

ReservedA.F.R.CRIMINAL APPEAL NO. 2967 OF 1986

Jit Singh and another

Appellants

Vs.

State of U.P.

.....

Respondent

Hon'ble Sheo Kumar Singh, J.Hon'ble Vinod Prasad, J.*(Delivered by Hon'ble Vinod Prasad, J.)*

Appellants Jit Singh (A-1) son of Sukua Gaud and Dayali (A-2) son of Hem Raj, both r/o village Bagharu, P.S. Duddhi, District Mirzapur, are aggrieved by the impugned judgment and order dated 21.10.1986 passed by Sessions Judge, Mirzapur recorded in S.T. No. 225 of 1985, State of U.P. Vs. Jit Singh and another, convicting both the appellants under section 302/34 I.P.C. and sentencing them to serve life imprisonment therefor and therefore have filed this appeal.

Unfolded prosecution allegations, as are discernible from the oral FIR Ext. Ka-1 and testified during the trial by the prosecution fact witnesses, informant Ram Ratan P.W.2, Dasrath P.W.2 and Bansidhar P.W.3, are that motivated by a lost court case with Dev Swaroop (deceased /father of informant RamRatan) that both the appellants, on 21.8.1985 at 9 A.M. assaulted Dev Swaroop (deceased) near the field of Ram Baran with spade and club (*lathi*) and caused him injuries, mostly on his upper and lower limbs. Dev Swaroop (injured/deceased) squatted on the ground sustaining inflicted injuries but even then he was belaboured by club. Injured shrieks attracted informant Ram Ratan P.W.1, Dasrath P.W.2, Bansidhar P.W.3 and other co-villagers at the assault scene, who had witnessed the belaboring of Dev Swaroop. Intervention by the witnesses and their attempt to apprehend the miscreants, forced both the appellants to leave the incident spot intimidating and threatening the witnesses. In an injured condition, Dev Swaroop,

when was being carried to the hospital, midway, near Duddhi market, lost the battle of his life and died.

RamRatan, informant/PW1, son of the deceased, immediately rushed to the police station Duddhi at a distance of 7 KMs, along with corpse of the deceased, where he orally dictated FIR to HM Shyam Bihari Singh P.W. 6, who slated it by registering the crime at 11.45 A.M. and preparing chik FIR Ext. Ka-1 and GD entry Ext. Ka-3. Special report regarding the crime was dispatched the same day at 12.45 P.M. through constables Lallan Rai and Lallan Bharti vide Rapat No. 17 Ext. Ka-4.

SSI Shivdhari Singh, PW7, in whose presence the crime was registered set afoot the investigation, copied the chik FIR and GD entry and dispatched SI Jagdish Singh and constables Ram Babu and Dharam Nath Singh to apprehend the murderers. PW7 himself performed inquest on the dead body and inked relevant papers like inquest memo, chalan lash, photolash, letters to RI and to CMO etc. which all documents are Exts. Ka-5 to Ka-8. Sealing the dead body in a cloth piece the same was dispatched to the mortuary through constables Chandra Bhushan Tiwari and Ram Lochan Chauhan for postmortem examination along with the prepared papers. Near the corpse of the deceased an iron *kadua* (a jug with a spout) was also recovered, which was sealed and recovery memo Ext. Ka-9 thereof was prepared. Thereafter informant and inquest witnesses were interrogated and their statements were recorded. Subsequent thereto, I.O. came to the incident spot in village Bagharu where he recorded the statements of witnesses Dasrath and Bansidhar and others. Spot inspection was conducted and site plan along with notings was prepared, which is Ext. Ka-10. Blood stained and plain earth were collected from the spot and recovery memo Ext. Ka-11 thereto was prepared and thereafter witnesses Ram Gyan was interrogated. Returning to the police station at 8.30 A.M. the following day, I.O./PW7 deposited recovered blood stained and plain earth vide GD Ext. Ka-12. Autopsy report was copied by the I.O., who thereafter penned down statements of constables Ram

Lochan Chauhan P.W. 4 and Chandra Bhushan Tiwari and also forwarded a report to send blood stained earth and the clothes for chemical examination to the serologist. On 30.8.1985, both the accused Jit Singh and Dayali were arrested from down town Mirzapur and were booked in penitentiary at 7.05 P.M. vide Rapat No. 27 Ext. Ka-13. Concluding investigation on 31.8.1985, I.O. charge sheeted both the accused vide Ext. Ka-14.

