A.F.R.

(Reserved On: 16.09.2019)

(Delivered On: 17.10.2019)

Court No. - 41

Case :- CRIMINAL APPEAL No. - 497 of 2000

Appellant :- Dhaukal And Others
Respondent :- State Of U.P.
Counsel for Appellant :- D.R. Chaudhary,Jitendra Prasad Mishra
Counsel for Respondent :- Govt. Advocate

Hon'ble Bachchoo Lal,J.

Hon'ble Narendra Kumar Johari,J.

(Delivered by Hon'ble Narendra Kumar Johari, J.)

1. Present appeal has been filed against the judgment and conviction order of Sessions Judge, Chitrakoot. Learned Sessions Judge vide order dated 05.02.2000 has convicted and sentenced the accused-appellants under Sections 302 read with Section 34 and 323 read with Section 34 of Indian Penal Code (hereinafter referred to as "I.P.C."). All the accused/appellants Dhaukal, Lulli, Kaluwa and Sundaria were sentenced for life imprisonment under Section 302/34 and rigorous imprisonment for three months under Section 323 read with Section 34 I.P.C.

2. Prosecution version in nut-shell is as follows:-

3. It has been mentioned by complainant-Kalutia @ Sentarva in her First Information Report on 23.07.1987 that she had kept a bundle of JHAKHAR on her BIRABARI which was taken by Sundaria who was daughter of her brother-in-law (Jeth). On an enquiry about aforesaid JHAKHAR, Sundaria started abusing and an altercation took place orally between them. At about 1:00 P.M. at noon, her husband-Sukhna returned at his house after ploughing the field and was eating his meal. At that time, her Jeth-Dhaukal came at her house and called her husband stated

that Sagir is calling him. On his call, her husband went with Dhaukal. Complainant followed them. When they reached near their old house, Sundaria, the daughter of Dhaukal seeing them, started abusing. Hearing the voice of Sundaria, her father-Dhaukal became angry and by abusing her he exhorted to kill. Consequently, Lulli, son-in-law (Damad) of Dhaukal and Kaluwa, son of Dhaukal and Dhaukal himself moved to attack on complainant by their *lathis*. Seeing their activities, Sukhana (her husband) came between accused persons and complainant just to save her wife from attack. Lulli hit the first blow of lathi which attacked on head of Sukhana and second blow of lathi was hit by Dhaukal. Receiving the injuries of lathis, Sukhana fell down. Complainant just to prevent lathi blows lie down and covered his body. At that time accused Kaluwa also attacked by lathi. Complainant hurled voice for help. Hearing the voice, the other villagers of neighbour Rania Pasin, Munni Pasin, Maika Pasi, Garib Pasi, Ramla Raidas, Bhori Pasin and Kallu Brahman etc. reached on spot who prevented accused persons from their attack. Then after that all the accused persons fleed away from the spot. Her husband Sukhna by the injuries of lathi blown by Lulli, Dhaukal and Kaluwa died on spot. Accordingly, the F.I.R. was written in Police Station-Mau, Karbi, Banda on the same date at 16:55 P.M. at Crime No.106 of 1987 under Section 304 I.P.C. Scriber of F.I.R. was Munni Ram.

4. The said First Information Report was entered at Serial No.27 in General Diary of Police Station on same date. Investigating Officer reached on spot. He took blood-stained piece of KATHARI and collected blood-stained and plain soil from the place of occurrence and prepared recovery memo (FARD) (Ex. Ka-4 and Ex. Ka-5) and sent the body of deceased for post mortem (Ex. Ka-8). Post mortem of deceased-Sukhana was conducted in combined health centre, Karvi, Banda on 25.07.1987 at 1:00 P.M. Medical Examination of injured complainant-Kalutia (Ex. Ka-7) was also done on 25.07.1987 at 05:45 P.M. Investigating Officer also

prepared the spot map (Ex. Ka-6), Panchnama, arrested accused persons and submitted charge-sheet(Ex. Ka-9) in Court.

5. On behalf of the prosecution, complainant Kalutia @ Sentarva deposed as PW-1, Garib Das (Scriber of Tehreer First Information Report) as PW-2, Munni Ram (who lodged First Information Report) as PW-3. Genuineness of Chik of FIR, recovery memos of KATHARI and soil, injury report of Kalutia @ Sentarva, posts mortem report, spot map and Charge-sheet was admitted by learned counsel for the accused persons under Section 294 of Cr.P.C., therefore, the aforesaid documents were exhibited in prosecution evidence without formal proof by concerned witnesses.

6. Charges under Sections 304/34, 323/34 and 302/34 I.P.C. were framed against the accused persons. Accused persons denied the charges and elected to be tried. Statement of accused persons was recorded under Section 313 I.P.C on behalf of accused persons who said about the facts of the case as “wrong”. Regarding evidence they shown their “ignorance”. Accused Kaluwa said that at the time of occurrence he was at Ansuiya Ashram. Dhaukal replied that he was at the field. In reply of their accusation, they replied “due to enmity”. Witness Chunni Lal was examined as DW-1.

7. Considering the facts and circumstances and evidence of the case, learned Sessions Judge convicted accused persons and sentenced accused persons under Section 323/34 and 302/34 I.P.C.

