

Reserved

Court No. - 45

**Case :-** CRIMINAL APPEAL No. - 232 of 2002

**Appellant :-** Surendra Harizan And Others

**Respondent :-** State of U.P.

**Counsel for Appellant :-** D.K. Srivastava, Hari Krishna Singh

**Counsel for Respondent :-** Govt. Advocate

**Hon'ble B. Amit Sthalekar, J.**

**Hon'ble Piyush Agrawal, J.**

**(Delivered by Hon'ble B. Amit Sthalekar, J.)**

1. Heard Sri D.K. Srivatava, learned counsel for the appellants, learned AGA for the State and perused the records.
2. The present criminal appeal has been filed against the judgment and order of the trial court dated 15.01.2002 passed by the Additional District and Sessions Judge, (Fast Track Court No.2), Azamgarh in S.T. No.227 of 1993 (State of U.P. Vs. Surendra and Two Others) convicting and sentencing the appellants to undergo imprisonment for life under Section 302/34 IPC and to pay a fine of Rs.5,000/-. In default of payment of fine they shall undergo further six months simple imprisonment.
3. The facts of the case are that a report was lodged by the informant Mewati wife of the deceased Baldhari Harijan resident of village Bajahuddinpur @ Jiudhipur, Thana Sidhari, District Azamgarh on 21.05.1992 at 11.30 am alleging that on 21.05.1992 she was sitting in front of her house and her husband-the deceased had come from Kanpur on the same day. She told her husband that

with regard to the dispute about a temporary cottage (Madai) regarding which there was a dispute about 7 months earlier with accused persons (appellants herein) and three days prior to the incident the accused Surendra Harijan, appellant no.1 and Parsad Harijan, appellant no.2 had come to the house and caught her father-in-law by his collar and shaken him up. Hearing this her husband-the deceased remonstrated with the accused at the door of his house whereupon accused Surendra rushed towards her husband with a Jaraudha (bamboo stick with roots) and started raining blows upon her husband as a result of which her husband fell on the ground whereupon the deceased picked up a stick to save himself and ran towards the house of other accused appellant no.2- Parsad Harijan. Thereafter on the exhortation of Surendra, the appellant no.2 Parsad Harijan picked up a Lathi and started raining blows upon the deceased, as a result of which her husband fell on the ground upon this the appellant no.3- Prabhawati alias Dwiji, wife of Parsad caught the deceased by his testicles and pulled it and also picked up a brick and started hitting the deceased on his chest with it. This incident was witnessed by P.W.2-Dhanpati wife of Mohan Harijan and P.W.3-Lekhrajji wife of Pancham and Suresh son of Munnar and on a hue and cry being raised by the people the accused Surendra Harijan, Parsad Harijan and Prabhawati @ Duiji ran away. When the informant and other persons went to examine the deceased they found that he had already died. This report was dictated by the informant to the scribe Prabhakarnath Pandey son of Ramdev Pandey and marked as Ext. Ka-1. On the basis of this report a First Information Report, Ext. Ka-11 was lodged in the Thana Sidhari, District Azamgarh.

4. The inquest, Ext. Ka-2 was conducted on 21.05.1992 at 12.20 pm. and thereafter the body was sent for post mortem and the post mortem, Ext. Ka-10 was conducted on 22.05.1992 at 3.00 pm. The

doctor, P.W.5 has mentioned the time of death about one day old and has noted the following injuries:

मृत्यु पूर्व आई चोटों का विवरण

1- खरास लिए हुए निलगू निशान 9 cm x 4 cm बाएं तरफ सीने पर बाएं निपल से 3 से0मी0 नीचे व मध्य की तरफ स्थित था।

2- खरास लिए हुए निलगू निशान 4 cm x 2 cm बाएं तरफ चेहरे पर आँख के तुरन्त नीचे था।

3- निलगू निशान 15 cm x 8 cm दाहिने कन्धे के ऊपरी हिस्से पर मौजूद था।

4- खरास लिए हुए निलगू निशान 3 cm x 2 cm सर पर नाक से 10 से0मी0 ऊपर मध्य रेखा में था।

