

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.40 of 2015

Arising Out of PS.Case No. -40 Year- 2003 Thana -SABAUR District- BHAGALPUR

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1. Kishore Mandal
 2. Ashok Mandal
 3. Sanjay Mandal, sons of late Congress Mandal, R/O Village-Goradih, PS-Sabour, Distt-Bhagalpur.

... Appellant/s

Versus

The State of Bihar

... Respondent/s

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Appearance :

For the Appellant/s : Mr. Shivesh Chandra Mishra, Adv.

For the Respondent/s : Abha Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 05-12-2017

Appellants, Kishor Mandal, Ashok Mandal, Sanjay Mandal have been found guilty for an offence punishable under Section 304 Part-II IPC and each one has been sentenced to undergo RI for eight years as well as to pay fine appertaining to Rs. 10,000/- in default thereof, to undergo RI for one month, additionally, vide judgment of conviction dated 19.11.2014 and order of sentence dated 22.11.2014 by the Additional Sessions Judge-3rd, Bhagalpur in Sessions Trial No. 1420/04.

2. PW-6, Nirmala Devi gave her Fard-e-beyan on 21.02.2003 at about 10.30 AM at an emergency ward of Jawahar Lal Nehru Medical College and Hospital, Bhagalpur near the dead body of her husband, Kunwar Mandal, alleging inter alia that about a year ago, her co-villager, Ashok Mandal had taken Rs. 5000/- from them



on the eve of marriage of his sister with an assurance that the aforesaid amount will be returned as soon as possible but, failed to stick to his commitment and that being so, her husband was repeatedly demanding the money but Ashok delayed the matter at one pretext or the other. On preceding day, i.e. on 20.02.2003 at about 10 AM while Ashok was present over the road in front of her house, her husband approached him and demanded the money as there was urgency, Ashok began to abuse and said that he had not borrowed any money from him, over which, an altercation took place. During midst thereof, Ashok called his other brothers who, came. Then Kishore Mandal, Ashok Mandal, Sanjay Mandal surround her husband near a ditch and began to give indiscriminate blows of lathi causing injuries over his head as well as other parts of body. Her husband shouted for help and then, became unconscious. She with the help of villagers lifted her husband and taken to hospital where during course of treatment died.

3. On the aforesaid Fard-e-beyan, Sabour PS Case No. 40/2003 was registered followed with investigation as well as submission of charge-sheet facilitating the trial which ultimately concluded in a manner, subject matter of instant appeal.

4. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is



that of complete denial. It has also been suggested that deceased had negotiated to sell his land with the appellants and had procured consideration money, only to digest the aforesaid amount, instant case has been filed by the informant. Furthermore, it has also been suggested that the deceased was an addict as well as drunkard as a result of which always remained in an inebriated condition on account thereof, he had fallen down and met with accidental death. In order to substantiate the same, three DWs have also been examined.

5. In order to substantiate its case, prosecution had examined altogether 11 PWs who are PW-1, Tarni Mandal, PW-2, Kishori Mandal, PW-3, Kanti Mandal, PW-4, Umesh Mandal, PW-5, Jaldhar Mandal, PW-6, Nirmala Devi, and PW-7, Santosh Kumar, PW-8, Saryu Mandal, PW-9, Ravindra Kr. Mandal, PW-10, Dr. Yogesh Prasad Sah and PW-11, Md Shakoora. Side by side, had also exhibited Ext-1, Signature of Santosh Kumar over Fard-e-beyan, Ext-2, Postmortem report, Ext-3, Fard-e-beyan, Ext-4, Formal FIR.

6. Side by side defence had also examined three DWs, namely, DW-1, Keshav Mandal, DW-2, Barasi Mandal and DW-3, Kharbuji Harijan.

7. It is the prosecution who has to prove its case beyond all reasonable doubt. If the burden is found duly discharged, then in that event, onus shifts upon accused to explain. It is yet to be seen by way



of proper analysis of evidence having on the record adduced on behalf of prosecution regarding culpability of the accused/appellants but in the background of DWs whereunder there happens to be admission over death of deceased and for that an explanation has been offered at their end that deceased was a drunkard and was intoxicated at the time of his falling resultant to his death and further, DW-3 had spoken that deceased had received Rs. 20,000/- as an earnest money in terms of negotiation having amongst them for sale of land and only to direct the aforesaid amount, instant case has been filed. Broadening the same, learned counsel for the appellant has submitted that from the evidence of doctor PW-10 it is crystal clear that the ante-mortem injury which was found over the dead body of the deceased could have been caused on fall from a height having head projected downward and that being so, cause of death is found duly explained which in the facts and circumstances of the case, could be an accidental. Therefore arraying the appellants to be guilty for an offence punishable under Section 304 Part-II of the IPC is not at all found maintainable.