8. In present appeal, in his oral argument, learned counsel for the appellants/accused persons submitted that they have been falsely implicated. Appellants-Kaluwa and Dhaukal were not present on the spot. The quarrel was started by deceased and his wife. Deceased-Sukhana has beaten brutally to appellant Lulli and Sundaria. Deceased-Sukhana and injured Kalutia have received injury in private defence of appellant-Lulli. The deceased was aggressor. Prosecution has failed to explain the injuries of Sundaria and Lulli. There is no recovery of weapons. There was no

intention of killing deceased. Prosecution witnesses are related and interested witnesses. There are discrepancies in their statement. It was no common intention. No motive has been prooved. They have wrongly been convicted. Hence, appellants are liable to be acquitted and appeal is liable to be allowed. In support of their contentions, learned counsel for the appellants submitted the case laws **Gurdial Singh and Ors. V. State of Punjab 2011 Cri. L.J. 1110, Nagarathinam and Ors. Vs. State 2006 Cri.L.J. 2120, State of U.P. Vs. Gajey Singh and Anr. 2009 Cri. L.J. 2274, Hanumantappa Bhimappa Dalavai and Anr. Vs. State of Karnataka 2009 Cri. L.J. 3045 and Darshan Singh Vs. State of Punjab and Anr. 2010 Cri. L.J. 1393, Dharam Pal and Ors Vs. State of U.P. 2008 CRI.L. J.1016 SC** and **Rizan and Anothers Vs. State of Chatisgarh 2003 CRI.L. J 1226 SC**.

9. Per contra, learned A.G.A. has replied that accused persons in consequence of earlier altercation in between Kalutia and Sundaria prepared a plan and in furtherance, appellants attacked on deceased and on his wife. Deceased was never aggressor. There was no occasion of private defence. Injuries on accused have not been proved. There was common intention and motive of all the accused persons. Sundaria is injured witness. There is no substantial discrepancy in the statements of prosecution witnesses. Evidence of eye witnesses is corroborated by medical evidence. Ingredients of offence under Section 302 I.P.C. are proved. Prosecution has proved the case against accused persons beyond any doubt. Appellant/accused have rightly been convicted. Appeal is liable to be dismissed.

10. Learned A.G.A. has relied on the case laws in support of his argument **Virsa Singh Vs. State of Punjab 1958 AIR 465, Dalip Singh Vs. State of Punjab, AIR 1997 SC 2985, Ramdeo Kahar & Ors Vs. State of Bihar 2009 (1) JIC 740 (SC), Hawa Singh and Anr. Vs. State of Haryana.**

11. Heard learned counsel for the appellants, learned A.G.A. and perused the record.

12. As according the First Information Report, prior to occurrence of offence in question, there was an incident of altercation which had taken

place earlier on same day at 07:00 A.M. It took place on the point of removal of JHAKHAR in between complainant Kalutia @ Sentarva and appellant-Sundaria.

This fact is proved by statements of PW-1-Kalutia and PW-2 Garib Das which is corroborated by evidence of DW-1-Chunni Lal. That earlier occurrence is sufficient to draw the inference about above presence of motive of assailant in subsequent occurrene.

The motive of assailant is mental condition. How the mind of an assailant reacts is not to be fathomed from a detached reflection, as it has been held by Hon'ble Supreme Court in case of ***Baboolal Vs. State of U.P. 2001 SCC (Cri.) 1448.***

13. Where there is direct evidence then in that case, it is not necessary for prosecution to prove the motive of assailant. Therefore, it is no ground for appellant to challenge the prosecution case.

14. As according to the facts of the case, informant had kept bundle of JHAKHAR on her BIRABARI which was taken away by appellant-Sundaria. On questioning about said JHAKHAR, Sundaria started abusing and an altercation took place orally between them. Subsequent to that occurrence, appellant-Dhaukal reached at the house of complainant and said to her husband Sukhana (deceased) that he is being called by Sagir. Deceased went with Dhaukal. Seing the activity of her husband, complainant followed them. When both the persons reached near the old house, appellant Sundaria started abusing. First Information Report shows that at that time other appellants-Kaluwa and Lulli were also present. Lulli, Dhaukal and Kaluwa were having lathis in their hands.

It has been mentioned in F.I.R. as well as in statement of PW-1 that at the spot, hearing the abusive language of Sundaria, his father Dhaukal also abused Kalutia and exhorted to attack. Consequently, Lulli, Kaluwa and Dhaukal moved forward to attack on Kalutia. Then, Sukhana came in between accused persons and Kalutia just to save his wife.

The above narrated fact indicates that Sagir was employer of Sukhana and by calling only to Sukhana from his residence by Dhaukal and on the place of occurrence by trying to attack on Kalutia, it seems that there was not any pre-planning in between accused persons to kill Sukhana. There was no previous enmity in between Sukhana and accused persons. On the spot, no altercation took place in between Sukhana and accused persons and accused persons did not try to attack on Sukhana first, rather they were aggressive on Kalutia. There was no weapon in the hand of Sundaria. Sukhana had received single blow given by accused Dhaukal and Lulli. Kaluwa (accused) has not given any lathi blow to Sukhana.