5- पोता सूजा हुआ था। काटने पर जमा हुआ खून का थैला? मौजूद था।

दोनो के साथ हाइड्रोशील था।

6- मलद्वार के रास्ते रेक्टम बाहर आ रहा था।

5. The informant, P.W.1, Mewati in her statement before the court has reiterated the contents of the FIR, Ext. Ka-11 and her written report, Ext. Ka-1 and stated that when she told her husband about the incident that the accused Surendra and Parsad had come to her house about 3 days prior to the incident in connection with the dispute which had occurred regarding construction of small cottage (Madai) on the mound (Bhita) and had caught hold her father-in-law by his collar and shaken him up the, deceased who was sitting about 4 steps at the door of the house near the Gulmohar tree, where the informant was also sitting, remonstrated with the accused Surendra and Parsad at the door of the house. Upon this the accused Surendra picked up a bamboo stick with roots (Jaraudha) and ran towards the deceased and started beating him. The deceased received injuries and also received a cut on the head upon which he ran towards the house of the other accused Parsad where upon exhortation of appellant no.1-Surendra, appellant no.2 Parsad picked up a Lathi and started raining blows on the deceased upon which the deceased fell on the ground. At the same time the appellant no.3-Prabhawati @ Dwiji

caught hold the testicles of the deceased and pulled it. The appellant no.3 also picked up a brick and hit the deceased on the chest.

6. In her cross examination the witness has stated that there was a dispute relating to construction of a small cottage (Madai) on the mound (Bhita) which was her abadi and she and her husband were also in possession of the said land and that for the last 11 years she has seen the cottage over the said land. P.W.1 has also stated that on the day of the murder the accused persons also pulled down the cottage (Madai) and its roof (Chappar). P.W.1 also stated that her husband was standing at the door of her house and remonstrated with the accused with regard to pulling down his cottage (Madai) whereupon accused Surendra picked up a bamboo stick with roots (Jaraudha) and ran towards the deceased and started beating him. In her cross examination the P.W.1 also stated that she fell upon her husband in order to protect him and her bangles were also broken on the spot whereupon the accused started beating her also and she received injuries on her leg but there was no cut on her body. She further stated that at about 3.00 o'clock in the night, S.O., Thana Sidhari came to the village and took away the body of the deceased in a police Jeep. She also stated that she has dictated the report to Panditji, whose name she does not know but who was known as Bhagwat Pandey, who used to often visit the village. The report was dictated to Panditji who noted it down and read it out to her which she took with her to the Thana and lodged the first information report. This witness has also denied that the first FIR was torn and thereafter another FIR was written.
7. P.W-2 is one Dhanpati Devi, who was declared hostile as she could not disclose as to where the incident took place. She also could not disclose whether the incident took place at 9.00 -10.00 am and she also denied having witnessed the incident.

8. P.W.3 is Smt. Lakhraji wife of Pancham, who in her testimony has stated that the incident had occurred at about 10.00 am and she had witnessed the accused Surendra raining blows upon the deceased- Baldhari with a Jaraudha (bamboo sticks with roots) and the accused was also using abusive language. P.W.3 also stated that to save himself the deceased ran towards the door of Parsad where on the exhortation of Surendra the accused Parsad picked up a Lathi and started raining blows upon the deceased, as a result of which the accused fell outside the door of Parsad whereupon the third accused, Prabhawati wife of Parsad caught the deceased by his testicles and pulled it and also picked up a brick and started hitting the deceased on his chest and after hearing the hue and cry raised by the public all the accused ran towards the West. She has also stated that the deceased died as a result of the injuries received by him.
9. In her cross examination the witness P.W.3 has also stated that the police took away the body in the police jeep around 10.00 am. She has also stated that at the time of the incidence she was inside the house and cooking and when she came out of the house she saw the deceased outside the house of the accused Prabhawati alias Dwiji. She did not notice whether the deceased was bleeding but the deceased had fallen on the ground and had died and the family of the deceased were crying over him.
10. In her cross examination, P.W.3 has also stated that at the time when the deceased was assaulted and had died, P.W.1-Mewati was also present there. This witness has clearly stated that it was wrong to say that she had not noticed the incidence.
11. The Investigating Officer, Sri R.N. Maurya was examined as P.W.4 who has proved the first information report and the G.D. Entries as well as the inquest report. He has also proved the statement of Dhanpati under Section 161 Cr.P.C. P.W.4 has also

