

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 150 of 2014

1. Sahetram @ Sahetaru @ Nanki S/o Devgaun Prasad Satnami Aged About 49 Years R/o. Lalpur, P.S. Kota, Distt. Bilaspur C.G., Chhattisgarh
2. Mahetram S/o Devgun Prasad Satnami Aged About 51 Years R/o. Lalpur, P.S. Kota, distt. Bilaspur C.G., District : Bilaspur, Chhattisgarh
3. Silwant Singh Nirgun @ Pappu S/o Sahetram Satnami Aged About 25 Years R/o. Lalpur, P.S. Kota, distt. Bilaspur C.G., District : Bilaspur, Chhattisgarh
4. Sonuram Nirgun S/o . Sahetram Satnami Aged About 40 Years R/o. Lalpur, P.S. Kota, distt. Bilaspur C.G., District : Bilaspur, Chhattisgarh

---- Appellants

Versus

State Of Chhattisgarh Through P.S. Kota, Distt. Bilaspur C.G., Chhattisgarh

---- Respondent

For Appellants No. 1 & 2	:	Shri R.K. Jain, Advocate
For Appellants No. 3 & 4	:	Shri Sourabh Dangi, Advocate
For State	:	Shri Anil Pillai, Dy. A.G.

D.B. : Hon'ble Mr. Justice Manindra Mohan Shrivastava & Hon'ble Mrs. Justice Rajani Dubey

Judgment On Board

13/11/2018

Per Manindra Mohan Shrivastava, J.

1. This appeal is directed against the judgment of conviction and order of sentence dated 20th January 2014 passed by learned First Additional Sessions Judge, Bilaspur in ST No.197 of 2011 whereby and whereunder the appellants/accused have been held guilty of commission of offence alleged against them and sentenced as described below:-

Name of the Appellant/Accused	Conviction	Sentence
Each of the appellants	u/S. 323 IPC (two counts)	RI for 2 months and fine of Rs.1000/-
	u/S. 506-B IPC	RI for 6 months

Appellants No. 1, 3 and 4	U/s. 302/34 IPC	Life imprisonment and fine of Rs.1000/-, in default of payment of fine, additional RI for 1 year
Appellant No.2	U/s 302 IPC	Life imprisonment and fine of Rs.1000/- and in default of payment of fine, additional RI for 1 year

2. Prosecution story, as unfolded from the impugned judgment and the records of the case, is that a dispute had arisen between appellants/accused Sahetram and Mahetram on one hand and deceased Sanjay on the other as the cattle belonging to Sanjay frequently used to trespass in the agricultural field of appellants- Sahetram and Mahetram which was situated adjacent to the house of Sanjay. It is said that this led to quarrel and Sanjay along with some other persons went to the house of Sahetram and Mahetram. This was followed by another incident in which Sahetram and Mahetram, all armed with weapons, came to the house of Sanjay where Sanjay was assaulted. It is also alleged that Janaki Bai (PW10) mother of the deceased and Rajkumari (PW5) wife of the deceased also sustained injuries. In this incident, Sanjay sustained fatal injury on his head and succumbed to death, in respect of which morgue intimation in Ex.P-5 was first sent from the hospital by PW15, followed by numbered morgue recorded in Ex.P-22 by the Constable (PW25). Rajkumari (PW5) lodged FIR in Ex.P-3. After preparation of inquest over dead body by the Investigating Officer in the presence of panch witnesses, dead body was sent for postmortem vide Ex.P-24, which was conducted in the hospital by Dr. Anil Kumar (PW23). Two head injuries were found and the doctor opined that cause of death was coma due to head injury. Time elapsed since death was said to be less than 24 hrs. As Rajkumari (PW5), wife of the deceased and Janaki Bai (PW10), mother of the deceased had also sustained injury, they were also examined by Dr. Kamlesh Khairwar (PW17) who examined and found injuries and gave his report. A charge sheet was filed and the appellants were put to trial by framing of charges against each of them for alleged commission of offence of murder of Sanjay and causing injury to Janaki and Rajkumari. The appellants having abjured guilt, were put to trial.

In order to prove its case, the prosecution examined number of witnesses. Sohaga Bai (PW2), Kunwariya Bai (PW3), Shivkumar (PW4), Rajkumari (PW5) and Janaki Bai (PW10) were examined by the prosecution as the eyewitnesses of the incident. Relying upon their evidence and the medical evidence of homicidal death, learned Court below held all the appellants guilty of commission of offence by recording a finding that appellants shared common intention to murder Sanjay and they also assaulted Rajkumari and Janaki and injured them.

