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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Judgment: 25th August, 2017

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CRL.A. 779/2000

DIWAN SINGH & ORS.

..... Appellants

Through: Mr. K. B. Andley, Sr. Advocate with
M.L. Yadav, Mr. Anurag Andley
and Mr. Kshitij Arora, Advocates.

versus

STATE OF DELHI

..... Respondent

Through: Ms. Radhika Kolluru, APP for the
State

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J. (ORAL)

1. This is an appeal under Section 374(2) of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') against the judgment dated 20.11.2000 by which the appellants have been held guilty for the offence under Sections 302/307/323/34 of the Indian Penal Code (hereinafter referred to as 'IPC'). Challenge is also made to the order on sentence dated 21.11.2000 by which the appellants have been sentenced to imprisonment for life and a fine of Rs. 2,000/- each for the offence under Section 302 read with Section 34 of IPC, in default of payment of fine, simple imprisonment for a period of one year each. The appellants have been further sentenced to rigorous imprisonment for a period of 5 years and a fine of Rs.500/- each for

the offence under Section 307 read with Section 34 of IPC, in default of payment of fine, simple imprisonment for a period of one month each. As per the order on sentence, all the appellants have been further sentenced to rigorous imprisonment for a period of six months each for the offence under Section 323 read with Section 34 of IPC. All the sentences were ordered to run concurrently.

2. At the outset, we may note that the appellant No.1 Diwan Singh, co-accused in the present case, has expired during the pendency of the appeal and the same has been verified by the learned counsel for the State as reflected in the order dated 24.08.2017 passed by this Court.
3. The brief facts of the case are that 5-7 days prior to the incident, there was a quarrel between the appellants and the complainant regarding over-flow of drain water and the consequential collection of water in the house of the deceased Hukum Chand. As per the version of Inder Pal (PW1), on 27.10.1997 at about 10.00 or 10.15 PM, PW1 alongwith his father Hukum Chand were coming from their *gher* and going towards their home. On reaching near the house of the appellants, PW1 was caught hold of by the appellant Om Parkash and the appellant Dharmender attacked him with a *pharsa* which he tried to ward off as a result of which PW1 sustained injuries on his right hand as well as on the left arm. The father of PW1 also tried to help him in setting free from the appellants. Thereafter, the appellants Om Parkash and Diwan Singh caught hold of the father of PW1. The appellant Mange Ram instigated the appellant Dharmender to kill father of PW1 as a result of which the appellant Dharmender gave a *pharsa* blow on the head of his father. As a result of *pharsa* blow, his father fell down. Thereafter, the appellants Om Parkash and Mange

Ram started giving *lathis* to his father. The mother of PW1 intervened and fell on the deceased to save him and received *lathi* blows as well. The incident was also witnessed by Jai Bhagwan (PW4). PW1 alongwith his mother (PW3), Rajpal (PW2) and Jai Bhagwan cried and tried to save his father. Thereafter, all the four appellants fled away from the spot alongwith *pharsa* and *lathis*. PW1 along with Rajpal (PW2) took his father to Santom Hospital, Pitampura, Rohini. The criminal machinery was set into motion vide DD No. 17A which was recorded on 27.10.1997 at 11.10 PM, at Police Station Ali Pur regarding quarrel at the house of the appellant Mange Ram. The said DD was proved by PW13 as Ex.PW13/A. The copy was given to ASI Dharam Pal who went to the spot along with Const. Suresh. It was claimed by the defence that the first information was passed by DW1 which led to the registration of DD No. 17A.

4. It is the case of the prosecution that all the appellants in furtherance of their common intention attacked Inder Pal (PW1) and the deceased Hukum Chand and inflicted injuries on them with *pharsa* and *lathis*. As a result of beatings, Hukum Chand lost his life and Inder Pal and Om Wati sustained injuries during the scuffle. Charge under Section 302 read with Section 34, Section 307 read with Section 34 and Section 323 read with Section 34 of IPC was framed against all the appellants to which they pleaded not guilty and claimed to be tried.
5. To bring home the guilt of the appellants, the prosecution examined 24 witnesses in all. The statement of the appellants were recorded under Section 313 of Cr.P.C. whereby they made similar statement and stated that on 27.10.1997 at about 10.00 PM, the complainants including Krishan who was armed with *pharsa*, however, Inder Pal,

