

**Reserved****AFR****Criminal Appeal No.3029 of 1986****Purshottam And Others Appellants****Vs.****State of U.P. Respondent****Honble Sheo Kumar Singh, J.****Hon'ble Vinod Prasad, J.*****(Delivered by Hon'ble Vinod Prasad,J)***

This appeal by the four appellants herein namely Purshottam Singh A-1, Dinesh Singh A-2, Narottam Singh A-3 and Surendra Singh A-4 is directed against the impugned judgment of conviction and order of sentence dated 14.11.1986, whereby IVth Additional Sessions Judge, Jhansi has convicted A-1 and A-2 for offence u/s 302 IPC and has sentenced them to serve life imprisonment, and A-3 and A-4 have been convicted u/s 323 IPC and have been sentenced to 1 year R.I recorded in S.T. No.173 of 1985, State Vs. Purshottam Singh and others.

Background facts, as are discernible from the F.I.R. and testimonies of fact witnesses, informant Hari Singh P.W.1, Mool Chand P.W.2 and Balak Das P.W.3, are that three of appellants A-1, A-2 and A-3 are uterine real sibling brothers being sons of Narain Singh, whereas A-4 is the son of A-1. On 13.8.1985 at 8.30 P.M. informant P.W.1 Hari Singh was sitting along with his younger brother Om Prakash on an erected pedestal in front of his house and both were having conversations about pending high court litigation. Meanwhile A-3 and A-4 arrived at that spot and intimated both of them. When informant proscribed and objected to their rankled act A-4 armed with iron rod started assaulting the informant followed by A-3 who wielded a club. When the younger brother Om Prakash(deceased) tried to intervene and save the informant then all of a sudden A-1 and A-2, both

armed with knives appeared at the scene and started stabbing Om Prakash. Meanwhile, witnesses Mool Chand, Balak Das and many others collected at the spot on which, accused scampered away from the incident scene through a damaged wall. Motive behind the assault was a pending litigation since last one and half decades between the informant and the appellants. After dispatching the injured to the hospital that the informant/PW1 came to police station Kotwali, District Jhansi, at a distance of 1½ Kms where he orally dictated incident F.I.R. Exhibit Ka-1, which was registered the same day at 9.05 P.M. by Head Mohrir Shiv Ram as crime number vide rapat no.39, by preparing chik FIR and G.D. entry Exhibit Ka-17.

S.I. Yogendra Singh Chauhan P.W.7 in whose presence the offence was registered commenced investigation into the crime, recorded informant's statement and thereafter came to District Hospital, Jhansi where he took in possession the attires of the injured Om Prakash and prepared it's recovery memo Exhibit Ka-6. Spot inspection was conducted and site plan Ka-8 was sketched. Blood stained and plain bricks were collected and recovery memo Exhibit Ka-7 thereof was prepared. Thereafter statement of witness Mool Chand was recorded. Constables Satendra Singh and Brijendra Kumar informed the I.O. regarding demise of the deceased and therefore I.O. came to medical college where he performed inquest on the cadaver of the deceased and slated inquest memo Exhibit Ka-9 and other relevant papers photo lash, challan lash, form no.13, seal impression etc., which documents are Exhibits Ka-10 to 15. I.O./P.W.7 thereafter copied medical examination report of the informant Hari Singh. Demise of injured Om Prakash resulted in conversion of crime u/s 302 IPC, on 14.8.1995 at 8.55P.M. vide rapat no.11 and G.D. entry thereof was made by H.M. Ram Gopal, which is Exhibit Ka-18. The said Head Mohrir had also copied the supplementary report the same day at 10.15P.M. and had prepared it's G.D., which is Exhibit Ka-19. Further investigation into the crime was conducted by Nathu Singh P.W.6, who recorded the statements of A-1 and A-4 on 23.8.85. A-3 was arrested on 26.8.85 and his statement was recorded. On 5.9.85, statement of witness Balak Das Exhibit Ka-5 and

that of inquest witnesses were penned down. Wrapping up the investigation charge sheet Exhibit Ka-4 was forwarded against all the accused appellants on 8.9.85.

Injured informant/PW1 was medically examined by Dr. A.K. Singh P.W.5 on the incident day at 1P.M. vide his medical examination report Exhibit Ka-3. Dr. has noted following injuries sustained by the informant injured.:-

"An abrasion of size 1.5 cm x 1 cm present in left side of forehead with bright red colour 5 cm above medial end at left eyebrow.