Therefore, considering the evidence as a whole it reflects that there was no common intention of accused persons to give fatal blows to Sukhana.

On this point, learned counsel for the appellants has submitted that where the common intention is not proved by the facts and circumstances of the case, accused persons cannot be convicted under Section 34 I.P.C. In support of his contentions, learned counsel has submitted case law of **Nagarathinam and Ors. Vs. State (2006) Cr. L.J. 2130.**

In reply, learned A.G.A. has submitted that common intention can be inferred from the surrounding circumstances of occurrence. Prosecution is not required to adduce direct evidence. In support of his argument, he has submitted case law of **Ramdeo Kahar and Ors. Vs. State of Bihar (2009) 1 JIC 740 (SC).**

We have considered the rival contentions of both the side and circumstances of the case as discussed above, we are of the considered view that there may be a chance of development of intention to attack on Kalutia on altercation, but not on Sukhana (deceased). Hence, on the point of common intention, argument advanced by learned counsel for the appellants seems forceful, accordingly prosecution is failed to prove common intention of accused person.

15. Learned counsel for the appellants has contended that on the place of occurrence, after hearing the abusive languages of Sundaria Sukhana became angry and in support of his wife, he started beating and blowing lathi on Lulli and Sundaria. Then after that only to save themselves Lulli attacked on Sukhana and on Kalutia (informant). The act of appellant Lulli was in private defence. In support of his argument, learned counsel for the appellants has relied on para 26 of case law of **State of U.P. and Ors. Vs. Gajey Singh and another 2009 Cr.L.J. 2274,** which is reproduced as under:-

> *"26.- In the present case, the circumstances indicate that Gajey Singh was assaulted on head by a sharp edged weapon 'balkati' causing a bone deep injury. As per the defence version there were four assailants who had come well prepared to assault at the door of their own house. In such a situation accused persons could have a reasonable apprehension of death or at least of grievous hurt. It was a case of single gun shot which was not repeated. Therefore, it cannot be said that the accused persons had exceeded their right of private defence in any manner."*

In continuation of his argument on above point, learned counsel for the appellants has further submitted that there are several injuries of appellants- Lulli and Sundaria. Their injury report are on record as paper no.24-A and 25-A. The injury report of Lulli (paper no.24-A) indicates that he had received six injuries on different part of his body in which three injuries of contusion, one of aberrated contusion and one of lacerated wound.

The injury report of Sundaria (paper no.25-A) indicates that she had received five injuries on different parts of her body which includes injury of one lacerated wound and four of contusion.

16. Learned counsel for the appellants has submitted that the above injuries on accused Lulli and Sundaria shows that they have received the injury which has been given by Sukhana hearing the abusive language of Sundaria. Therefore, deceased Sukhana was aggressor who has given above injuries to Lulli and Sundaria. Then, after that accused Lulli became compelled to attack on Sukhana seeing the danger of life.

In reply, learned A.G.A. has submitted that PW-1 has stated in her cross-examination at page-6 that when her husband went with Dhaukal on his calling, he was empty handed. She has not said anywhere in her statement that ever Sukhana had lathi in his hand even in her cross-examination, nowhere she has admitted that Sukhana had beaten Lulli and Sundaria. Another eye-witness PW-2 has also denied and stated that Sukhana had not beaten to Lulli and Sundaria.

17. The injury report of appellants Sundaria and Lulli indicates that they had total 11 injuries on different parts of their bodies. For the sake of argument, if it is true that deceased-Sukhana was carrying lathi in his hand then in that case also it was not possible for deceased to give almost 11 injuries on appellants- Lulli and Sundaria particularly in presence of other accused persons Dhaukal and Kaluwa. If it would have been true then in that case deceased and his wife would also had received more injuries on their bodies. On contrary, Sukhana and his wife Kalutia had received only two injuries each, out of which Kalutia had simple injuries which has been explained by her in evidence. Nowhere any such fact came into light in any evidence that while Lulli and Sunadaria were being beaten by Sukhana, they have shouted any voice for help.

18. The point of argument, regarding injuries on appellants and their action in private defence is not found place in the statements of accused appellants under Section 313 of Cr.P.C. also. They have not stated any such mitigating circumstance in his above statement.

19. In injuries of Lulli, paper no.24-A the finding of doctor was that except injury no.-3 which was as contusion on the left forearm of injured, all the injuries were simple in nature. Doctor had advised X-ray for injury no.3. Accordingly. The finding of doctor on examination of injuries of Sundaria paper no.25-A also shows that doctor had advised X-ray for her contusion injury on index finger and all other injuries were simple in nature, but neither any X-ray report has been filed by accused persons (Lulli and Sundaria) nor any doctor was produced to prove the aforesaid

injury reports of Lulli and Sundaria (papers no.24-A and 25-A). In absence of formal prove of injury report, paper no.24-A and 25-A cannot be relied upon in evidence. Also there was no occasion to attack on Lulli first by deceased Sukhana as the altercation was being taken place in between Sundaria and Kalutia.