Dr. P.N. Singh P.W. 5 had performed autopsy on the cadaver of the deceased on 21.8.1985 at 1.20 P.M. Deceased was 85 years of age having a thin physic, rigor mortis and postmortem lividity were in the process of setting in. Following nineteen ante mortem injuries on the cadaver of the deceased were detected by the doctor:-

- 1. Contusion 2cm x 1cm over the left side chest.*
- 2. Contusion on 1.5cm x 1cm on right side forehead.*
- 3. Incised wound 5cm x 2cm x 2.5cm on the back of left forearm.*
- 4. Incised wound 3cm x 2cm skin deep on the right fore arm.*
- 5. Incised wound 7cm x 5cm over the outer side of right forearm. Both the bones of this fore arm were found fractured.*
- 6. Incised wound 3-1/2cm x 1-1/2cm skin deep over the back side of right forearm.*
- 7. Lacerated wound 2cm x 1cm skin deep on the back of right forearm.*
- 8. Lacerated wound 1.5cm x 1cm skin deep on the back of right hand.*
- 9. Incised wound 2-1/2cm x 1cm bone deep on the middle and proximal phalanx.*
- 10. Contusion 8cm x 2cm on the outer surface of right thigh.*
- 11. Contusion 11cm x 2cm on the back of right thigh.*
- 12. Contusion 6.54cm x 2.5cm on the right side buttock.*
- 13. Incised wound 9cm x 2.5cm x 3cm on the medial surface of right leg.*
- 14. Incised wound 6cm x 1.54cm skin deep on the medial aspect of right leg just below injury no. 13.*
- 15. Lacerated wound 6cm x 4cm bone deep on the back side of left forearm. The bone under this injury was fractured.*
- 16. Incised wound 10cm x 6cm muscle deep on the back of medial aspect of right forearm.*
- 17. Lacerated wound 6cm x 4cm bone deep on the right fore arm just at the left wrist joint. Both the bones*

*underneath were fractured.*

*18. Lacerated wound 2cm x 1cm skin deep over the left side of abdomen.*

*19. Incised wound 9cm x 3cm muscle deep on the outer aspect of the left leg 5cm below knee joint."*

On internal examination, no abnormality was detected in any of the internal organs but fractures of Rt. Ulna, Rt. lower middle phalanx and shaft of humerus and wrist was detected in injuries numbers 5,9,15, &17. Small and large intestines were empty. In the estimation of the doctor, deceased had died due to shock and hemorrhage produced by sustained injuries.

Submission of charge sheet resulted in registration of criminal case against both the accused appellants before the committal court of C.J.M., Mirzapur, on 23.9.1985 as Case No. 1790 of 1985, State Vs. Jit Singh and another, under section 302 I.P.C., which case, in due course, was committed to the Sessions Court for trial, were on 8.10.1985, it was registered as S.T. No. 225 of 1985, State Vs. Jit Singh and another, in the court of Sessions Judge, Mirzapur.

Learned trial Judge charged both the accused with offence u/s 302 I.P.C. on 2.11.1985 and since both of them abjured that charge and denied their guilt that to establish the same and prove their complicity in the crime that the learned trial Judge resorted to Sessions Trial procedure to prosecute both the accused appellants.