3. Learned counsel appearing for appellants No. 1 & 2 contended before us that the allegation against these two appellants is an afterthought and concocted story. He would argue that, in fact, Sanjay was the assailant and he had assaulted these two appellants by which they had sustained injury and had also lodged report in the police station. The incident of quarrel in which Sanjay died, did not at all take place with these appellants but, in fact, there was a dispute amongst family members of Sanjay and following a dispute with his own wife, other person assaulted Sanjay which led to his death, as has been deposed reliably by the defence witnesses. He would next argue that all the eyewitnesses are concocted one. Suhaga Bai (PW2) has admitted in her cross-examination that she did not witness the incident. Kunwariya Bai (PW3) has stated that when she reached the spot, the assailant had already left the place. Kunwariya Bai (PW3) is an interested witness, trying to suppress her relationship with deceased and Rajkumari (PW5) and Janaki Bai (PW10) are the wife and the mother respectively of the deceased whose statement are not reliable in view of material contradictions and omissions with regard to very presence of appellants- Sahetram and Mahetram, overt act alleged against them, therefore, as the testimony of defence version is a plausible one, these two appellants are entitled to be given benefit of doubt. In the alternative, it is argued that even if it is accepted that on the date of incident, some dispute arose between the parties on account of cattle trespassing into the agricultural field of Sahetram and Mahetram, looking to the proximity of the event taking place one after the other, it would be a case of sudden fight, quarrel and assault, without any premeditation. Therefore, as it is not a case that these appellants have taken advantage or otherwise acted in a cruel manner, at the most, it would only be a case of culpable homicide not

amounting to murder, punishable under Section 304 Part-II IPC and in the circumstances of the case, the appellants having already undergone more than 6 years of imprisonment, sentence could be imposed for the period already undergone by them. Learned counsel also submitted that the doctor's opinion is not clear with regard to homicidal death but it only adds to the grave doubt with regard to the veracity of the prosecution story. According to learned counsel for the appellants, whether the injury caused to the deceased, in ordinary course of nature, was sufficient to cause death has not been clearly stated by the doctor. Therefore, it cannot be said to be a case of culpable homicide amounting to murder. In support of his submissions, learned counsel appearing for appellants No. 1 & 2 relied upon judgments in **Bunnilal Chaudhary Vs. State of Bihar** (2006) 10 SCC 639 and **Balbir Singh and Ors. Vs. State of Punjab and Ors.** 2005 SCC (Cri) 1245.

4. Learned counsel appearing for appellants No. 3 & 4 while adopting the arguments raised by learned counsel appearing for appellants No.1 & 2, additionally submits that as far as these two appellants are concerned, merely because these persons had accompanied appellants No.1- Sahetram and appellant No.2- Mahetram, cannot be held to share common intention to murder Sanjay, firstly because, though they had come along with Sahetram and Mahetram, they did not open any assault on Sanjay and according to prosecution evidence, the main assailants were Sahetram and Mahetram who were holding axe and crowbar in their hands. He would next submit that the allegation that in the FIR and case diary statement of Rajkumari (PW5) and Janaki Bai (PW10), with which, these witnesses have been confronted with, elicits that the statement that these appellants also assaulted Sanjay, is a material omission as it was neither stated in the FIR nor in the diary statement of two witnesses and the only allegation was that these appellants assaulted Rajkumari but Rajkumari is not found to have sustained any specific injury and her MLC report states that she only complained of some pain. Therefore, these two appellants, at the most, could be held guilty of commission of offence under Section 323 IPC and nothing more. In support of his submissions, learned counsel for appellants placed reliance upon judgments in **Virendra Singh Vs. State of Madhya Pradesh** (2010) 8 SCC 407, **State of Uttar Pradesh Vs. Dinesh**

(2009) 11 SCC 566, *Krishnegowda and Ors. Vs. State of Karnataka* by *Arkalgud Police* (2017) 13 SCC 98, *Anjani Chaudhary Vs. State of Bihar* (2011) 2 SCC 747.