8. Furthermore, it has been submitted that even considering the evidence on record, it is evident that prosecution had deflected from their initial version whereunder PW-6, the informant claimed herself to have gone to the place of accused/appellants at the instance



of her husband to demand the money and during course thereof, she was assaulted by the accused persons whereupon the deceased had gone in rescue and was assaulted. That means to say, the initial version of the prosecution that seeing Ashok on road in front of his house, the deceased had gone to demand money completely been given a goby. That being so, the manner of occurrence, the genesis of occurrence are found completely, charged and that happens to be the reason behind presence of inconsistency amongst the evidences of the material witnesses.

9. Furthermore, it has been submitted that if the evidence in its totality is taken into consideration, it is apparent that no case under Section 304(Part-II) of the IPC is made out because of the fact that neither there was absence of knowledge at the end of the appellants while, as per prosecution, assaulted the deceased which according to the prosecution itself, happens to be at the spur of moment without any pre-meditation. That being so, the appellants, if found guilty, should be under Section 323 IPC or 325 IPC and for that they sufficiently remained under custody.

10. Learned APP controverted the submission and submitted that it is wrong to say that there was no pre-meditation in the background of the fact that after demanding, all the accused conjointly assaulted. Presence of accused conjointly while assaulting



the deceased who was not at all armed with any weapon, nor he had occasion to protect himself speaks otherwise and that being so, the learned lower court rightly convicted and sentenced the appellant for an offence punishable under Section 304(Part-II) of the IPC.

11. In terms of Section 101 of the Evidence Act an obligation to substantiate its case lies upon the party who, if not proved, would fail and so, it happens to be obligation on the part of the prosecution to substantiate the case irrespective of the defence whatever been at the end of the accused persons until and unless the same has got some sort of repercussion or impact over prosecution version. As per evidence of PW-10, it is clear that the deceased died whereupon, he had conducted postmortem and found the following ante mortem injuries:-

1. One abrasion with bruise on left side of chest 1" x ½".
2. One abrasion with bruise on right side wrist joint 1" x ½".
3. The head was found bandaged. After removal of the bandage one lacerated injury 2" x 1" x bone deep was found on wall of skull. After cutting scalp tissue and opening the scalp, the underlying scalp tissue was found deeply bruised with extra-vassection blood and blood clots. There was fracture of both side temporal and parietal bone. There was sub-dural and extra-dural haematoma on both sides of cerebral hemisphere. Injury No.1, was found simple in nature while injury no.2 grievous and dangerous to life and were caused by hard and blunt substance. Cause of death on account of contusion and compression of brain. It was due to above mentioned ante-mortem injury. Time elapsed since death happens to be 12 to 24 hours from the conduction of postmortem examination. During cross-examination, he



had stated that if a person falls from a height facing head, this injury may be caused.

12. Now, it has to be seen whether occurrence took place as per version of the prosecution, or there happens to be probability of fall from height facing head, as suggested by the appellants. To ascertain the same ocular evidence is to be seen and for that, first of all the evidence of informant is taken up. She had deposed that the occurrence is of about 5 ½ years ago. It was Thursday. It was 10.30 AM. She had gone to demand Rs. 5,000/- from Kishore. He had not paid the amount. On the other hand, assaulted her. She was assaulted by Kishore, Sanjay and Ashok. Then thereafter, they caught hold of by her hair and threw her in a ditch. Her husband rushed in rescue whereupon Kishore, Sanjay and Ashok assaulted him with Lathi as a result of which he sustained injury over different parts of his body including head. Her husband fell down on the ground whereupon she along with her children and others lifted him and then took him to Mayaganj Hospital. He was admitted at 2.00 PM. and during course of treatment, at about 10.30 PM, he died. Police had recorded her statement in the hospital itself. Then had disclosed that the occurrence took place in the garlic field of Singham Mandal. Identified the accused. During cross-examination at para-4, she had admitted the accused persons to be her step Bhagina. Then had stated that her