2. An abrasion of size 1 cm x 1 cm present in right parietal region 10 cm from medial end of right eyebrow and 12 cm from upper end of right ear with bright red colour.

3. A lacerated wound of 2.5 cm x 5 cm present on later end of right eyebrow with fresh bleeding.

4. An abrasion of size 4cm x 1.5cm present on right side of face with posterior end 2cm from upper border of right ear and interior end is 0.5 cm from lateral end of right eyebrow.

5. An abrasion of 1.5 cm x 1 cm present over the tip of nose with bright red colour.

6. A contusion of size 2 cm x 1.5 cm present on right half of upper lip."

According to the doctor injury nos.3 and 6 could have been caused by iron rod.

Post mortem examination on the dead body of the deceased was performed by Dr. D. Saxena P.W.4 on 14.8.1985. Cadaver was brought to the doctor by constable Brijesh Kumar, who had identified the dead body. Physique of the deceased was weak and on his corpse doctor has noted following ante mortem injuries:-

"1. Incised wound 6cm x 1/2cm x upto bone on right side head 9cm above right ear along the length of chest. Anterior end

is 8cm above outer end of right eye brow. Tailing at posterior end present.

2. Stab wound 3cm x 1-1/2cm x cavity deep on left side chest, oblique at 12 O'clock posterior, lower end 3cm above nipple (on exposing only inter costal muscle is cut vis, pleura intact).

3. Incised wound 3cm x 1-1/2cm x muscle deep on left side chest, oblique. It's upper end is 5cm from mid line and lower end, 6-1/2cm from mid line 6cm below left nipple at 7 O'clock position.

4. Stab wound 3-1/2cm x 1-1/2cm x cavity deep. Horizontal on the left side chest posteolateral surface 23cm below axila medial end is 15cm from mid line (omentum coming out).

5. Incised wound 3cm x 1-1/2cm x skin deep on right side grain 7cm from mid line, oblique.

6. Incised wound 3cm x 2cm x muscle deep on right thigh upper most part outer aspect, oblique. 5cm from injury no. 5.

7. Stab wound 3cm x 1-1/2cm x cavity deep horizontal on front of right side chest. It is medial end is 15cm below right nipple at 7 O'clock position.

8. Stab wound 3-1/2cm x 1-1/2cm x cavity deep on right side back of chest 2cm below interior angle of right scapular inner end is 11cm from mid line.

9. Incised wound 2-1/2cm x 1cm x skin deep on left side thigh middle and outer aspect. Horizontal. Inner end shows tailing.

10. Incised wound 2cm x 1/2cm x skin deep on the right buttock, oblique, inner end shows tailing."

On internal examination doctor had found that right pleura and right lung were cut and an incision 2 cm x 2 1/4 cm was present on the right lung and lower lobe was congested. Peritoneum, right ventricle were cut in a size of 1 1/2 cm x 1/4 cm and one liter of blood was present in the thoracic cavity. Peritoneum also had a stabbed wound. Some food material was present in the peritoneum cavity. On the left side back, there was a cut of 2 cm x 1/2 cm x cavity deep and..... was also cut in an area of 2 1/2 cm to 1/2 cm. Cause of death of the deceased was shock and hemorrhage due to ante mortem injuries, which were sufficient in ordinary course of nature to cause death. Post mortem examination report of the deceased is Exhibit Ka-2. From the body a blue colour underwear was removed and was sealed

and handed over to the constables. The injury sustained by the deceased could have been caused by knives. Along with dead body fourteen(14) papers were received by the doctor which were signed by him and were handed over to the constables.

On the strength of submitted charged accused were summoned after registration of criminal case against them and under procedural law(Cr.P.C.) their case was committed to the court of Sessions for trial after observing due formalities.

IInd Additional Sessions Judge, Jhansi, on 15.1.1986, charged appellants A-3 and A-4, under sections 323, 302/34 IPC. Appellants A-1 and A-2 were charged under section 302 IPC. Both the charges were read out to both the sets of accused who all abjured them, pleaded not guilty and claimed to be tried and consequently their trial commenced to establish their guilt.

Prosecution in it's efforts to prove its case tendered in all seven witnesses, out of whom informant Hari Singh P.W.1, Mool Chand P.W.2 and Balak Das P.W.3 were the fact witnesses. Rest of the formal witnesses included both the doctors and investigating officers.

