a *prima facie* case was made out against them.

In cross-examination, he denied the suggestion that his investigation was perfunctory.

These are all the evidence adduced by the prosecution witnesses.

Out of 17 prosecution witnesses P.W.15 was tendered, P.W.17 was the investigation officer, P.W.16 was the doctor and P.W.11 was the police officer. So, P.Ws 11, 16 and 17 were formal witnesses. The remaining witnesses were private witnesses. Amongst the witnesses, P.Ws 1,2,5,9 and 12 were eye-witnesses in this case.

From a careful scrutiny of the evidence on record and also in view of the discussions made hereinabove, it is clear that at the time of quarrel between the appellant and the family of the deceased Khurshed Ali due to construction of house at the

disputed land at night before the date of occurrence, appellant Samad inflicted 'shabol' blow on the head of the deceased. As a result, the deceased fell down on the ground and initially he was taken to Nalitabari Hospital for treatment. Thereafter, he was transferred to the Mymensingh Medical College Hospital and he died there on the following day. From the evidence on record, it appears that the victim Khurshed Ali was killed by 'shabol' blow of the appellant Samad. In the post-mortem report, the nature of injury on the head of the victim was described as, "*On dissection: Depressed multiple pieces of bone found in the left temporo-parietal bone, epidurally 2" diameter hematoma found in the left temporo-parietal region and 3" diameter hematoma found in the right temporo-parietal region of the head. 1½" diameter epidural hematoma found in the vertex. Intracerebral hemorrhage found right and left temporo-parietal region of the brain substance.*"

Regarding cause of death, the doctor opined that, "*In my opinion, death was due to head injury caused by the above mentioned injuries which were ante-mortem and homicidal in nature.*" So, it is proved beyond reasonable doubt that the appellant namely, Abdus Samad @ Md. Abdus Samad killed the victim Khurshed Ali.

Now the question before us to be decided is that, whether the act of the appellant would fall within the ambit of an offence of murder punishable under Section 302 of the Penal Code or

culpable homicide not amounting to murder i.e. under Exceptions 1 and 4 to Section 300 punishable under Section 304 Part-I of the Penal Code.

Culpable homicide has been defined in Section 299 of the Penal Code which reads as under:

"Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injuries as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

Culpable homicide becomes murder if it attracts any circumstances enunciated in Section 300 of the Penal Code. To consider culpable homicide not amounting to murder, five exceptions have been referred in Section 300 of the Penal Code. If any act falls within the purview of any exception enunciated in Section 300 of the Penal Code, then the culpable homicide becomes not amounting to murder. In *the State Vs Tayeb Ali and others*. [40 DLR(AD) 6] the difference between 'murder' and 'culpable homicide' has been alluded by this Division: ".....All murders are culpable homicide but all culpable homicides are not murder. Excepting the General Exceptions attached to the definition of murder an act committed either with certain guilty intention or with certain guilty knowledge constitutes culpable homicide amounting to murder. If the criminal act is done with the intention of causing death then it is murder

clear and simple. In all other cases of culpable homicide, it is the degree of probability of death from certain injuries which determines whether the injuries constitute murder or culpable homicide not amounting to murder. If death is likely to result from the injuries it is culpable homicide not amounting to murder; and if death is the most likely result, then it is murder....."

From the evidence on record, it appears that the deposition of the informant P.W.1 was corroborated by other 4(four) eye witnesses i.e. P.Ws 2, 5, 9 and 12. It is admitted that there was dispute between the appellant and the deceased over the land. The day before the date of occurrence, house was built in the place of occurrence by the informant party, thereafter, the appellant along with others came to the place of occurrence and there was a sudden fight among them. At one moment, the appellant Samad inflicted '*shabol*' blow on the head of the deceased Khurshed Ali and Khurshed fell down on the ground. Thereafter, Khurshed was taken to Nalitabari Hospital for treatment and being transferred to Mymensingh Medical College Hospital, he died there, on the following day. So, from the evidence on record, it appears that over a piece of land there was dispute between them and as the victim built house at the disputed land, the appellant became furious and came there. Though the appellant came with '*shabol*' and inflicted blow with the same on the head of the deceased, but it is presumed

that the 'shabol' blow was inflicted at the heat of passion upon a sudden quarrel being provoked by the deceased and his family. From the facts and circumstances, it appears that the appellant himself brought the 'shabol' and the eye witnesses i.e. P.Ws.1, 2, 5, 9 and 12 saw him bringing the 'shabol'. At the same time, the appellant inflicted the 'shabol' blow on the vital part of the body i.e. on the head of the deceased. So, the ingredients of Section 300 of the Penal Code are available in this present case i.e. the appellant inflicted 'shabol' blow with the intention of causing death. But the Exceptions No.1 and 4 to Section 300 of the Penal Code read as follows:

“Exception 1.-Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or cause the death of any other person by mistake or accident.