During the trial, prosecution placed reliance on testimonies of in all seven witnesses including those of informant Ram Ratan P.W. 1, Dasrath P.W. 2 and Bansidhar P.W. 3 as fact witnesses. Constable Ram Lochan Chauhan P.W.4, Dr. P.N. Singh P.W. 5, Head Constable Shyam Bihari Singh P.W. 6 and SSI Shivdhari Singh/I.O. P.W. 7 were the formal witnesses.

In their examinations by the court u/s 313 Cr.P.C., both the accused abjured all the incriminating prosecution evidences occurring against them in the testimonies of the witnesses and pleaded a common defence of false implication with additional plea that the deceased was murdered some times in the night as he had

lots of other enemies and since the murderers could not be identified, therefore, because of already concluded court proceedings that the appellants have been nailed in by the informant and other witnesses in the present crime, albeit they both had nothing to do with it.

Recapitulating the final outcome of the trial, since learned Sessions Judge found the guilt of the accused established beyond all shadow of reasonable doubt, that he convicted the appellants under section 302/34 I.P.C. and sentenced them to life imprisonment vide impugned judgment and order, and consequently challenging said decision that this appeal has arisen.

In the backdrop of aforesaid factual matrix, when this appeal, after being pending in the dockets of this Court for nearly about twenty seven(27) years came up for hearing, nobody appeared to argue the appeal for the appellants although the names of Sri B.B. Paul and Sri P.N. Tripathi advocates were printed in the cause list. Since appeal could not have been kept pending into the racks of criminal section for an unlimited period therefore, for its final disposal, we applied the law laid down by the Apex Court in **Bani Singh and others Vs. State of U.P.: AIR 1996 Supreme Court 2639** and appointed Sri Brijesh Sahai, learned advocate as an *amicus curiae* to assist the court in disposal of this appeal, as in our opinion, he has a good experience of arguing criminal appeals and would have rendered valuable assistance to us. We therefore have heard him for the appellants in support of the appeal and Sri Sangam Lal Kesharwani, learned AGA in opposition.

Assailing the impugned judgment learned *amicus curiae* harangued numerous contentions viz: none of the fact witnesses were present at the spot during the incident nor had witnessed the crime, which in fact had occurred in the darkness when deceased was all alone and therefore all the fact witnesses have deposed a mendacious tutored story without any element of truth in it. No motive ever existed for the appellants to annihilate the deceased,

investigation into the crime is inept and dishonest and I.O./PW7 had deliberately tried to implicate the appellants as perpetrators of the crime. Witnesses are unworthy of credence and even the learned trial judge has doubted presence of P.W.1 and P.W.3 during the incident and for this contention Sri Sahai has brought to our notice internal page 24 of the impugned judgment. Next, it was argued that the oral dying declaration of the deceased made to his son informant PW1 is opaque, afterthought and unbelievable and therefore, cannot be relied upon to sustain appellant's conviction. Dasrath P.W.2 is the cousin of the first informant and is a chance and interested witness and his testimony being unreliable and unconvincing, on vetting and summing of it, is liable to be discarded. Site plan does not show presence of any of the witness ostensibly for the reason that none of them were present during happening of the incident and because of this reason no independent witness has supported the prosecution case and lend credence to it. On the testimonies of only interested and partisan witnesses conviction of the appellants should not be affirmed strenuously urged learned amicus curie. Unnatural conduct of related witnesses of remaining silent spectators to the assault made on the deceased being very surreal and weird does not satiate inquisitiveness of judicial scrutiny of their being present at the spot. Elaborating the submission it was contended that had ten witnesses being present at the time of the incident, there was no difficulty for them to apprehend the culprits armed only with two agricultural implements, a spade and a club, and they would not have allowed them to escape scot free without hindrance. Concluding his submissions lastly it was submitted by learned *amicus curie* that looking to the autopsy report and the testimony of the doctor, part of the body selected to inflict injuries, nature of injuries and surrounding circumstances guilt of the appellants do not cross boundary of section 304 (II) I.P.C. and therefore conviction u/s 302/34 I.P.C. cannot be sustained. Prosecution had failed to get it elicited from the doctor that any of the injury was sufficient in

