

CRIMINAL APPEAL NO. 4814 OF 2004

RAEESAPPELLANT
 VERSUS
 STATE OF U.P.....RESPONDENT

HON'BLE VINOD PRASAD J.
HON'BLE VIRENDRA SINGH J.

(DELIVERED BY HON'BLE VINOD PRASAD J.)

Challenged in this appeal by the sole appellant Raees is to his conviction under section 302 IPC and imposed sentence of life imprisonment with fine of Rs. Five thousand and in default in payment thereof to serve six months further imprisonment, implanted by Special Session's Judge, J.P. Nagar in S.T. No. 463 of 2001, State versus Raees and others, relating to PS Hasanpur, district J.P. Nagar vide it's impugned judgement and order dated 26.8.2004. By the same judgement, trial court has acquitted three other accused Shabbir, Afsar and Imtiaz.

Unfolded prosecution case, stated briefly, are that on 19.7.2001 at 7.15 p.m. appellant fatally thrust spear blow in the chest of deceased Nisar, brother-in-law of informant PW1 Kayamuddin at the shop of P.W.1, at the instigation of Shabbir while two other culprits Imtiaz and Afsar were catching hold of him. Other malefactors were armed with knife and tabal. This incident was witnessed by Shaukin, Ehsan and Aurangzeb. Informant was also caught hold by Shabbir during the blow. Motive behind the crime was an altercation which had ensued between accused Imtiaz and the deceased for wooden rings, which belonged to accused Imtiaz. Written report, Ext. Ka 1 about the murder was scribed by Mohd. Hasam at the dictation of informant PW 1 Kayamuddin, who then rushed to the police station Hasanpur and lodged it there, covering a distance of 3 kms.

Head Moharrir Arvind Kumar, PW 8 registered the FIR as crime number 566 of 2001, under section 302/506 IPC, same day at 8.45

p.m., prepared chik FIR, Ext. Ka 3 and GD entry, Ext. Ka 4. Incharge Station Officer B.P. Singh, PW9 commenced the investigation who interrogated the witnesses, prepared site plan, Ext. Ka 5, took remand of the appellant and at his pointing out recovered murder weapon and prepared its seizure memo Ext. Ka 4. I.O. got inquest conducted on the corpse through SSI Suresh Chand Yadav and proved inquest report Ext. Ka 6. Concluding investigation he had laid a charge sheet against the accused vide Ext. Ka 7.

Autopsy of the cadaver of Nisar was performed on 20.7.2001 at 2.10p.m by Dr. Sunil Kumar, PW 6, which was brought to him by Constables Khurshid Alam and Dinesh Singh. Doctor found the deceased to be aged about 18 years having an average built body and rigor mortis had passed off from his neck and present on upper and lower extremities, mouth closed and eyes half open. Following single ante mortem injury was detected on the deceased corpse :-

1- Stab wound 3.5cm x 2.5cm x chest cavity deep over left side of chest(front) 5cm away from left nipple at 10' O clock position.

On internal examination doctor found pleura and left side lung incised, 200 gms of un-digested food present in the stomach, both the intestines contained gases and digested food. Cause of death was shock and haemorrhage as a result of ante mortem injury.

Chief Judicial Magistrate, J.P. Nagar summoned the accused and committed their case to the Session's court for trial, where it was registered as S.T. No. 463 of 2001, State versus Shabbir and 3 others. Special Session's Judge, J.P. Nagar charged all the accused for offences U/S 302/149, 506 I.P.C. on 5.10. 2002 and since, all the accused denied those charges trial procedure commenced to establish their guilt.

In its attempt to prove the charges, prosecution tendered in all nine prosecution witnesses, out of whom informant Kayamuddin (PW 1), Ehsan Ali(PW2), Aurangzeb (PW3), Shaukin (PW4) and Tahsin

(PW5) were fact witnesses. Rest of formal witnesses included Dr. Sunil Kumar (PW6), Const. Khursheed Alam(PW7), Const. Arvind Kumar(PW8), and B.P. Singh I.O. (PW9).

In their statements under section 313 Cr.P.C all the accused denied depositions of prosecution witnesses to be false and pleaded the defence of false implication.