20. Learned A.G.A. has argued that accused has not produced any witness in support of his above version of private defence whereas, so many villagers were present at the time of occurrence. All the prosecution witnesses PW-1, PW-2 and PW-3 has nowhere mentioned or admitted either in their examination-in-chief or in their cross-examination that deceased had assaulted on Sundaria and Lulli. There was no preponderance of probability of such a situation. Burden of proof about action in private defence was on accused persons which could have been established by appellants by indicating the circumstances transpiring from prosecution evidence itself, but they were failed.

21. On the above point, Hon'ble Apex Court has given verdict in case law of **Rizan and another Vs. State of Chhattisgarh 2003 Cr.L.J. 1226.**

22. The relevant portion is reproduced as under:-

> "13. *Then comes plea relating to alleged exercise of right of private defence. Section 96 I.P.C. provides that nothing is an offence which is done in the exercise of the right of private defence. The Section does not define the expression 'right of private defence.' It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case the Court can consider it even if the accused has not taken it. If the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872, the burden proof is on the accused, who sets of the plea of self-defence, and , in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the*

absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive or by eliciting necessary facts from the witness examined for the prosecution. An accused taking the plea of the right of private defence is not required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack of forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favor of that plea on the basis of the material on record. (See Munshi Ram and others vs. Delhi Administration, AIR 1968 SC 702; State of Gujarat vs. Bai Fatima, AIR 1975 SC 1478; State of Bihar vs. Mohd. Musheer Khan, AIR 1977 SC 2226 and Mohinder Pal Jolly vs. State of Punjab, AIR 1979 SC 577). Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extents under Section 100 to causing death if there is reasonable apprehension that death or grievous heart would be the consequence of the assault. The oft quoted observation of this Court in Salim Zia vs. State of U.P. (AIR 1979 SC 391), runs as follows:

"It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence."

The accused need not prove the existing of the right of private defence beyond reasonable doubts. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea. "

23. It has been further held by Hon'ble Supreme Court in paragraphs-14 to 16 of case law of **Rizan and others Vs. State of Chhattisgarh** (Supra) which is as under:-

"14. The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so cause on the accused probabilises the versin of the

right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstances. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases.

This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. [See Lakshmi Singh V. State of Bihar (AIR 1976 SC 2263)]. In this case, as the Courts below found there was not even a single injury on the accused persons, while PW-2 sustained large number of injuries and was hospitalized for more than a month. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject matter of right of private defence. The plea of right comprise the body or property (i) of the person exercising the right; or (ii) of any other person; and the right may be exercised in te case of any offence against the body, and in the case of offences of theft , robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 and 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101, IPC define the limit and extent of right of private defence. 1976 Cri LJ 1736.

15. Sections 102 and 105, IPC deal with commencement and continuance of the right of private defence of body and property respectively. The right commence, as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, or commit the offence, although the offence may not have been committed but not until that there is that reasonable apprehension. The right lasts so long as the reasonable apprehension of the danger to the body continues. In Jai Dev V. State of Punjab (AIR 1963 SC 612), it was observed that as soon as the cause for reasonable apprehension disappears and the threat has either been destroyed or has put to route, there can be no occasion to exercise the right of private defence. 1963 (1) Cri LJ 495

16. In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the

> *accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. Thus, running to house, fetching a tabli and assaulting the deceased are by no means a matter of course. These acts bear stamp of a design to kill and take the case out of the purview of private defence. Similar view was expressed by this Court in Biran Singh v. State of Bihar, AIR 1975 SC 87 and recently in Sekar alias Raja Sekharan v. State represented by Inspector of Police, Tamil Nadu (2002 (7) Supreme Court 124). 1975 Cri LJ 44 AIR 2002 SC 3667: 2002 AIR SCW 4315."*

24. Therefore, appellants could not establish either by evidence or by surrounding circumstances that deceased himself was aggressor and deceased Sukhana and injured Kalutia have received injuries in private defence of accused appellants- Lulli and Sundaria.

25. It has been further argued by learned counsel for the appellants that prosecution witnesses are closely related with informant. Therefore, those are interested witnesses and their evidence cannot be relied upon.

26. PW-1 is wife of deceased Sukhana. PW-2 is scriber of FIR. Both the witnesses have stated that they are eye-witnesses at a time of incident. PW-1 was present on the spot and she has received injuries also which has been proved by her medical examination report (Ex. Ka-VII). Spot map (Ex. Ka VI) shows that house of PW-2 and its front gate is towards North from the place of occurrence. Therefore, it is highly probable that he might have been eye witness of occurrence. Accordingly, in absence of any evidence in contrary his statement cannot be doubted. Witness PW-1 has received injury in the same occurrence, hence her presence on spot is natural and trustworthy. On the point, it has been held by Hon'ble Supreme Court in **Surjit Singh @ Gurmit Singh Vs. State of Punjab 1993 SCC (Cri) 161.**

> "9.-*To be fair to the learned counsel for the appellant, we may mention that he ventured to argue that the evidence regarding the marrying of the crime bullet shells with the pistol recovered was not convincing, more so when the 303 pistol, the alleged crime weapon, was recovered from Gurmit Singh, co-accused. It is noteworthy that Gurmit Sing, co-accused, stands convicted under the Arms Act for being in possession of that pistol. This aspect of the case cannot be a substitute to the eyewitness account or the plea taken by the appellant. Had the presence of the two witnesses, that is, Jaswinder kaur PW 5 and Taljit Singh*

PW 2 at the scene of the occurrence been doubted, the recovery of the weapon of offence and its connection with the empty shells recovered at the spot would have assumed some significance. When the two eyewitnesses are natural witnesses of the crime, one being the young wife who would normally be in the company of the husband at 10.30 p.m. on a summer night and the other the nephew of the deceased who had suffered grievous injuries in the occurrence and was thus a stamped witness, not much importance is to be attached to this aspect of the case. The venture is futile."