husband had given Rs. 5,000/- to them at the time of marriage of their sister. No document was prepared therefor. She had further stated that Tarni Mandal (PW-1) happens to be her Bhainsur who had sold away his land in favour of accused persons about 2 months prior to the alleged occurrence. Then had disclosed that marriage of sister of accused persons was solemnized about a year ago from the alleged occurrence. Then had denied the suggestion that the accused persons had also negotiated with her husband as, her husband had shown inclination to sell his share in their favour as well as receipt of the earnest money. Then had denied suggestion that motive was assigned by them regarding handing over of Rs. 5,000/- and demand and assault on that very pretext happens to be imaginary. Then there happens to be contradiction relating to assault having over her person as well as over person of her husband and then lifting to Mayaganj Hospital with the assistance of her children. At para-5, he had stated that when she had gone to the place of accused to demand Rs. 5,000/- and at that very time, she was assaulted by the accused persons, 10-15 villagers assembled out of whom she had named only one, Bhukku Mandal who is not witness of this case. Then had stated that she returned back and disclosed the event to her husband. After an hour she again had gone there for demanding the money and at that very moment, she was assaulted and then was pushed in a ditch. Even at



that very time, 10-15 persons assembled and out of them she had named Kesho Mandal, Saryu Mandal, Tara Devi etc and they are not witnesses in this case. At that very time, she had sustained injury over her elbow as well as back of her head. She was not treated at the hospital. She had further stated that on account of Mar-peet she became unconscious. On an effort of her children, she regained sense. Then had said that half an hour thereafter, Mar-peet took place which continued for 10 minutes. During course thereof, about 50 persons had assembled including Jagdhar Pandit, Suresh Tanti, Shayam Tanti and Pujo Tanti but they are not witness in this case. At para-6, had given boundary of the place of occurrence, North-house of Singham Mandal, South-house of Purab Mandal, East- she is unable to say and West- Road. Then had said that persons having their houses in the boundary are not witness of the case. Then had said that blood oozed out from the injury of her husband and fell over the ground. I.O. had come to the place of occurrence. He had not seized blood stained earth. Then had denied the suggestion that it is not the fact that she falsely deposed that blood had fallen down on the ground. Then had disclosed that she had not handed over the blood stained clothe belonging to her husband. In para-7, she had stated that she had seen the house of accused persons on the date of occurrence. The same was not damaged. Then had denied the suggestion that she had stated



before the police that tiles over roof of the accused had been dismantled. Then had denied the suggestion that no such type of occurrence had taken place. Her husband was not murdered by the accused persons. He died at some other place and then in order to digest the money, in conspiracy with her Bhainsur got this case filed.

13. PW-1 is Tarni Mandal, Bhainsur of PW-6 and brother of the deceased. He had deposed that on the alleged date and time of occurrence, after hearing uproar, he came out from his house whereupon seen Ashok, Sanjay and Kishore assaulting Kuber with Lathi in the garlic field of Singham Mandal. When he rushed in rescue, he was also challenged by them as a result of which, he withdrew himself. When villagers assembled, then the accused persons escaped therefrom. His brother Kuber had sustained injury over his head, as well as other parts of the body including stomach, waist and leg. His brother became unconscious. They had lifted Kuber to the police station, wherefrom he was referred to the Mayaganj hospital immediately where, during course of treatment he died. The motive of aforesaid occurrence has been shown as accused persons borrowed Rs. 5,000/- from the deceased but they were not inclined to return back the same. Even on the date of occurrence, there was an altercation in between with regard thereto and during course thereof, the deceased was assaulted by them. It has further been deposed that