5. Per contra, learned counsel for the State, supporting the impugned judgment, argues that in so far as the genesis of dispute between the parties is concerned, all the eyewitnesses have clearly stated that in a background of a dispute, the appellants arrived near the house of the deceased Sanjay and all of them were armed with weapon, whether it be an axe, crowbar or a club. All the prosecution witnesses have clearly deposed in their evidence that all the appellants assaulted the deceased and, therefore, it became immaterial which injury proved to be fatal to life of the deceased. He submits that once assault is opened by all the appellants on the deceased, intention of causing death can be held to be shared by all the appellants irrespective of nature of weapon held by each of them. He would next submit that two injured witnesses namely Rajkumari (PW5) and Janaki (PW10) have fully supported the prosecution case and there is no reason why they would falsely implicate the appellants and save the real culprit. He would submit that the defence version is wholly improbable and is only an attempt to save the appellants. Learned counsel for the State further argues that the fact that appellants No. 3 & 4 were armed with club and they not only assaulted the deceased but also other members of the family namely Rajkumari (PW5) wife of the deceased and Janaki (PW10) mother of the deceased, fully proves that these two appellants along with other two appellants all had come prepared to murder Sanjay and the family members who were coming to intervene were being assaulted. Learned counsel for the State further argues that present is not a case where the dispute arose between the parties at the spot, all of sudden and that without premeditation, the weapons were wielded and assault was given to Sanjay. In the background of an incident of cattle trespassing in the field of Sahetram and Mahetram, all the appellants had come prepared with weapon which obviously was to harm the deceased. Therefore, it cannot be said to be a case of sudden fight and assault without premeditation.
6. We have considered rival submissions made by learned counsel for the parties and perused the records of the case.

7. The first information report (Ex.P-3) was lodged by Rajkumari (PW5), the wife of the deceased who has proved the same by stating that she had lodged the report and signed the same. Narsingh Ram (PW22), the Investigating Officer, also states that on the report given by Rajkumari, he had recorded FIR. We may, at this stage, mention the story as depicted in the FIR, lodged by Rajkumari, who was an injured witnesses and said to be an eyewitness of the case. In the FIR lodged on 14.8.2011 at 20:10 hrs., on the date of incident itself i.e. after few hrs., it has been recorded that at about 6:30 in the evening, while Rajkumari was standing in front of her house along with her husband and mother-in-law, the appellants arrived, hurling abuses and raised grievance that time and again, their cattle trespass and destroy the crops and, therefore, they would be killed and then Sahetram and Mahetram assaulted her husband- Sanjay with the help of *tabbal* (crowbar). When she and mother-in-law intervened, Sahetram assaulted her mother-in-law by *tabbal* (crowbar) and Pappu and Sonu assaulted Rajkumari by *danda* (club). It has also been recorded that due to assault given by *tabbal* (crowbar), her husband sustained injury on the head and mother-in-law sustained injury on the back of head and they have also witnessed the incident.
8. The postmortem report (Ex.P-35), prepared by Dr. Anil Kumar (PW23), has been proved by him in his evidence before the Court in which, after having stated regarding conduct of postmortem by him, which fact remains uncontroverted, the doctor found following injuries on the body of the deceased:-

“3. मृतक के शरीर पर बाहरी चोट निम्नानुसार पाया है ।
मृतक के बायें आंख के भोंह के पास फटा हुआ घाव
7 x 0.5 सेमी., दूसरा सिर के बाये ओर सामने की ओर
फटा हुआ घाव 5 x 1 सेमी0 हड्डी की गहराई तक था ।
तीसरा लीनियर फ्रेक्चर दूसरी चोट के नीचे था साइज 10
सेमी0 था ।”

In para-4 his evidence, the doctor has stated that haematoma was also found. It as been deposed :

“4. मृतक के कपाल और मेरुदंड सिल्ली और मेरुरज्जा में
खून जमा हुआ था । पर्दा, पसली, कोमलस्व, फुस्फुस,
श्वास नली सामान्य थे । दाया फेफड़ा तथा बाया फेफड़ा

सिकुड़ा हुआ था । पेरीओम परकशसयम सामान्य था ।
हृदय के दाहिने चेम्बर में खून भरा हुआ था और बाया हृदय
खाली था। विहत वाहिका सामान्य था । पर्दा आंतों की
झिल्ली मुह तथा ग्रास नली ग्रसनी सामान्य थे।”

According to doctor, injuries were antemortem and were caused by sharp and blunt object. The opinion with regard to the cause of death was as below :

“8. मेरे मतानुसार मृत्यु का कारण सिर में आयी चोट से
मृतक के कोमा में जाने के कारण उसकी मृत्यु हुई । मृत्यु
की अवधि 24 घंटे के भीतर की है।”

In the cross-examination, he admits that he had not specifically mention in his report that the injuries were homicidal in nature and has further admitted that, if the deceased would have been immediately provided treatment, he could be saved. He has also admitted that the injury found on the head of the deceased could be caused, if the deceased happens to fall on a sharp object. He also admits that by apparently seeing, the injuries do not appear to be homicidal.

