

Neutral Citation No. - 2023:AHC:197025-DB

**AFR**

(Judgment reserved on 05.10.2023)

(Judgment delivered on 13.10.2023)

Court No. - 42

**Case :-** CRIMINAL APPEAL No. - 1483 of 1984

**Appellant :-** Kali Prasad Misra And Another

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

**Counsel for Appellant :-** Satish Trivedi, Manoj Kumar Singh, P.K. Singh

**Counsel for Respondent :-** A.G.A., Saurabh Chaturvedi

**Hon'ble Surya Prakash Kesarwani, J.**

**Hon'ble Ms. Nand Prabha Shukla, J.**

**(Per: Surya Prakash Kesarwani, J.)**

1. Heard Shri PK Singh, learned counsel for the accused appellant No.1, Shri I.K. Chaturvedi, learned Senior Advocate assisted by Shri Amresh Singh and Shri Saurabh Chaturvedi, learned counsel for the informant and Shri K.P. Pathak, learned A.G.A. for the State.

2. There are two appellants in this appeal. Appellant no.2 Sheo Shanker Misra has died and the appeal qua the accused appellant no.2 Sheo Shanker Misra has been abated by order dated 30.08.2018. Thus, the appeal now survives only for accused appellant no.1 Kali Prasad Misra.

**Facts:-**

3. Briefly stated facts of the present case are that the informant eyewitness PW-1, Smt. Ram Adhari Devi wife of the deceased Hinch Narayan Mishra, resident of village Pure Khudi, P.S. Handiya, District Allahabad lodged a **first information report (Chik No.162) on 23.5.1980 at about 05:00 a.m. with respect to an incident dated 22.05.1980 of about 06:00 p.m.** being Case Crime No.186/10/1980 under Section 304 IPC alleging that her Devar Lakh Narayan Mishra and two nephews namely Kali Prasad and Sheo Sankar, both sons of

Ram Lakhan came to call her husband for panchayat in the family dispute but her husband refused to go in panchayat and there upon all the aforesaid three accused persons started abusing and the accused persons Kali Prasad and Sheo Sankar beaten her deceased husband with their lathis on the pointing out of the accused Lakh Narayan Mishra to assault. Her husband fell and thereafter the accused persons fled away abusing. She took her husband and laid him in a cot at the house of the door and called Dr. Hari Vishal Singh who gave treatment but her husband died at about 10:00 p.m. When the PW-3 Mahendra Narayan Mishra, who is sister's son of the informant; came at about 02:00 a.m. in the night, she went to lodge the FIR at the police station and accordingly the FIR was registered at 05:00 a.m. on the next day, i.e. on 23.05.1980. The investigating officer came on the spot and prepared two recovery memos both dated 23.05.1980, which includes the recovery memo of taking sample of plain earth and blood stains from the spot of incident. Inquest report was prepared on 23.05.1980. In the inquest report, the Panches had opined that the deceased Hinch Narayan Mishra has died due to injuries caused on the head. The body of the deceased was sent for autopsy. As per postmortem report, following injuries were found on the body of the deceased Hinch Narayan Mishra:-

- “(1) Contusion 2" x 3/2" over the nasal bridge and below the left eye with fracture of nasal bone.*
- (2) Lacerated wound transversely directed, 2" x 1/2" on the middle of skull, 8" above the root of the nose.*
- (3) Contusion obliquely directed 2" x 1" over the scalp, 1" towards right of Injury No. 2.*
- (4) Depressed fractured scalp, 1,1/2" x 1" with fracture of left parietal bone which was 4" above the right ear.*
- (5) On the opening of ante-mortem injury No. 4, plenty of denatured blood came out.*
- (6) Contusion 2" x 2" over the right fore-erm.*
- (7) Contusion 2" x 2" over the right palm.*
- (8) Contusion 2" x 1,1/2" over the outer and lower aspect of left leg, 4" above the ankle joint.”*

4. The **chargesheet dated 05.07.1980** was submitted by the police against all the aforesaid three accused persons under Section 304 I.P.C. The Vth Additional Session Judge, Allahabad framed the **charges on 06.05.1982** under Section 302/34 I.P.C. against all the three accused persons and in alternative under Section 304/34 I.P.C.

5. The prosecution examined seven witnesses, namely **informant eyewitness PW-1, Smt. Ram Adhari Devi (wife of the deceased), eyewitness PW-2, Smt. Saraswati Devi (daughter-in-law of the deceased), PW3 Mahendra Narayan Mishra, PW-4 Shyama Prasad Dubey** - constable who carried the dead body of the deceased for postmortem, **PW-5 Dr. Nisar Ahmed** - Medical Officer who conducted autopsy on the body of the deceased, **Ram Ji Mishra - PW-6** - head constable who registered the FIR and **PW-7 Sarvadin Pandey** - Investigating Officer who conducted the investigation of the case. The accused persons were examined under Section 313 Cr.P.C. The defence examined DW-1, Dr. Hari Vishal Singh, who as per first information report, gave treatment to the deceased after the deceased received injuries.

6. As per postmortem report and the ocular evidence of P.W.-5 (doctor), the deceased was a man of good built aged about 50 years. The age of accused appellant No.1 Kali Prasad and accused appellant No.2 Sheo Shankar have been mentioned in their statements under Section 313 Cr.P.C. to be 19 years and 22 years respectively. Sheo Shankar was a student of B.A. Part-I. Thus, both the accused persons were of very young age at the time of the incident.

7. The **Session Trial No.459/1981** (State versus Lakh Narayan Mishra, Kali Prasad Mishra and Sheo Shankar Mishra) was concluded and the impugned judgment and order dated 22.05.1984 was passed by the Vth Additional Session Judge, Allahabad **acquitting** Lakh Narayan Mishra but **convicting** the accused appellant No.1 Kali Prasad Mishra and accused appellant No.2 Sheo Shankar Mishra under Section 302/34 I.P.C. and sentenced them for life imprisonment. Aggrieved with the aforesaid judgment of the session court, the accused appellants have filed the present appeal. **The accused appellant No.2**

**Sheo Shankar Mishra has died and consequently the appeal qua him was abated by order of this court dated 30.08.2018. Thus, the present appeal now survives only for the accused appellant No.1 Kali Prasad Mishra.**

**Submissions on behalf of the accused appellants:-**

8. Learned counsel for accused appellants submits as under:-

(A) As per own evidence of prosecution, intention to cause death is not established as is evident from the following evidences of the prosecution:-

(i) From bare reading of the first information report, the testimony of eye-witness PW-1 and eye-witness PW-2, it is evident that the deceased Hinch Narayan Misra is the real uncle of the accused persons, Kali Prasad Misra and Sheo Shanker Misra and the real brother of accused Lakh Narayan.

(ii) There was some dispute between brothers of the deceased relating to a grove.

(iii) The accused appellants came to call the deceased for Panchayat. The deceased refused to go and participate in Panchayat as he apprehended that some dispute may arise in Panchayat.

(iv) On refusal to go in Panchayat, some abusive languages were used by the accused persons against the deceased and the deceased who was sitting on the south side of the well on the 'Jagat' came down and went to the west of the well.

(v) The accused appellant no.1 Kali Prasad Misra gave the first and the only blow of Lathi on the head of the deceased and accused appellant no.2 gave the second blow of Lathi near the nasal bone of the deceased. Thereafter, only the accused appellant no.2 Sheo Shanker Misra gave blows of Lathi to the deceased on forearm, palm and leg causing injury

nos.6, 7 and 8.

(vi) The injury nos.3 and 4 were the result of blow of Lathi caused by the accused appellant no.1 Kali Prasad Misra and the injury nos.1 and 2 were the result of Lathi blow caused by the accused appellant no.2 Sheo Shanker Misra.

(B) The entire story of the prosecution is false inasmuch as the deceased while returning in the night at about 10:00–11:00 p.m. from somewhere has received injury and was brought by someone to home but to implicate falsely the accused appellant, the P.W. 1 lodged the first information report on account of dispute.

(C) Even if the prosecution story is taken to be correct, the accused appellants cannot be said to be guilty of commission of offence under Section 302 I.P.C., since as per own evidences of the prosecution, intention to kill the deceased was neither alleged nor established. Therefore, as per own evidence of the prosecution, the accused appellants could have been convicted only under Section 304 Part II I.P.C. and not under Section 302 I.P.C., inasmuch as, the injury caused, as per own evidence of the prosecution; was without any intention to cause death. Premeditated mind of the accused to cause murder of the deceased, has neither been alleged nor established by the prosecution. Therefore, at best, as per own case and evidences of the prosecution; the accused appellants could have been convicted and sentenced only under Section 304 Part II I.P.C. The first information report itself was lodged under Section 304 I.P.C., charge sheet was filed under Section 304 I.P.C. but the charges were also framed under Section 304 I.P.C. and in alternative under Section 302/34 I.P.C.

(D) Thus, the learned trial court has committed manifest error of law and fact to convict and sentence accused appellants under Section 302/34 I.P.C., whereas, as per own evidence of the prosecution, at best,

the accused appellants could have been convicted and sentenced only under Section 304 Part II I.P.C.