when his Bhabhu (PW-6) had gone in rescue, Kishor caught hold of her hair and then pushed her in a ditch. He had further stated that inquest was prepared in his presence. Dead body was sent to mortuary for postmortem. During course of cross-examination at para-7, he had stated that place of occurrence lies at northern western corner from his house at a distance of 20 steps. He came out from his house after hearing sound, '*Maar raha hai, maar raha hai*'. He had seen the occurrence at a distance of 20 steps as the accused persons had threatened to assault him. In para-8, he had stated that they had gone to PS firstly, but as the condition of Kuber deteriorated on account thereof, they were directed to move to the hospital first. Police had taken his statement at his house. He had also stated that his statement was also taken at Mayaganj Hospital. He had also stated that he had not seen altercation having taken place in between the deceased as well as the accused persons. In para-9, he had admitted that he had sold some land to Sanjay Mandal. In para-10, he had stated that 10-12 persons were present at the place of occurrence out of whom he named Saryu Pandit, Kishori Mandal, Ravi Mandal, Sumesh Mandal, Santosh Pandit etc. Ramdhari Mandal, Satendra Mandal, Shyam Mandal, Kesho Mandal, Eknath Paswan were also present. Then had shown the boundary of place of occurrence. North-houses of Puran Pandit, Shyam Sundar Mandal and Prasadi Mandal, South- houses of



Ramdhari Mandal, Etwari and Kesho Mandal, East-Houses of Sikandar Mandal, Abhimanyu Pandit, Ghanshyam Mandal and Sharat Pandit, West-houses of Singham Mandal and Shyam Mandal. Dinesh is son of Singha Mandal. None of the persons of the boundary is witness in this case. When he reached at the place of occurrence, he saw assault having over person of his brother. Mar-peet continued only for 5 minutes. During midst thereof, how many persons came, he is not remembering, nor he is able to disclose their names. After occurrence, accused persons fled away. At para-12, he had stated that Investigating Officer had come to the place of occurrence one day after the occurrence. He had gone along with Darogajee. Darogajee had written something. He had not disclosed regarding shop of Saryu Mandal. Then had said that he is not remembering whether shop of Saryu Mandal was opened or not. Investigating Officer had not seized anything from the place of occurrence though blood was there. He is not knowing whether Darogajee had gone to the shop of Saryu Mandal or not. Then had stated that place of occurrence happens to be garlic field of Singham Mandal. Then at para-13, he had stated that first of all, wife of Kuber was assaulted and then Kuber was assaulted. In para-14 he had stated that garlic plant in an area of 2 Dhurs was trampled. Accused had taken Rs. 5,000/- at the time of marriage of their sister but he is unable to say the exact date. No document was



prepared therefor. He had sold out 10 Dhurs of land to accused persons, about two months prior to the occurrence. There he had handed over possession to the accused persons over the land. Then had denied the suggestion that no such type of occurrence had taken place rather being a brother of the deceased, has falsely deposed.

14. PW-2 is Kishori Mandal, who had deposed that on the alleged date and time of occurrence while he was going to meet nature's call and reached near shop of Saryu Mandal, heard uproar coming from western side whereupon he proceeded. When he reached to the west of the road, he saw, Ashok, Sanjay and Kishore were assaulting Kuber with Lathi. He tried to prevent as well as forbidden the accused persons but the accused persons did not pay heed to it rather they threw brick particles over him as a result of which he sustained injury over his finger. He accordingly, ran therefrom. Then had said that Kuber had sustained injury over his head and other parts of body whereupon, he fell down. Kuber was taken to hospital and during course of treatment, he died. During cross-examination, at para-4, he had stated that he was not treated. He had admitted that during course of statement before the police he had not stated that he was going to meet nature's call, but he had stated that all the three accused were assaulting Kuber with Lathi. He also stated that he tried to prevent the Mar-peet and for that, forbidden them. He had stated



that when he reached at the place of occurrence 10-20 persons were present. As he flew therefrom after sustaining injury, he is unable to say with regard to subsequent event.

15. PW-3, had stated that on the alleged date and time of occurrence he was at Goradhi Chowk. On seeing that people were running towards house of Singham Mandal, he also rushed and saw Ashok, Sanjay and Kishore assaulting Kuber with Lathi who fell down in the garlic field on Singham Mandal due to assault. There was injury over his head. Then thereafter, he rushed back to the chowk, procured a jeep whereupon victim was taken to the hospital along with informant, Tarni Mandal and other family members. Then had disclosed the motive. During course of cross-examination at para-4 he had stated that how the dispute had originated, he is unable to say. In para-5, he had stated that when he reached at the place of occurrence, so many persons were present out of whom, he named Kesho Mandal, Kishori Mandal, Sumesh Mandal, Saryug Mandal, Sikandar Mandal, Baldeo Mandal, Patdhar Yadav, Bindeshwari Yadav, Kammo Yadav and Shambhu Choukidar. In para-6, he had stated that he stayed at the place of occurrence about 15-20 minutes. During midst thereof, how many persons came he is unable to say. Police had come to inspect the place of occurrence. He had made statement before the police. Police had found copious blood over the place of occurrence. Police had