Taking a cue from what has been stated in the cross-examination of the doctor, an argument has been raised by learned counsel for the appellants that prosecution has failed to prove that death was homicidal in nature or that the injury, in ordinary course of nature, was sufficient to cause death. Having given our anxious considerations on the submissions, we are inclined to reject the same. Whether or not the death was homicidal in nature cannot be conclusively stated in the postmortem report and the homicidal nature of death is required to be determined by the Court taking into consideration the nature and extent of injury as also manner in which the injury was caused. In a case where there is an assault with clear intention of murder leading to sudden injury, the combination of the two may lead to an inference of homicidal death and even if the doctor has not specifically stated regarding the same, the Court can definitely reach to that conclusion of homicidal death. Ordinarily, such kind of opinion are given by the doctor which are based only on the injuries found on the body of the deceased and considerations are whether it is suicidal, accidental or a natural death but then, merely because the doctor has given an opinion that apparently for him, it does not appear to be homicidal, it is not

conclusive piece of evidence.

An argument has been raised that the doctor has not opined that injuries, in ordinary course of nature, were sufficient to cause death. This would also be a matter of appreciation of evidence. The death of deceased took place immediately after the incident. He was given assault on his head. The doctor has clearly stated that there was haematoma found. There were three injuries found on the head of the deceased out of which, one was linear fracture. Apparently, the injury given on the head of the deceased resulted in clotting of blood. The force of injury was so much so that a linear fracture was also caused. Therefore, it is obvious that injury, in ordinary course, was sufficient to cause death.

9. Rajkumari (PW5) and Janaki (PW10) are the wife and mother respectively of the deceased. They are injured witnesses. Dr. Kamlesh Khairwar (PW17) who examined them has stated regarding specific injury on the body of Janaki Bai (PW10). In his evidence he has stated that Janaki sustained injury on the back of her head which was a stretch wound. The opinion is that injury was caused by hard and blunt object but was simple in nature.

As far as Rajkumari (PW5) is concerned, doctor only observed that she complained of pain on back in her waist and left side of the buttock but no superficial injury was found.

10. Rajkumari (PW5) has deposed that while she along with her mother-in-law and husband was standing outside their house, Sahetram, Mahetram, Sonu and Pappu arrived, hurling abuses and declaring that they would be killed. Thereafter, they started assaulting her husband Sanjay. When she and mother-in-law sought to intervene, they were also assaulted due to which, she sustained injury on her waist and her mother-in-law sustained injury on the back of her head which was caused by crowbar. She has stated that her husband was assaulted by *tabbal*, *lathi* and *tangiya* (crowbar, club and axe respectively) by all the accused. He had sustained injury near his eyes. She stated that injury sustained on the head and above the eyes were caused by *tabbal* (crowbar) and *tangiya* (axe) and remaining injury on the body of her husband were caused by *danda* (club). In her cross-examination, this witness has been confronted with her previous statement in the case diary and FIR, to elicit an important omission with regard to role alleged to be played by appellants Pappu and Sonu that in the FIR and case

diary statement, the fact regarding Sonu and Pappu assaulting Sanjay was not mentioned in those documents. Moreover, contradiction has also been brought with regard to weapon used and the details of the incident of murder as contained in diary statement (Ex.P-4). In para-20 of her cross-examination, though she admits that she had not stated the name of Sahetram and Mahetram to the police, she stated that she does not know these names and she does not know how these names have been mentioned in the FIR and the case diary statement. She has deposed that she had informed the police that Sahetram is known as Nanki and Mahetram is known as Mahetaru. She had disclosed the name of Mahetaru as accused while giving report and diary statement and then she had disclosed before the police, the names of accused as Mahetraru and Nanki and it has also been elicited that no identification was got done in the name of Mahetaru and Nanki. On the basis of this statement of the witness, elicited in her cross-examination, an argument has been raised that, in fact, Mahetaru and Sahetaru were actually never named in the FIR or in the case diary statement nor they were put to identification and therefore, it is a case of false implication because, some other persons known as Nanki and Mahetaru were the persons as assailants, as disclosed by this witness at the time of lodging of FIR and case diary statement, but the police of its own, recorded the names of Sahetram and Mahetram.