In their examinations under section 313 Cr.P.C., the common defence of all the accused were that of denial and false implication at the instance of the informant because a Will was executed by Hari Das, maternal uncle of A-1, in his favour, which property informant wanted to grab and, therefore, accused were arraigned falsely in the crime.

Learned trial Judge believed the prosecution story in its' entirety but, on facts, found that A-3 and A-4 did not share the same common intention with A-1 and A-2 and therefore, as an abundant caution gave benefit of doubt to A-3 and A-4 respecting charge under section 302/34 IPC and acquitted them of the said charge but convicted them u/s 323 I.P.C. and sentenced them to 1 year RI. Learned trial Judge convicted A-1 and A-2 for the charge of murder u/s 302 IPC and sentenced them to life imprisonment vide impugned judgment and order dated 14.11.86, which decision has now been assailed in the instant appeal.

The appeal is of the year 1986. It was printed in the cause list for disposal but in spite of the fact that names of many counsel were printed, nobody appeared for the appellants to argue their cases. Since the appeal could not have been kept pending in the dockets of this Court for an unlimited period, therefore, applying the law laid down by the Apex Court in **Bani Singh and others Vs. State of U.P.: AIR 1996 Supreme Court 2639**, Sri Patanjali Mishra, was appointed *amicus curiae* to assist in disposal of the appeal as he has been an erstwhile learned AGA for more than a decade and has vast experience of arguing criminal appeals. We have heard him in support of the appeal and Sri Sangam Lal Kesherwani, learned AGA for the respondent State.

Before we proceed to deal with appellant's urged contentions it will but be appropriate to take stock of relevant portions of witnesses testimonies as present is the case of eye witnesses account. According to the informant/P.W.1., who besides fully corroborating his F.I.R. version has further deposed that A-1,A-2 and A-3,Purshottam, Dinesh and Narottam, are uterine sibling brothers being sons of Narain Singh and appellant Surendra Singh is son of Purshottam and nephew of other two appellants and, therefore, it is evident that all the appellants belonged to the same family. Houses of appellants and the informant were across a road facing each other in the same precinct surrounded by a wall and in the same precinct house of Ram Ratan also situated. House of A-1 was No.1 whereas house of informant was number 2.These facts are in conformity with the site plan Exhibit Ka-8 as well and since these are indubitable admitted facts, therefore identity of the accused cannot be doubted. Informant further admitted that since last one and a half decades civil litigation was pending with the appellants. After the incident, informant had proceeded to lodge his report at the police station whereas his injured brother was rushed to the hospital for medical attendance. Regarding topography about the place of the incident, informant was subjected to lengthy and searching cross examinations by the defence who miserably failed to get elicited from him any otherwise evidence denting prosecution version. Further since

topographical evidences do not affect merits of the controversy in any manner whatsoever, therefore we do not go into the details of the cross examination concerning that except to mention that house of Ram Singh Lawana, brother of the informant, who had taken injured Om Prakash to the hospital, resided in Sagar Gate locality where witness Balak Das also had his residence. The informant was not asked regarding the distance between the said locality and place of the incident therefore in our opinion, it seems that the said locality lies in close vicinity from the place of the incident. Witness Mool Chand was a resident of Laxmi Gate locality and while going there P.S. Kotwali falls in the way. Informant further evidenced that Ram Singh Lawana had a taxi business with a Metador URY 969 and his son was his driver. Informant further admitted that he is a clerk of an advocate since last twenty five years. Relating to motive and court litigation it was stated by the informant that he had filed an allotment application for house of A-1 because he (A-1) had illegally trespassed into the said house but his said allotment application was dismissed and he had not challenged the said rejection order in any appeal. PW1/Informant further admitted that his father Heera Lal had filed a civil suit against Hari Das, maternal uncle of appellant A-1 and after demise of Hari Das, A-1 was impleaded as a defendant in that suit. The relief sought in that suit was regarding possession of house no.1 aforementioned. Informant denied the suggestion that the sale deed produced by his father in the said suit was judged to be a sham document. It is further admitted to P.W. 1 that after demise of his father in 1984, they were implicated in the suit as plaintiffs. It was also admitted that the said suit was dismissed by principle civil court and First appeal challenging decree by court of original jurisdiction too was dismissed on 21.11.1984 and, therefore, a second appeal was filed in the High Court, which is still sub judice. Informant could not offer any explanation as to why he had mentioned A-1's address as house no. 2 in his FIR when he resided in house no.1. He was also questioned regarding non mentioning of different residential abodes of appellants Narottam A-3 and Dinesh A-2 to which he had stated that since they were real brothers