(E) The death of the deceased was caused not on account of Lathi blows but on account of excessive bleeding as no arrangement for medical treatment of the deceased was made by the PW-1 and PW-2 since the time of the incident till he died in the midnight. Thus, the deceased was kept without proper medical aid for more than four hours which caused his death on account of excessive bleeding. If treatment would have been given, these injuries would not have resulted to the death of the deceased.

(F) Reliance is placed upon the judgment of Hon'ble Supreme Court in Anbazhagan Vs. State [2023 5 Supreme 266 (Para 20 to 37, 60, 62 & 63]

**Submissions on behalf of the informant:-**

9. Sri I.K. Chaturvedi, learned Senior Advocate submits as under:-

(i) The prosecution witnesses are totally consistent to the effect that the accused appellants have killed the deceased with clear intention and with premeditated plan to kill the deceased. Thus, the accused appellants have committed murder of the deceased and therefore, they have been lawfully and correctly convicted under Section 302 I.P.C. and sentenced with life imprisonment.

(ii) The submissions advanced on behalf of the accused appellants is misinterpretation of Section 304 I.P.C., inasmuch as, the act of the accused persons was clearly covered by Section 300 I.P.C. and the prosecution has fully established that the accused appellants have committed murder of the deceased.

(iii) The accused appellants came on the spot armed with lathis with premeditated mind to cause murder of the deceased Hinch Narayan Mishra. Coming armed with lathis itself shows that the accused

appellants came on the spot with premeditated mind to kill the deceased otherwise there was no occasion for them to come armed with lathis to call their real uncle i.e. the deceased, for panchayat.

(iv) The evidence of eyewitnesses PW-1 and PW-2 clearly proves that the accused persons came with common intention and object to kill the deceased and therefore Section 34 IPC has been rightly applied by the learned trial court.

(v) The accused appellant No.1 with intention to kill the deceased and with knowledge that the injury being caused by him is sufficient to cause death of the deceased, has given first blow of lathi on vital part of the body i.e. on the head, which resulted in depressed fractured scalp with fracture left parietal bone and lacerated wound transversely directed on the middle of the skull. It was a deadly injury by which death was bound to be caused. Therefore, it was a clear case of murder as defined under Section 300 I.P.C. and consequently the accused appellants have been lawfully and correctly convicted under Section 302 I.P.C. The accused appellant No.2 has also given blow of lathi which resulted in contusion over the nasal bridge and below the left eye with the fracture of nasal bone and contusion obliquely directed over the scalp. Thereafter they gave repeated blows of lathi causing injury Nos.5, 6, 7 and 8. This leaves no manner of doubt that the manner in which the accused appellants given repeated blows of lathi to kill the deceased, does not fall under any of the exceptions of Section 300 I.P.C., therefore, the death of the deceased caused by the accused appellants is not culpable homicide not amounting to murder under Section 304 I.P.C. The manner in which the accused appellants treated the deceased was cruel.

**Submissions on behalf of State:-**

10. Learned A.G.A. submits that he adopts the aforementioned arguments

advanced by Sri I.K. Chaturvedi, learned Senior Advocate for the informant.

**Submissions on behalf of the accused appellant No.1 in rejoinder:-**

11. Sri P. K. Singh, learned counsel for accused appellant No.1 submits in rejoinder as under:

(i) Bare perusal of the first information report and the evidence of PW-1 and PW-2 clearly established that it was merely at the heat of the passion that some scuffle took place without any intention or premeditated mind of the accused appellants to kill the deceased. The accused appellants have not murdered the deceased and as per evidence of eyewitnesses, no inference of any intention to kill or common intention and common object or premeditated mind can be drawn.

(ii) The accused appellant No.1, as per the prosecution story and evidence of eyewitnesses, has given only one blow of Lathi, therefore, there was neither any element of cruelty nor any intention to kill the deceased. The deceased died for reason that when the deceased received some injuries at some place in the night at about 10:00-11:00 p.m. he was brought by someone to his house where the informant PW-1 has not made any arrangement for appropriate treatment of the deceased. Since the deceased could not get any medical treatment, therefore, he died due to excessive bleeding but the PW-1 has falsely implicated the accused appellants.

**Discussion and findings:-**

12. We have carefully considered the submissions of the learned counsels for the parties and perused the trial court record.

**Whether the accused appellants have killed the deceased?:-**

13. The deceased Hinch Narayan Mishra, the accused Lakh Narayan Mishra, the accused Kali Prasad Mishra and the accused Shiv Sankar Mishra, all are family members. The acquitted accused Lakh Narayan Mishra is the

real brother of the deceased. The accused appellant No.1 and the accused appellant No.2 are the sons of real brother of the deceased. As per site plan, the house of the deceased and the acquitted accused Lakh Narayan Mishra are adjoining, whereas the house of both the accused appellants is very near towards north side of the house of the deceased. The deceased was also having a house adjacent to his first house. In between the house of the deceased and the house of the accused appellants, there is a well and a neem tree. As per first information report, the deceased was sitting on the platform wall of the well at the time of incident. As per F.I.R., the accused appellants along with the acquitted accused came at about 06:00 p.m. to call the deceased to come for panchayat in the family dispute matter and when the deceased refused to go in panchayat, then the accused appellants started abusing and on the pointing out of the acquitted accused Lakh Narayan Mishra, they gave lathi blows on the deceased who fell on the ground on account of injuries and thereafter died at about 10:00 p.m. In her evidence, the informant eyewitness PW-1 has proved the first information report and the manner in which the accused appellants have given lathi blows to the deceased resulting in his death. She offered a natural explanation that in her cross-examination for the delay in lodging the report that she had seen ghastly occurrence and when PW-3 Mahendra Narayan Mishra, (her sister's son) arrived late in the night, then she went to lodge the first information report. It is undisputed that metalled road was about 3-4 km away from the place of occurrence and she being an illiterate village lady, could not courage to go to police station to lodge FIR in the late night passing through lonely place. Thus, the delay in lodging FIR has been fully explained.

14. The evidence of the informant eyewitness PW-1 and the eyewitness PW-2 are totally consistent and also corroborate with the first information report as to the date, time and place of the incident. The presence of PW-1 at the place of incident is quite natural inasmuch as the incident took place outside her dwelling house. The ocular evidence of eyewitness PW-1 and PW-

2 as to the injuries caused by the accused appellants is also totally consistent with the first information report and medical evidences i.e. the postmortem report and the evidence of PW-5, the doctor who conducted the autopsy. The Chik FIR has been proved by the PW-6 Ram Ji Mishra, head constable. The samples of plain earth and blood stains taken by the Investigating Officer PW-7 from the place of occurrence vide recovery memo dated 23.05.1980 has been proved by the PW-7 who also proved the site plan prepared on the spot and the inquest report. The injuries found on the body of the deceased as mentioned in the postmortem report has been proved by the PW-5 Dr. Nisar Ahmed, Medical Officer who conducted autopsy on the body of the deceased. The injuries as mentioned in the postmortem report and proved by the PW-5 in his ocular evidence, corroborate with the first information report and the evidence of eyewitnesses PW-1 and PW-2 as well as the inquest report. The PW-5 has also opined that the cause of death is excessive bleeding and shock and all the injuries were possible by Lathi and the injury Nos.1 to 4 were ordinarily sufficient to cause death. Thus, the date, time and place of incident, the presence of the accused appellant at the place of incident and the injuries caused by them to the deceased resulting in the death of the deceased have been successfully proved by the prosecution beyond a reasonable doubt.

15. Now, **the question** that arises out of submissions of learned counsels for the parties as aforementioned is as to **whether the accused persons acted with common intention and common object with premeditated mind to kill the deceased resulting in murder as defined under Section 300 IPC and are liable for punishment under Section 300 to IPC, or the assault was at the heat of passion without any motive or intention to cause death of the deceased?**

**Whether the accused are guilty of offence of murder as defined under Section 300 IPC liable to punishment under Section 302/34 I.P.C. OR the death caused was culpable homicide not amounting to murder under Section 304 I.P.C.:-**

16. Before we proceed to examine this aspect, it would be beneficial to reproduce relevant portion of the first information report, the evidence of

informant eyewitness PW-1 and the evidence of eyewitness PW-2 as under:-

**“Relevant portion of first information report 23.05.1980:-**

मेरे देवर श्री लाख नारायण पुत्र श्री उमादत्त एवं मेरे देवर श्री राम लखन के लड़के काली प्रसाद एवं शिवशंकर घरेलू झगड़े के विषय में पंचायत करने के लिये बुलाने आये किन्तु झगड़े के भय से मेरे पति ने पंचायत में जाने से इन्कार किया इस पर उपर्युक्त तीनों व्यक्तियों ने गाली गलौज शुरू कर दिया कि काली प्रसाद एवं शिव शंकर ने अपनी लाठियों से लाख नारायण के इशारे पर मेरे पति को मारा। मेरे पति चोट खाकर वहीं गिर गये। गांव के भी कुछ लोग मौके पर आ गये थे। मैंने तथा मेरी बहुओ ने रोकना चाहा किन्तु वे लोग गाली देते चले गये। अपने पति को उठाकर मैं तथा बहुओ ने अपने दरवाजे पर लाकर रखा।