The above exception is subject to the following provisos:-

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

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

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

Explanation.- Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.....

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

It is admitted by the informant that the disputed land was possessed by the appellant and the night before the date of occurrence, they built houses thereon. There was dispute regarding the land. So, when the victim built houses on the land possessed by the appellant at night and thereafter the appellant heard the news, he became furious and lost the power of self-control by a sudden provocation given by the deceased which attracts Exception No.1 to Section 300 and also as there was a sudden fight between the parties, the appellant on the spur of the moment without premeditation inflicted 'shabol' blow on the head of the deceased. Though 'shabol' is a dangerous weapon and blow was inflicted on the vital part of the body, it attracts the provisions enunciated in Exceptions No.1 and 4 of Section 300 of the Penal Code. It was held in *State of Andhra Pradesh vs. Rayavarapu Punnayya and ors.* [AIR 1977 SC 45 (Para-22)] that, ".....whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder,' on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at

*the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300, Penal Code is reached. This is the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four Clauses of the definition of murder contained in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third Clause of Section 299 is applicable. **If this question is found in the positive, but the case comes, within any of the Exceptions enumerated in Section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the First Part of Section 304, Penal Code.**" (Emphasis given by us)*

The same view was taken by this Division in *Khalil Peada and others vs. State* [70 DLR (AD) (2018) 126 (Para-20)] that, "An offence of culpable homicide may or may not amount to murder but all murders are culpable homicide. Even if the culpable homicide attracts section 300, if any of the special exceptions provided in section 300 is

attracted, then also the offence will be culpable homicide not amounting to murder punishable under either part I or part II of section 304.....”

So, even if the accused causes hurt with the intention of killing or causes such bodily injury as it likely to cause death, but if the act of the accused falls within the ambit of any exception to section 300 of the Penal Code, 1860, then the accused would be punished for culpable homicide not amounting to murder.

It was also observed by the Appellate Division in the case of *Superintendent & Remembrancer of Legal Affairs, Government of Bangladesh vs Siddique Ahmed reported in 31 DLR(AD) 29 (Para-7)* that, ".....Section 304 of the Code which consists of two parts, does not create any offence but provides for the punishment of manslaughter or culpable homicide not amounting to murder. The Section makes a distinction in the award of punishment. Under the first part of the Section, the intention to kill is present, and the act would have amounted to murder if the act is done with the intention of causing such bodily injuries as is likely to cause death, but the act having fallen within any one of the five exceptions, in Section 300 of the Code, the offence will fall within its ambit. The second part of the Section is attracted to a case where the act is done with the knowledge likely to cause death but without any intention of causing death or to a case where bodily injury is caused as is likely to cause death. The first part applies to a case where there is

guilty intention, and the second part where there is no such intention, but there is guilty knowledge".

The facts and circumstances of this case lead us to believe that the appellant inflicted 'shabol' blow on the head of the deceased with the intention of causing grievous injuries which were likely to cause death, but the 'shabol' blow was inflicted at the spur of the moment in a sudden fight between the parties without any premeditation, as well being provoked by the deceased the appellant lost self-control. Moreover, the act of the appellant falls within the purview of Exception Nos.1 and 4 of Section 300 that is punishable under section 304 Part-I which provides that the act by which the death is caused is done with intention of causing death or such bodily injury as is likely to cause death. The High Court Division committed an error of law in convicting the appellant under Sections 302/148 of the Penal Code in holding that "*the weapon used was sabol. The accused dealt sabol blow on the vital part of the body. All these show that the accused had intention to kill Khorshed.*" The High Court Division failed to consider that, though the appellant has caused the death with the intention, he did the same in a sudden fight, in the heat of passion being provoked by the victim.

Thus, the appeal is **dismissed with the modification of the sentence of the appellant.** We, therefore, alter the conviction of the

appellant from Section 302 to Section 304 Part-I and reduce the sentence to rigorous imprisonment for 10 (ten) years with a fine of Tk.1,000.00 (one thousand), in default to pay the fine, the appellant shall suffer rigorous imprisonment for 15(fifteen) days more.

C.J.

J.

J.

J.