stated that first of all he prepared the case diary and at the end of the sentence with "वजहुद्दीनपुर उर्फ जिवधीपुर दिनांक 21.05.92" he has further written "इन दोनो के मारने से हमारे पति चोट खाकर नीचे गिर पड़े कि इतने मे परसाद की औरत प्रभावती उर्फ दुइजी ने झपट कर हमारे पति का बैजा पकड़ कर ऐंठ दिया। तथा वहीं जमीन पर पड़ा ईंटा उठाकर सीने पर मारने लगी।" and stated that these lines though were mentioned in the FIR but due to omission he did not note it in the case diary and that it was noted by him later on.

12. The Investigating Officer further stated that he did not notice whether there was blood stains on the clothes of the informant Mewati or whether her child had received any injuries in the assault as claimed by her but he has clearly stated that the body had been sent for post mortem on the same day around 3.00 pm. He has also stated that in the chick FIR the distance of the police station from the place of the incidence has been mentioned as 4 ½ km whereas in the inquest report it was mentioned to be 5 km to which the Investigating Officer stated that this note was made by him on the information of the people present at the spot. As to how the distance was not noted by him in the Panchayatnama according to the first information report, the witness stated that since he was investigating the matter so he asked the people present at the spot and noted it in the Panchayatnama. The Investigating Officer has also stated that the body of the deceased was found to the South East of the house (hut) of the accused Parsad. P.W-4 has also proved the site plan, Ext. Ka-9.

13. Dr. K.K. Singh, E.N.T. Specialist, Shiv Prasad Gupta Hospital, District Varanasi has testified as P.W.5. He has also proved the post mortem report as well as injuries sustained by the deceased.

14. The P.W.5 has also proved the post mortem report, Ext. Ka-10 and has also stated that the death could have occurred at 10.00 am on 21.05.1992. With regard to Injury no.1 he has also stated that

injury could have been caused by brick and lathi. As regard Injury no.5 he has stated that swelling in the testicles and collection of blood therein could have been caused by pressing of the testicles and he has also confirmed that these injuries were capable of causing death of the deceased instantaneously.

- 15.P.W.6, Constable, Lallan Rai has proved the FIR stating that when the same was being written down he has posted in the police station Sidhari, District Azmagarh and he had seen Head Moharrir noting down the FIR and he also recognises his handwriting and signature.
- 16.Sri D.K. Srivastava, learned counsel for the appellants submitted that in the inquest report distance between the police station and place of incidence has wrongly been mentioned as 5 km whereas in the first information report it is mentioned as being 4 ½ km. which was a serious error committed by the Investigating Officer.
- 17.In this regard we find that the Investigating Officer has himself clarified that though in the first information report the distance has been mentioned as 4 ½ km because he was investigating the matter and he had asked the people present at the spot as to what would be the distance between the place of incidence and the police station and on being informed that it was about 5 km he mentioned the same in the inquest report.
18. In our opinion aberration in mentioning half km in the distance between the place of incidence and the police station instead of 5 km in the present case cannot be said to be fatal to the trial or to the investigation. Distance in such cases is usually based upon approximates and not on an actual mathematical measurements in such cases there are bound to be slight discrepancies and variations. However, we may hasten to add that discrepancy in the distance between the place of the incident and the police station may acquire relevancy only if the same is so vitally different as to

cast a doubt as regards occurrence of the incidence at the place where it is alleged to have actually occurred.

19. Sri D.K. Srivastava, learned counsel for the appellants next submitted that the assault by appellant no.3- Prabhawati Devi alias Dwiji wife of accused Parsad was added later on after the first FIR was torn and the second FIR was written down. In our opinion, there is nothing emerging from the original records to support the contention of the learned counsel for the appellants nor is there any overwriting in the Ext. Ka-1 to suggest manipulation or other error. The submission of the learned counsel is simply hypothetical and without any foundation.
20. The learned counsel for the appellants then submitted that the scribe of the report, Prabhakarnath Pandey was not examined. In our opinion, this would also not be fatal since an FIR is neither substantive evidence nor is an encyclopedia of the facts; the lodging of a report only sets the law into motion for purposes of investigation.
21. In **1993 Supp (1) SCC 208, (Surjit Singh alias Gurmit Singh Vs. State of Punjab)** the Supreme Court in paragraph 8 has held as under:-