**Relevant portion of evidences of informant eyewitness PW-1 (examination-in-chief):**

2- हिन्द नरायण मेरे पति थे। घटना के पहिले मेरे पति और रामलखन ने एक बाग साझे में खरीदा था। राम लखन भी मेरे देवर हैं। बिना बटवारा के मुल्जिमान काली प्रसाद व शिवशंकर उसमें नींव खोदने लगे। मेरे पति मना किये थे उसके बारे में गांव में पंचायत होने की बात चल रही थी।

3- उस नींव खोदने के दस दिन बाद और आज से तीन साल पांच महिना पहिले शाम के छः बजे का यह वाक्या है। मेरे पति उस समय असदिया- बाजार से घर आये थे। मैं व मेरी तीनों बहुये जय देवी, आशा देवी व सरस्वती देवी दरवाजे में बैठी थी। मेरे पति कुंवा की जगत पर उस समय बैठ गये। वहां नीम का पेड़ था छाया के लिये बैठे थी। मैंने उन्हें पानी व मीठा दे रखा था। उसी समय लाख नरायण, काली प्रसाद व शिवशंकर वहां आये। तीनों लाठियो लिये थे। ये लोग मेरे पति क पास आये। इन लोगों ने मेरे पति को पंचायत में चलने को कहा। मेरे पति ने कहा कि इस समय मैं पंचायत में नहीं आऊंगा। ये लोग कहे कि साले चलो। उसी समय लाख नरायण ने कहा कि मारो सालो को तब काली प्रसाद ने लाठी से मेरे पति के सिर पर मारा। दूसरी लाठी शिवशंकर ने जब उनके नाक पर मारा तब मेरे पति गिर गये। गिरने पर भी शिव शंकर लाठियों से मेरे पति को मारता रहा।

5- पति को हम लेकर उठाकर पश्चिम वाले ओसारे के सामने चारपाई पर लिटा दिये थे। दौड़धूप किया गया। हरविलास व हरी गांव के डाक्टर आये थे। सुई लगाये थे व पट्टी बांधे थे। पति को कुछ भी फायदा नहीं हुआ। मेरे पति वाक्या के चार घन्टे बाद मर गये।

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13- सशपथ प्रति परीक्षा- 27.1.1984

जब बाग खरीदा गया तब मेरे पति व मुल्जिमान के पिता राम लखन अलग अलग थे। उस बैनामे में दोनों आदमियों ने पैसा लगाया व हरके का आधा आधा हिस्सा था। उस बगीचे में पेड़ थे वे भी लिखाये गये थे। घटना के 7-8 साल पहिले यह बागीचा खरीदा गया था। दोनों आदमी बाग के काबिज थे लेकिन बटवारा नहीं हुआ था। उस बाग में दस पेड़ महुवा थे और पेड़ नहीं था। महुआ के पेड़ों का बटवारा नहीं हुआ था। महुवा में फल आधा आधा बंट जाता था। और जमीन बगीचा के खाली पड़ी थी। बगीचा में कुछ पश्चिम व कुछ पूरब खाली जमीन पड़ी थी। खाली जमीन का कोई इस्तेमाल नहीं होता था। दोनों पूरी बाग का इस्तेमान करते थे। इसी बीच रामलखन ने बाग के उत्तर-पश्चिम के कोने पर दालान व छुआ लगाकर बरामदा बना लिया था। घटना के बाद गांव का आबादी छोड़कर राम लखन का परिवार उस दालान में आ गया।

14- मैंने अपनी रपट में यह नहीं लिखाया था कि बिना बटवारा के मुलजिमान काली प्रसाद व शिवशंकर नींव खोदने लगे व मेरे पति मना किये थे। बाग के सिलसिले में झगड़ा था व पंचायत होने वाली थी वाली बात अपनी रपट में लिखा दिया था। मुलजिमान से बाग के अलावा घरेलू झगडा नहीं था। मैं नहीं बता सकती कि बाग के बारे में पंचायत वाली बात मेरी रपट में क्यों नहीं लिखी गई है।

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सशपथ प्रति परीक्षा- dated 28.01.1984 :-

36- मैंने दरोगा को वह जगह दिखा दिया था जहां से मैंने घटना देखा था। उस समय दरवाजा पर मैं बहुओ के साथ घन्टा दो घन्टे से बैठी थी। मेरे मकान का दरवाजा उत्तर तरफ खुलता है। दरवाजा के सामने ओसारा लगा है। घटना के समय मैं उसी ओसारे में थी। कुंवा की जगत अन्दाजन पांच फीट ऊंची है। जगत के ईन्टे सीमेन्ट से जुड़े थे ऊपर प्लास्टर नहीं हुआ था। नीम का पेड़ कुवा से एक बीत्ता या डेढ़ बीत्ता दखिन तरफ है। यह पेड़ अब भी मौजूद है मेरे पति कुंवा के दखिन तरफ बैठे थे वे पश्चिम मुंह करके बैठे थे। यह जगत दो हाथ चौड़ी थी। **बात चीत होने पर मेरे पति जगत के नीचे आ गये थे। मेरे पति नीचे आ गये थे। मेरे पति नीम के पेड़ की तरफ नहीं गये बल्कि कुंवा के पश्चिम गये थे।**

37- जब मेरे पति जगत से पश्चिम तीन चार कदम पर थे तभी मारपीट हुई थी। **मेरे पति को पहला लाठी काली प्रसाद मारे थे तब दूसरी लाठी शिवशंकर मारे थे** मैंने अपनी रपट व बयान पुलिस में बताया था कि गिरने के बाद भी मेरे पति को शिवशंकर लाठियों से मारे थे। मैं नहीं बता सकती कि मेरी रपट व बयान पुलिस में यह बात क्यों नहीं लिखी गई।

**Relevant portion of evidence of eyewitness PW-2 (examination-in-chief):-**

3- उसी समय काली प्रसाद, शिवशंकर व लाख नरायण काली प्रसाद के घर मे से लाठिया लेकर मेरे ससुर के पास आये। इनमें से **काली प्रसाद व शिवशंकर मेरे ससुर से कहे कि चलो दादा आज हमारा पंचायत होगा। तब मेरे ससुर झगड़े के डर से पंचायत मे जाने से इंकार कर दिये। इस पर काली प्रसाद व शिवशंकर बोले कि नहीं चलते हो तो चलो साले आज हमारा तुम्हारा तो हो जायेगा।** इस पर भी मेरे ससुर झगड़े के डर से जाने से इंकार कर दिये।

4- इस पर **लाखनरायण ने ललकारते हुये ईशारा किया कि आज नहीं चलते है तो जान से मार दो साले को हम देख लेंगे।** इस पर काली प्रसाद सिर पर और शिवशंकर बाई आंख के नाक के उपर लाठियों से मारे। मेरे ससुर गिय गये। उनके गिरने पर दोनों ससुर को दो दो लाठियां और मारे थे।

8- सन्त लाल यादव से डा० हरि विलास व डा० हरी सिंह को बुलवाया गया। उसके बाद चोट के चार घन्टे तक मेरे ससुर जिन्दा रहे। व रात दस बजे मर गये।

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19- मैंने दरोगा को यह दिखा दिया था कि घटना व समय मुलजिमान वहां से आये थे। दरोगा को वह भी बता दिया था कि मुलजिमान काली प्रसाद के घर से निकले थे। मैंने दरोगा को यह भी बताया था कि काली प्रसाद व शिवशंकर मेरे ससुर से कहे थे कि **दादा चलो आज हमारा पंचायत होगा। मैंने दरोगा को यह भी बताया था कि ये लोग बोले कि नहीं चलते हो तो चलो साले आज हमारा तुम्हारा तो हो जायेगा। मैं नहीं बता सकता कि दरोगा ने मेरे बयान में ये बातें क्यों नहीं लिखा है।**

20- **मुलजिमान से मेरे ससुर से ज्यादा से ज्यादा दो मिनट बाते हुई थी।** कुवा के पूरब ज्यादा दूरी पर मुल्लिमान की ही चरही वगैरह थी तीन चरफ चरही वगैरह नहीं थी।

21- **मुलजिमान जगत पर नहीं चढ़े थे मेरे ससुर बातचीत के समय जगत से नीचे आ गये थे।** मुल्लिमान उनसे दो-तीन कदम पर थे। मेरे ससुर जगत से पश्चिम उतरे थे। मेरी सास चार कदम पर उठ कर वही खड़ी हो गई थी। "

**17. From the relevant portion of the first information report the evidence of informant eyewitness PW-1 (wife of the deceased) and the eyewitness PW-2 (daughter-in-law of the deceased), the following facts emerge:**

- (a) The accused persons and the deceased all are **family members.**
- (b) The accused persons and the deceased were having their **houses close to each other.**

(c) The deceased and the father of the accused appellant have jointly purchased a grove which was not partitioned but on north-west portion of the open land of the grove the father of the accused appellants had constructed veranda due to which dispute arose and a **panchayat was convened** in that matter. **Except the grove, there was no family dispute** between the deceased and the accused appellants.