Trial court found the case of the prosecution proved to hilt as only against appellant Raees and therefore convicted and sentenced him as is recorded above in the opening para of this judgement while three other accused were acquitted by it. Hence the challenge by the sole convicted appellant of his conviction and sentence in this appeal.

We have heard Sri Brahma Singh, learned counsel for the appellant and learned AGA for the appellee state.

Castigating impugned judgement, Sri Singh contended that the charge against the appellant was framed under section 302/149 IPC and therefore the whole trial is illegal. More over appellant could not have been convicted under section 302 simplicitor. At no point of time the charge was altered and therefore recorded conviction is bad in law. It was next submitted that only four persons participated in the incident and therefore section 149 was illegally and wrongly applied instead of section 34 IPC. There is no evidence that the applicant acted in furtherance of common intention of all and therefore also his conviction is indefensible. PW 2 in his examination in chief has testified that he did not witness who assaulted whom and one of the assailants had pierced spear in the body of the deceased and such an evidence of PW 2 does not corroborate PW1. Since rest of the accused have been acquitted, appellant also deserves to be treated similarly. It was further submitted that PW 2 was declared hostile by the prosecution and during his cross examination he had denied his entire relevant 161 Cr.P.C. statement. Another witness PW3 also did not support prosecution case and testified complete ignorance regarding the

incident. He too was declared hostile and during cross examination he had also toed the line of PW 2. It was further harangued that the evidence of PW 4 is also identical as he also denied having witnessed the incident and he was also declared hostile and he also followed suit like that of his two predecessor witnesses during cross examination. His evidence is that of hearsay and he denied having witnessed the incident. It was submitted that prosecution rests only on evidences of two prosecution witnesses PW 1 and PW5 who are interested, enemical and partisan and hence they can not be relied upon. Admittedly appellant had landed property dispute with PW 1 and 5 and therefore their evidences can not be accepted as gospel truth. It was next argued that the examination of appellant under section 313 Cr.P.C. is so perfunctory that it is no examination at all and on such an examination no conviction should be sustained. Lastly it was strainously harangued that even if the entire evidences of PW 1 and 5 are relied upon even then the offence of murder against the appellant will not be proved in absence of credible evidence of harbouring an intention to commit murder or intention to cause such bodily injury as in all probability was likely to cause death and therefore the offence for which appellant should be convicted be one of culpable homicide not amounting to murder punishable under section 304 Part I. It was therefore, concludingly suggested that if the appellant is not awarded clean acquittal, his crime be altered to one under 304 part I and sentence to the period of imprisonment already undergone as the appellant had already served eight years in prison.

Conversely, learned AGA argued that the appellant is the main assailant and from its very inception prosecution has specified his role. He has caused fatal injury to the deceased and therefore his conviction be upheld. There was no motive for the prosecution to falsely rope him and it is quality of the evidence led in the trial, which is relevant and germane to decide it and not the quantity of evidences tendered. It is

not the numerology but the quality of evidence produced that matters submitted learned AGA. Replying argument on charge it was submitted that though trial court committed error in framing of the charge but since the appellant never raised any grievance in that respect and no prejudice was caused to him therefore on that score alone appellant should not escape punishment of man slaughter. There was no grave and sudden provocation and therefore offence should also be not diluted and altered. Drawing curtain of the argument it was submitted that the appeal lacks merit and be dismissed in full.

We have considered rival contentions and have perused trial court record. Considering the objection regarding the charge framed by the trial judge, there is no gainsaying that the said charge is defective. For applicability of section 149 IPC requirement of section 141 IPC has to be satisfied which mandates participation of atleast five accused, whether known or unknown, in the crime. Less than five accused will not be covered within the ambit of section 149 IPC as there will be no unlawful assembly. In the present case participation of only four named accused are alleged. There is no other person who was joined by the prosecution at any stage of the trial but for four named accused. Hence section 149 IPC has no application at all. Trial court while framing charge completely ignored this factual and legal aspect and in an uncared manner framed the charge. We therefore express our displeasure over such a careless attitude of the trial court. Trial courts are advised to be more careful and oblivious of facts of the case and sections to be applied while conducting trials. Accused has a fundamental right to be tried in accordance with the procedure established by law, the natural corollary of which is a procedure sanctified by the procedural statute. Every accused is entitled to a fair and just trial. Digression from prescribed procedure in an unwarranted manner must be attended with caution criticism and