The evidence of this witness itself clarified that Sahetram and Mahetram are known as Nanki and Mahetaru. This witness has otherwise clearly identified these appellants in the dock during her examination stating that Sahetram is Nanki and Mahetram is Mahetaru. Even otherwise, Shiv Kumar (PW4) has deposed in para-12 of his evidence that Nanki and Mahetaru are known as Sahetram and Mahetram. This defence, therefore, appears to be extremely weak and cannot be accepted.

The contradiction and omission as pointed out in respect of evidence of Rajkumari (PW5) wife of the deceased, an eyewitness except with regard to role of appellant- Pappu and Sonuram does not render her evidence liable to be disbelieved as such contradictions and omissions are not so material as to completely disregard her testimony as the eyewitness of the incident of assault on her own husband.

11. Janaki Bai (PW10) who had sustained injury on the back of her head, as proved by the evidence of Dr. Kamlesh Khairwar (PW17), is also one of the important prosecution witnesses as eyewitness. She has deposed in her evidence that in the background that their cattle had trespassed in the field of Sahetram, he had come and started hurling abuses. At that time, she along with her son Sanjay, Shiv Kumar, Umesh and daughter-in-law was sitting near the house. When Sanjay said that whatever loss has been caused would be compensated but the appellants should not hurl abuses, Sahetram @ Nanki and Mahetram @ Mahetaru assaulted Sanjay with the help of *tabbal* (crowbar) and *tangiya* (axe). She further deposed that her son was assaulted on the back of the head and face and on either sides of the head also. According to her, Sonu and Pappu also assaulted on the thighs of her son with the help of club thereafter, her son fell down. When she and her daughter-in-law tried to intervene, Mahetram abused and gave assault on her head from the backside of crowbar. She further states that thereafter, Sonu assaulted on the front part of her head with the help of club due to which she sustained injury. She further states that Pappu assaulted with the help of club on her left shoulder and thereafter, all of them ran away. She further deposed that Sahetram chased her daughter-in-law Rajkumari and assaulted her from the backside of *tabbal* (crowbar) on account of which she sustained injury in her back. This witness has been subjected to detailed cross-examination and she has been confronted with her case diary statement in which it has been elicited that at 6:00 p.m. in the evening, she was standing on the road, was not stated in her diary statement. Moreover, on a suggestion given that a part of statement as contained in her diary statement (Ex.D-5 "b to b") was not stated while giving police statement, has been elicited and on that basis, it has been stated that in fact, this witness never stated regarding Sahetram and Mahetram carrying axe and crowbar and assaulting her son hurling abuses. This elicitation regarding non-mentioning of this fact in the diary statement may only be of little variance in the manner in which the incident occurred and the fact that Sahetram and Mahetram were holding axe and crowbar and they assaulted Sanjay is stated in the diary statement. Further, contradiction with regard to altercation taking place, preceding assault has also been brought about as also the specific details of assault on the head

of her son. There are other elicitation as contained in para 6, 7 & 8 but they do not impeach the credibility of this witness as eye witnesses. These contradictions are only with regard to minute details of the incident and not with regard to presence of these witnesses or presence of appellants Sahetram, Mahetram, Sonu and Pappu or kind of weapon they were holding in their hand. Assault given by Sahetram and Mahetram with the help of tabbal (crowbar) on Sanjay cannot be said to be improvement in the present case though, with regard to Pappu and Sonu, this appears to be an improvement. In the totality of the evidence of this witness, an injured one, we are inclined to rely upon the testimony of this witness with regard to the prosecution case of appellants arriving at or near the house of the deceased.