(d) **The accused appellants came to call the deceased to come in panchayat and using polite words “DADA CHALO” requested him to participate in panchayat** but the deceased refused to go.

(e) **The accused appellants had not climbed on the jagat of the well where the deceased was sitting rather the deceased came down to the accused persons during oral altercation between them.**

(f) Thereafter the accused appellant No.1 gave one lathi blow on the skull of the deceased and the accused appellant No.2 gave one lathi blow on the nasal bone of the deceased and thereafter when the deceased fell down, only the accused appellant No.2 Sheo Shankar gave some lathi blows to the deceased on arm and leg.

(g) The accused appellant Nos.1 and 2 gave lathi blows on the pointing out of the acquitted accused/ brother of the deceased namely Sri Lakh Narayan Mishra.

(h) The duration of the entire episode was only two minutes as per evidence of P.W.-2.

18. Before we proceed to examine as to whether the death of the deceased caused by the accused appellant Nos.1 and 2 is the murder as defined under Section 300 IPC liable to punishment under Section 302 **or** it is a culpable homicide not amounting to murder under Section 304 IPC, it would be appropriate to examine the relevant provisions and the law settled on the point.

**What is murder:-**

19. Section 299 IPC defines “**culpable homicide**”, Section 300 defines “**murder**” carving out five Exceptions and Section 304 provides for “**punishment for culpable homicide not amounting to murder,**” as under:-

***“299. Culpable homicide.**—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.*

***300. Murder.**—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—*

*(Secondly) —If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—*

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

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

***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.*

***Exception 2.**—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.*

***Exception 3.**—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.*

**Exception 4.**—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

*Explanation.*—It is immaterial in such cases which party offers the provocation or commits the first assault.

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

**304. Punishment for culpable homicide not amounting to murder.**—Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death,

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.”

20. In **Virsa Singh Vs State of Punjab A.I.R 1958 SC 465** Hon'ble Supreme Court laid down four elements to establish that an offence is a murder under Section 300 “thirdly” as under:-

“12. To put it shortly, the **prosecution must prove the following facts** before it can bring a case under s. 300, 3rdly ”;

**First**, it must establish, quite objectively, that a bodily injury is present ;

**Secondly**, the nature of the injury must be proved; These are purely objective investigations.

**Thirdly**, it must be proved that **there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.**

Once these three elements are proved to be present, the enquiry proceeds further and,

**Fourthly**, it must be proved that the injury of the type just described made up of the three elements set out above is **sufficient to cause death in the ordinary course of nature.** This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.”

(Emphasis supplied by us)

21. In **Anda and others vs. State of Rajasthan A.I.R. 1966 SC 148**, (Four judges bench) (Paras 10, 11 and 20, 1965 SCC Online SC 46) Hon'ble Supreme Court explained Section 300 “thirdly” and laid down the law that the third clause views the matter from a general stand point. It speaks of an

intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. The emphasis here is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensues and the causing of such injury is intended the offence is murder. **Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant. The determinant factor is the intentional injury which must be sufficient to cause death in the ordinary course of nature. If the intended injury cannot be said to be sufficient in the ordinary course of nature to cause death, that is to say, the probability of death is not so high, the offence does not fall within ‘murder’ but within culpable homicide not amounting to murder or something less. The sufficiency of an intentional injury to cause death in the ordinary way of nature is the gist of the clause irrespective of an intention to cause death.** Here again, the exceptions may bring down the offence to culpable homicide not amounting to murder.

22. In the scheme of IPC, “culpable homicide” is the genus and “murder” is its specie. All murder is culpable homicide but not vice-versa. For the purpose of fixing punishment, proportionality to the gravity of generic offence, IPC practically recognizes three degrees of culpable homicide, *firstly* murder as defined in Section 300 IPC; *secondly*, culpable homicide punishable under Section 304 Part I and *thirdly*, lowest type of culpable homicide punishable under section 304 Part II. There is fine difference between the two parts of Section 304 of the IPC. **Under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while under the second part, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the offence punishable under the second part of Section 304 of the IPC, the accused need not bring his case within one of the exceptions to Section 300 of the IPC.**

**Culpable Homicide Not Amounting to Murder:-**

23. Explaining the provisions of Section 299 and Clauses **secondly** and **thirdly** of Section 300 IPC, Hon'ble Supreme Court held that in clause **secondly**, ***mens rea*** is the knowledge possessed by the offender regarding particular victim being in such a peculiar condition or state of health with internal harm caused to him is likely to be fatal notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in a normal health or condition. **The intention to cause death is not the essential requirement of clause secondly** but it is only the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom harm is caused. If assailants had no knowledge about the disease or special frailty of the victim nor an intention to cause death or **bodily injury sufficient in the ordinary course of nature to cause death the offence will not be murder** even if the injury which caused the death was intentionally given. In **Clause thirdly** of Section 300 instead of the words “likely to cause death” used of the words “sufficient in the ordinary course of nature to cause death” shows the degree of probability of death resulting from the intended bodily injury. It is the probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. **“Bodily injury sufficient in the ordinary course of nature to cause death” means that death will be the most probable result of the injury having regard to the ordinary course of nature.** Clause **fourthly** of Section 300 is applicable where the knowledge of the offender as to the probability of death of a person in general as distinguished from a particular person being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability.

24. In **Khokhan alias Khokan Vishwas vs. State of Chhattisgarh (2021) 3 SCC 365** (Paras 9 and 12), Hon'ble Supreme Court considered **Exception 4** to

**Section 300 IPC** and held, as under:

*“9. Section 300 of the IPC is in two parts. The first part is when culpable homicide can be said to be the murder and the second part is the exceptions when the culpable homicide is not murder. The relevant part of Section 300 IPC for our purpose would be clause 4 to Section 300 and exception 4 to Section 300 IPC. As per clause 4 to Section 300 IPC, if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury, such culpable homicide can be said to be the murder. However, as per exception 4 to Section 300, culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. **As per explanation to exception 4 to Section 300 IPC, it is immaterial in such cases which party offers the provocation or commits the first assault.**”*

25. In **Dheerajbhai Gorakhbhai Nayak vs. State of Gujarat, (2003) 9 SCC 322 (Para 11)**, Hon’ble Supreme Court discussed the ingredients of Exception 4 of Section 300 IPC and held that **help of Exception 4** can be invoked if death is caused **(a)** without premeditation **(b)** in a sudden fight **(c)** without the offenders having taken undue advantage or acted in a cruel or unusual manner and **(d)** the fight must have been with the person killed. **Heat of passion** requires that there must be no time for the passions to cool down. In **Pulicherla Nagaraju vs. State of A.P. (2006) 11 SCC 444 (Para 29)**, Hon’ble Supreme Court held, as under:

*“29. Therefore, the court should proceed to decide the pivotal **question of intention**, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. **Many petty or insignificant matters — plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality.** At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. **The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of***

*sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may.”*

*(Emphasis supplied by us)*

26. Thus, **Part-I** of Section 304 IPC is applicable if the act by which the death is caused is done **(i)** with the intention of causing death, or, **(ii)** with the intention of causing such bodily injury as is likely to cause death. **Part-II** of Section 304 IPC is applicable if the act causing death is done **(i)** with the knowledge that it is likely to cause death, but without any intention to cause death, or **(ii)** with the knowledge to cause such bodily injury as is likely to cause death. The word “intention” as used in Part-I is absent in Part-II. Part-II shall be applicable where the intention as used in Part-I is absent but the act is done unintentionally by an accused with knowledge that his act is likely to cause death or the act is done unintentionally to cause such bodily injury as is likely to cause death. There is fine difference between the two parts of Section 304 of the IPC. **Under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while under the second part, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the offence punishable under the second part of Section 304 of the IPC, the accused need not bring his case within one of the exceptions to Section 300 of the IPC.** In determining the question, whether an accused had guilty intention or guilty knowledge in a case where only a single injury is inflicted by him and that injury is sufficient in the ordinary course of nature to cause death, **the**

fact that the act is done without premeditation in a sudden fight or quarrel, or that the circumstances justify that the injury was accidental or unintentional, or that he only intended a simple injury, would lead to the inference of guilty knowledge, and the offence would be one under Section 304 Part II of the IPC.

**Assault by Lathi when Culpable Homicide Not Amounting to Murder – case laws:-**

27. In **Chmaru Budhwa vs. State of M.P.**, AIR 1954 SC 652, the facts were that the three accused went over to the courtyard of the deceased with **lathis in their hands**. One accused dealt a blow on the head of the deceased who fell down and died due to injury on the head. The doctor opined that the injury inflicted on the head of the deceased was sufficient in ordinary course of nature to cause death. The trial court and the High Court both held the accused to be guilty of offence under Section 302 IPC. In criminal appeal, Hon'ble Supreme Court held that the crime was committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the accused's having taken undue advantage or acted in a cruel or unusual manner thus would fall within the Exception 4 of Section 300 IPC. Accordingly, Hon'ble Supreme held that **the accused has committed offence under Section 304 Part-II of the IPC** and sentenced him to 7 years rigorous imprisonment.