Rajpal, Jag Pal, Tej Pal, Hukum Chand (the deceased) and Umed Singh were armed with *lathis*. Om Wati (PW3) forcibly entered their house and instigated all the aforesaid persons to teach them a lesson and also instigated to kill them. At the instigation of Om Wati, all the above mentioned persons started giving them *lathis* blows. The appellants Mange Ram and Om Parkash sustained multiple injuries. Blood started oozing out from their heads and clothes of both the appellants got smeared with blood. Krishan wanted to give a *pharsa* blow on Dharmender. In the meantime, the deceased came in between and due to darkness, it fell on the head of the deceased. Meenakshi alias Rani (DW1) rushed to the house of her neighbour and gave a call to PCR. After the complainants came to know that Meenakshi had informed the police, the assailants along with the deceased ran away from their house and while leaving they threatened them that they would kill them. The Police reached their home and the place of incident was photographed. The appellants also stated that in the scuffle, they had received injuries which was evident from their MLCs and were proved as Ex. PW10/D, Ex. PW10/A, Ex. PW9/B, Ex. PW9/C. All the appellants pleaded innocence and claimed to be falsely implicated in the instant case. One witness was examined by the appellants in their defence.

6. Learned counsels appearing on behalf of the appellants have jointly submitted that the judgment of the Trial Court is based on surmises and conjectures and not based on cogent, clear or impeachable evidence. Counsels contend that the Trial Court had erred in not taking into consideration that the prosecution has not been able to

prove its case beyond reasonable doubt. The order is contrary to the law and has resulted in gross miscarriage of justice.

7. Learned counsels have highlighted the fact that the deceased alongwith the complainant had approached the house of the appellants and a scuffle took place between them, which is apparent from the fact that blood was found inside and outside the house of the appellant Mange Ram and is corroborated from the testimony of PW23 ASI Dharma Pal. Attention of this Court has been drawn to the fact that the first call to the PCR was made by none else, but by the wife of the appellant Dharmender, which would show that initially a quarrel had taken place between the parties that turned ugly and resulted in the death of Hukam Chand and during the quarrel, PW1 also sustained injuries. While relying on the MLCs of the appellants, learned counsels submit that the injuries were sustained by the appellants as well, which would show that it was free for all situation.
8. Counsels for the appellants submit that the injured eye witnesses had ascribed the specific role of catching hold of the deceased against the appellants Om Prakash and Diwan Singh. It was highlighted by the counsels that the role ascribed to the appellant Mange Ram was that he instigated appellant Dharmender to kill the deceased and as a result of his instigation, the appellant Dharmender gave *pharsa* blow to the head of the deceased however, as per the testimony of PW1, the initial attack was made on him and later when his father intervened, he was attacked by all the appellants. Thus, there is no clarity as to whether the appellant Mange Ram had exhorted to kill the deceased or not. In this backdrop, the evidence of PW1 and PW3 is not truthful and reliable.

9. Additionally, learned counsels submit that they have instructions not to press the appeal on merits as far as the judgment of conviction is concerned, except that no case under Section 302 of IPC is made out as no lethal weapon was used. *Pharsa* is an agricultural instrument found in the house of every farmer. The appellants did not act in any unusual and cruel manner and there was no pre-meditation. Moreover, there was no meeting of minds between the appellants Dharmender, Mange Ram, Diwan Singh and Om Prakash. Learned counsels for the appellants submit that the appellants and the complainant were residing in the same village and their houses were adjacent to each other. They further submit that, even as per the case of the prosecution, the bone of contention was over-flowing of water drainage pipe and the consequential collection of water near the house of the deceased. Lastly, learned counsels for the appellants submit that since the appellant No.1 had expired and the appellant No.2, Mange Ram is about 90 years of age. He further submits that all the appellants are residing peacefully in the same house in the same neighbourhood and there is no untoward incident since 1997. Learned counsels submit that both the appellants Mange Ram and Om Prakash have served a sentence of more than five years each, while the appellant Dharmender has served a sentence of more than six years, including remission earned by him.
10. Reliance has been placed on the decision rendered by a co-ordinate Bench of this Court, of which one of us (G.S. Sistani, J.) was a member in the case of *Ajay Bind v. State NCT of Delhi* reported at **2017 SCC Online Del 9033**, wherein the circumstances of the case were almost identical. The injury was given on the head of the

deceased and was caused by a blunt object. After considering all the facts and circumstances, this Court modified the conviction from Section 302 to one under Section 304 Part II of IPC. All the appellants were sentenced to imprisonment for a period of five years.