*“8. The High Court turned down all the grounds. The High court termed the reasoning given by the Trial Judge as implausible. What weighed with the High Court was the presence of Surjit Singh in the village up to 13.5.78 till 4.00 p.m., whereafter he allegedly commenced his journey to join his unit. The High Court viewed that it was for the appellant to prove that he left the village at 4.00 p.m. on May 13, 1978 so as to be absent at the time of the occurrence and then having reached his unit on May 16, 1978. The appellant had cited one Naib Subedar Waryam Singh as defence witness but gave him up. The two defence witness cited by the defence were merely formal with regard to the sending of certain complaints in the office of Senior Superintendent of Police, Jullundur. The evidence of these defence witnesses did not even remotely touch the alibi of the appellant. With regard to the confusion about the name,*

*the High Court observed that it would be uncommon and unreasonable for two brothers to be having the same name. The appellant does have a brother named as Gurmit Singh and yet strangely the appellant assumes his brother's name to be Gurmit Singh. Taljit Singh PW 2 had deposed that the appellant has read only up to 4th or 5th class whereas Gurmit Singh was a Matriculate and that when the appellant sought recruitment in the Army he gave his name as Gurmit Singh and utilised the matriculation certificate of his brother Gurmit Singh. He also deposed that later when papers for verification had come to the village the appellant had approached Mohinder Singh deceased that he should help him by telling the Enquiry Officer that his name was Gurmit Singh and he was a matriculate. This evidence was totally overlooked by the Trial Judge for reasons we cannot understand. The High Court used this evidence against the appellant. The High Court had gone on to observe, and in over view rightly, that the appellant was known as Surjit Singh and was known as such even for the purpose of Army records. He went with the assumed name Gurmit Singh, for the reasons explained by the prosecution in the statement of Taljit Singh PW 2. It is noticeable that in the appeal against his acquittal, service of the appellant was effected in the name of Surjit Singh alias Gurmit Singh through the Military authorities. The High Court observed that this particular was suggestive that in the force as well he was known as Surjit Singh. The appellant having taken up a positive plea of alibi, he could prove it from his travel papers which have been checked and suitably endorsed upon by the railway authorities and/or the Army authorities on his joining his unit. The appellant miserably failed to discharge that burden. In this situation the aforesaid misdescription/ omissions in the FIR about the number of shots fired and the absence of Taljit Singh's injuries or the appellant being not described as a military man become of lesser importance. First Information Report is not an encyclopedia of the entire case and is even not a substantive piece of evidence. It has value, no doubt, but only for the purpose of corroborating or contradicting the maker. Here the maker was a young woman who had lost her husband before her very eyes. The omission or misdescription of these details in the FIR which was recorded most promptly, within three hours of the occurrence, would not tell on the prosecution case or the statements of the eyewitnesses with regard to the participation of the appellant in the crime. He had taken a leading and prominent part in spearheading and committing it. For these reasons, we are*

*of the view that the High Court was right in convicting the appellant on giving cogent reasons to demolish the reasoning of the Trial Judge and adding thereto reasons of its own.”*

In **(2017) 6 SCC 1, Mukesh Vs. State (NCT of Delhi)** the Supreme Court in Paragraph 55 has held as under:

*“55. As far as the argument that the FIR does not contain the names of all the accused persons is concerned, it has to be kept in mind that it is settled law that FIR is not an encyclopedia of facts and it is not expected from a victim to give details of the incident either in the FIR or in the brief history given to the doctors. FIR is not an encyclopedia which is expected to contain all the details of the prosecution case; it may be sufficient if the broad facts of the prosecution case alone appear. If any overt act is attributed to a particular accused among the assailants, it must be given greater assurance. In this context, reference to certain authorities would be fruitful.”*