28. In **Inder Singh Bagga Singh Vs. State of Pepsu** A.I.R. 1955 S.C. 439, the facts were that while one Pearey Singh coming with a bucket containing milk was proceeding towards his residential house, he engaged the deceased in some talk and at that time the accused Inder Singh Bagga Singh came out of his house **armed with a lathi and gave a blow with it on the head of the deceased from behind**. He gave another blow on the deceased head and after the deceased fell down, he gave another blow on the deceased neck. In all, he gave six lathis blows and ran away from the place of occurrence. The Session Judge convicted him under Section 302 IPC. High Court on appeal confirmed the conviction. On further appeal, a three judges bench of Hon'ble Supreme

Court held that even though the blows were inflicted by the appellant on the head of the deceased with force. **The lathi not being iron shod and the deceased being a young man and strongly built the appellant could not under the circumstances be held to have been actuated with the intention of causing the death of the deceased,** nor do we think despite the medical evidence, that the injury was sufficient in the ordinary course of nature to cause death, seeing that he survived for three weeks and seeing on the doctor's admission that an injury of that kind is not incurable. But he no doubt knew that he would be causing such bodily injury as was likely to cause death and the **offence so committed would fall under Section 304 Part I and not under section 302 IPC.**

29. In **Kapoor Singh Vs. State of Pepsu AIR 1956 SC 654**, the facts were that one Chand Singh held the deceased by head and appellant inflicted injuries as many as **18 injuries on the arms and legs of the deceased with a gandas**a and thereafter absconded but was subsequently arrested and was convicted by the trial court under Section 302 IPC with death sentence. High Court confirmed the conviction and sentenced. Motive for committing the crime to wreck his vengeance on the family of Bachan Singh. Hon'ble Supreme Court held that **since the injury was not inflicted on any vital part of the body of the deceased therefore the intention of the appellant was not to kill the deceased outright and accordingly Supreme Court convicted the accused appellant under Section 304 Part-I IPC.**

30. In **Sarman and others vs. State of MP 1993 Supp.2 SCC 356** Hon'ble Supreme Court held, as under:

*“6.Although post-mortem report says that all the injuries might have caused the death of the deceased but in as much as the **accused inflicted injuries with lathies and particularly when they are simple and on non vital parts it cannot be said that their object was to kill the deceased. They may have knowledge that the blows given were likely to cause death.**”*

*(Emphasis supplied by us)*

31. In **Gurmail Singh and others vs State of Punjab (1982) 3 SCC 185**, the facts were that the four accused persons armed with gandasi and gandhali

kassiya and spear challenged the deceased and another saying that they should get ready to learn a lesson for abusing one of them on the previous day and immediately thereafter opened the attack which was intervened by Tej Singh and others and in this fight the accused **Gurmail Singh gave a blow with his spear on the chest of Tej Singh who fell on the ground and succumbed to his injuries on the same day.** Referring to the decisions in **Jagroop vs State of Haryana A.I.R. 1981 SC 1552** and **Randhir Singh @ Dhire vs State of Punjab A.I.R. 1982 SC 55**, Hon'ble Supreme Court held that it cannot be said that the accused Gurmail Singh intended to cause that particular bodily injury which caused death even if the injury inflicted may have been found to be sufficient in the ordinary course of nature to cause death. It was further held that **what ought to be found is that the injury found to be present was the injury that was intended to be inflicted.** The accused is a very young man shown to be aged about 19 years, has committed an offence under Section 304 Part II IPC and sentence of 5 years rigorous imprisonment would be adequate sentence.

32. In **Joseph vs State of Kerla 1995 SCC (Cri.)165**, on facts that hot exchange of words between the deceased and the accused over the stake of money in gambling, the accused challenged the deceased and the deceased walked towards the accused and the accused attacked the deceased with a **weapon lathi** and dealt **two blows on the head of the deceased** and the deceased collapsed on the ground, Hon'ble Supreme Court held that the **weapon is not a deadly weapon.** The whole occurrence was a result of a **trivial incident** and in those circumstances **the accused dealt two blows on the head with a lathi** therefore it cannot be said that he intended to cause injury which is sufficient to cause death. At the most it can be said that by inflicting such injuries, he had knowledge that it was likely to cause death. Accordingly Hon'ble Supreme Court held that the offence committed by the accused would be **culpable homicide not amounting to murder** and convicted him under Section 304 Part II IPC and sentenced him to 5 years' R.I.

33. In **Pappu Vs State of M.P. (2006) 7 SCC 391 (Paras3, 9, 13, 14 and 15)**,

the facts were that **in a marriage function there was exchange of hot words and altercations** between the deceased and the accused and **suddenly one of the accused dealt with a lathi blow on the left side of the head of the deceased and the other accused also caused injury on left shoulder and left arm of the deceased**. The deceased fell down and thereafter died. Hon'ble Supreme Court held that the assault was given in the course of a sudden quarrel and there was no premeditation and the accused did not take undue advantage and has not acted in a cruel manner and accordingly convicted the the accused appellant under **Section 304 Part II IPC** holding as under:

*“13. The **Fourth Exception** of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, **in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do.** There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. **In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did.** There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. **For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner.** The expression 'undue advantage' as used in the provision*

means '**unfair advantage**'.

14. *It cannot be laid down as a rule of universal application that whenever one blow is given, Section 302 IPC is ruled out. It would depend upon the weapon used, the size of it in some cases, force with which the blow was given, part of the body it was given and several such relevant factors."*

*(Emphasis supplied by us)*

34. In **Rajpal and others Vs. State of Haryana (2006) 09 SCC 678 (Paras 5, 14, 15, 16, 17, 24 and 27)**, the facts were that accused persons desisted the deceased from repairing the gate asserting a share in the property and the deceased told that they had no right over the property and they had got their property in the partition. The accused opposed the deceased and **in a fit of anger**, the accused gave **a lathi blow on the head** of the deceased. **The other accused also gave a lathi blow on the head of the deceased. Another accused gave a jelli blow on the leg of the deceased.** Others also joined the fray. The trial court convicted the accused persons under Section 304 Part I read with Section 34 IPC. High Court dismissed the appeal of the convicted persons. On appeal, Hon'ble **Supreme Court** held the accused persons to be liable for punishment under **Section 304 Part II** read with Section 34 IPC instead of Section 304 Part I/34 IPC and accordingly sentenced them for 7 years' RI.

35. In **Kikar Singh Vs. state of Rajasthan, (1993) 4 SCC 238**, it has been held by Hon'ble Supreme Court that if the accused used deadly weapons against the unarmed man and struck a blow on the head, it must be held that by using the blows with the knowledge that they were likely to cause death, he had taken undue advantage. This judgment has been relied in **Ramkishan vs. State of Maharashtra, (2007) 3 S.C.C. 89** and **Nafe Singh vs. State of Haryana, 2009 12 S.C.C. 408 (Para 14)**.

36. In **Indrasan vs. State of Uttar Pradesh, (2009) 14 S.C.C. 532**, the facts were that buffaloes belonging to the father of the deceased were impounded and taken to the contractor but were released subsequently and therefore there was some grudge of the accused being an employee of the contractor against the deceased when on the next day the accused saw the deceased he got

infuriated and **picked up his lathi and gave one blow on the head of the deceased and ran away.** The deceased died. Hon'ble Supreme Court held that the lathi blow was so forceful that as a consequence thereof the deceased died within an hour before he could be taken to the hospital and therefore **it is a case of culpable homicide not amounting to murder** but considering the nature of injuries caused on a vital part of the body accordingly altered the conviction of the accused from Section 302 IPC to **304 Part I IPC and sentenced for 10 years imprisonment.**

37. In **Gurumukh Singh vs. State of Haryana (2009) 15 S.C.C. 635 (Paras 3 and 14 to 26)**, facts were that the accused persons **armed with lathi** came and stopped the tractor from passing through the disputed passage and when tractor was not stopped, the **accused Gurumukh Singh gave a lathi blow on the head of the deceased** Huzoor Singh rendering him unconscious resulting in his fall on the ground who subsequently died in the hospital. Hon'ble Supreme Court converted the conviction of the accused from Section 302 IPC to **Section 304 Part II IPC and sentenced for 7 years R.I.** while after laying down certain **factors for awarding appropriate sentence to the accused**, held, as under:

*“23. These are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen from its special perspective. The relevant factors are as under:*

- (a) Motive or previous enmity;*
- (b) Whether the incident had taken place on the spur of the moment;*
- (c) The intention/knowledge of the accused while inflicting the blow or injury;*
- (d) Whether the death ensued instantaneously or the victim died after several days;*
- (e) The gravity, dimension and nature of injury;*
- (f) The age and general health condition of the accused;*
- (g) Whether the injury was caused without pre-meditation in a sudden fight;*
- (h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;*
- (i) The criminal background and adverse history of the accused;*
- (j) Whether the injury inflicted was not sufficient in the ordinary course of*