11. *Per contra*, Ms. Radhika Kolluru, learned counsel for the State submits that there is no infirmity in the judgment passed by the Trial Court. The Trial Court has carefully analysed the testimonies of various witnesses and reached the conclusion of the guilt. Ms. Kolluru submits that the testimonies of the injured witnesses are consistent in the manner how the deceased had sustained fatal blow from the *pharsa* and *lathis* which were given by the appellants in furtherance of their common intention to kill the deceased.
12. Ms. Kolluru further submits that a careful reading of the evidence on record of PWs 1 and 3 would establish the presence of the appellants at the place of the incident and sudden attack which was made by the appellants. She also submits that it is not in dispute that PWs 1 and 3 are not eye witnesses to the incident. Ms. Kolluru further submits that the case of the prosecution stands fully established not only on the basis of the evidence of the injured witnesses but also stands established on the basis of the medical evidence.
13. We have heard learned counsels for the parties and considered their rival submissions and also given our thoughtful consideration to the matter. Before the submissions of learned counsels for the parties are considered, we deem it appropriate to discuss the testimonies of the injured witnesses who were examined as PW1 Inder Pal and PW3 Om Wati being the son and wife of the deceased respectively.

14. PW1 Inder Pal (son of the deceased) testified in his examination-in-chief that he knew all the appellants who were present in Court, as they were residing in his neighbourhood in the same village. 5/7 days prior to the incident, a dispute had taken place between him and the appellants over the flow of water of the drain. The appellants Om Parkash and Dharmender had put a brick in the drain as a result of which water started accumulating in front of their house. When PW1 asked the appellants to remove the brick, the appellants started fighting with them. On 27.10.1997 at about 10.00 or 10.15 PM, PW1 and his father Hukam Chand were coming from their *gher* and going towards their home. Jai Bhagwan (PW4) also accompanied them. When PW1 reached in front of the house of the appellants, he was caught hold of by the appellant Om Parkash and the appellant Dharmender attacked him with a *pharsa* which he tried to ward off with his right hand as a result of which PW1 sustained injury on his right hand near thumb and the index finger. The second blow fell on the left arm of PW1 near his shoulder. Somehow, PW1 managed to escape the blows. The father of PW1 also tried to help him in setting him free from the appellants, as his father was behind him. The appellants Om Parkash and Diwan Singh caught hold of his father. The appellant Mange Ram instigated the appellant Dharmender to kill his father. On instigation, the appellant Dharmender hit *pharsa* on the head of his father. As a result of the blow, his father fell down. When his father had fallen, the appellants Om Parkash and Mange Ram started hitting him with *lathis*. The mother of PW1 fell upon his father to save him as a result of which she also received *lathi* blows. PW1 alongwith his mother, Rajpal (PW2) and Jai Bhagwan (PW4) cried

and tried to save his father. The ladies who belonged to the house of the appellants started throwing bricks on them which resulted in injuries to the appellants. Thereafter, all the four appellants fled away from the spot alongwith *pharsa* and *lathis*. PW1 along with Rajpal (PW2) took his father to Santom Hospital, Pitampura, Rohini. After sometime, his father died in the hospital. Police reached hospital and recorded his statement which was proved as Ex.PW1/A. PW1 accompanied police to the spot. The photographs of the spot were taken and the site plan was prepared at his instance which was proved by him as Ex.PW1/B. Blood was lifted from the spot. All the appellants were arrested and interrogated. The disclosure statements were made by the appellants. The appellant Dharmender got recovered *pharsa* under the cot at the *gher*. The appellant Om Parkash got recovered two *lathis* which were lying under the cot at the house of Om Parkash. The said *pharsa* (Ex.P.1) and *lathis* (Ex.P.2 and P.3) were identified by PW1 in Trial Court which were used in the incident and were got recovered at the instance of the appellants.