and they used to visit A-1's house of and on, therefore, their addresses were clubbed together. Informant further disclosed that since five minutes prior to incident he was having conversations regarding high court litigation sitting at the door of the deceased, which was adjacent to his door. Informant also stated that A-3 and A-4 had arrived at the scene from the house of A-1 but he could not slate these facts in his FIR because of being in a hurry and that is why the intimidation part by Narottam and Surendra and appellant Surendra wielding an iron rod also could not be mentioned by him. PW1 further evidenced that he was not stabbed with knives and deceased was not assaulted with iron rod and deceased was stabbed with knives as he had come in front. However, being in a hurry these facts in detail could not be penned down by him in his FIR. On being asked, informant disclosed that he used to do pairvi of the civil litigation and he could not state the reason why accused assaulted him first. It was further stated by him that sustaining injuries deceased had fallen down on the ground. However, he was unable to spell out the names of the locality people, besides the witnesses named in the FIR, who had arrived at the scene of the incident during its happening. Informant further disclosed that Ram Singh Lawana, his brother, had arrived at the assault scene on his own ten or fifteen minutes after the incident and at his instructions that informant had gone to the police station to lodge the FIR, which is in front of district hospital with a road dividing them. Informant further deposed that the injured was transported to the hospital in a taxi while he had gone to the police station on foot arriving there within five or seven minutes and it took another ten or fifteen minutes to record the FIR. It is also stated that while deceased was being stabbed, other two accused had caught-hold of him to make him imbecile and that is why he could not attempt to save his brother. Informant denied defence suggestion that at the time of the incident only he and the deceased were present and that FIR was the outcome of consultation and deliberations between Ram Singh Lawana and the police and was made ante timed. Informant/PW1 emphatically refuted defence case that because the house and the immovable property were

given by their father to the deceased, therefore informant used to fight with him and that is why on the incident date, due to rapacity of the property, that in an inebriated condition he had gone to the house of the deceased and because the deceased refused to part away with any share that he had assaulted the deceased with knife and in that jostling he had also sustained injuries and later on in connivance with Ram Singh Lawana that the appellants have been implicated in the crime after fabricating a spurious version. On being questioned specifically, informant stated that after sustaining injury, his brother has given him some liquor and thereafter he had gone to the police station Kotwali where his injuries were jotted down. He also denied that his medical examination report is a sham document. Informant further rebutted defence case that Balak Das was not present at the time of the incident and, due to enmity, with false allegations that the appellants were arraigned as accused in the case. He also denied the defence suggestion that being in an inebriated condition, he was unable to carry the injured to the hospital and lodge a report and that is why, he had called his brother Ram Singh Lawana, who had taken the injured to the hospital and it was he who, in connivance with the police, had lodged the FIR. Regarding the pedigree of the appellants, informant had further disclosed that Dinesh and Narottam were real sibling brothers whereas Purshottam was their step brother and Hari Das belonged to their caste who had executed a registered will in favour of Purshottam A-1 which in the civil suit was found to be a genuine document. PW1/informant denied that no such incident as alleged by him had ever occurred. Some insignificant omissions have been put to the informant but since they do not affect the merits of the appeal and are insignificant and trivial that we have not registered them.

Another fact witness Mool Chand P.W. 2 in all material aspects has corroborated the informant and during cross examination, he has stated that he is a bachelor and I.O. had interrogated him on the following day of the incident. Some contradictions were put to this witness regarding which PW2 could not offer any acceptable explanation. Concerning actual incident

this witness has further evidenced that firstly the incident had occurred at the road and then inside the house. From his cross examination, we have not been able to decipher testimonies of substance, which could have helped us in vetting through the facts and circumstances of the appeal that is why we eschew detailing his depositions.

Balak Das P.W. 3 turned hostile and did not support the prosecution version as he stated in his examination-in-chief itself that he had not witnessed the assaulted because it was dark. Learned ADGC had sought permission of the Court and has cross examined him regarding his interrogatory statements but this witness made a categorical deposition that he could not state the reason how his such statements were recorded by the I.O. and, therefore, his evidence does not countenance prosecution case.

The formal witnesses have deposed those very facts which have already been slated herein above and hence for the sake of brevity we eschew their rewriting.