12. The evidence of Rajkumari (PW5) & Janaki Bai (PW10) proves that all the appellants arrived at the spot where deceased was standing along with his mother, wife and that all of them had abused. However, after arrival at the spot, in so far as role alleged to be played by Pappu and Sonu is concerned, we find that the evidence of these two witnesses Rajkumari (PW5) & Janaki Bai (PW10), with regard to role played by these accused, there is clear omission from what has been stated in the FIR (Ex.P-3) and their respective case diary statements Ex.D-4 & D-5 . In all the three documents, with which the witnesses were confronted, it is stated before the Court for the first time that Pappu and Sonu also assaulted deceased- Sanjay, whereas the overt act alleged against them was of assault on Rajkumari (PW5). To test the veracity of the statement of these two witnesses in this regard, in so far as role played by Pappu and Sonu are concerned, if we look into the medical evidence, on the body of the deceased Sanjay, except head injury and injury on the face and above eyes, no other kind of injury was found on his body. According to evidence of Rajkumari (PW5) and Janaki Bai (PW10), the injury on the head and on the face above the eye was given by Mahetram and Shahetram were caused by hard and sharp edged weapon tabbal (crowbar). Therefore, it becomes doubtful whether Sonu and Pappu had at all assaulted the deceased Sanjay, though it is true that these two appellants (Pappu and Sonu) had come along with Mahetram and Sahetram at the spot and had also hurled abuses.

13. As far as Suhaga Bai (PW2) is concerned, though in his examination-in-

chief, it has been stated by her that she had seen the incident of assault by the appellants, however, in para-10 of her cross-examination, she has admitted that she has not seen the incident of *marpeet* (fight). The evidence of this witness is rendered doubtful.

14. Kunwariya Bai (PW3) is one of the prosecution witnesses who claims to have seen the incident. In her cross-examination, suggestion has been given that she is the relative of deceased as she is real sister of Barilal, father of the deceased. This witness has denied the suggestion. However, even if it is accepted that she was one of the relative, her evidence cannot be discarded only on that count but the law requires more caution and care to be applied while evaluating her evidence. She has alleged regarding assault given on Sanjay. According to her, Sanjay was being assaulted by *tabbal* (crowbar) and *danda* (club) by the appellants. It is also said that mother and wife of the deceased were also assaulted. She states that when they sought to reach the spot to rescue the victim, they were chased and ran away. In her cross-examination, this witness has emphatically stated that in her presence, two assaults were given by *tabbal* (crowbar) on Sanjay. She has been confronted with her case diary statement Ex.D-1 and it has been elicited that the evidence of she having seen the incident of assault, is complete improvement, which was not stated in her case diary statement by her at the time of giving statement to the police. Therefore, this witness also appears to be doubtful.

15. Shivkumar (PW4) is the child witness who is the brother of the deceased. He has deposed that at about 6:00 in the evening, Sonu, Pappu, Mahetaru and Nanki came. He further states that Nanki and Mahetaru are also known as Sahetram and Mahetram but he does not know who is known by which name. He further deposed that their cattle trespassed in the field of the accused. They had come to quarrel. He has deposed that Mahetaru was holding *tabbal* and assaulted his brother and during this period when his mother sought to rescue, she was also assaulted by the appellants. He further states that Nanki and Mahetaru were holding *tabbal* (crowbar) and Sonu and Pappu were holding *danda* (club). He stated that his brother was assaulted on his eyes and abdomen. In his cross-examination, he has admitted that when he reached the spot, persons who were assaulting, ran away. Learned counsel for the appellants laid stress on this aspect by

stating that this witness is not reliable because according to him, by the time, they had reached, the appellants had already left. There appears to be considerable force in the submission. Though, it is not very clear from statement that he had seen the incident at the time, when it was about to be over or he had not seen *marpeet* except the deceased while reaching the spot.

16. In any case, the evidence of Rajkumari (PW5) and Janaki Bai (PW10) being reliable on all material aspects could be made a basis to hold the prosecution story reliable regarding the assault giving by Sahetram and Mahetram with the help of *tabbal* (crowbar) on deceased Sanjay and Pappu and Sonu assaulting Rajkumari.

17. Learned counsel for the appellants Sahetram and Mahetram relied upon the judgment of the Supreme Court in the case of **Balbir Singh** (supra). The judgment turns on facts with regard to whether all the appellants therein shared common intention.