warning as trial courts can not be allowed to abdicate their foremost primary responsibility of observing procedure established by law. The primary requirement of a fair procedure is to charge the accused only with those offence which has been committed by him. Framing of charge is not an empty formality but a solemn act. It not only informs the accused for what offence he is being tried and what case he has to meet but also cautions him in preparing his defence. By observing thus we however note that the point of determination here before us is as to whether appeal of the appellant be allowed on the said score and he be acquitted of the charge of murder? In our view this is not possible. Firstly sections 215 in conjunction with section 464 Cr.P.C. mandates that no defect in stating the charge or mentioning of offence shall alone be independently sufficient to alter the conviction, unless it has occasioned in failure of justice and accused has been misled by the said defect. Such is not the present case. From it's inception role of trusting spear has been assigned to the appellant at the date and time specified in the FIR. Prosecution has not deviated from it's such allegation at any point of time and therefore appellant was never misled and had no misconception regarding the case he had to defend. During trial appellant raised no objection in that respect. Even in his statement under section 313 he did not complained about it. Thus it is too late a stage for him to cry foul and argue that he has been prejudiced although in essence no prejudice was caused to him. Since framed charge did not result in failure of justice nor there was any miscarriage of justice, therefore defence argument is unmerited and is hereby repelled. We are fortified in our view by following decisions of the apex court. In **Sanichar Sahni versus State of Bihar: (2009) 7 SCC 198** it has been held as follows:-

“22. In State of A.P. v. Thakkidiram Reddy this Court considered the issue of not framing the proper charges. In that case averment had been raised that charges have not been framed against the accused persons in accordance with Section 211 Cr.P.C. In that case the charge had been framed under Section 148 IPC, though it was alleged

that they were the members of an unlawful assembly, it was not mentioned what its common object was. Besides, it was contended, a charge under Section 302 IPC simpliciter was framed against all the accused persons and not with the aid of Section 149 IPC for which they were convicted by the trial court.

23. This Court repealed the contention observing as under: (Thakkidiram case, SCC p. 558, para 10)

"10. Sub-section (1) of Section 464 of the Code of Criminal Procedure 1973 ('the Code', for short) expressly provides that no finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. Sub-section (2) of the said section lays down the procedure that the court of appeal, confirmation or revision has to follow in case it is of the opinion that a failure of justice has in fact been occasioned. The other section relevant for our purposes is Section 465 of the Code; and it lays down that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a court of appeal, confirmation or revision on account of any error, omission or irregularity in the proceedings, unless in the opinion of that court, a failure of justice has in fact been occasioned. It further provides, *inter alia*, that in determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

24. The Court in Thakkidiram case further held that in judging a question of prejudice, as of guilt, the court must act with a broad vision and look to the substance and not to technicalities, and its main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. In the said case this Court ultimately came to the conclusion that in spite of defect in framing of charge, as no prejudice had been caused to the convicts, no interference was required.

25. A Constitution Bench of this Court in Willie (William) Snaney v. State of M.P. considered the issue of non-framing of charges properly and conviction of an accused for the offences for which he has not been charged and reached the conclusion as under: (AIR p. 137, para 86-87)

"86. ... In such a situation, the absence of a charge under one or

other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out.

87. ...If it is so grave that prejudice will necessarily be implied or imported, it may be described as an illegality. If the seriousness of the omission is of a lesser degree, it will be an irregularity and prejudice by way of failure of justice will have to be established."

26. This Court in Gurpreet Singh v. State of Punjab referred to and relied upon its earlier judgements in Willie (William) Slaney and State of A.P. v. Thakkidiram Reddy and held that unless there is failure of justice and thereby the cause of the accused has been prejudiced, no interference is required if the conviction can be upheld on the evidence led against the accused. The Court should not interfere unless it is established that the accused persons were in any way prejudiced due to the errors and omissions in framing the charges against him. A similar view has been reiterated by this Court in Ramji Singh v. State of Bihar."