27. On the same point, Hon'ble Supreme Court in case lwa **Rizan and another Vs. State of Chatisgarh** (Supra) it has been held that:-

"6.- We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible."

28. The same verdict has been given by Hon'ble Supreme Court in the case of **Dharampal and others Vs. State of U.P. 2008 Cr.L.J. 1016**. The relevant part of the judgment is reproduced as under:-

"This takes us to the next question viz. whether the other lacunae pointed out by the learned counsel for the appellants are fatal to the prosecution case . We agree that the High Court erred in relying on the evidence of PW4, who admittedly was declared a hostile witness. Nevertheless, we fell that in the fact of the other evidence of PW2 Dannu, PW3 Om Prakash who were corroborated in all material respects by PW7 Dr. R.P. Goyal and by PW9, Dr. U. Kanchan, the evidence of PW4, even if discharged, is inconsequential. The evidentiary value of a dying declaration and the principles underlying the imprtance of a dying declaration have already been discussed herein earlier. Simply because PW2 and PW3, in their cross-examination, have been shown to be related to the deceased does not mean that their testimony has to be rejected. It is well settled that evidence of a witness is not to be rejected merely because he happens to be a relative of the deceased. In State of Himanchal Pradesh V. Mast Ram [(2004) 8 SCC 660], this Court observed as under :-

"……...The law on the point is well settled that the testimony of the relative witnesses cannot be disbelieved on the ground of relationship. The only main requirement is to examine their testimony with caution. Their testimony was thrown out at the threshold on the ground of animosity and relationship. This is not a requirement of law……..."

> *In this view of the matter and this being the well-settled law, it is difficult for us to discard the evidence of the witnesses, as discussed hereinabove, only on the ground that they were related to the deceased, in the absence of any infirmity in the said evidence."*

In view of the above, it cannot be said that evidence of witness PW-1 and PW-2 is not believable only on the ground of their relation with deceased. Particularly, when their presence on spot is highly probable, there is consistency in their statement on substantial point of the case and their statements are supported with medical evidence and nothing is on record to prove contrary.

29. Learned counsel for the appellants submitted that there is no consistency in statement of witnesses. He has pointed out that witness PW-1 has stated in her evidence at page-2 that first lathi was blown on the head of Sukhana by Lulli, second lathi was blown by Dhaukal, then her husband fell down. On the other hand, witness PW-1 has stated that her husband was fallen down just after first lathi blow. He further said that the above discrepancy destroys the FIR version.

30. The record shows that statement of PW-1 at page-2 is corroborated with medical evidence (Anti mortem injury in P.M.R.). The statement of witness should be considered as a whole. It must be kept in mind that the witness PW-1 is rustic and illiterate lady. Her statement is being recorded after a period of approximately eleven and half years from the date of incident. In such a situation, some contradictions are bound to occur as has been held by Co-ordinate Bench of this Court in the case of **State of U.P. vs. Shane Haidar & others 2015 (1) J.Cr.C 775** that:-

> *"34. After an overall assessment of all the witnesses, produced by prosecution, we are of thhe firm view that all the witnesses are throughout cogent and consistent while deposing in court. All the factual witnesses are rustic villagers, who are bound to get confused during their cross-examination. PW-2 is an injured witnesses, which fact is evident from his injury report, duly proved by the Doctor. Apart from some minor contradictions nothing has been elicited in their statements to cause a shadow of doubt on their credibility."*

31. On the same point, another Bench of this Court in case of **Tufail Ansari vs. State of U.P. 2015 (2) J.Cr.C 1086** has held that:-

> "28. *The contention that PW-3 Smt. Babli Jaiswal has admitted in her cross examination that the police had come to their house at about 8.00 p.m., and that she was unsure when she had left for the police station and that PW-1 Ramesh Kumar Jaiswal, informant had stated that he had reached the police station at about 7.00 p.m. or that the appellant Tufail was arrested at about 9.00 p.m. Even if there were some conflicts in the timings, it only suggests that the rural witnesses were a little confused about the timings of the incident or the time when the police had taken the appellant Tufail at about 2.00 a.m. to get the body recovered. Even if there are certain minor discrepancies in the timings and conduct of the investigation, as the basic structure of the prosecution evidence is intact in this case, on the basis of the factum of discovery of the dead body in the middle of the night on the pointing out of the appellant, which was admissible under section 27 of the Evidence Act and the last seen evidence against the appellant by PW-2 Suresh is also intact, little reason exist for not relying on these crucial circumstances which are sufficient to establish the complicity of the appellant in this offence.*"