ordinary course of nature to cause death of the deceased and hence crime committed by the appellants should be mollified and they should be convicted only u/s 304 (II) I.P.C. to culpable homicide not amounting to murder, if the appellants are not conferred with clear benefit of doubt and awarded clean acquittal, and since they have already served more than seven years behind the bars from 30.8.1985 to 7.9.1992 that they should be let off by sentencing them to the period of imprisonment already under gone by them. For the last limb of argument Sri Sahai incisively and repeatedly pointed out at the injuries, the body parts on which it were inflicted, absence of any internal damage and also to the fact that intention of the accused can be safely gathered from the injuries caused most of which were simple in nature and were on non-vital parts of the body on both the limbs. Sri Sahai further submitted that even doctor was not sure about the fatality of any injury sustained by the deceased and in a situation like this, it was urged, that the safest course to be adopted should be that knowledge to cause death can only be imputed to the accused appellants and not the intention to commit murder and therefore, crime of the accused will not fall outside the purview of culpable homicide not amounting to murder.

Transversely Sri Sangam Lal Kesharwani, learned AGA submitted that the accused had fail to fathom out any favourable evidence from all the fact witnesses and the oral dying declaration of the deceased made to his son immediately after the incident remained unchallenged and therefore, guilt of the appellant's is established within all canons of judicial discipline. Accused have failed to dislodge the prosecution story and testimonies of fact witnesses and therefore, their participation in the crime is indubitable and is a foregone conclusion. Causing nineteen(19) injuries, most of which were on the limbs without any internal damage, does not necessarily take out the case of the appellants out of the purview of 302 I.P.C. and it should be presumed that they have committed murder of the deceased. Learned AGA, therefore, submitted that the appeal sans merit and be dismissed in its entirety

with affirmation of impugned judgment and order.

We have gone through the entire record including oral and documentary evidences and have critically examined the submissions raised by both the sides.

Pondering over various contentions on merits of the appeal, we find that on an overall assessment of testimonies of fact witnesses it cannot be said that witnesses are untrustworthy and unreliable. Although from the depositions of the informant/PW1 it is conspicuous that he had not witnessed the assault at all and was informed about the same by PW2 but nonetheless soon after the incident he had inquired from his father who had narrated him the names of the two appellants as inflictors of his injuries. It is very significant to note that this statement by the injured/deceased by virtue of his demise has to be treated as his oral dying declaration but for the reasons best known to the defence it has not challenged its authenticity. On all material and major part of prosecution version all the fact witnesses informant P.W.1, Dasrath P.W.2 and P.W.3 Bansidhar have supported the prosecution case in its entirety without spelling out any otherwise evidence, which may cast a doubt on the genuineness of the prosecution version. Incipient and inchoate oral testimonies regarding genesis of the incident may have a vital consideration on the offence committed by the appellants but on the assessment of presence of the witnesses and involvement of the appellants in the crime it does not diminish efficacy of statements of all the fact witnesses that only appellants had participated in the incident. PW1 besides confirming FIR allegations as aforesaid has deposed further regarding civil litigation between the deceased and A-2 in which appellant accused A-2 had remained unsuccessful and it was decreed favouring the deceased. The nature of the dispute was that Dayali wanted to purchase a piece of land to which the deceased had denied. Although PW1 had failed to narrate details about the litigation but he was emphatic and sure that murder was motivated because of that reason. When questioned P.W.1 has asserted that had that not being the motive,

the murder would not have been committed. It was further stated by PW1 that the civil litigation was decreed in the year 75-76 and in between decree and murder brawl had taken place between the deceased and appellant Dayali (A-2) because deceased had refused to sign on the documents three months after he became decree holder. Besides said litigation there was no other dispute with the appellants nor even with Jit Singh A-1. Both PW2 & 3 have not been tested on civil litigation and therefore we find that appellants could have motive to do away with the deceased and it cannot be said that incident had occurred without any motive and resultently we repel learned amicus curie's submissions on the score that appellants could not have any motive to commit murder.