In the backdrop of the aforesaid factual matrix and evidences that we have scanned the contentions incisively and strenuously harangued by learned *amicus curiae*, who submits that because of pending civil litigation in which both, informant and his father, had remained unsuccessful on two occasions before the original court as well as first appellate court that they have falsely implicated the appellants in the murder after cooking up a mendacious story. F.I.R. is the outcome of due consultation and deliberations and was lodged ante timed and ante dated. Informant in a drunken inebriated condition used to fight with the deceased coercing him to part away with some share of the property which was bestowed on him by his deceased father, which property included a house and also movable properties. On the incident date fully charged with alcoholic intoxication that the informant had approached the deceased at his house where, in buffeting between the two regarding share in the property, that the informant/PW1 had fatally stabbed the deceased and himself had sustained injuries. Being intoxicated that the informant was unable to proceed for the

police station and to the hospital and therefore he had sent for his brother Ram Singh Lawana, who had carried the injured to the hospital and in was in consultation with him that the incident FIR was fabricated with feigned allegations to falsely implicate the appellants and no such incident as alleged by the prosecution had occurred. Articulating his submissions, learned *amicus curiae* invited our attention at the medical examination report of the informant wherein the doctor has mentioned liquor smell coming out of his mouth. Josteling between both the brothers and sustaining of injuries by both of them was benefittingly utilized by hostile enemies to nail in the appellants and seeks vengeance from them over property dispute asserted learned *amicus curiae*. Next it was urged that P.W.2 was not present at the incident scene and subsequently he was made an eye witness of the incident. PW3, sole independent witness examined by the prosecution turned hostile and did not support the prosecution case and from vetting of his testimonies it becomes apparent that at the time when occurrence took place it was pitch dark and nobody could identify the miscreants. No motive ever existed for the appellants to commit deceased murder as at all times they were decree holders and but for that dispute no other reason was present for the appellants to involve themselves in a murder incident. Informant/PW1 is unreliable and un-creditworthy witness and on many occasions had failed to divulge vital and significant aspects both pre and post incident and consequently on his testimonies no reliance can be placed submitted learned *amicus curiae*. Since he was the eye sore being the *paikar* of the litigation hence it is puerile to cogitate that he will be spared by the accused who had assembled to seek revenge of court case. In fact incident started with assault on the informant and therefore if the assailants desired to settle scores for civil dispute they would not have spared informant with insignificant injuries. In any view escaping of informant is not providential contended learned *amicus curiae*. For stabbing Om Prakash, who was just an intervener, there was no reason and therefore incident had not occurred as alleged by the prosecution witnesses. Causing no injury by *lathi* to Om Prakash is an indication that in

fact, the prosecution story is incredible as had the Om Prakash intervened in the assault he must have sustained some blunt object injury and therefore description of the incident by the fact witnesses do not fit in well with the admitted facts and hence, no reliance can be placed on the prosecution story. Promptness with which FIR is lodged makes it a suspect document which seems to have been fabricated later on. It is further submitted that the investigation of the case by the two I.Os. are perfunctory, inept and moldy which do not instill confidence. Learned counsel further urged that examining from any angle the prosecution story is incredible, which do not inspire any confidence and therefore, appeal of the appellants deserves to be allowed and they be set at liberty and be acquitted of the charges.

Learned AGA conversely interdicted appellant's submissions and argued, pointing out to the suggestions given to the witnesses, that prosecution has successfully anointed the guilt of the appellants beyond all reasonable doubt and there is no reason to set aside appellants convictions. Medical consistency with ocular version, prompt registering of FIR containing all the relevant essential details about the incident and firm testimonies of eye witnesses all leaves no room for doubting prosecution version. There exist no reason for the accused to contend that no such incident as alleged by the prosecution did not happen. There was no earthly reason for the real brother to tell tale a story regarding murder of his own sibling brother harangued, learned AGA. It was next submitted that a brother in howsoever inebriated condition he may be will not assault his uterine brother so mercilessly so as to stab on his chest repeatedly with such excessive force as to cause him extensive internal damage as each of the inflicted injuries singularly were sufficient in ordinary course of the nature to cause death and therefore, the defence case that it was a fight between the informant and the deceased is the most facetious and preposterous contention which could never be raised by any man of common sense and ordinary prudence. Learned AGA, therefore, castigated all the contentions urged by learned amicus curiae and submitted that the

impugned judgment do not suffer from any error and infact learned trial Judge has taken extra caution and was extremely judicious in not applying section 34 IPC on at least two of appellants and giving them benefit of doubt as, on the merits of the matter, he had found common intention pervading amongst all the accused absent. Learned AGA, therefore, drew the curtain of his argument by submitting that appeal lacks merit and be dismissed.