32. In para 9 of the case **Leela Ram vs. State of Haryana and Others, 2000 SCC (Cri) 222**:- Hon'ble Supreme Court has held that:-

> *"9.- Be it noted that the High Court is within its jurisdiction being the first appellate court to reappraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and* ***unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety****. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. In this context, reference may be made to the decision of this Court in* ***State of U.P. v. M.K. Anthony ; AIR 1985 SC 48****. In para 10 of the Report, this Court observed: (SCC pp. 514-15)*
>
> *"10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not*

> *touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."*

33. In case ***Shivappa and Others vs. State of Karnataka, 2008 CrLJ 2992***, Hon'ble Supreme Court has held in para 26 that:-

> *"…….Minor discrepancies or some improvements also in our opinion, would not justify rejection of the statements of eyewitnesses if they are otherwise reliable. Some discrepancies are bound to occur because of the sociological background of the witnesses as also the time gap between the date of occurrence ad the date on which they give their depositions in Court."*

34. Perusal of evidence as a whole, shows that there is no such discrepancies found in the evidence of prosecution witness which touches the core of prosecution story. There may be discrepancy minor/trifle in nature, but in our considered opinion they are not able to destroy prosecution story.

35. So far as, the gravity of offense is concerned, it has to be determined that whether the offence committed by accused persons comes under the definition of culpable homicide not amounting to murder (Section-299 I.P.C.) or it was murdered (Section 300 I.P.C.).

36. On the above point, learned A.G.A. has submitted case laws of **Virsa Singh vs. State of Punjab AIR 1958 (SC) 465** and **State of Andhra Pradesh vs. Rayavarapu Punnaya & others (1976) SCC (4) 382.**

37. In the light of verdict given by Hon'ble Apex Court, the fact and evidence on the record is needed to be scrutinized according to the essential ingredients of Section 299 and Section 300 of I.P.C. The question to be considered at the first stage would be:-

whether the accused persons/ appellants have done an act by doing which he has been caused the death of Sukhana.

38. Witness PW-1 (eye-witness) has stated in his evidence that when they reached near their old house, Sundaria started abuse them. Dhaukal and Sundaria given threat and Dhaukal exhorted to kill her. Hearing the voice, Lulli blown Lathi on the head of her husband. Then, the second lathi blow was given by Dhaukal. By the injuries of above attack, Sukhna fell down. She lay down over the body of her husband to cover him from further attack, then Kaluwa given lathi blow which hit the head of Kalutia, then after that again Dhaukal gave another lathi blow to PW-1 which hit her leg.

39. Witness PW-2 have stated in his evidence at page-2 that Lulli has assaulted to Sukhna on his head by his lathi. Dhaukal also assaulted him by his lathi. Although, he has further stated that Kaluwa has given lathi blow to Sukhna then after that Dhaukal again given lathi blow to hit Kalutia. Here is a little discrepancy in the statement of PW-2 with the statement of PW-1, which is explained itself by the statement of PW-2 at page 3 of his evidence. He has deposed that at the time of occurrence, he was in his house and was hearing the abusement of accused persons and Kalutia. Further he has mentioned in his evidence at page-3 that when deceased Sukhana received first lathi blow, his wife was standing at the door of house. When PW-2 heard the noise, he ran towards the place of occurrence. He has further stated that wife of deceased reached first then after that he (PW-2) reached on spot. When he reached, he saw that wife of deceased was covering in lying position over the body of her husband. The part of statement shows that, in fact PW-2 was not present on the spot when Sukhana fell down after lathi blow. In fact he was watching the occurrence from his house, which is in just south from place of occurrence (as shown in spot map, Ex. Ka-VI). Hence, he cannot describe the exact actions of accused persons. Therefore, the above discrepancy is not fatal for prosecution story in the light of evidence of injured witness

PW-1. It is to be kept in mind that evidence of PW-2 was also recorded on 23.02.1999 i.e. after almost eleven and half years from the date of occurrence.

40. The statement of PW-1 regarding assault on Sukhana is corroborated by anti-mortem injury (as mentioned in post-mortem report Ex. Ka-VIII). There were two injuries, first of lacerated wound on the top of the skull with fracture of occipital bone, 30 c.m. above the left ear. The parietal bone was also found fractured. Second injury was of aberrated contusion at right parietal region over 9 c.m. above the right ear with fracture of right parietal bone. The cause of death has been shown *coma* due to anti-mortem injuries.

41. It is to be noted that genuineness of post-mortem report has been admitted by the counsel for appellants.

42. No other evidence is found on record which could show that deceased has not received above the fatal injuries or injuries by any other mode than facts and evidence of the case. Therefore, it is proved that accused persons Dhaukal, Kaluwa and Lulli have done the act of assault over the vital part of Sukhana's body which caused his death.

Now, it is to be considered that:

whether the act of accused persons amounts to culpable homicide not amounting to murder as defined Section 299 I.P.C.