15. In his cross-examination, PW1 stated that he had mentioned in his statement to the police that at about 10.00/10.15 PM, he was coming from his *gher* and was going towards his house alongwith his father. PW1 further stated that Jai Bhagwan (PW4) was also with them. It was stated by PW1 that his father was behind him and tried to help him in setting him free from the appellants. PW1 alongwith his mother (PW3), Rajpal (PW2) and Jai Bhagwan (PW4) tried to save his father. The father of PW1 fell down and was bleeding. The appellants Om Parkash and Mange started giving *lathi* blows to his father. It was further stated by PW1 that the appellants fled away with *lathis* and

pharsa from the spot. PW1 was confronted with his statement (Ex.PW1/A) wherein all the afore-mentioned facts were not so recorded. PW1 denied the suggestion that the appellants Om Parkash and Mange Ram did not hit his father with *lathis* and when his mother tried to save his father, only then they gave *lathi* blows. PW3 further denied that no stones were thrown by the ladies of the house of the appellants. PW1 also stated that he did not tell to the police that he was alone when at about 10.00 PM, he was coming towards his home from *gher* and the appellant Om Parkash had caught hold of him from behind and the appellant Dharmender gave him a *pharsa* blow. The said fact was confronted with his statement (Ex.PW1/A) wherein it was so recorded. PW1 denied the suggestion that Rajpal (PW2) and his father were not with him at the time of the attack.

16. PW3 Om Wati (wife of the deceased) testified in her examination-in-chief that she knew all the appellants and identified them in Court, as they were residing in her neighbourhood. About 6/7 days prior to the date of incident i.e. 27.10.1997, a quarrel had erupted with the appellants over the water of the drain which was flowing towards the house of the appellants. The appellants Dharmender and Om Parkash kept bricks inside the drain to stop the flow of the water as a result of which the water started accumulating outside their house. When PW3 asked the appellants not to do the same, the appellants Om Parkash and Dharmender started fighting with them. The appellants were fighting continuously with them. A false allegation was made regarding her son Inder Pal that he was peeping through the window into the bed room of the appellant Dharmender and his wife. Thereafter, the appellants warned Inderpal that they would take

revenge for the misdeed. On 27.10.1997 at about 10.00 PM, PW3 was present inside her house and heard screams from outside her house and came out. PW3 saw the appellants Om Prakash and Diwan Singh holding her husband. Rajpal (PW2) and Jai Bhagwan (PW4) were raising noise and asked the appellants not to fight. The appellant Dharmender was having a *pharsa* in his hand, while the appellants Om Prakash and Mange were having *lathis* in their hands. The appellant Mange Ram exhorted that the deceased should be finished on that day. Thereafter, the appellant Dharmender gave a *pharsa* blow on the head of her husband as a result of which he fell down on the ground. In order to save her husband, she fell upon him. The appellants Mange Ram and Om Parkash started giving *lathi* blows on her. The ladies of the house of the appellants started throwing bricks and stones from the roof of their house which hit the appellants. Thereafter, the appellants were under this impression that her husband had died, all the appellants fled away from the spot. Inder Pal (PW1) and Raj Pal (PW2) took her husband to the hospital in a tempo. In the meantime, PCR van reached the spot and took PW3 to Hindu Rao Hospital. After the return of PW3 from the hospital, she came to know that her husband had died and her son Inder Pal was lying in the hospital in an injured condition. In addition to the injury sustained by her husband, her son Inder Pal also received injuries at the hands of the appellants.

17. In her cross-examination, PW3 stated that the police reached the spot after her husband was taken to the hospital i.e. about 10/15 or 20 minutes and at that time she was inside her house. PW3 stated that she received injury on her finger and could not say if Kishan Pal, Tejpal,