Besides motive informant PW1 has also divulged relationships between both the appellants as A-2 being father-in-law of A-1 as wife of A-1 Smt. Suman D/O Ram Prasad r/o Baghadu was the relative of A-2. Concerning actual incident it becomes apparent from the testimonies of the informant/PW1 that in fact he has not seen the actual assault and was informed about it by PW2 but even then it is also apparent that soon after the incident when informant asked from his injured father as to how he had sustained injuries, he was informed by the injured that it were the appellants who had caused injuries to him. As already mentioned herein above such a disclosure by the deceased to his son immediately after the incident concerning his death has to be treated as his oral dying declaration u/s 32 of the Evidence Act and it is very significant to note that defence had not made any effort to dislodge such an important piece of evidence by challenging it's veracity. Under section 32 Evidence Act it is both relevant and admissible. Informant has not been probed regarding other aspects of lodging of FIR and transporting of the deceased to the hospital on a cot and most of his other cross examination remains concentrated on insignificant and peripheral trivial aspects and therefore do not require any detailed discussion and hence we eschew from referring them. However it has been stated by PW1 that at the time of the incident

he was grazing his buffaloes in the fallow land (*Nala*) near the hillock along with Dashrath PW2 and Banshidhar PW3 since 6 A.M. and the incident had occurred near the field of Ram Gyani where the deceased had met both the appellants armed with their respective weapons at 8 A.M. on the incident date. Informant had emphatically denied the defence case that he was stating a spurious version and no such incident alleged by him ever occurred or he has witnessed any such incident.

Now adverting to the depositions of Dashrath/PW2 he too was grazing his cattle alongwith informant and PW3 in the vicinity of the place of the incident. He further evidenced that since *Kadua* could not be repaired by the iron-smith therefore deceased was returning with both the *Kaduas* unrepaired and when Dev Swaroop (deceased) had reached near the agricultural field of Ram Gyani that both the accused appellants, out of whom Jit Singh A-1 armed with a spade and Dayali A-2 armed with a club had started assaulting him who could not withstand the assault and squatted on the ground and thereafter also was assaulted with club by A-2. On hearing the shrieks of the injured that he had rushed to the spot and after accused had left the incident scene that informant P.W.1 had inquired from his father as to how he had sustained injuries, to which injured father had replied that the two appellants were his assaulters and when injured was being carried to the hospital on a cot that he died midway. PW2 was searchingly cross-examined at length by the accused but most of his cross-examinations are directed on topography about the place of the incident. Insignificant omissions and contradictions have been put to this witness, which do not bely the main substratum of the prosecution allegations. Thus P.W.2 had supported P.W.1 on all the material aspects of the incident and defence had miserably failed to get elicited from him any damaging statement on the basis of which it can be said that he was not present at the spot. On being questioned by the Court P.W.2 had clearly deposed that he had gone to graze the cattle at the same spot where he used to take the livestock everyday for

grazing because at that spot new grasses come up. He also cemented the presence of P.W.1 and P.W.3. and had further testified that the deceased had left the house at dawn at 4 A.M. for getting the *Kadua* repaired and at the time of incident they were grazing their cattle with PW1 & 3. Dasrath P.W.2 further confirmed the statement of the informant regarding the oral dying declaration made by the deceased when he was questioned by the informant. PW2 has also deposed that when he along with PW1 had arrived near the injured he was speaking. Nothing material contrary to the prosecution story has come out in his evidence. P.W.2 has also denied the same suggestion emphatically and clearly as was put to the informant regarding his not witnessing the incident.

P.W.3 further added truthfulness and credence to both the earlier witnesses concerning the disclosure made by the deceased to PW1 and regarding other facts and from vetting of his testimonies also we have not been able to fathom out any statement which can dent the core issues in the present appeal. He had also seen the accused running from the spot but has also rebuffed defence suggestion that due to the relationship with the deceased of being grandfather and grandson that he was deposing falsely. However one thing which is apparent from his evidence is that he has also not seen the genesis of the incident.