We have pondered over rival contentions and have critically scanned and appreciated the entire evidences. What is discernible from our vetting is that both the factions resided in the same precinct and were very well acquainted with each other and their houses were in front across a road. Both the sides were at daggers drawn and in between them a civil litigation was pending since more than one and a half decade. From the court of original jurisdiction as well from first appellate court informant side had lost the suit but none the less the decree holder, who were the appellants were denied usufruct of that decree and were unable to reap the fruits of both the decrees as the informant succeeded in obtaining a stay of both the decrees from this Court in a second appeal. This must have rankled and infuriated the appellants and must have imbibed them with revengeful feelings as even after litigating for so many years they were unable to enjoy benefit of the suit property. Thus, there existed a strong motive for the appellants to commit the crime. Further most vital and significant aspects of the incident are admitted to the defence and they themselves came out with a version that on the date, time and place of the incident, deceased was caused fatal injuries by knife on his chest and other parts of his torso because of which he had lost his life the same day after few hours. Blood was found at the spot alleged by the prosecution and admitted to the appellants. Thus date, time, place of the incident, use of knife as weapon of assault, presence of the deceased and the informant during the incident all are the facts which are admitted to the defence. It will be appropriate to refer to the defence suggestion given to the informant which is *"it is wrong to say that on the incident date after*

consuming liquor I had gone to the house of Om Prakash and because he was not parting with the share I stabbed him with knife."

If this version/ suggestion by the defence is taken to be correct, the natural ramification of it will be that major part of prosecution version will stand proved by the defence case itself. It then becomes indubitable firstly, that the incident had occurred at the time date and place alleged by the prosecution in which knife was used to caused injuries to the deceased and secondly, it establishes the presence of the informant as well as of the deceased at the place of the incident during its happening. Once these facts are admitted to the accused, the scope of our scrutiny remains in a narrow area only to judge as to whether prosecution case about participation by the appellants is true or defence plea of informant being the real assailant is correct. When the facts and circumstances are scrutinized and vetted in depth to judge said aspect, the fathomed out residue is that the prosecution story holds the ground and seems to be the correct version for the following reasons. Firstly that both PW1 & 2 unambiguously stated that the deceased was stabbed by A-1 and A-2 and inspite of searching cross examinations defence has not been able to dislodge their evidences. Secondly that medical report as well as defence version both establishes medical consistencies with ocular version. Thirdly that defence has failed to get it elicited from the fact witnesses that because of property dispute informant and deceased were not on good terms. Fourthly that FIR of the incident was lodge very promptly diminishing chances of it being fabricated and cooked up. Fifthly that FIR contains all the essential details naming the appellants as culprits. Sixthly that presence of blood at the spot fixed place of the incident which has not been disputed even by the defence. Seventhly that if the informant was in such an inebriated condition that he was unable to proceed for medical examination and to lodge the FIR then there was no reason for the deceased not to save himself from the attack by such a person, as self-preservation instinct is most dominant in all human beings against an assault even by his close relatives. Eightly, that if defence case is correct

there was no reason for the deceased to save himself by pushing the informant or by grappling with him in an endeavour to save his life which fact never occurred ostensibly because deceased could not get enough time to react and save himself against an attack which was launched on him all of a sudden. Ninthly, if the informant was the real culprit and the murderer, at least some member of the deceased family would have entered into the witness box not to shield him of such a serious crime which evidence is significantly missing from the record. Tenthly, that the merciless manner, without any compassion in which the deceased has been stabbed by knife, unerringly is a pointer that whosoever was the culprit, he was assaulting the deceased with excessive vengeance and venomosity. It is, therefore, difficult to swallow appellants contention that it was the informant who had stabbed the deceased, his real sibling brother in such a gruesome, cruel and diabolical manner against all canons of human psyche. The irresistible conclusion therefore is that the defence of the appellants by itself nailed them as real perpetrators of the crime. There is no scope for conferring on them any benefit whatsoever and the prosecution has successfully established its case with confidence inspiring testimonies of PW-1 & 2. Although on some trivial aspects at different occasions PW1 had faltered to disclose facts but that does not take away the efficacy of the main substratum of the prosecution allegations nor does it rob the prosecution version of its authenticity and acceptability. Doctor's testimony spelt out by Dr. D. Saxena PW-4 cements the prosecution version beyond all reasonable doubt and unerringly makes its consistent with the prosecution charge of stabbing of the deceased by knife. F.I.R. was lodged without any wastage of time just after thirty minutes of the incident at the police station Kotwali, one and half kilometer from the place of the incident and but for a bald argument, no material could be brought before us which can even remotely suggest that the F.I.R. is cooked up or fabricated and was lodged ante timed. Accused are specifically named in the F.I.R. as the real culprits and it is not difficult at all to arrive at the conclusion that in such a short span of time, prosecution would not have been able to