seized blood stained earth. He had not put signature over any of the document. He is unable to say whether any document was prepared or not. Then there happens to be contradiction. In para-7, he had stated that he had not seen any document regarding borrowing of Rs. 5,000/- . He had further stated that he is unable to say whether any Panchayati was convened for the same or not. He had further stated that after death of the deceased he had seen the dead body.

16. PW-4 is Umesh Mandal who had deposed that on the alleged date and time of occurrence he was at his house. He rushed therefrom after hearing sound of uproar and reached at the road in front of house of Ashok where he saw mob. Then saw Ashok, Sanjay and Kishore assaulting wife of Kuber. Then thereafter, he intervened and rescued the wife of Kuber. Subsequently thereof, all the three accused persons began to assault wife of Kuber as well as Kuber with lathi and during course thereof, Kuber became unconscious after sustaining injury whereupon he was lifted to hospital where during course of treatment died. In para-3, he had shown boundary of the place of occurrence as North- house of Ramdhani and again corrected as barren land then the house of Ramdhani, East- Road, West-house of Singham Mandal. Then thereafter, he again clarified after barren land there happens to be houses of so many persons. Then had detailed about houses of different persons. Then had said that



Investigating Officer had not visited the place of occurrence in his presence. Then he stated that his house lies ½ K.M away in eastern northern direction. Then had said that there happens to be no house in between place of occurrence as well as his house. Again corrected it and disclosed names of so many persons whose house lies in between. In para-4, he had stated that he heard sound of uproar and he reached within two minutes. When he reached at the place of occurrence there was assembly of 100-200 persons. Then had claimed that he is able to name only ten out of them. He stayed at the place of occurrence only for 10 minutes. In para-5, he had stated that both the parties are inter related. Then had shown ignorance with regard to sale of land by Tarni in favour of accused. He had also shown his ignorance whether any talk of negotiation was in between the deceased and Sanjay with regard to sale of a land and for that, deceased had received the consideration amount. In para-6, he had stated that he had not seen injury over the person of the wife of Kuber. He had seen injury over the person of deceased. Then he denied the suggestion that he had not seen any occurrence. He had also denied the suggestion that prosecution party in order to digest the money got the accused persons involved in this case.

17. PW-5 had deposed that on the alleged date and time of occurrence, he was present at the shop of Saryu Mandal and during



course thereof, he had seen Ashok, Sanjay and Kishore assaulting the wife of Kuber. Kuber rushed to rescue his wife whereupon, Ashok, Sanjay and Kishore began to assault him with Lathi. He sustained injury at so many places including over his head. Mar-peat took place in the garlic field of Singham Mandal, on account thereof, his garlic crop was destroyed. Kuber was taken to hospital where during course of treatment, died. Then had disclosed motive for the occurrence which happens to be over the demand of Rs. 5,000/- which the accused persons had borrowed from the deceased at the time of marriage of his sister which, the prosecution party was insisting to return. During course of cross-examination at para-3, he had stated that he is unable to say the date and time of marriage sister of Ashok. In likewise manner, he had stated that money was not paid in his presence. He had no seen any document with regard thereto. At para-2, he has stated that he came to know a few days prior to the occurrence that Tarni Mandal had sold ½ Kattha of land in favour of accused, Sanjay Mandal. Then had denied the suggestion that deceased, Kuber had also negotiated and had received consideration amount. In para-3, he had stated that police had not come in his presence. His statement was recorded at the hospital itself. Then had denied the suggestion that he shown ignorance whether funeral had taken place at Barari Ghat as he was not present. In para-4, there



happens to be contradiction. In para-5, he had stated that when he reached at the shop of Saryu Mandal after hearing the sound of uproar, he went towards that direction and then had seen the occurrence. Then had stated that Saryu Mandal as well as he himself had seen the occurrence from the shop itself as the place of occurrence happens to be contiguous to the same. Then had said that he had gone to the place of occurrence and soon thereafter, returned back. Then had said that when he reached at the place of occurrence at that very time, accused persons were assaulting Kuber. He had given the boundary of the place of occurrence. Then had said that 25-30 persons were present at the place of occurrence but he is unable to name all of them. He had not talked with them. As a result of assault made by the accused persons, Kuber became unconscious. Then had denied the suggestion that in order to misappropriate the amount which the accused persons had given to Kuber in lieu of consideration amount, this false case has been filed.