Jagpal and Amar Singh were present in the village or not. However, Jai Bhagwan (PW4) was present in his house. Jai Bhagwan (PW4) and Rajpal (PW2) were present at the time of the incident. However, Krishan, Jagpal, Amar Singh and Tejpal were not present at the time of the incident. The police did not make any enquiry from PW3, but on seeing her injury, she was taken to the hospital. The next morning when she came back from the hospital, the police made enquiries from her. It was stated by PW3 that the police might have recorded her statement after the enquiries. It was further stated by PW3 that she had told the police that Rajpal (PW2) and Jai Bhagwan (PW4) were raising noise. On confrontation, this fact was not mentioned in his statement (Ex.PW3/DA). PW3 further stated that she told Police that she also raised noise and asked the appellants not to fight however; it was not mentioned in his statement (Ex.PW3/DA). The ladies from the house of the appellants had thrown stones which hit the appellants. On confrontation with her statement (Ex.PW3/DA) it was not so recorded. It was also stated by PW3 to the Police that she did not state to the police that the stones thrown by the ladies of the family of the appellants had hit all the persons present at the time of incident. On confrontation with her statement Ex.PW3/DA, the said fact was narrated to the Police. PW3 admitted that many persons were living around her house. On hearing the noise and cries of PW3, Jai Bhagwan (PW4), Rajpal (PW2) and her husband, the neighbours of the adjoining locality did not come at the spot. The fight continued only for 2/3 minutes after she heard the noise and came out. On hearing the noise, PW3 immediately came out and tried to save her husband. During the process of saving her husband, her clothes were

not torn. PW3 failed to state the number of *lathi* blows which were received by her when she tried to save her husband by falling on him, but she received a number of *lathi* blows. The *lathi* blows were received by PW3 on her back, but she did not receive any *lathi* injury on her head and no blood had come out from the injuries received by her. PW3 failed to give the time when she was taken to the hospital. The doctor made enquiry from her as to how she received *lathi* blows and as to who had caused them. PW3 told the names of the appellants Mange and Om Prakash to the doctor. The police did not meet PW3 in the hospital and she came back from the hospital all alone by tempo. PW3 did not go to the police station, but she went directly to her house. After returning from the hospital, PW3 did not call the police, nor did she send any person to the police station. PW3 denied the suggestion that she did not inform the police, because the *pharsa* was held by Krishan who wanted to attack with *pharsa* on the appellant Dharmender but had escaped and the same hit her husband. The PCR came and took PW3 to the hospital and she had also seen the blood lying in the street.

18. Another eye witness to the incident is PW2 Rajpal who testified in his examination-in-chief that the deceased Hukam Chand was his uncle. All the appellants were his neighbours. 5/6 days prior to the incident, there was a dispute between the appellants and the deceased over flow of water of house of the deceased which was passing through the drain in front of the house of the appellants. The appellants had put some bricks in the drain and obstructed the flow of water. PW2 further deposed that on 27.10.1997 at about 10/10.15 PM, on hearing the shrieks of Inder Pal (PW1), he came out of the house and saw that

Inder Pal had been caught hold by the appellant Om Parkash. The appellant Dharmender attacked Inder Pal twice with the *pharsa* due to which he sustained injuries on his right hand and left shoulder. Inder Pal was set free and he had tried to ward off the blows. Thereafter, the appellant Diwan Singh and Om Parkash caught hold of the deceased. The appellant Mange Ram instigated the appellant Dharmender and exhorted him that the deceased should be finished on that day. On this, the appellant Dharmender gave a *pharsa* blow on the head of the deceased as a result of which the deceased fell down on the ground. PW2 and Jai Bhagwan (PW4) tried to save the deceased. In the meantime, wife of the deceased tried to save the deceased and had fallen on him to save him who was already present at the spot, but the appellants Mange Ram and Om Parkash also gave *lathi* blows to her. The ladies from the house of the appellants had thrown bricks as a result of which the appellants sustained injuries. All the four appellants fled away from the spot alongwith the weapons. PW2 alongwith PW1 Inder Pal took the deceased to Santom Hospital, Rohini, Delhi where after sometime he died in the hospital. PW2 identified in Court the *Pharsa* and *lathis* which were used in assaulting the deceased by the appellants.