43. The provisions of Section 299 is reproduced as under:-

> *"**299. Culpable homicide.**—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury 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.*
>
> *Illustrations*
>
> *(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.*

(b) A knows Z to be behind a bush. B does not know it A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(c) A, by shooting at a fowl with intent to kill and steal it, kills B who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skillful treatment the death might have been prevented.

Explanation 3.—The causing of the death of child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born."

44. The evidence on record indicates that accused persons are near relatives of deceased. In First Information Report, it has been mentioned that when they reached near their old house, Sundaria and Dhaukal started abusing and Dhaukal exhorted to attack. Hearing the voice, Lulli and Kaluwa came forward to hit her. Seeing their activities, the husband of informant moved forward to save his wife. Consequently when Lulli and Dhaukal blown their lathis that hit Sukhana. Witness PW-1 has narrated the same fact at page-2 of his evidence. Witness PW-2 has also stated in his evidence that he heard the abusing voices of PW-1 and Sundaria. Nowhere it has been shown that there was any quarrel between deceased and accused persons. Witness PW-1 has also contended in his evidence at page-4 that before the occurrence on that date, there was no previous enmity between Kalutia and Sundaria. The above evidence indicates that appellants had no intention to kill Sukhana. But, they were certainly intending to cause such bodily injury as was likely to cause death. It

transpires that Sukhana received the fatal injuries by chance as he entered between his wife and accused persons.

45. The above conclusion can be drawn by the statement of PW-1 at page-3 that when she lie down over the body of her injured husband, she received two lathi blows, one by Kaluwa and another by Dhaukal. The injury of Kalutia has been shown in his medical examination report (Ex. Ka-VII) as one contusion on 3 cm × 2 cm on the right side of her face and one contusion 8 cm × 3 cm on her left thigh, which were not fatal but simple in nature.

46. The age of deceased has been shown in post mortem report as 35 years with average built body. He has received two lathi blows on different part of his head which caused his death. Witness DW-1 has mentioned in evidence at page-5 that Sukhana had received the injury by the iron part of lathi. So, the attack by iron part of lathi on vital part of body with proper force is sufficient to draw inference that accused persons Dhaukal and Lulli were having the knowledge that injury caused by them will cause grievous injury on vital part of victim and may likely to cause death of Sukhana. Therefore, the act of accused Lulli and Dhaukal comes under definition of offence defined under Section 299 of I.P.C. The ingredients of Section 299 of I.P.C. has been proved.

It can be termed that culpable homicide is "Genus" and murder as "Species". Accordingly, all the murders are culpable homicide, but every culpable homicide is not murder.

Now, it has to be seen that:

whether the such act of accused appellants comes under the perview of section 300 I.P.C. or not.

The provisions of Section 300 I.P.C. is reproduced as under:-

> "***300. Murder.***—*Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—*
> *(Secondly)—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—*

(Thirdly)—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

(Fourthly)—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here, A is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

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

The above exception is subject to the following provisos:—

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

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

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

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

Illustrations

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills. Y, Z's child. This is murder, in as much as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, in as much as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as witness before Z, a Magistrate, Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose, Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, in as much as the provocation was given by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2.—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. Illustration Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good

faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

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.

Exception 5.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Illustration

A, by instigation, voluntarily causes, Z, a person under eighteen years of age to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder."

47. Applying the provisions of Section 300 I.P.C. with fact and evidence of the case, it transpires that although it was in the knowledge of accused-appellants Dhaukal and Lulli that the injury which is being caused by them to Sukhana on his vital part i.e. head, is likely to cause death, but considering the close relation of deceased with accused persons and also that there was no previous enmity and that removal of bundle of JHAKHAR is a trifle matter, it appears that it was not the intention of accused persons to cause injury which is sufficient in ordinary course of nature to cause death or which must in all probability sufficient to cause death. The distinction on the point of knowledge is very fine. In the above circumstances it can be inferred by the degree of probability of death resulted by injury. In other words, it was in the knowledge of accused persons Lulli and Dhaukal that by their assault death of victim Sukhana may possible, but not most probable. Normally, the village persons carrying lathi in their hand with iron covering or ring on its top. Witness DW-1 has stated in his evidence at page-5 that deceased had received injury from the iron part of lathis. The iron part, accelerates the force of attack and is able to give severe injury that is why the bones underneath of injury found fractured. The facts mentioned in F.I.R. and evidence led by PW-1 clearly indicates that accused persons were not intending to attack

on Sukhana rather they were intending to attack on his wife. Angry accused attacked on Kalutia by their lathis, but as a matter of chance deceased arrived between Kalutia and accused persons and received injury by the iron ring part of the lathi which became fatal for him. The evidence on record also indicates that neither there was sudden fight in between Sukhana and accused persons nor there was any occasion of sudden provocation, any circumstance was also not existing for recourse of private defence by accused persons.