Dr. P.W. 5 has clearly stated that the deceased could have sustained injuries by spade and lathi and, therefore, analyzing broader aspects we are of the considered opinion that participation of both the appellants into the crime is proved beyond any shadow of reasonable doubt and therefore, conviction of the appellants through the impugned judgment cannot be taken to be unmerited and non- sustainable. Prosecution story seems to be credible also for the reason that there was total absence of any viable reason for the close relatives to spare real assailants and implicate innocent persons. It is day light incident with prompt FIR and consistent medical evidence. Insignificant contradictions inconsistencies and

omissions, which all do not touch the root of the allegations, occurring in witnesses deposition do not discredit prosecution charge and of the appellants being the actual perpetrators of the crime nor it demolishes prosecution story, and it appears, that because of this reason that the accused had failed to lead any defence evidence supporting their version. Conviction of the appellants consequently are hereby affirmed.

This now takes us to the second limb of the argument regarding the offence disclosed against both the appellants. On this aspect, we find considerable force in the submissions of learned amicus curie. As discussed herein above none of the fact witnesses had seen how the incident started as they have not disclosed its genesis. Incident as is discernible from the evidence seems to have occurred all of a sudden without having any causa causans or immediate cause nor it seems to be premeditated. Autopsy report Ext. Ka-2, indicates most of the injuries, except two sustained by the deceased, to be on his upper and forehands. Except the fracture of phalanx, right elbow and wrist joint, no other grievous injury was detected by the doctor on the cadaver of the deceased. There was no internal damage as well underneath all these injuries except as stated above. No assault was made on the deceased on his vital parts, torso, bony cage or on the head by spade and lathi so as to impute intention to cause death to both the appellants. Moreover none of the injuries in ordinary course of the nature was sufficient to cause death and appellants had never intended to cause it. All the injuries except three, underneath of which fractures have been found, were simple in nature. The weapons of assault wielded by both the appellant accused for the purposes of causing injuries, were dependent upon the force applied by the accused and parts of the body selected by them. In cases where such type of weapons are used which are dependent upon the force applied while inflicting injuries, common intention of the accused can very well be gathered from the natures of actually inflicted injuries, part of the body selected to inflict them with other surrounding

circumstances. If both the appellants had shared the same common intention to commit murder of the deceased, they would have inflicted more serious and grievous injuries on the vital parts of the deceased than what they have actually caused. Number of injuries is not always the safest and surest determinative criterion to judge intention of the accused which has to be gathered from taking into considerations all the attending relevant and germane facts and circumstances peculiar to an incident. Further, causing number of injuries taking abundant caution not to damage any vital part nor inflicting them on vital parts of the body with no injury to the internal and vital organs is a significant guide to cogitate and fathom out the real intention of the assailants which has to be anything but be not an intention to commit murder. Looking to Section 300 I.P.C. we find that both the accused had no intention to cause death of the deceased as their acts do not fall in any of the categories mentioned for disclosing an offence of murder. They also had no intention to cause such bodily injury as in all probability would have resulted in deceased death nor they possessed any intention to cause such an injury which definitely would have caused death. Regard being had to all the above materials with attending facts that incident occurred all of a sudden without any premeditation and weapons of assault were ordinary agricultural implements that we are in grave doubt as to whether both the appellants had the requisite intention to cause death of the deceased although it can be safely inferred that by chastising the deceased, they did possess requisite knowledge that their assault may result into his death and, therefore, crime of the appellants do not travel beyond the purview of section 304 part II I.P.C. In our such an opinion we also draw support from the statement of the doctor, who, when questioned as to which injury of the deceased was fatal, deposed in no uncertain terms that he had not found any such injury. Although, the doctor had noted cause of death as shock and hemorrhage due to sustained injuries but after scanning the autopsy report searchingly and minutely we have not been able to

find out sine qua non requisite intention to cause death as none of the injury singularly was sufficient in ordinary course of nature to cause death with no internal damage underneath any injury except three fractures on the upper limb noted as above. Thus only chastising the victim severely having a knowledge that it may result into his death can only be imputed to both the appellants.