22. The FIR has been proved by the Investigating Officer- R.N. Maurya who has also clearly stated that the words “इन दोनो के मारने से हमारे पति चोट खाकर नीचे गिर पड़े कि इतने मे परसाद की औरत प्रभावती उर्फ दुइजी ने झपट कर हमारे पति का बैजा पकड़ कर ऐंठ दिया। तथा वहीं जमीन पर पड़ा ईंटा उठाकर सीने पर मारने लगी।” were added in the case diary later on as due to omission he had not noted in the case diary and that it was being noted by him later on.
23. We have gone through the original records and we have noticed that the lines as quoted hereinabove have been added by the Investigating Officer separately in the case diary but we also find that the same facts have already been stated in the written report Ext.Ka-1 and also in the FIR, Ext. Ka-11 therefore it is not a case of embellishment or improvement of the facts as narrated in the first information report, therefore, the submission of the learned counsel for the appellants to that effect is thoroughly misconceived.
24. We also find that there is nothing to support the submission of the

learned counsel for the appellants that there was initially a first FIR which was torn and destroyed and thereafter a second FIR Ext. Ka-11 was written down later. We find that the written report Ext. Ka-1, which is on record has been proved by Smt. Mewati the informant which is of the same date as the date of incidence i.e. on 21.05.1992 clearly mentioning the time of the incidence as 10 am. The FIR, Ext. Ka-11 is a prompt FIR having been lodged at 11.30 am same day as the incidence i.e. on 21.05.1992 and in that also the time of the incidence has been mentioned as 10.00 am.

25. In this view of the matter we find that the learned counsel for the appellants has failed to establish a foundation for his submission that there was a second FIR after destroying the first FIR.

26. Sri D.K. Srivastava, learned counsel for the appellants then submitted that initially the case was registered by the police under Section 304 and 504 IPC but subsequently it was converted into under Section 302/34 IPC which was suggestive of a second FIR.

27. The submission of the learned counsel must necessarily be rejected at the outset since in the written report Ext. Ka-1 as well as the FIR, Ext. Ka-11 itself it has been mentioned that the deceased Baldhari had died as a result of the assault by Lathi and Jarautha (Bamboo stick with root) and of Prabhawati catching hold the testicles of the deceased and pulling it. Dr. K.K. Singh, P.W.5 who conducted the post mortem has also mentioned the cause of death as due to ante mortem injuries having been caused by injury no.1 and injury no.5 and that these injuries were capable of causing instantaneous death.

28. Learned counsel for the appellants next submitted that the P.W.1 informant has not assigned any actual role to the appellant no.1-accused Surendra. The submission is without any basis and may be rejected outright since in the testimony of P.W.1 she has clearly

stated that the accused Surendra had picked up a Jarautha (bamboo stick with roots) and was beating her husband on account of which he received injuries and cuts on the head. The P.W.1 has also stated that after the deceased had fallen on the ground the accused Surendra and Parsad pinned him down on the ground with bamboo stick. Medical Officer, P.W.5, Dr. K.K. Singh has also testified that it was possible for injury no.1 to have been caused by brick and by Lathi.

29. Learned counsel for the appellants then submitted that P.W.1 while testifying had forgotten whether the incident was a day light incident or whether a night incident and has referred to the evidence in cross-examination. We may refer to that part of the statement of P.W.1 in cross examination where she has stated that she had rushed to the police station to lodge a first information report and had reached at 12.00 o'clock night but later on she has corrected herself and stated that at 12 o'clock in the day. Minor aberration or slip of tongue while making the statement which is immediately corrected by the P.W.1 then and there cannot be cast as a conflict in testimony. P.W.1 is quite clear that the incident had occurred at 12 o'clock in the day. In the FIR, Ext. Ka-11 and written report, Ext. Ka-1 she had stated that it had occurred at 10 am. On 21.05.1992. The FIR was lodged at 11.30 am on the same day. Minor errors in details relating to the exact timing of an incident like the one in the present case particularly when a person is not looking at a watch but watching a fatal incident being executed cannot be said to vitiate the trial.

30. Learned counsel for the appellants next submitted that the testimony of P.W.2- Dhanpati Devi who is stated to be an eye witness is most unreliable as she has been declared a hostile witness.

31. We may note that Dhanpati Devi has stated that she does not know

where the incident took place. She also could not disclose whether the incident took place at 9.00 -10.00 am and she has also stated that she has not witnessed the incident and it is for this reason she has been declared hostile. In the circumstances her testimony becomes completely useless but we have to see whether the prosecution has still succeeded in proving their case.