In Annareddy sambasiva Reddy versus State of A.P.: AIR 2009 SC 2661 it has been observed by the Supreme Court as follows:-

"40. Chandrasekhara Aiyar, J. however, put a note of caution to subordinate Courts :

"80. This judgement should not be understood by the subordinate courts as sanctioning a deliberate disobedience to the mandatory requirements of the Code, or as giving any licence to proceed with trials without an appropriate charge. The omission to frame a charge is a grave defect and should be vigilantly guarded against. In some cases, it may be so serious that by itself it would vitiate a trial and render it illegal, prejudice to the accused being taken for granted. In the main, the provisions of Section 535 would apply to cases of inadvertence to frame a charge induced by the belief that the matter on record is sufficient to warrant the conviction for a particular offence without express specification, and where the facts proved by the prosecution constitute separate and distinct offence but closely relevant to and springing out of the same set of facts connected with the one charged."

41. Willie (William) Slaney thus holds : that where the charge is rolled-up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable, in such a situation, the absence of a charge under one or other or the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for

the substantive offence, without a charge can be set aside, prejudice will have to be made out.

42. The aforesaid legal position holds good after enactment of the Code of Criminal Procedure, 1973 as well in the light of Sections 215, 216, 218, 221 and 464 contained therein. In unmistakable terms, Section 464 specifies that a finding or sentence of a court shall not be set aside merely on the ground that a charge was not framed or that charge was defective unless it has occasioned in prejudice. Because of a mere defect in language or in the narration or in form of the charge, the conviction would not be rendered bad if accused has not been adversely affected thereby. If the ingredients of the section are obvious or implicit, conviction in regard thereto can be sustained irrespective of the fact that the said section has not been mentioned. A fair trial to the accused is a sine qua non in our criminal justice system but at the same time procedural law contained in the Code of Criminal Procedure is designed to further the ends of justice and not to frustrate them by introduction of hyper-technicalities. Every case must depend on its own merits and no straightjacket formula can be applied; the essential and important aspect to be kept in mind is: has omission to frame a specific charge resulted in prejudice to the accused.”

There is another disquieting feature of the trial procedure adopted by the trial Judge and that is while examining accused under section 313 Cr.P.C. trial court has not put any incriminating circumstance to him. It is trite law that in examination under section 313 Cr.P.C. all incriminating circumstances has to be put to the accused and he has to be specifically questioned about it for him to make a proper answer. Examination of accused under section 313 Cr.P.C. is not an empty formality. Trial court can not eschew its responsibility on that score. Statement of accused can be taken note of for and against prosecution and /or accused. It assumes significance in judging a case. It can prove or disprove one or many facts in issue and therefore its observance has to be in accordance with the legislative intent in pith and substance. It is not ornamental nor is a decorative section. Recently apex court has come down heavily on non observance of this section as is required under the law. In **Ganesh Gogoi v. State of Assam: AIR 2009 SUPREME COURT**

2955 it has been observed by the apex court as follows:-

“The provisions of Section 313 are for the benefit of the accused and are there to give the accused an opportunity to explain the ‘circumstances appearing in the evidence against him’. In Basavaraj R. Patil and others v. State of Karnataka and others - (2000) 8 SCC 740, this Court held that those provisions are not meant to nail the accused to his disadvantage but are meant for his benefit. These provisions are based on the salutary principles of natural justice and the maxim ‘audi alteram partem’ has been enshrined in them. Therefore, the examination under Section 313 has to be of utmost fairness.....”

In **Bishnu Prasad Sinha v. State of Assam: AIR 2007 SUPREME COURT 848**, Supreme court has held thus:-

“It is well settled that statements under Section 313 of the Code of Criminal Procedure, cannot form the sole basis of conviction; but the effect thereof may be considered in the light of other evidences brought on record. (See Mohan Singh vs. Prem Singh [(2002) 10 SCC 236], State of U.P. vs. Lakhmi [(1998) 4 SCC 336], and Rattan Singh vs. State of HP. [(1997) 4 SCC 161].)”

This view has been expressed by the apex court in many other binding precedences. In **Ashraf Ali versus State of Assam (2008) 16 SCC 328 - 2008 Cr. L.J. 4338**, it has been observed by the apex court as under :-

“13 Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced. The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial Court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed similar view in S. Harnam Singh v. The State (AIR 1976 SC 2140), while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facets by

the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under Section section 313 is not a purposeless exercise”.