We further note, as stated, the incident occurred all of sudden at the spur of moment. From the testimony of P.W. 1 from pages 21 to 24, it does not transpire that he had witnessed the incident. He was informed about belaboring of the deceased by P.W. 2, who in his statement also do not spell out that he had seen the real genesis of the incident. He had only mentioned that when he had reached at the spot then he had seen that the deceased already lying in an injured condition and the accused were beating him. This is so apparent from internal pages 5 to 8 of the testimony of P.W.2. In view of above fact, so far as genesis of the incident is concerned, it is somewhat shrouded in mystery. Taking abandoned caution of the entire fact scenario, we have concluded that the guilt of the appellants will not be one under section 302 IPC but will be only under section 304 Part (II) IPC. In support of our view, we rely upon some of decisions of the Apex Court in **Bhoopat Singh Vs. J.B. Katariya: (2009) 17 SCC 242.** Wherein it has been held by the apex court as under:-

*"10. In Para 3 Dr. Shukla stated, "in our opinion, the death of the deceased may have been caused due to ante-mortem injuries, bleeding and shock". In Para 6, Dr. Shukla opined that the injuries on the body of the deceased could be caused by lathi and that ante-mortem injuries were ordinarily sufficient to cause death. In view of this, it is not safe to rely on the testimony of PW 8 for recording a firm conclusion that injuries inflicted by the appellant were sufficient to cause death in the ordinary course of nature and the High Court*

*cannot be said to have erred in altering the appellant's conviction from Section 302 to Section 304 Part II IPC."*

In **Babu Lal versus State of Madhya Pradesh:1993 Cr.L.J. 2667** it has been laid down by the apex court as under:-

*"5.Now coming to the nature of the offence, according to the eye-witnesses the three accused came together armed with sharp-edged weapons and inflicted injuries which resulted in the fracture of the skull bones. The fracture of the tibia, fracture of the metacarpal bone and some other injuries were also caused. However, if their intention was to cause death, they should have inflicted some more injuries on any vital part of the body but they have given one blow only with the blunt side of the axe and the deceased died only six days later. Therefore, in these circumstances, it cannot be said that they had a common intention for causing the death. But they must be attributed that by inflicting such injuries they were likely to cause the death of the deceased, in which case the offence will amount only to culpable homicide and not murder."*

In another decision **State of Rajasthan versus Jora Ram:AIR 2005 SC 2440** it has been held by the apex court as under:-

*"The case of the prosecution was that the respondent who was armed with a knife had caused injuries on the person of the deceased. The High Court found that the medical evidence on record did not make out a case of murder. The medical evidence on record discloses that the injuries found on the person of the deceased were simple injuries and none of them was described as grievous. There is no evidence to prove that the injuries inflicted on the deceased were sufficient in the ordinary course of nature to cause death. There was a bruise on the front of the neck of the deceased and the medical evidence disclosed that there was bleeding of the trachea as a result of that injury, and the bleeding resulted in clotting of the blood in the trachea leading to Asphyxia. This injury was not attributed to the respondent, and there was nothing to establish that the injury which ultimately resulted in the*

*death of the deceased was intended by any one. In these circumstances, the High Court held that the offence under Section 302, IPC was not made out and that the offence made out was one punishable under Section 304, Part II, I.P.C."*

**In Ranjha and another versus State of Punjab: AIR 1996 SC 2741= 1996 CR.L.J. 3991** it has been held by the apex court as under:-