19. In his cross-examination, PW2 admitted that he was not present at the spot on the day when there was a dispute over the drain. The incident of drain had taken place at about 12 noon 5/6 days prior to the present incident. The said quarrel erupted between the deceased and his wife and on the other side, the appellants Om Parkash, Dharmender, Mange and Diwan Singh. PW2 further stated that he did not lodge any report to the police about the incident. It was also stated by PW2 that the

police recorded his statement about the present incident on 28.10.1997 at about 5.00 or 5.15 AM in the hospital whereby he stated that at about 10.00 or 10.15 PM on 27.10.1997, on hearing the screams of Inder Pal, PW2 came out of his house. The said statement was confronted with his statement to the Police (Ex.PW2/DA) wherein it was not so recorded, but the name of the deceased was recorded. PW2 denied the suggestion that he came out of his house on hearing the screams of the deceased and not of Inder Pal. PW2 further stated that he told the police that Inder Pal had been caught hold of by the appellant Om Parkash and the appellant Dharmender attacked him twice with a *pharsa* on Inder Pal. On confrontation with his statement (Ex.PW2/DA), it was not so recorded. PW2 also stated to the police that Inder Pal sustained *pharsa* blows on his right hand and left shoulder, as he tried to ward off the blows. On confrontation with his statement (Ex.PW2/DA), it was not so recorded.

20. The next eye witness PW4 Jai Bhagwan testified in his examination-in-chief that he knew all the appellants and the complainants as they were residing in his neighbourhood. About 5/7 days prior to 27.10.1997, a dispute arose between both the parties over the flow of water in the drain. On 27.10.1997 at about 10.00 or 10.30 PM, when PW4 was going towards his house from his *gher*, he saw Inder Pal (PW1) and the deceased were going towards their house and were ahead to him. When Inder Pal crossed the house of the appellant Om Parkash, Inder Pal was being caught hold by the appellant Om Parkash. The appellant Dharmender who was also standing nearby, was having a *pharsa* in his hand and tried to inflict *pharsa* blows on Inder Pal and inflicted injury on his left and right side. Inder Pal tried

to save himself, but was hit on his right hand near the thumb and index finger and also on the left hand near his left shoulder when he tried to ward off the blows. Since the deceased was also with Inder Pal, the appellant Om Parkash caught hold the deceased alongwith the appellant Diwan Singh. Thereafter, the appellant Mange Ram exhorted that the deceased should be killed. Thereafter, the appellant Dharmender gave a *pharsa* blow on the backside of the head of the deceased as a result of which the deceased fell down on the ground. In the meantime, Om Wati (PW3/wife of the deceased) intervened and tried to save the deceased and fell on him. The appellants Om Parkash and Mange Ram started giving *lathi* blows to Om Wati. PW4 alongwith Rajpal (PW2) and Om Wati tried to stop the appellants from fighting, but the appellants did not stop. Thereafter, all the four appellants fled away from the spot. The ladies from the house of the appellants started throwing stones and bricks from the roofs which hit the appellants. The deceased was taken to the Hospital by Inder Pal and Rajpal in a tempo. Thereafter, the PCR van reached the spot and removed Om Wati alongwith the appellants Om Parkash and Diwan Singh to Hindu Rao Hospital. PW4 identified the *pharsa* and the *lathis* in the Court as the weapon of offence.

Medical Evidence:

21. PW6 Dr. Navin Mukhi testified in his examination-in-chief that on 27.10.1997 at about 11.30 PM, he alongwith Dr. A. Jain examined the deceased Hukam Chand, who was brought to the hospital in an injured condition. The deceased was found in badly injured condition and

was gasping and was also bleeding profusely from the head. On the same night, at 12.20 AM, PW6 informed Police Station Alipur with regard to the admission of the deceased in the hospital and thereafter Police reached the hospital.

22. PW7 Dr. Ashok Jaiswal testified that on 28.10.1997, he conducted the post-mortem examination of the body of the deceased Hukum Chand. His detailed report was proved by him as Ex.PW7/A. The following external injury was found on the body of the deceased:

“Curved incised wound 6 inch x 1-1/2 inch x brain matter deep extending from left occipito parietal region across vault to right parietal region, broader on right side, bony pieces driven in with bruise margins.”