18. PW-7 is Santosh Kumar who had also deposed that he had gone to the shop of Saryu Mandal where had seen Ashok, Sanjay and Kishore assaulting Kuber with Lathi. During course thereof, Kuber fell down and became unconscious. He along with other persons raised alarm whereupon other assembled. Then thereafter, Kuber was taken to police station and then to hospital where during



course of treatment he died. He had put his signature over inquest report. Informant had recorded her Fard-e-beyan in his presence over which he had also put his signature. During cross-examination at para-5 he had stated that deceased Kuber was his brother-in-law. His house and house of Kuber is intervened by 30-35 houses. When he reached at the shop of Saryu Mandal, none was present there. None had come to the shop of Saryu Mandal till his presence at his shop. Mar-peat took place 2-3 hands away from the shop. When he reached there, he had seen Kuber lying over ground. People were lifting him. Then thereafter 50-60 persons assembled. Some of them were named. In para-6, there happens to be contradiction. At para-7 he had stated that Fard-e-beyan of Nirmala Devi was recorded in his presence on 21.02.2003. Inquest was prepared on the same date. Then had stated at para-8 that he had got no document to support his presence at the place of occurrence. Then had denied the suggestion that he was not an eyewitness to the occurrence.

19. PW-8 is Saryu Mandal. He, during course of his examination-in-chief had stated that first of all grappling was amongst Ashok, Sanjay, Kishore and Kuber. At the time, he was at his shop. Then thereafter, the matter was pacified. After some time, wife of Kuber was pushed in a ditch. One child was in her lap. People rescued her. After five minutes, again there was an uproar to the effect that



Mar-peat took place. When he came to the place of occurrence, he found Kuber lying in the garlic field. He had seen injury over his head, different part of his body. Blood was oozing out. He was unconscious. Villagers as well as his family members took him to hospital and during course of treatment, he died. He had seen Ashok, Sanjay and Kishore fleeing therefrom with lathi. During cross-examination at para-3, he had stated that he is not related with Kuber. In para-5 he had stated that he is not remembering how many customers were present at the time of occurrence. In para-6, he had stated that there was uproar for 2-4 minutes. He had not gone there. He had seen the occurrence from his shop. At that very time, he had seen 8-10 persons who remained till last. They were co-villagers. In para-7, he had stated that police had come to the place of occurrence in his presence. He is unable to say the area whereunder blood had spread over but blood was there. Blood was seized by the police and for that paper was prepared. He is not remembering whether he had put signature or not. He is not remembering who has put signature over the same. Then at para-14 he had stated that he had not seen dead body of Kuber. He denied suggestion that being friend of Kuber he had deposited falsely.

20. PW-9 is Ravindra Kumar Mandal who had deposited that on the alleged date and time of occurrence while he was at his



house, he had seen Kuber, Ashok, Sanjay and one more (name not remembering) were engaged in altercation with regard to money. During midst thereof, wife of Kuber Mandal came who was thrashed by Kishore in a ditch whereupon he rushed and rescued, Nirmala Devi as a result of which his cloth drenched with water. He had gone to handpipe to clean his cloth meanwhile. After 2-3 minutes, again there was uproar that Kuber has been assaulted. All the three had assaulted Kuber. Then thereafter, villagers had taken Kuber to hospital where he died during course of treatment. During cross-examination at para-3 said that police had not recorded his statement. In para-4 he said that his shop lies 100-150 Feet away from the place of occurrence. In para-6, he had stated that no customer was present at that very time at his shop. In para-7, he had stated that when he returned after cleaning his clothe at that very time, Kuber was unconscious. More than 100 people were assembled but he is not able to disclose the names all of them. He had not seen any injury over the person of wife of Kuber. In para-9 he had stated that police had taken blood stained earth from the place of occurrence. Then at para-11 had stated that accused persons are Bhagina of deceased, Kuber. Then had denied the suggestion that he had not personal information with regard to occurrence.