In **Ranvir Yadav v. State of Bihar :2009 CRI. L. J. 2962**, apex court has held as follows:-

“10. It is true as contented by learned counsel for the appellant that no incriminating materials were put to the accused under Section 313 of the Code. There is no accusation specifically put in question during examination as quoted above. It only refers to victim of kidnapping. So far as the question No.3 is concerned same relates to PW 10. He did not say that he had seen gun fired by the appellant.

11. Above being the position the appeal deserves to be allowed. It is a matter of regret and concern that the trial court did not indicate the incriminating material to the accused. Section 313 of the Code is not an empty formality. There is a purpose behind examination under Section 313 of the Code. Unfortunately, that has not been done. Because of the serious lapse on the part of the trial court the conviction as recorded has to be interfered with. Conviction recorded by the High Court is set aside. Bail bonds executed to give effect to the order of bail dated 8.1.2002 shall stand cancelled because of the acquittal.”

In yet another decision **Bimla Devi And Another versus State of Jammu And kashmir: (2009) 6 SCC 629**, Supreme Court has observed in para 16 thereof as follows:-

“ Apart from that , in the present case, in examination under section 313 of the Code no question was put up relating to demand of dowry and abatement of suicide. That being so , the appeal deserves to be allowed which we direct.”

In view of above exposition of law, the inescapable conclusion is that one of the foremost responsibility of the trial Judge is to question the accused on the incriminating circumstances appearing against him in prosecution evidences. Law abhors non observance of such legal imperative which has serious consequences on the out come of the criminal trial. Inspite of such exegesis by the apex court, in the present case, the same has not been observed in accordance with the legal mandate. Examination of the accused is so pitiably wanting that it is no questioning of accused appellant at all on the incriminating circumstance. No incriminating circumstance was put to him. We

reproduce the exact text of examination of the appellant which is as under :-

Question No.1: According to prosecution on 19.7.2001 at 7.15 evening in village Shahpur Kala, P.S. Hasanpur, District Jyotiba Phula Nagar you all in furtherance of common object murder Nisar, brother-in-law of informant Kayamuddin from knife, spear, tabal etc. dangerous weapon and threatened informant with lathi, what do you have to say about it?

Answer: No.

Question: P.W.1 Kayamuddin has proved Ext. Ka-1 and his signature on it. What do you have to say about it?

Answer: it is wrong.

Question: what do you have to say for deposition of witness P.W.2 Ahsan Ali, P.W.3 Aurangjeb and P.W.4 Shaukin?

Answer: wrong statement given.

Question: P.W.5 Tahsin had supported the incident in his statement. What do you have to say about it?

Answer: it is wrong.

Question: witness P.W.6 Dr. Sunil Kumar has proved post-mortem reported paper number 5/15 Ext. Ka-2 in his own hand writing and signature. What you have to say about it?

Answer: It is wrong.

Question: Constable Khurshid Ahmad P.W.7 in his deposition has said that he carried papers along with the dead body for post-mortem. What do you have to say about it?

Answer: it is wrong.

Question: Constable Arvind Kumar P.W.8 has proved FIR Ext. Ka-3 and GD of registration of case Ext. Ka-4 in his hand writing and under his signature. What do you have to say about it?

Answer: He has done wrong.

Question: witness P.W.9 Inspector, Sri B.P. Singh has proved signature of S.S.I. Suresh Chandra Yadav and his hand writing on the

recovery memo and site plan Ext. Ka-6 and charge-sheet Ext. Ka-7 in his hand writing and signature. What you have to say about it?

Answer: it is wrong.

Question: why witnesses deposed against you?

Answer: enmity.

Question: do you want to leave defence?

Answer: No.

Question: do you want to say anything?

Answer: Nothing.