*nature to cause death but the death was because of shock;*

*(k) Number of other criminal cases pending against the accused;*

*(l) Incident occurred within the family members or close relations;*

*(m) The conduct and behaviour of the accused after the incident. Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment?*

*These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused.”*

38. In **Rampal Singh vs. State of Uttar Pradesh (2012) 8 S.C.C. 289 (Paras 21, 27, 30, 32 to 35)**, the facts were that the **accused and the deceased both were related to each other being of one family**. The whole dispute between them was with regard to construction of Ladauri by the deceased to prevent garbage from being thrown on his open land which was broken by the accused appellant. Both were serving in the Indian Army. The accused appellant entered into a heated exchange of words. Both grappled with each other. Thereafter the accused went to his house and climbed on the roof of one Muneshwar armed with a rifle and from there he asked his brother to keep away from him and he wanted to shoot the deceased. The deceased remarked as to whether the accused had the courage to shoot him. Thereafter the accused fired at the deceased who died. There was no previous animosity. There was nothing on record to show that the relation between the family of the deceased and the accused was not cordial. The dispute arose with a specific reference to Ladauri. Hon’ble Supreme Court held that the accused had not committed the crime with any premeditation and there was no intention on his part to kill. It was in the state of anger that the appellant went to his house, took out the rifle and from a distance he shot the deceased aiming at the lower part of the body, i.e. stomach. Thus, there was no intention to kill but without any premeditation the appellant committed the offence with intent to cause a bodily injury which could result in death of the deceased. Hon’ble Supreme Court converted the conviction from Section 302 to 304 Part I IPC and sentenced for 10 years R.I. and a fine of Rs.10,000/- observing in Para 21 (SCC) as under:

*“21. Sections 302 and 304 of the Code are primarily the punitive provisions. They declare what punishment a person would be liable to be awarded, if he commits either of the offences. An analysis of these two Sections must be done having regard to what is common to the offences and what is special to each one of them. The offence of culpable homicide is thus an offence which may or may not be murder. If it is murder, then it is culpable homicide amounting to murder, for which punishment is prescribed in Section 302 of the Code. **Section 304 deals with cases not covered by Section 302 and it divides the offence into two distinct classes, that is (a) those in which the death is intentionally caused; and (b) those in which the death is caused unintentionally but knowingly. In the former case the sentence of imprisonment is compulsory and the maximum sentence admissible is imprisonment for life. In the latter case, imprisonment is only optional, and the maximum sentence only extends to imprisonment for 10 years. The first clause of Section 304 includes only those cases in which offence is really ‘murder’, but mitigated by the presence of circumstances recognized in the exceptions to section 300 of the Code, the second clause deals only with the cases in which the accused has no intention of injuring anyone in particular. In this regard, we may also refer to the judgment of this Court in the case of Fatta v. Emperor, 1151. C. 476 (Refer : Penal Law of India by Dr. Hari Singh Gour, Volume 3, 2009 )”***

*(Emphasis supplied by us)*

39. In **Litta Singh and another vs. State of Rajasthan (2015) 15 SCC 327 (Paras 22, 23, 24, 26 and 27)**, Hon’ble Supreme Court explained the meaning of the word “**maro maro**” and held as under while converting the conviction under Section 302 to 304 Part II IPC :-

*“22. The word **“maro maro”** can never mean “kill kill”. The word “kill” means to cause the death of a person or animal. It also means to put some one to death, to murder, to slaughter. On the other hand, the word **“maro maro”** means to beat, to cause assault. Here the thin line of distinction lies between the two words. If the voice is “kill kill”, it means to cause death of the person and to finish him. **Had the intention of the person been to make such call or voice “kill kill” and on the basis of such call the accused persons had assaulted the deceased, then the intention would have been clearly to kill and murder the deceased.** Here on hearing the call “maro maro”, the accused persons with Boga Singh started beating the deceased.*

*23. **Considering the nature of the injury caused to the deceased and the weapons i.e. lathi and gandas (sickle) used by them, it cannot be ruled out that they assaulted the deceased with the knowledge that the injury may cause death of the person. Moreover, there is no evidence from the side of the prosecution that the accused persons pre-planned to cause death and with that intention they were waiting for the deceased coming from the field and then with an intention to kill the deceased they assaulted him.***

*24. **It is well settled proposition of law that the intention to cause death with the knowledge that the death will probably be caused, is very important***

*consideration for coming to the conclusion that death is indeed a murder with intention to cause death or the knowledge that death will probably be caused. From the testimonies of the witnesses, it does not reveal that the accused persons intended to cause death and with that intention they started inflicting injuries on the body of the deceased. Even more important aspect is that while they were beating the deceased the witnesses reached the place and shouted whereupon the accused persons immediately ran away instead of inflicting more injuries with intent to kill the deceased.*

*26. After analyzing the entire evidence, it is evidently clear that the **occurrence took place suddenly and there was no premeditation on the part of the appellants. There is no evidence that the appellants made special preparation for assaulting the deceased with the intent to kill him.** There is no dispute that the appellants assaulted deceased in such a manner that the deceased suffered grievous injuries which was sufficient to cause death, but we are convinced that the injury was not intended by the appellants to kill the deceased.*

*27. In the facts and circumstances of the case, in our considered opinion, **the instant case falls under Section 304 Part II IPC as stated above. Although the appellants had no intention to cause death but it can safely be inferred that the appellants knew that such bodily injury was likely to cause death, hence the appellants are guilty of culpable homicide not amounting to murder and are liable to be punished under Section 304 Part II IPC.***

*(Emphasis supplied by us)*

40. In **Sridhar Bhuyan vs. State of Orissa, (2004) 11 SCC 395**, Hon'ble Supreme Court observed that to bring a case within Exception 4 of Section 300 IPC, if death is caused then it should be **(a)** without premeditation; **(b)** in a sudden fight; **(c)** without the offender's having taken undue advantage or acted in a cruel or unusual manner.; and **(d)** the fight must have been with the person killed. The word fight is a combat between the two and more persons whether with or without weapons. To apply Exception 4 does not sufficient to show that there was a sudden quarrel and there was no premeditation. It must be shown further that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "**undue advantage**" means "**unfair advantage**". In **Criminal Appeal No.1510 of 2019 (Nandlal vs. State of Maharashtra)** decided on 15.03.2019 (Paras 14, 15 and 16), Hon'ble Supreme Court found that the accused and the deceased were close relatives. The **dispute between them was due to construction of a common wall and non-sharing of expenses.** The court found that sudden quarrel took place between them and there was no premeditation. The accused inflicted a single blow injury with Gupti on left armpit of the deceased which pierced into the lung.

On a finding that the sudden quarrel took place in the heat of passion, Hon'ble Supreme Court gave benefit of Exception 4 to Section 300 IPC and converted the conviction of the accused under Section 302 IPC to **Section 304 Part II IPC**.

41. In **Ananta Kamilia vs. State of West Bengal (2020) 2 SCC 511 (Paras 6.1, 6.2 and 7)**, Hon'ble Supreme Court while observing that the **incident had taken place on the spur of moment and after some altercation the accused took lathi and caused the injury on the head of the deceased resulting in his death**; held that there does not appear any intention on the part of the accused to cause the very injury which ultimately led to the death of the deceased and there does not appear to be any premeditation or intention to kill the deceased. The death resulted due to injury in quarrel. Accordingly, Hon'ble Supreme Court held that the case would fall under Exception 4 to Section 300 IPC and converted the conviction of the accused under Section 302 IPC to **Section 304 Part I** and sentenced to undergo imprisonment for 10 years.

42. In **Jugut Ram vs. State of Chhattisgarh (2020) 9 SCC 520 (Paras 6 to 10)**, Hon'ble Supreme Court held that **"a lathi is a common item carried by a villager in this country linked to his identity"** which is capable of being used as a weapon of assault but it does not make it a weapon of assault simplicitor and, therefore, assault on the head with a lathi is always a question of fact in each case whether there was intention to cause death or only knowledge that death was likely to occur. After aforementioned law laid down in the case of **Virsa Singh vs. State of Punjab (supra)**, **Joseph vs. State of Kerala (supra)**, **Jameel vs. State of M.P. (supra)**, **Gurmukh Singh vs. State of Haryana (supra)**, **Muhammad Shakeel vs. State of AP (supra)**, Hon'ble Supreme Court altered the conviction of the accused from Section 302 IPC to **Section 304 IPC Part II IPC** holding as under:

*"6. A lathi is a common item carried by a villager in this country, linked to his identity. The fact that it is also capable of being used as a weapon of assault, does not make it a weapon of assault simpliciter. In a case like the present, of an assault on the head with a lathi, it is always a question fact in each case whether there was intention to cause death or only knowledge that death was likely to*

occur. The circumstances, manner of assault, nature and number of injuries will all have to be considered cumulatively to decipher the intention or knowledge as the case may be. We do not consider it necessary to dilate on the first principles laid down in this regard in *Virsa Singh vs. The State of Punjab*, 1958 SCR 1495, which stand well established. Suffice it to notice from precedents that in *Joseph vs. State of Kerala*, (1995) SCC (Cri.) 165, the appellant dealt two blows on the head of the deceased. The deceased died two days later. The post mortem report found lacerated injury on the head and internal examination revealed fracture to the occipital bone extended up to the temporal bone. The High Court convicted the appellant under Section 302 IPC holding that the injury caused by the lathi was sufficient to cause death of the deceased. This Court observed as follows:

“3. ....The weapon used is not a deadly weapon as rightly contended by the learned counsel. The whole occurrence was a result of a trivial incident and in those circumstances the accused dealt two blows on the head with a lathi, therefore, it cannot be stated that he intended to cause the injury which is sufficient (sic). At the most it can be said that by inflicting such injuries he had knowledge that he was likely to cause the death. In which case the offence committed by him would be culpable homicide not amounting to murder. We accordingly set aside the conviction of the appellant under Section 302 IPC and the sentence of imprisonment for life awarded thereunder. Instead we convict the appellant under Section 304 Part II IPC and sentence him to five years’ RI.”