The other decision in the case of **Bunnilal Chaudhary** (supra) has been referred, to buttress the submission that in the absence of medical evidence and the opinion that the injury, in ordinary course of nature, was sufficient to cause death as essential ingredients of commission of offence, case would not be made out. In a given case where injury, in its ordinary course of nature, was not sufficient to cause death, it may not be a case of murder, as defined under Section 300 IPC but then, in the present case, as we have elaborately considered, the deceased sustained multiple injuries on his head with so much of force that there was fracture of the skull, resulting in haematoma which led to coma and death. The very nature of injury led to instantaneous death of the deceased and it is not a case where Sanjay remained admitted in the hospital and cause of death was the reason other than one attributable to the injury caused to him. It is a case of assault on the head by sharp edged weapon with considerable force resulting in skull fracture, haematoma, coma and death due to hemorrhage shock. Therefore, we are unable to accept the submission of learned counsel for the appellants that the injury, in ordinary course of nature, was not sufficient to cause death. Perhaps what has been stated by the doctor appears to be basis of this submission because in the cross examination of

Dr. Anil Kumar (PW23) it has been elicited that injured could be saved with proper treatment. This opinion of the expert, in our view, is quite vague. Where the injuries are serious on fatal parts caused by dangerous weapon resulting in instantaneous death, doctor's opinion, which is merely an expert opinion, is not binding on us.

18. From the state side, an argument has been made by learned Dy. Advocate General that sharing of common intention to cause death of Sanjay must be attributed to all the accused for the reason that they all accompanied and arrived at the spot, armed with weapon, though of a different nature. He would submit that it is not a case that Pappu and Sonu did not do anything. He would argue that at the first instance, the eyewitness have stated that all of them opened assault on the deceased.

We have considered the submission of learned counsel for the State in the light of the evidence on record. At the first place, as we noticed and also recorded finding, the story of appellant Sonu and Pappu giving assault to Sanjay is clear improvement on the story as stated in FIR and diary statement of two injured witnesses namely Rajkumari (PW5) and Janaki (PW10). We have recorded finding that this part of exaggeration in the prosecution evidence of Pappu and Sonu giving assault to Sanjay, on account of complete omission, has become doubtful. What then leaves us with overt act of Pappu and Sonu giving assault to Rajkumari, the wife of the deceased. True it is that Pappu and Sonu are the members of the family of Mahetram and Sahetram and accompanied towards the house of the deceased Sanjay and it is also found that they were also armed with weapon as has been found proved, while Mahetram and Sahetram were armed with *tabbal* (crowbar), these two appellants Sonu and Pappu are said to be armed with club. However, after they reached the spot, their overt act which has been found reliable from the evidence of prosecution is only to the extent giving assault to Rajkumari, though they could have very well given assault on Sanjay but then, assault on Sanjay was given by Sahetram and Mahetram who were armed with *tabbal* (crowbar). Moreover, we also find from the evidence of Dr. Kamlesh Khairwar (PW17) and injury report of Rajkumari (PW5) that Rajkumari did not receive any serious injury. In fact, no apparent injury was found on her body though, it

was recorded that she was complained of pain in her waist. With that much of role played by these two appellants, we find ourselves unable to accept submission of learned State counsel that these two appellants also shared common intention to murder. As we have seen, the genesis of dispute was that the cattle belonging to Sanjay had trespassed in the field of Mahetram and Sehatram which led to certain quarrel and Sanjay is said to have gone the house of Mahetram and some *marpeet* had taken place and thereafter, Mahetram and along with Sahetram came down to the house of deceased Sanjay. Till the time of arrival, it cannot be definitely stated that all of them shared common intention to murder unless it is proved by their individual overt act at the spot or a concerted overt act towards causing injury to Sanjay at the spot. However, the story which is believed by the Court is that at the spot, these two appellants did not open any assault on Sanjay. Therefore, the criminal act rendering them liable for commission of offence of murder cannot be said to be completed. We shall, at this stage, refer to decision cited by learned counsel for the appellants No. 2 & 4/ Sonu and Pappu.

In the case of **Virendra Singh Vs. State of Madhya Pradesh** (2010) 8 SCC 407, it was held as under:-

“15. Ordinarily, a person is responsible for his own act. A person can also be vicariously responsible for the acts of others if he had the common intention to commit the offence. The words "common intention" implies a pre-arranged plan and acting in concert pursuant to the plan. It must be proved that the criminal act was done in concert pursuant to the pre-arranged plan. Common intention comes into force prior to the commission of the act in point of time, which need not be a long gap. Under this section a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the spot, it must, however, be anterior in point of time

to the commission of the crime showing a pre- arranged plan and prior concert. The common intention may develop in course of the fight but there must be clear and unimpeachable evidence to justify that inference. This has been clearly laid down by this Court in the case of Amrik Singh & Ors. v. State of Punjab 1972 CrLJ 465 (SC).