Above examination of accused under section 313 of the Code indicate that the trial judge did not examine the appellant on specific role of assault made by him at all. It fetched out a third case altogether, without caring for the evidences of witnesses led in the trial. Actually trial court never thought it to examine the accused for thrusting spear into the chest of the deceased which was specific allegation against the appellant. A circumstance not put to the accused in statement under section 313 Cr.P.C. can not be utilised against him at all. Hence that part of prosecution story which distinguished the case of the appellant from other acquitted accused, since not asked from him under section 313 Cr.P.C. could not have been utilised by the trial court to convict him. This is most significant defect in the trial. Question no.1 framed by the trial court is not the prosecution evidence about the actual assault and what was testified by prosecution witnesses was never put to the appellant at all. There is no questioning about the deceased being caught hold and catching hold of the informant. There is no questioning that it was the appellant who gave spear blow to the deceased on his chest. In fact questioning of the accused appellant as has been done in the instant trial is negation of right of the accused to explain evidences against him. Here we observe that exposition of law by the apex court which is binding under Article 142 of The Constitution on all the subordinate Courts through out the length and breath of the

country must be bestowed with due respect while deciding cases. The decisions of the apex court can not be ignored nor they are meant only to be published in the law books. Scope of section 313 Cr.P.C. and effect of non observance of said section in accordance with law has been deprecated since decades. It is very concerning state of affairs that the trial courts are conveniently not observing the above exposition of law, which they are legally bound to do. Trial courts should be cautious in conducting trials. Without dragging the issue further we hope that there shall be no future recurrence of such mistakes and now we proceed to consider the case of the prosecution on its merits to fathom out prejudice caused to the appellant because of such non examination.

The evidences of two intact and unhostile prosecution witnesses informant P.W. 1 and Tahsim P.W. 5 indicate that there was no love labour lost between the prosecution and the accused. Appellant is a close relative of the informant and the deceased. He is the cousin brother (*mausera Bhai*) of the informant and the deceased. His father Shabbir , a co-accused was *Mausa* of informant. Informant had given his house to them to reside which had a through passage running in the midst of the house of the informant. The accused persons illegally sold that property regarding which the dispute arose between the prosecution and the defence. Entire endeavour of the defence counsel during the cross examination was only to bolster up this enmity for his hankered defence of false implication because of that reason but in that feat defence has miserably failed. Attour there was no reason for the prosecution witnesses to anoint specific role of causing fatal injury to the appellant leaving the father and the Imtiaz at bay although earlier altercation had ensued between Imtiaz and the deceased when appellant was not even in picture at all. It was Imtiaz, elder brother of the appellant, who had engaged himself in tiradic exchange of verbal dual and physical muscle flexing with the deceased. It was them who

had assaulted each other. Appellant was not present at that spot at that moment and was inside his house and therefore, if the prosecution witnesses had to cook up a case, they could have very conveniently alleged Imtiaz as the main assailant which they have not done. The testimony of P.W. 1 and 5 are clear cogent and credible in respect of appellant that it was he who had thrust the fatal spear in the chest of the deceased. We find ourselves unable to accept the contention of the learned counsel for the appellant that the appellant has been falsely implicated as we are unable to gather any reason for his false implication. His presence on the spot and his role is proved unerringly by the prosecution beyond any pale of doubt and role assigned to him is specific. Appendaged with above argument was the harangued contention that no offence under section 302 IPC is made out against the appellant and therefore we now turn to that aspect of the appeal on which much emphasis was laid.

On the score of crime committed by the appellant, we find the argument of the learned counsel for the appellant carry much substance. Incident started with tirade between the deceased and acquitted accused Imtiyaz. Vituperation between them succeeded with an assault launched by the deceased on Imtiyaz. It is clear from the deposition of P.W. 1 at internal page 3 thereof that in between vituperation there was a scuffle in which PW1 had intervened. The said scuffle continued for about 3 or 4 minutes and meanwhile some public persons had gathered to separate them. Uncle of the informant had also come there. After this first part of the incident, Imtiyaz had left the scene by intimidating the deceased. There after the co-accused Afsar came to the spot and questioned the informant as to why the deceased had physically assaulted Imtiyaz. Informant had replied that he was his guest and what ever they want to do, they can do to him. On such facts we are of the view that it seems that after returning to the house the beaten accused Imtiyaz must have narrated the assault