fabricate a story and lodged it at the police station. In our opinion, F.I.R. is a genuine piece of evidence and on the inchoate submissions the same cannot be discarded as unauthentic piece of corroborative evidence. Learned *amicus curiae* has submitted that the deceased was admitted in the hospital as a case of accidental injury for which, he had invited our attention to the admission document Ext. Kha-1 wherein, it is mentioned in the blank space left for mentioning disease ACC Inj. (accidental injury). In our view, the said aspect do not diminish genuineness of the prosecution story for the simple reason that in fact the deceased was assaulted accidentally when he had tried to intervene into the assault on his brother by the two accused wielding iron rod and *lathi*, whereas the deceased was assaulted by the other two accused who had appeared at the incident scene all of a sudden subsequently armed with knives. Further we do not know what was informed to the doctor by the person who had brought the deceased to the doctor on the basis of which doctor had made such a noting. If the accused wanted to take advantage of the same and wanted to reap the benefit of such a writing, they should/could have questioned the doctor specifically on the aforesaid aspect which they eschewed consciously and conveniently therefore, we are not impressed by the submission of learned *amicus curiae*. Another feeble contention, which has been raised before us by learned *amicus curiae* is that the weapon of assault iron rod and the knife have not been recovered by the Investigating Officer and for that we hereby observe that the investigation into the crime is not above board and much what was desired was left by the two Investigating Officers. However, these aspects do not erode credibility, efficacy and trustworthiness of evidences of the two fact witnesses specially that of the informant P.W.1.

Concluding our discussions, we are of the opinion that the prosecution has anointed accused guilt beyond all shadow of reasonable doubt.

Learned trial Judge while vetting through the case has rightly recorded that in the facts and circumstances of the present case common

intention as is required under section 34 IPC cannot be applied to all the accused as the incident had occurred in two different parts. In the first part, only A-3 and A-4 had participated, whereas in the second part A-1 and A-2 had stabbed the deceased independent of the first without A-3 & 4 knowing their design. It is categorical statement of the informant himself that no attempt was made on him by the accused wielding knives and also no attempt was made by A-3 and A-4 to assault Om Prakash. Both the incident were bifurcated by their separate special features and, therefore, there was no common link which ran in between all the accused. The incident had occurred all of a sudden at the spur of the moment and since the case of A-1 and A-2 is squarely distinguishable from the case of A-3 and A-4, the learned trial Judge rightly conferred the benefit of taking out the case of A-3 and A-4 out of the purview of common intention and has rightly acquitted them under section 302/34 IPC.

So far as A-1 and A-2 are concerned, no error has been committed by the learned trial Judge and, therefore, we hereby concur with his findings and the conclusions. The charge of murder is well anointed against A-1 and A-2 and, therefore, they have been rightly held guilty of the charge of murder and have been rightly convicted for life imprisonment as it is not a case which falls within the category of rarest of rare case.

A precipitated residue of our above discussion is that the appeal lacks merit and is hereby **dismissed**.

All the appellants are on bail, their personal and surety bonds are hereby cancelled and they are directed to be taken into custody forthwith to serve out the sentence imposed on them.

Let a copy of this order be certified to the learned trial Judge for him to take necessary action immediately for compliance of this order.

Dt/.29.1.2014
R.K./Arvind/Tamang

Honble Sheo Kumar Singh, J.
Hon'ble Vinod Prasad, J.

Sri Patanjali Mishra, learned Amicus Curiae has rendered valuable assistance in deciding the appeal, which was pending since last 27 years and, therefore, he is directed to be paid Rs. 8,000/- as his fees by the office of this Court.

Dt./29.1.2014
R.K./Arvind/Tamang