23. On internal examination, PW7 found blood under scalp tissue i.e. under external injury No. 1 with comminuted fracture involving occipital and parietal bone with bone pieces being driven in with short cut in meninges and sub dural haemorrhage all over the scalp tissue. PW7 opined the cause of death as cranio cerebral injuries. It was also opined by PW7 that injury No. 1 was ante-mortem in nature which had been caused by some heavy sharp edged weapon and was sufficient to cause death in the ordinary course of nature. Time since death was opined as about 14 and half hour. As to the weapon of offence, PW7 opined that injury No.1 was possible by *pharsa* (Ex.P1).
24. PW1 Inder Pal was examined by PW8 Dr Arinjay jain on 27.10.1997 at 11.30 PM, with the alleged history of having been attacked by neighbours and was beaten with sticks and *pharsas*. PW8 found the following injuries on him:

*“1. Incised wound 1.5 cm x 5 cm subcutaneous deep on base of right thumb on dorsal aspect which was bleeding.
2. Skin cut 5 cms on knuckle of right index finger on dorsal aspect.
3. He was complaining of pain right wrist joint. Local tenderness was positive. No bony injury clinically.
4. Linear abrasion 5 inch long on left arm lateral aspect reddish.
5. Abrasion 2 cm long on left wrist lateral side.
6. Small abrasion on dorsal side first knuckle middle of middle finger.”*

25. PW8 opined the nature of injuries sustained by PW1 as simple and proved his MLC as Ex. PW8/A. Besides this, it is evident from the records that the appellants had also sustained injury which has been proved from their MLC's. In this background, we find force in the argument raised by the counsels for the appellants that the fight was free for all and both the parties i.e. the appellants as well as the complainant sustained injuries on their body.
26. The question which arises for consideration is as to whether the present case is one of deliberate or intentional killing resulting in the injuries, which would be a case of murder under Section 302 of IPC. Further, if it is a case of unintentional and not a premeditated act and had arisen out of a sudden quarrel, on the spur of the moment whether it falls under one of the special exceptions carved out under Section 300 of IPC?
27. At this stage, we deem it appropriate to revisit the law relating to conviction of the accused persons under Section 302 with the aid of Section 34 of IPC.
28. In the case of ***Suresh and Another vs. State of U.P.*** reported at (2001) 3 SCC 673, the Hon'ble Supreme Court discussed the scope of

Section 34 of IPC and its applicability in paras 37- 41, which read as under:

“37. However, in view of the importance of the matter, in so far as the interpretation of Section 34 of the Indian Penal Code is concerned, we have chosen to express our views in the light of consistent legal approach on the subject throughout the period of judicial pronouncements. For the applicability of Section 34 to a co-accused, who is proved to have common intention, it is not the requirement of law that he should have actually done something to incur the criminal liability with the aid of this section. It is now well settled that no overt act is necessary to attract the applicability of Section 34 for a co-accused who is otherwise proved to be sharing common intention with the ultimate act done by any one of the accused sharing such intention.

38. Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The Section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

39. The dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as "the Code") is the element of participation in absence resulting in the ultimate "criminal act". The "act" referred to in latter part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The Section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.

40. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown to not have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have pre-conceived result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in **Shatrughan Patar & Ors. v. Emperor: AIR 1914 Cal 901 (2)** held that it is only when a court with some certainty hold that a particular accused must have pre-conceived or pre-

meditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.

41. In **Barendra Kumar Ghosh vs. King Emperor: AIR 1914 Cal 901(2)** the Judicial Committee dealt with the scope of Section 34 dealing with the acts done in furtherance of the common intention, making all equally liable for the results of all the acts of others. It was observed:

".... [T]he words of S. 34 are not to be eviscerated by reading them in this exceedingly limited sense. By S. 33 a criminal act in S. 34 includes a series of acts and, further, "act" includes omissions to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By S. 37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things 'they also serve who only stand and wait'. By S. 38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. S. 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it. S. 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the

actor liable to be punished for the commission of the offence. S. 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other."

(Emphasis Supplied)

29. In the case of *State of M.P. v. Deshraj*, reported at (2004) 13 SCC 199, the Apex Court held that the distinctive feature of Section 34 is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision. The relevant para 5 reads as under:

"5. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved

facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was a plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true content of the section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in Ashok Kumar v. State of Punjab (1977) 1 SCC 746, the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.”