7. In *Chamru Budhwa vs. State of Madhya Pradesh*, AIR 1954 SC 652, the appellant dealt a blow on the head of the deceased with a lathi and which proved fatal. The injury was medically opined sufficient in the ordinary course to cause death. Conviction under Section 302, IPC followed. This court observed as follows:

“5. It now remains to consider whether the offence which he committed falls within the first part or the second part of Section 304 of the Indian Penal Code. When the fatal injury was inflicted by the appellant on the head of the deceased by only one blow given in the manner alleged by the prosecution it could as well be that the act by which death was caused was not done with the intention of causing death or of causing such bodily injury as is likely to cause death. The act appears to have been done with the knowledge that it was likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death within the meaning of Part II of Section 304 of the Indian Penal Code.

6. We accordingly allow the appeal to this extent that the conviction of the appellant under Section 302 of the Indian Penal Code and the sentence of transportation for life awarded to him will be set aside, but the appellant will be convicted of having committed the offence under Section 304 Part II of the Indian Penal Code and will be sentenced to seven years’ rigorous imprisonment.”

8. In *Gurmukh Singh vs. State of Haryana*, (2009) 15 SCC 635, the deceased died three days later after an assault on the head with a lathi opined to be sufficient in the ordinary course of nature to cause death. Holding that the assault was made on the spur of the moment without premeditation the conviction was altered from one under Section 302 to Section 304 Part II and a sentence of seven years was handed. Similarly in *Mohd. Shakeel vs. State of A.P.*, (2007) 3 SCC 119, the appellant had caused only one injury and had suffered injury himself also. Altering the conviction from under Section 302 IPC to 304 Part II, the appellant was sentenced to the period undergone since 1999.

*9. We do not consider that Laltu Ghosh (supra) and S. Rayappa (supra), with regard to credibility of related witnesses, have any relevance to the issue in question being decided by us.*

*10. We accordingly alter the conviction of the appellant from Section 302 IPC to Section 304 Part II, IPC. The appellant is in custody since 2004. He has already undergone the maximum period of sentence prescribed under the same. The appellant is, therefore, directed to be set at liberty forthwith unless wanted in any other case.*

*11. The appeal is allowed.”*

43. In **Baijnath vs. State of Uttar Pradesh (2008) 11 SCC 738**, the accused Baijnath and the deceased Kalika Prasad were real cousins. There was some dispute between the two families regarding *Nabhdan* and fixing of *Kuntas* (pegs) for tying the cattle. To settle the dispute, a panchayat was called but when accused Baijnath declared that the disputed land belonged to him and will not be given to the deceased who made a counterclaim, the accused Baijnath dealt a lathi blow on the head of the deceased Kalika Prasad who sustained head injuries and fell down and died. The accused ran inside his house. The doctor opined that the accused's cause of death was due to coma as a result of head injury. Hon'ble Supreme Court held that the case is covered by Section 304 IPC and held that custodial sentence of seven years as imposed, does not suffer from any infirmity.

44. In **Khokhan alias Khokan Vishwas vs. State of Chhattisgarh (2021) 3 SCC 365** (Paras 9 and 12), Hon'ble Supreme Court considered Exception 4 to Section 300 IPC and held, as under:

*“9. Section 300 of the IPC is in two parts. The first part is when culpable homicide can be said to be the murder and the second part is the exceptions when the culpable homicide is not murder. The relevant part of Section 300 IPC for our purpose would be clause 4 to Section 300 and exception 4 to Section 300 IPC. As per clause 4 to Section 300 IPC, if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury, such culpable homicide can be said to be the murder. However, as per exception 4 to Section 300, culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. As per explanation to exception 4 to Section 300 IPC, it is immaterial in such cases which party offers the provocation or commits the first assault.*

12. There is no evidence that there was any premeditation on the part of the accused. Considering the case of the prosecution as it is and as observed hereinabove, there was a sudden quarrel with respect to money and the accused pushed the deceased and stood on the abdomen in the heat of passion upon a sudden quarrel. Therefore, the case would fall under exception 4 to Section 300 IPC. As per explanation to exception 4 to Section 300 IPC, **it is immaterial in such cases which party offers the provocation or commits the first assault.** Therefore, both the courts below have materially erred in holding the appellant-accused guilty for the offence punishable under Section 302 IPC. According to us, at the most, it can be said that the appellant-accused has committed the offence under **Section 304 I IPC.**”

45. In **Krishnamurthy vs. State (2022) 8 SCC 664 (Paras 5 and 11)**, Hon’ble Supreme Court noticed the fact and held as under:

“5. The case of the prosecution in nutshell before the trial was that the deceased - **Samidurai and the accused were the neighbours in the Village - Elavathadi. Some quarrel had taken place between Accused no. 1 and the wife and the son of the deceased in respect of a missing goat belonging to the deceased Samidurai. In the said quarrel on 13.03.2006, Accused no. 1 - Govindaraj assaulted the son of the deceased Shanmugaperumal using an iron rod on his hands and biting him on his cheek. On 14.03.2006 at about 2.00 a.m, all the three accused, with the intent to assault the deceased and his family members, armed with an iron pipe and wooden log, came to the house of the deceased by hurling abusive filths against the family members of the deceased. The deceased came out of his house and asked the accused as to why they were shouting at such an odd hour. By that time, the Accused no. 2 - Krishnamurthy assaulted Samidurai on his head with a wooden log and pushed him down, while the first accused- Govindaraj assaulted Samidurai who was lying on the ground using an iron pipe on his chest and the third accused-Selvaraj also assaulted Samidurai by a wooden log on the right side of his chest. When the family members of Samidurai came to rescue him, all the accused threatened them with dire consequences and ran away from the place. The said Samidurai succumbed to injuries and died at about 04.15 p.m. on 14.03.2006. On the complaint having been lodged by PW-1, son of the deceased, the investigation was carried out and the chargesheet was filed against all the three accused.**

11. In view of the above, and having regard to the role played by the appellant, to the use of the weapons and to the injuries suffered by the deceased, **we are of the considered opinion that it could not be said by any stretch of imagination that the appellant had an intention to cause such injuries to the deceased-Samidurai so as to cause his death. In our opinion, at the most it could be said that he had committed the alleged act with the knowledge that such act was likely to cause death. Therefore, his case would fall under Section 304(II) of IPC and not under Section 302 IPC.**”

46. In **Anbazhagan vs. State (2023) 5 Supreme 266 (Paras 46, 48, 60 and 63)**, Hon’ble Supreme Court held as under:

46. .... We have noticed something in the aforesaid observations made by this Court which, in our opinion, creates some confusion. We have come across such observations in many other decisions of this Court over and above the case of *Jagrup Singh (supra)*. What we are trying to highlight is that in *Jagrup Singh*

(supra), although this Court altered the conviction from Section 302 to Section 304 Part II, it took shelter of Exception 4 to Section 300 of the IPC. The question is, was there any need for the Court to take recourse to Exception 4 to Section 300 of the IPC for the purpose of altering the conviction from Section 302 to Section 304 Part II of the IPC. We say so because there is fine difference between the two parts of Section 304 of the IPC. **Under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while under the second part, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the offence punishable under the second part of Section 304 of the IPC, the accused need not bring his case within one of the exceptions to Section 300 of the IPC.**

48. In *Camilo Vaz v. State of Goa* [(2000) 9 SCC 1 : 2000 SCC (Cri) 1128] **the accused had hit the deceased with a danda during a premeditated gang-fight, resulting in the death of the victim.** Both the trial court and the Bombay High Court convicted the appellant under Section 302 IPC. This Court, however, converted the conviction to one under Section 304 Part II IPC and observed:- (SCC p. 9, para 14)

**“14. ... When a person hits another with a danda on a vital part of the body with such a force that the person hit meets his death, knowledge has to be imputed to the accused. In that situation case will fall in Part II of Section 304 IPC as in the present case.”**

**60. Few important principles of law discernible from the aforesaid discussion may be summed up thus:-**

(1) .....