32. The testimony of P.W.3- Smt. Lakhraji is very clear and candid. P.W.3 has in clear terms stated that she saw the accused Surendra with a Jaraudha assaulting the deceased and using abusive language. She has also stated that the deceased in order to save himself ran towards the door of the second accused Parsad where, on the exhortation of Surendra, accused Parshad assaulted him with a Lathi whereupon the deceased fell on the ground outside the door of Parsad and just then the third accused Prabhawati alias Dwiji rushed towards the deceased and pulled his testicles so much so that he died on the spot.

33. Learned counsel for the appellants submitted that the P.W.3 was not an eye witness as she has stated that at the time of incident she was in the house cooking and when she came out she saw the deceased lying dead outside the door of Parsad.

34. We find from the testimony of Lakhraji that a direct question was put to her that she has not seen the incident to which the witness replied that it is wrong to say that she has not witnessed the incident. Merely because she was cooking in the house also does not go to show that she could not have witnessed the incident as no question was put to her by the defence in this regard that if she was inside the house cooking she could not witness the incident.

The Supreme Court in **(2013) 7 SCC 278 (Ganga Singh Vs. State of Madhya Pradesh)** in paragraphs 12 and 13 has held as under:

*“12. According to Mr. Mehrotra, however, PW-5 is not a reliable*

witness as she has made a significant omission in her evidence by not stating anything about the seizure of the blouse, dhoti and broken bangles which were made in her presence. But we find that no question has been put to PW-5 in cross-examination with regard to seizure of the blouse, dhoti and broken bangles in her presence. If the appellant's case was that PW-5 cannot be believed because she made this significant omission in her evidence, a question in this regard should have been put to her during her cross-examination. To quote Lord Herschell, LC in *Browne vs. Dunn* [(1893) 6 R 67]:

“.....it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross examination showing that the imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit.”

13. [Section 146](#) of the Indian Evidence Act also provides that when a witness is cross-examined, he may be asked any question which tend to test his veracity. Yet no question was put to PW-5 in cross-examination on the articles seized in her presence. In the absence of any question with regard to the seizure of the blouse, dhoti and broken bangles in presence of PW-5, omission of this fact from her evidence is no ground to doubt the veracity of her evidence.”

35. Sri D.K. Srivastava, learned counsel for the appellants submitted that the chik FIR has not been proved as Head Moharrir Vishwanath Yadav was not examined.
36. We may note here that the Investigating Officer has proved the first information report and P.W.6, head constable Lallan Rai has also in his testimony stated that on the date of the incident he was posted in the police station Sidhari, Ghazipur and the first information report was noted down in his presence by Sri Vishwanath Yadav whose writing and signature he has identified as he was familiar with the same. Therefore, we are of the view that even if Vishwanath Yadav was not produced as a witness this was not fatal to the trial for the reason that it was a broad day light incident which has been proved by P.W.1, Mewati. P.W.3 Smt. Lakhraji. The inquest report has been proved by the Investigating

Officer and the post mortem report, Ext. Ka-10 has been proved by P.W.5, Dr. K.K. Singh. We find that the testimony of P.W.1 and P.W.3 and the findings in the post mortem Ext. Ka-10 corroborate and support the facts as stated in the written report, Ext. Ka-1 and FIR, Ext. Ka-11 as well as the Site Plan, Ext. Ka-9 and there is no contradiction in the same. It was a case of a prompt and noted FIR. The body was recovered by the Investigating Officer and sent for post mortem on the same day. We are therefore satisfied that the prosecution has succeeded in proving the guilt of the accused.