(Emphasis Supplied)

30. In a recent case of **Sudip Kumar Sen v. State of W.B.**, reported at (2016) 3 SCC 26, it was held as under:

“14. Section 34 IPC embodies the principle of joint liability in the doing of a criminal act and essence of that liability is the existence of common intention. Common intention implies acting in concert and existence of a pre-arranged plan which is to be proved/inferred either from the conduct of the accused persons or from attendant circumstances. To invoke Section 34 IPC, it must be established that the criminal act was done by more than one person in furtherance of common intention of all. It must, therefore, be proved that:

(i) there was common intention on the part of several persons to commit a particular crime, and

(ii) the crime was actually committed by them in furtherance of that common intention.

Common intention implies pre-arranged plan. Under Section 34 IPC, a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The essence of liability under Section 34 IPC is conscious mind of persons participating in the criminal action to bring about a particular result. The question whether there was any common intention or not depends upon inference to be drawn from the proved facts and circumstances of each case. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted.”

(Emphasis Supplied)

31. In view of the above, the existence of a common intention amongst the participants in a crime is the essential element for application of Section 34. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case. In the present case, the prosecution has established by direct evidence that there was a plan or meeting of minds of all the appellants to commit the offence for which they are charged with the aid of Section 34, and it has been proved that the common intention was developed before the commission of the offence.
32. As noticed in the paragraphs foregoing, learned counsels for the appellants have not contested the order on conviction except that no case under Section 302 of IPC is made out. The counsels reiterate that reading of the post-mortem report would show that the appellants did not act in a cruel or in unusual manner. There was no pre-meditation and thus a case, at best, under Section 304 of IPC could be made out.

33. We have carefully examined the evidence of the injured witnesses being PW 1 and 3. We find the submission made by the learned counsels for the appellants that the evidence of PW 1 and 3 is not truthful and reliable to be without any force rather we find the evidence of PW 1 and 3 to be truthful and reliable. PW 1 has given a complete account as to how his father and he were returning back and the manner in which he was attacked when he was crossing the house of the appellants. The case of the prosecution is further corroborated from the eye witness account of PW2 Rajpal and PW4 Jai Bhagwan who deposed on similar lines on all material aspects. All the prosecution witnesses were known to the appellants as the appellants were living in the same village and their houses were adjacent to each other. In this backdrop, we find the testimonies of PW1, 2, 3 and 4 as reliable and trustworthy.
34. Applying the law laid down in the case of *Ajay Bind (supra)* and the judgment of the Apex Court extracted hereinabove to the facts and circumstances of the present case, we are persuaded to accept the alternative limb of submission advanced by the learned counsels for the appellants that the present case would fall within the ambit of Section 304 Part I of IPC. We find force in the argument made by the counsel for the appellants that the injuries were sustained by the appellants also, which would show that the fight was free for all. The injuries were caused with the *pharsa* which is an agricultural instrument and is found in the house of every farmer. The other injuries were also given by *lathis*. The appellants did not act in any unusual and cruel manner, there was no pre-mediation and there is every possibility that the appellants had picked the *pharsa* which is

easily available at their home. This shows that the appellants did not have the requisite intention to kill the deceased and the incident had happened on the spur of moment which had occurred over a trivial issue of water drainage between the appellant and the deceased. Having regard to the testimonies of the injured witnesses PW1 and PW3, being the son and the wife of the deceased who had identified the appellants in Trial Court and attributed a specific role to them. There was no motive which could have impelled PW1 and 3 to falsely implicate the appellant and allow the real culprits go scot free.

35. We are being informed that the appellant Mange Ram has been granted bail vide order dated 30.09.2002 and has undergone about 5 years. The bail was also granted to the appellant Om Parkash vide order dated 29.01.2003 and has undergone more than 5 years. The appellant Dharmender has been granted bail vide order dated 11.03.2004 and has undergone more than 6 years. The ends of justice would be met if we modify the sentence awarded to the appellants and sentence them to the period already undergone by them.
36. Consequently, the appeal is allowed in part, the conviction and order on sentence recorded by the Trial Court is modified to the extent indicated hereinabove. The appeal stands disposed of. The fine imposed upon the appellant and the default sentence awarded to him shall remain unaltered.
37. The Trial Court record be sent back along with a copy of this judgment.

38. Copy of this judgment also be sent to the Superintendent-Central Jail, Tihar for updating the jail record.

G. S. SISTANI, J.

AUGUST 25, 2017
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CHANDER SHEKHAR