(2) .....

(3) .....

(4) Even if single injury is inflicted, if that particular injury was intended, and objectively that injury was sufficient in the ordinary course of nature to cause death, the requirements of Clause 3rdly to Section 300 of the IPC, are fulfilled and the offence would be murder.

**(5) Section 304 of the IPC will apply to the following classes of cases: (i) when the case falls under one or the other of the clauses of Section 300, but it is covered by one of the exceptions to that Section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression 'sufficient in the ordinary course of nature to cause death' but is of a lower degree of likelihood which is generally spoken of as an injury 'likely to cause death' and the case does not fall under Clause (2) of Section 300 of the IPC, (iii) when the act is done with the knowledge that death is likely to ensue but without intention to cause death or an injury likely to cause death.**

To put it more succinctly, the **difference between** the two parts of Section 304 of the IPC is that **under the first part**, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while **under the second part**, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the offence punishable under the second part of Section 304 of the IPC, the accused need not bring his case within one of the exceptions to Section 300 of the IPC.

(6) The word '**likely**' means probably and it is distinguished from more

*'possibly'. When chances of happening are even or greater than its not happening, we may say that the thing will 'probably happen'. In reaching the conclusion, the court has to place itself in the situation of the accused and then judge whether the accused had the knowledge that by the act he was likely to cause death.*

*(7) ..... Culpable homicide is not murder when the case is brought within the five exceptions to Section 300 of the IPC. But, even though none of the said five exceptions are pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of Section 300 of the IPC to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any one of the four clauses of Section 300 of the IPC, namely, 1stly to 4thly, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under Section 299 of the IPC.*

*(8) .....*

*(9) .....*

*(10) .....*

*(11) Where the prosecution proves that the accused had the intention to cause death of any person or to cause bodily injury to him and the intended injury is sufficient in the ordinary course of nature to cause death, then, even if he inflicts a single injury which results in the death of the victim, the offence squarely falls under Clause thirdly of Section 300 of the IPC unless one of the exceptions applies.*

*(12) In determining the question, whether an accused had guilty intention or guilty knowledge in a case where only a single injury is inflicted by him and that injury is sufficient in the ordinary course of nature to cause death, **the fact that the act is done without premeditation in a sudden fight or quarrel, or that the circumstances justify that the injury was accidental or unintentional, or that he only intended a simple injury, would lead to the inference of guilty knowledge, and the offence would be one under Section 304 Part II of the IPC.***

*63. In the aforesaid view of the matter and more particularly bearing the principles of law explained aforesaid, the present appeal is partly allowed. The conviction of the appellant under Section 304 Part I of the IPC is altered to one under **Section 304 Part II of the IPC**. For the altered conviction, the appellant is sentenced to undergo rigorous imprisonment for a period of **five years**."*

*(Emphasis supplied by us)*

**Punishment should be proper and proportional to the gravity of the offence committed:-**

47. In **Jameel vs. State of Uttar Pradesh (2010) 12 SCC 532 (Para 15)** Hon'ble Supreme Court reiterated the principle by stating that punishment must be proper and proportional to the gravity of offence committed. Speaking about the concept of sentencing Hon'ble Supreme Court observed that the facts and given circumstances, the nature of the crime, the manner in which it

was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons and all other attending circumstances are relevant facts which would enter into the area of consideration.

48. In **Gopal Singh versus state of Uttarakhand (2013) 7 SCC 545**, Hon'ble Supreme Court observed that just punishment is the collective cry of the society while the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and the punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. The punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the judge but same has to be guided by the certain principles. In certain cases, the nature of culpability the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect propensity to become a social threat or nuisance and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and the attractability of the doctrine of bringing the convict to value-based social mainstream may be the guiding factors. Hon'ble Supreme Court converted the conviction from Section 307 to 324 IPC.

**Present Case:-**

49. The first information report was lodged and registered on 23.05.1980 at about 5 a.m. under Section 304 IPC with respect to the incident in question dated 22.05.1980 at about 6 p.m. The case was investigated and charge sheet dated 05.07.1980 was submitted by the police under Section 304 IPC. The trial court framed charges on 06.05.1982 under Section 302/34 IPC and in alternative under Section 304/34 IPC. Own evidence of eyewitness PW-1 and eyewitness PW-2 as reproduced in paragraph 16 and summarized in paragraph 17 above leaves

no manner of doubt that while the deceased was sitting over the jagat of the well, two of his real nephews, namely the accused appellant No.1 Kali Prasad Misra aged about 19 years and the accused appellant No.2 Shiv Sankar Misra aged about 22 years who died during pendency of this appeal, came to call the deceased Hinch Narayan Misra for the panchayat convened for settlement of family dispute with regard to a grove and except which there was no dispute in the family of the deceased and his brother. The aforesaid two accused appellants requested the deceased to come to panchayat by using respectful words "DADA CHALO" but the deceased refused to go. Thereafter, some oral altercation took place and the deceased came down from the jagat of the well. At this moment without any premeditated mind but at the heat of passion, the accused appellant No.1 gave single blow of lathi and the accused appellant no.2 also gave one blow of lathi which had hit the deceased on his head and nasal bone respectively and he fell down. Thereafter the accused appellant no.2 has given some blows of lathi on the arm and leg of the deceased as per own evidence of the eyewitness PW-2. This entire episode happened only within two minutes. There was no time for the passions to cool down. This proves that lathi blows were given by the accused appellants to the deceased on oral altercation at the heat of passion without any premeditated mind or intention to cause death. After the deceased fell down, the accused appellants fled away. The PW-1 and PW-2 had laid the deceased on a cot but had not made any effort to carry him to hospital. Due to excessive bleeding, the deceased Hinch Narayan Misra died after four hours of the incident. The dispute between the deceased and his brother (father of the accused appellants) was on a trivial issue of constructing a veranda on a small portion of the jointly owned grove which was not yet partitioned. It has been admitted by the eye witnesses that except the dispute with regard to grove land, there was no dispute between the family of the two brothers. This admitted fact also finds support from the respectful words used by the accused appellants to request the deceased to participate in the panchayat.

50. The accused appellant No.1 Kali Prasad Misra was aged about 19 years while the accused appellant No.2 Sheo Shankar Misra was aged about 22 years at

the time of incident and the deceased was a man of good built. The accused appellant No.2 was a student. Both the accused appellants have no criminal history as per the record of this appeal. There was neither any motive nor any previous animosity between the accused persons and the deceased. The incident had taken place at the spur of the moment. By lathis, the accused person caused injuries to the deceased at the heat of passion.

51. As held by Hon'ble Supreme Court in the case of **Jugut Ram** (supra), lathi is a common item carried by a villager in this country linked to his identity which is capable of being used as a weapon of assault but does not make it a weapon of assault simpliciter. The accused appellants have not taken any undue advantage or acted in a cruel or unusual manner but they gave lathi blows to the deceased at the heat of passion after some oral altercation, without any intention to cause death of the deceased. The accused Lakh Narayan Misra (real brother of the deceased) to whom the role of exhortation was assigned, was acquitted by the trial court as exhortation could not be established by the prosecution.

52. Thus, considering the entire facts and circumstances of the case, evidences and the law laid down by Hon'ble Supreme Court in various judgments discussed in the foregoing paragraphs and more particularly the law laid down in **Gurmail Singh and others** (supra), **Joseph** (supra), **Pappu** (supra), **Rajpal and others** (supra), **Gurumukh Singh** (supra), **Litta Singh and others** (supra), **Sridhar Bhuyan** (supra), **Jugut Ram** (supra), **Baijnath** (supra), **Krishnamurthy** (supra), **Dheerajbhai Gorakhbhai Nayak** (supra) and the most recent judgement in **Anbazhagan** (supra), we hold that the accused appellants have not committed murder as defined under Section 300 IPC, but they are guilty of committing culpable homicide not amounting to murder under Section 304 Part II of the Indian Penal Code. Accordingly, the conviction and sentence awarded by the impugned judgment is altered and the surviving **accused appellant No.1 Kali Prasad Mishra is convicted under Section 304 Part-II and is sentenced with 7 years' Rigorous Imprisonment and fine of Rs.1 lac** which shall be paid to the wife of the deceased and in case she is not surviving, then to legal heir of the deceased and **on failure to pay fine, the**

**accused appellant No.1 shall undergo further rigorous imprisonment for one year. Accordingly, the conviction and sentence of the accused appellant No.1 as provided in the impugned judgement and order dated 22.05.1984 in Session Trial No.459 of 1981 passed by Vth Additional Session Judge, Allahabad is altered. The appeal is partly allowed.**

53. The accused appellant No.1 is on bail. His bail bond is hereby cancelled. He shall be forthwith taken into custody by the Chief Judicial Magistrate Prayagraj and shall be sent to jail to complete the sentence awarded to him as above. A copy of this judgement shall be sent immediately to the trial court for compliance. Original record be returned to the trial court forthwith.

**Order Date :- 13.10.2023**  
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