on him by the deceased which must have rankled the entire family, who all took it to be a temerity or a faux pas. They therefore came at the scene where, according to the prosecution, appellant thrust a single below in the chest of the deceased while two other acquitted accused were catching hold of him. Time gap between the two incidents is so negligible that it cannot be said that they do not form the part of same transaction and therefore there was no grave and sudden provocation. Entire episode makes a conglomerated whole and the sequence of events are unmistakeably interwoven in one incident. Outraging of family honour by a rival close relative have always been taken to be thing of grave provocation. In such a view slapping of Imtiyaz by the deceased was enough provocation for the younger brother aged about just 27 years to loose his sense and temper and give a single below to that man who had assaulted his elder brother. There is no evidence on record that the appellant really intended to cause that injury, which has been sustained by the deceased. Act of appellant was an impulsive act at the heat of passion with out repeating the blow. No other accused launched any attack on any body nor any instigation was hurled prior to the assault. Contextually, therefore, we find it extremity difficult to hold that the guilt of the appellant will be one of culpable homicide amounting to murder purviewed within the ambit of section 300 and punishable u/s 302 IPC. A single blow in heat of surcharged atmosphere tormented by temerity of family prestige does not indicate that the appellant had the requisite intention to cause murder or that he really intended to cause that injury which may prove fatal. Consequently we are of the opinion that entire sequence of events, gamut of evidences led in the trial leads only to one conclusion that the offence committed by the appellant will not travel beyond the scope of section 304 part I IPC. In our view we draw support the from following Apex court decisions.

In **Laxminath v. State of Chhattisgarh :AIR 2009 SUPREME COURT**

1383;it has been held as under :-

“20. Considering the factual scenario and the facts that one arrow was shot the offence is covered by Section 304, Part I, IPC and not Section 302, IPC. Though it cannot be laid down that whenever one arrow is shot Section 302, IPC will not apply, on the facts of the present case it appears to be so. Therefore conviction is altered from Section 302, IPC to Section 304, Part I, IPC. Custodial sentence of eight years would meet the ends of justice.”

In **Ranveer Singh v. State of M.P.:AIR 2009 SUPREME COURT 1658** the facts were as follows:-

“4. Prosecution version in a nutshell is as follows : Report Ex.P/1 was lodged by complainant Lakhansingh (PW1) according to which on 31.5.1990 his cousin Pappu had some altercation with Kanthshree (DW1), sister-in-law of appellant. Due to that incident when on 1.6.1990 at 6.00 a.m. Pappu was going to answer call of nature, he was surrounded by appellant Ranveer Singh and his son Munnu alias Prithviraj and was thrashed to ground. When he shouted, complainant Lakhansingh (PW 1), Vasudev (P.W.3) and Vrindawan (PW 3) reached the spot along with Lalita alias Firki (hereinafter referred to as the 'deceased'), sister of the complainant Lakhansingh and his cousin Sunil (PW8). Seeing them, appellant asked his son Prithviraj alias Munnu to bring his licensed rifle from the home. Prithviraj alias Munnu brought the gun from the house. On exhortation of the present appellant, Munnu fired a gun shot which caused injury to Lalita on the left thigh. Lalita was taken to the hospital in a bullock cart but on the way she succumbed to the injury sustained by her.

Report of the incident was lodged on 1.6.1990 at about 7 A.M. at police station Dehat, Bhind. On the basis of the report lodged by Lakhansingh (PW 1), police registered a criminal case against the present appellant and his son Prithviraj alias Munnu. Said Prithviraj alias Munnu being a minor, his case was referred to the Juvenile Court. So far as the present appellant is concerned, the matter was investigated by the police and challan was filed against him. The case was committed to the Court of Session for trial. The Sessions Court recorded the evidence and after appreciating the evidence convicted and sentenced the present appellant as indicated hereinabove. An appeal was preferred before the High Court.

Before the High Court the basic stand was that the accused had exercised the right of private defence and, therefore, no offence was made out. The High Court held that even if the right of private defence is accepted to be available at some point of time, it was exceeded and, therefore, the appropriate conviction was under Section 304 Part II

IPC.”

On such facts it has been observed by the apex court as follows:-

“17. In the present case the High Court has rightly held that even if it is accepted that at some point of time the appellant was exercising the right of private defence, the same was exceeded and has rightly found him guilty under Section 304, Part I, IPC and sentenced him to undergo imprisonment for five years. The sentence as imposed cannot be considered to be harsh. On payment of fine of Rs. 20,000/-, same was to be paid to the heirs of the deceased. Here again there appears to be no infirmity in the order of the High Court.”