21. PW-11 has been examined as a formal witness as Investigating Officer has not been examined During course thereof,



exhibited relevant document.

22. Defence had examine three DWs, namely, DW-1, Keshav Mandal, DW-2, Barasi Mandal and DW-3, Kharbuji Harijan. DWs-1 to 3 have asserted that the deceased was a drunkard as well as drug addict and so, he died of falling over the ground. The aforesaid ground belonged to Singham Mandal. Then thereafter, he was taken to hospital and died. DW-3 had further stated that deceased had taken Rs. 20,000/- as a consideration amount from the accused on account of finalization to sale of a land and in order to digest the money this case has been falsely filed.

23. From the evidence available on record, it is evident that death is not denied. As per cross-examination, from suggestion of the doctor, it is evident that such kind of injury was possible in case the deceased would have fallen from a height having head at the lower level over hard surface. None of the witnesses were cross-examined at that very score. Surprisingly, defence by way of examining DW-1 and 3 had tried to explain that on account of falling of deceased in the field of Singham, he sustained such injury but failed to explain that surface was hard which could not be, as garlic was planted upon. Because of the fact that place of occurrence being garlic field of Singham is out of controversy, on account thereof, non examination of Investigating Officer, the defence is not all found to be prejudiced



on that score. Furthermore, as the contradiction, over which attention of the respective witnesses have been drawn, did not get to the root of the prosecution case more particularly, relating to assault over deceased, that being so, will not cause any dent in the prosecution case.

24. Now coming to the evidence on record it is evident that there happens to be some sort of exaggeration in the evidence of PW-6, informant and that relates to an incident taken place prior to the incident whereunder deceased was assaulted, on the same day when she had gone to the place of accused in order to demand Rs. 5000/- which they were carrying. More or less that happens to be evidence of her Bhainsur. Other witnesses, as it appears from totality of their respective evidences, they corroborated/substantiated the assault as well as lifting of deceased to the hospital where he died during treatment. The accused persons happens to be step Bhagina of the deceased and that part is not challenged. Furthermore, so far motive is concerned, the prosecution party had shown as borrowing of Rs. 5000/- by the accused persons at the time of marriage of their sister while at the end of the defence, it has been suggested that they had advanced Rs. 20,000/- in view of finalization of negotiation and as deceased died on account thereof, to digest the money the instant case has been filed but no specific plea that means to say, Khata number,



Khesra number or boundary of the plot has been shown at the end of the accused/appellants to suggest that for the aforesaid land negotiation was finalized.

25. Be that as it may, it happens to be pious duty of the Court to search out truth from the falsehood like separating the grain from chaff as has commonly been perceived that during course of evidence, witnesses out of over enthusiasm depose exaggerating their version. As held hereinabove, some sort of exaggeration has been found amongst the evidence of some of the PWs. At the present juncture, status of PW-5, PW-7 cannot be overlooked as PW-5, PW-7 have stated that they were at the shop of PW-8 which PW-8 had not corroborated, but manner whereunder they were cross-examined relating to main occurrence, suggest otherwise and the same happens to be supportive from PW-5, Para-4, 5, PW-8, Para-6. So far PW-7 is concerned, his status as an eyewitness became doubtful, though having his presence over Fard-e-beyan, as well as inquest report. Furthermore, from the evidence of PW-9, it is apparent that his status appears to be doubtful as in para-3 had stated that he had not made statement before the police. However, he had not claimed as an eye witness of occurrence. But so far status of PW-6, PW-4, PW-3, PW-2 and PW-1 are concerned, they are consistent over assault over Kuber by the appellants by means of Lathi in the field of Singham, and to



that extent is found admitted at the end of appellants themselves. Furthermore, non examination of Investigating Officer is not at all found adverse in the interest of appellants as there happens to be no exaggeration on that very score.

Now, only question remains with regard to applicability of Section 304(II) of the Cr.P.C.

26. The Hon'ble Apex Court in *State of Andhra Pradesh vs. Rayavarapu Punnayya & Anr.* reported in *AIR 1977 SC 45* has held as follows:

13. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minutae abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the key words used in the various clauses of [ss. 299](#) and [300](#). The following comparative table will be helpful in appreciating the points of distinction between the two offences.