*"10. The next question, which is required to be considered, is whether by causing the death of Khanu the appellants committed the offence of murder, as held by the High Court, or culpable homicide not amounting to murder. From the injuries found on the person of Khanu, as detailed earlier, we get that except one abraded contusion on the back of the lower part of the chest (injury No. 3), beneath which three ribs were found fractured, all other injuries were simple and most of them were inflicted on non-vital parts of the body. If really the three accused persons intended to cause death of the deceased it was likely that they would have caused much more grievous injuries on vital parts of the body more so when they were armed with deadly weapons. Considering this aspect of the matter and the nature of the injuries sustained by Khanu, we feel that the offence committed by the two appellants in causing the death of Khanu comes under S. 304 (part II), IPC. We, therefore, set aside the conviction and sentence of the appellants under S. 302/34, IPC; and instead thereof convict them under S. 304 (Part II)/34, IPC and sentence each of them to suffer rigorous imprisonment for seven years."*

On injuries in somewhat similar facts apex court in the decision of **Karia Versus State of Karnataka : JT 2002 (6) SC 582** has held as under :-

*" 3. It is the case of the prosecution that the appellant attacked the deceased in his village which was witnessed by PW 1, his daughter-in-law. Taking into consideration the case of the prosecution, it is evident that if the appellant had intended to cause the death of the deceased then he should have attacked the victim at the vital part of his body. On perusing the injuries which are only on the hands and*

*legs of the deceased and there being no injuries on the vital part of the body and the evidence of the doctor who conducted the post-mortem, who has stated that none of the injuries individually was sufficient to cause the death, we are of the opinion that the appellant did not intend to cause the death of the deceased.*

*4. In the said circumstances having considered the material on record and having heard the parties, we are of the opinion that the conviction of the appellant under Section 302 is not sustainable and the same should be one under Section 304 part II of the IPC. Accordingly, we partly allow the appeal and convert the sentence to ten years rigorous imprisonment under Section 304 part II of IPC. If the appellant has served the said sentence he shall be released forthwith. While deciding the period of sentence the authorities will take into consideration the remission of sentence which the appellant is entitled to in law."*

From our above discussion the precipitated residue which emerges is that conviction of the appellants for the charge of murder u/s 302 I.P.C. is unsustainable and they both are liable to be convicted u/s 304 (II)/34I.P.C. as their guilt do not travel beyond the scope of that offence and, therefore, we alter their conviction from 302 I.P.C. to one u/s 304 (II)/34 I.P.C.

This now lead us to the question of sentence. As already noted, appellants have already served seven years of imprisonment. They have caused injuries to the deceased who was an octogenarian because of an earlier concluded civil litigation which was assolzied against them and they had remained judgment debtor. The deceased had lost his life same day and, therefore, in the fitness of things, but looking to the intervening period lapsed as of now and there being no other offence reported against the appellants and hostile atmosphere must have been palliated by now that in our opinion 8 years R.I. with fine of Rs.25,000/- to each of the appellants and in default of payment of fine to serve one year additional R.I. will meet the ends of justice.

Wrapping up the discussions appeal succeeds in part. Conviction of the appellants under section 302 IPC is altered to 304(II) I.P.C. and their sentence from life imprisonment is modified to 8 years R.I. with Rs. 25,000/- fine on each of the appellants and

in default of payment of fine to serve 1 year R.I. additional imprisonment. If the fine is deposited by both the appellants, half of the total amount of the same shall be given as compensation to the family members of the deceased.

Appeal is finally **allowed in part** as above.

Let a copy of this judgment be certified to the learned trial Judge for its intimation and further action.

*Dt.29.1.2014*

*Rk/Arvind/Tamang/-*

**Hon'ble Sheo Kumar Singh, J.**

**Hon'ble Vinod Prasad, J.**

Sri Brijesh Sahai, advocate was appointed as *Amicus Curiae* by us to assist the Court in disposal of the appeal under the direction passed by the Apex Court. Sri Sahai has rendered valuable assistance for which he is directed to be paid Rs. 8,000/- as his fees by the office of this Court.

**Dt.29.1.2014**

**Rk/Arvind/Tamang/-**