48. During the trial, an opportunity was given to accused persons to explain the evidence and incriminating circumstances against them under Section 313 Cr.P.C. in which they have mentioned that the facts and evidence are "not true". On the question that why they are facing trial, they have submitted that "due to enmity", but what was the previous enmity with deceased or informant they have not explained, rather the evidence on record indicates the absence of any previous enmity between the parties. Accused appellants Dhaukal and Kaluwa has further stated in their statement under Section 313 that at the time of occurrence, he (Dhaukal) had gone to his field for ploughing the field and Kaluwa was present at the Anusuiya Ashram. The burden of proof was on accused appellant to prove Alibi, but they were failed to establish this fact. Even witness Chunni Lal who had been projected by defence as an eye witness has not stated in his evidence that at a time of occurrence, Dhaukal was in his filed and Kaluwa was at Anusuiya Ashram, rather he has stated that Dhaukal and also Kaluwa were ½ mile away from the place of occurrence. No where he has stated specially that Dhaukal was present at his field and Kaluwa at Anusuiya Ashram. Therefore, the above stand of Alibi is not supported by any evidence and is not proved.

49. So far as evidence of DW-1 is concerned, his present on the spot has neither been shown in F.I.R. nor in evidence of any witness. He has stated in his evidence that when he reached on spot then, Sundaria and Kalutia were making a noise and Sukhana was at the gate of his (DW-1)

house which is against the spot map (Ex. Ka-6) and evidence of PW-1 and PW-2. Witness DW-1 has shown himself as close relative and neighbour of Sukhana and accused persons, but even then he did not try to interfere to settle the quarrel of Kalutia and Sundaria. His statement at pages-4 and 5 seems against the human behaviour, at page-5 he has stated that his father and Sukhana's father were real brother. On the other hand, as according to his version at page-4, he went to call Dhaukal and Kaluwa, as they were not present on the spot. He did not try to take care of injured Sukhana and he also not tried to arrange for any medical aid to injured persons. This is against human behaviour of close relative. Therefore, the statement given by DW-1 is not credible which has rightly been ignored by learned Sessions Judge.

50. In conclusion, it has been proved that it was in the knowledge of accused Dhaukal and Lulli while blowing their lathis which was covered by iron ring on its top on the head of Sukhana. It is likely to cause death of victim. Like a prudent man it was well in their knowledge, that head of a person is vital part. But, facts and circumstances show that the degree of such probability of causing death, which was in the knowledge of accused persons, was not much severe as will definitely cause death of Sukhana. There was no previous enmity. They were in close relation with fiduciary capacity. The subject matter of dispute was trifle in nature. Number of lathi blows were single in number (given by Dhaukal and Lulli separately). There was no brutal attack. Genesis of occurrence was mere sudden quarrel by abusement which took place in between Sundaria and Kalutia. No active/aggressive role of Sukhana has been shown. Victims themselves had gone near the residence of accused persons. No common intention proved. Weapons used are common in nature which normally carried by villagers. Therefore, all the above circumstances indicate that the offence committed by accused Dhaukal and Lulli was without pre-meditation of mind and accused Dhaukal and Lulli have not taken any undue advantage.

Hence, it can be concluded that the act of accused persons Dhaukal and Lulli comes under the provisions of exception-4 of Section 300 I.P.C. and is covered by offence defined under Section 299 of I.P.C.

51. It has been proved by the prosecution witnesses PW-1 and PW-2 that accused Kaluwa has given voluntary hurt to Kalutia which was simple in nature. The same is corroborated by injury report of Kalutia (Ex. Ka-VII).

52. Therefore, taking into consideration, the facts and circumstances of the case, argument advanced by both the parties and considering the citations submitted by both the sides, we are, therefore, of the considered view that the appellants Lulli and Dhaukal have committed the offence pubishable under second part of Section 304 I.P.C. It has been proved that appellant Kaluwa committed offence pubishable under Section 323 I.P.C. Further, Sundaria and Kaluwa are liable to be acquitted from the offence punishable under Section 302 read with Section 34 of I.P.C. As prosecution has failed to prove ingredients of the offences against them. Accused Lulli and Sundaria is liable to be acquitted under Section 323 read with Section 34 I.P.C. Dhaukal has died during the pendency of appeal and appeal has been abated against him, therefore, in the light of above discussion, considering the time gap of occurrence accused Lulli is liable for the rigorous imprisonment for the terms of 5 years and Rs.10,000/- as fine under second part of Section 304 I.P.C. In default of payment of fine accused Lulli shall under go rigorous imprisonment further three months. In case the fine is realized then in that case Rs.8,000/- out of Rs.10,000/- shall be paid to complainant Kalutia @ Sentarva as compensation. Accused Kaluwa is liable for the rigorous imprisonment for the terms of three months under Section 323 of I.P.C..

Accordingly, the conviction and sentence given by learned Sessions Judge is modified. The period of previous detention of accused persons in jail will be set off. The appellants Lulli and Kaluwa will surrender

before Chief Judicial Magistrate concerned forthwith, failing which Chief Judicial Magistrate, concerned will issue non-bailable warrant against them. In compliance, if accused Lulli and Kaluwa appear or are brought before the court of Chief Judicial Magistrate, concerned they shall be sent to jail by warrant for their sentences.

53. Let the copy of the judgment be sent to court concerned forthwith for compliance.

54. Appeal allowed partly.

(Narendra Kumar Johari, J.) **(Bachchoo Lal, J.)**

Order Date :- 17.10.2019

SK Goswami