(See table on facing page)

14. Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the 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 normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of clause (2). Only the intention of *causing* the *bodily injury* coupled with the offender's *knowledge* of the



likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by Illustration (b) appended to Section 300.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done —	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done —
INTENTION	
(a) With the intention of causing death; or	(1) With the intention of causing death; or
(b) With the intention of causing such bodily injury as is likely to cause death; or	(2) 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
(3) 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	
KNOWLEDGE	
(c) With the knowledge that the act is likely to cause death.	(4) With the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

15. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such 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.

16. In clause (3) of Section 300, instead of the words “likely to cause death” occurring in the corresponding clause (b) of Section 299, the words “sufficient in the ordinary course of nature” have been used. Obviously, the distinction lies between a bodily injury *likely* to cause death and a bodily injury *sufficient in the ordinary course* of nature to cause death. The distinction is fine but real, and, if overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word “likely” in clause (b) of Section 299 conveys the sense of “probable” as distinguished from a mere possibility. The words “bodily injury ... sufficient in the ordinary course of nature to cause death” mean that death will be the “most probable” result of the injury, having regard to the ordinary course of nature.

17. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. *Rajwant v. State of Kerala AIR 1966 SC 1874* is an apt illustration of this point.

18. In *Virsa Singh v. State of Punjab AIR 1958 SC 465* Vivian Bose, J. speaking for this Court, explained the meaning and scope of clause (3), thus (at p. 1500): “The prosecution must prove the following facts before it can bring a case under Section 300, „thirdly“. 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. It must be proved that there was an intention to inflict that particular 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 was 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.”

19. Thus according to the rule laid down in *Virsa Singh case* of even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be “murder”. Illustration (c) appended to Section 300 clearly brings out this point.

20. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general — as distinguished from a particular person or persons — 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, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is “murder” or “culpable homicide not amounting to murder”, on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to “culpable homicide” as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of “murder” contained in Section 300. If the answer to this



question is in the negative the offence would be “culpable homicide not amounting to murder”, punishable under the *first* or the *second* part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be “culpable homicide not amounting to murder”, punishable under the first part of Section 304, of the Penal Code.”

27. In *Jagriti Devi v. State of H.P.* reported in *AIR*

2009 SC 2869, it has been held

18. [Section 299](#) and [Section 300](#) IPC deals with the definition of culpable homicide and murder respectively. [Section 299](#) defines culpable homicide as the act of causing death; (i) with the intention of causing death or (ii) with the intention of causing such bodily injury as is likely to cause death or (iii) with the knowledge that such act is likely to cause death. The bare reading of the section makes it crystal clear that the first and the second clause of the section refer to intention apart from the knowledge and the third clause refers to knowledge alone and not intention. Both the expression "intent" and "knowledge" postulate the existence of a positive mental attitude which is of different degrees. The mental element in culpable homicide i.e. mental attitude towards the consequences of conduct is one of intention and knowledge. If that is caused in any of the aforesaid three circumstances, the offence of culpable homicide is said to have been committed. [Section 300](#) IPC, however, deals with murder although there is no clear definition of murder provided in [Section 300](#) IPC. It has been repeatedly held by this Court that culpable homicide is the genus and murder is species and that all murders are culpable homicide but not vice versa. [Section 300](#) IPC further provides for the exceptions which will constitute culpable homicide not amounting to murder and punishable under [Section 304](#). When and if there is intent and knowledge then the same would be a case of Section 304 Part I and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304 Part II. The aforesaid distinction between an act amounting to murder and an act not amounting to murder has been brought out in the



numerous decisions of this Court.

28. From the evidence discussed hereinabove, it is apparent that appellants continued blowing Lathis indiscriminately, as a result of which apart from other parts of body, head was also affected. It has not been cleared from PW-10, doctor that the injury was of single blow or more than that and that being so, defence could not take advantage. So the repeated blow, smashing the delicate part of the body would expose the intention to cause such kind of injury which they knew to cause death of accused.

29. That being so, the conviction and sentence recorded by the learned lower court is found in accordance with law whereupon the instant appeal sans merit and is accordingly, dismissed.

30. Appellants are on bail. Hence, their bail bonds are cancelled directing them to surrender before the learned lower court to serve out remaining part of sentence, failing which the learned lower court will proceed against the appellants in accordance with law.

(Aditya Kumar Trivedi, J)

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