37. Learned counsel for the appellants further submitted that the accused have wrongly been convicted under Section 302 IPC for murder although there was neither intention nor knowledge could be attributed to the accused for commission of murder and he further submitted that it was a case to which the appellants would be entitled to the benefit of Exception-1 to Section 300 IPC which reads as under:

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

*The above exception is subject to the following provisos:-*

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

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

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

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

38. The submission of the learned counsel for the applicant has substance in as much as in the written report Ext.Ka-1 as well as in the first information report Ext.Ka-11 it has been clearly stated by the informant Mewati that her husband had come from Kanpur on the date of incident and while they were sitting outside the door of her house under the Gulmohar Tree she told him that with regard to the dispute relating to the temporary cottage (Madai) on the Bhita the accused Surendra and Parsad had come to her house in the absence of her husband and caught her father-in-law by the collar and shaken him up. She further stated that hearing this her husband rushed to the door of his house and started shouting and remonstrated with the accused persons, whereupon the accused Surendra rushed towards the deceased with a Jaraudha (bamboo stick with roots) and started beating him. The deceased in order to save himself rushed towards the house of Parsad where, on the exhortation of Surendra the accused Parsad also came out with a Lathi and started raining blows upon the deceased as a result of which the deceased fell on the ground and then the third accused Prabhawati caught hold of the deceased's testicles and pulled it resulting in his death.
39. Learned counsel for the appellants therefore submits that the assault upon the deceased by the accused was as a result of the abuse being hurled in a public place at the accused by the deceased stating at the door of his house and that the incident was neither preplanned by any of the accused nor executed with the common intention to kill the deceased.
40. Learned counsel for the appellants further submitted that though P.W.5, the Dr. K.K. Singh has opined that Injury no.5 i.e pulling of the testicles of the deceased by the third accused would have resulted in his instantaneous death it cannot be said that the appellant no.3-Prabhawati alias Dwiji had intended or planned to

actually pull the testicles of the deceased with the intention to kill him and that whatever happened, happened in the heat of the moment on the provocation of the deceased himself.

41. We find that the story as narrated by the informant P.W.1 that there was a dispute about 7 months earlier with regard to the temporary cottage (Madai) on the Bhita over which the informant and the deceased were in possession and that three days prior to the incident the accused Surendra and Parsad had come to her house and caught her father-in-law by collar and roughed him up and shaken him up and on the date of the incident when the deceased returned from Kanpur and she narrated this fact to her husband he went to the door of the house and started abusing and remonstrating the accused upon which the accused Surendra picked up a Jaraudha (bamboo stick with roots) and rushed towards the deceased and started thrashing him; the deceased thereafter in order to save himself ran towards the house of Parsad where on the exhortation of Surendra, accused Parsad also picked up a Lathi and started raining blows upon the deceased after this the third accused Prabhawati wife of Parsad caught hold of the testicles of the deceased and pulled it as a result of which the deceased died on the spot. This narrative is sustained in the written report, Ext. Ka-1, the FIR, Ext. Ka-11, in the testimony of P.W.1. P.W.3. in her testimony has also testified that at the time of the incident she was inside in her house but hearing the noise of abuse she came out to see what had happened and saw accused Surendra assaulting the deceased with a Jaraudha and when the deceased rushed toward the door of the house of Parsad with exhortation of Surendra, accused Parsad took up Lathi and started assaulting the deceased whereupon he fell on the ground and then the third accused Prabhawati, wife of accused Parsad caught the deceased by his testicles and pulled it and thereafter picked up a brick and hit it on the chest of the deceased. From this narrative

what emerges is that the incident was neither preplanned by the accused nor was it executed with the intention to cause his death but was caused due to shouting and remonstrations by the deceased himself at the accused.

42. We are therefore of the view that the accused persons have wrongly been convicted under Section 302 IPC when in fact they were entitled to the benefit of Exception-1 of Section 300 IPC and therefore we are of the view that the appellants would succeed on the point that the incident occurred due to grave and sudden provocation offered by the deceased himself. We therefore modify the conviction and sentence of the appellants under Section 302 IPC, awarded by the trial court and instead hold them guilty of an offence under Section 304 Part I IPC and sentence each of them imprisonment for 10 years with fine of Rs.5000/- each, and in default of payment of fine they shall undergo a further simple imprisonment of six months.

43. The appellants Surendra Harijan, Parsad Harijan and Prabhawati alias Dwiji are on bail. The C.J.M. Azamgarh is directed to take them into custody forthwith and send them to jail to serve out the sentence awarded by us as aforesaid.

44. Accordingly, the Appeal is partly allowed.

**Order Date :- 06.12.2019**

N Tiwari