In Ravindra Shalik Naik v. State of Maharashtra: AIR 2009 SUPREME COURT 1709 the facts were as follows:-

“ 3. Background facts in a nutshell are as follows : Appellant Shalik is father of appellants Ravindra and Naresh. On 13.11.1999, at about 7 p.m. appellant Naresh was going to his house and was carrying bundle of cotton/grass. The road to his house was adjacent to the house of complainant Vandana (PW1). On the way, the cotton bundle hit the roof of the complainant's house and, therefore, husband of the complainant, Dewanand (PW 3) accosted appellant Naresh and told him that he should have been more careful while carrying the bundle of cotton and ought to have seen that no damage was done to the roof of the house of complainant. Quarrel ensued between appellant Naresh and Dewanand (PW-3) and there was exchange of words between them. Appellants Shalik and Ravindra also came to the spot of incident and started quarrelling with the husband of the complainant- Dewanand (PW3). The father-in-law of the complainant, Kisan Gedam (hereinafter referred to as 'deceased') intervened to pacify the quarrel, between appellants and his son Dewanand. Appellants Shalik, Ravindra and Naresh went inside their house, which was close to the spot of incident and all of them returned to the spot armed with axe, knife and. gupti. All the three appellants inflicted injuries on the head and abdomen of deceased Kisan by means of those weapons. Appellants Ravindra and Naresh inflicted injuries on the hand of husband of complainant-Dewanand (PW3) with those weapons with intention to cause his death. Deceased Kisan was taken to the Hospital at Ner where he was declared dead.”

on the above facts the apex court has been pleased to hold as follows:-

“7. Considering the background facts in our considered opinion the appropriate conviction would be under Section 304 Part I IPC. The custodial sentence of 10 years would meet the ends of justice.”

In **Abdul Mazid, Appellant v. State of Assam, 1994 CRI. L. J. 2169** apex court has held as under :-

“4. The surrounding circumstances would also show that this is not a premeditated murder. The appellant was armed with only a torch and during the quarrel it happened that A-2 gave a dagger and the version given by the defence shows that there was a scuffle among the accused and the deceased and it is also difficult to hold that the appellant intended to cause that particular injury. At any rate that the injury caused by the accused was sufficient in the ordinary course of nature to cause death has not been objectively proved, in the absence of such a proof clause (3) of Section 300 I.P.C. is not attracted. Therefore, the conviction under Section 302 IPC cannot be sustained. However, the appellant must be attributed knowledge that by inflicting such an injury on the neck he was likely to cause the death. Doctor's general opinion was that all the injuries cumulatively caused the death. In that view of the matter the offence committed by the appellant is one which is punishable under Section 304 Part-II IPC.”

Drawing support from the above decisions we are of the view that the offence of the appellant will not travel beyond the scope of section 304 part I and it will not be covered under section 302 IPC.

Since the appellant has not been questioned under section 313 Cr.P.C so as to explain what he had to say about the offence and the specific role assigned to him, serious prejudice has been caused to him. In fact the most incriminating circumstance was never put to the accused appellant in his statement under section 313 Cr.P.C. and therefore the same can not be relied upon against him. Other wise also all other accused have been acquitted by the trial Judge and there has been no appeal against their acquittal which has attained finality. Major part of prosecution case thus has already been disbelieved by the trial judge himself . Appellant had already served more than eight years in jail as an under trial and during pendency of his appeal in this court. We, therefore, lean in favour of the appellant and opine that the appeal be allowed.

Concluding our discussion, we allow the appeal, set aside conviction of the appellant dated 26.8.2004, under section 302 IPC and imposed sentence of life imprisonment implanted by Special Session's Judge, J.P. Nagar, in S.T. No. 463 of 2001, State versus Raees and others, PS Hasanpur, district J.P. Nagar and acquit him of that charge. Appellant is directed to be released from jail forthwith unless he is incarcerated there in connection with any other offence.

This appeal is allowed as above.

Let a copy of this judgement be sent to the trial court for its intimation.

Dt.16.7.2010

SKS/4814/2004