16. The essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. Undoubtedly, it is difficult to prove even the intention of an individual and, therefore, it is all the more difficult to show the common intention of a group of persons. Therefore, in order to find whether a person is guilty of common intention, it is absolutely necessary to carefully and critically examine the entire evidence on record. The common intention can be spelt out only from the evidence on record.

17. Section 34 is not a substantive offence. It is imperative that before a man can be held liable for acts done by another, under the provisions of this section, it must be established that there was common intention in the sense of a pre-arranged plan between the two and the person sought to be so held liable had participated in some manner in the act constituting the offence. Unless common intention and participation are both present, this section cannot apply.

x x x
x x x

37. Under the Penal Code, a person is responsible for his own act. A person can also be vicariously responsible for the acts of others if he had a common intention to commit the acts or if the offence is committed by any member of the unlawful assembly in prosecution of the common object of that assembly, then also he can be vicariously responsible. Under the Indian Penal Code,

two sections, namely, sections 34 and 149, deal with the circumstances when a person is vicariously responsible for the acts of others.

38. The vicarious or constructive liability under section 34 IPC can arise only when two conditions stand fulfilled, i.e., the mental element or the intention to commit the criminal act conjointly with another or others; and the other is the actual participation in one form or the other in the commission of the crime.

39. The common intention postulates the existence of a pre-arranged plan implying a prior meeting of the minds. It is the intention to commit the crime and the accused can be convicted only if such an intention has been shared by all the accused. Such a common intention should be anterior in point of time to the commission of the crime, but may also develop on the spot when such a crime is committed. In most of the cases it is difficult to procure direct evidence of such intention. In most of the cases, it can be inferred from the acts or conduct of the accused and other relevant circumstances. Therefore, in inferring the common intention under section 34 IPC, the evidence and documents on record acquire a great significance and they have to be very carefully scrutinized by the court. This is particularly important in cases where evidence regarding development of the common intention to commit the offence graver, then, the one originally designed, during execution of the original plan, should be clear and cogent.

40. The dominant feature of section 34 is the element of intention and participation in action. This participation need not in all cases be by physical presence. Common intention implies acting in concert.

41. The essence of section 34 IPC is a simultaneous consensus of the minds of the persons participating in

criminal action to bring about a particular result. Russel in his celebrated book "Russel on Crime" 12th Edn. Vol. 1 indicates some kind of aid or assistance producing an effect in future and adds that any act may be regarded as done in furtherance of the ultimate felony if it is a step, intentionally taken for the purpose of effecting that felony. It was observed by Russel that any act of preparation for the commission of felony is done in furtherance of the act.

42. Section 34 IPC does not create any distinct offence, but it lays down the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence there must be a pre-arranged and pre-meditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the pre-meditation and though the plan may be formed suddenly. In order that section 34 IPC may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified person. In fact, the section is intended to cover a case where a number of persons act together and on the facts of the case it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime. Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with section 34.

43. The other section under which a person can be vicariously responsible for the acts of others is section 149 in the Indian Penal Code. Section 149 IPC reads as under:

"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.- If an offence is committed by any

member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

44. Both sections 34 and 149 IPC deal with combinations of persons who become punishable as sharers in an offence. In both these sections, the persons are vicariously responsible for the acts of others. Simultaneously, there is a basic resemblance in both these sections and to some extent they also overlap.

45. There is a substantial difference between these two sections with which we would deal in the later part of this judgment. When several persons, numbering five or more, do an act or intend to do it, both sections 34 and 149 IPC may apply. Section 149 IPC is of wider scope than section 34 IPC and in a case where section 149 applies, a constructive liability arises in respect of those persons who do not actually commit the offence. "

19. We, therefore, have to hold that in so far as Sonu and Pappu are concerned their conviction for commission of offence under Section 302 IPC with the aid of Section 34 IPC is not sustainable in law though, their conviction for commission of offence under Sections 323 for assaulting Rajkumari is upheld.

20. The next question which arises for consideration in this appeal and for which a very fervent plea has been made by learned counsel for the appellants- Sahetram and Mahetram is that looking to the overall circumstance of the case, the conviction of Mahetram and Sahetram/appellants No. 1 & 2 may be altered to one under Section 304 Part-II IPC. To appreciate this submission, it is necessary to refer to relevant provision in the form of Exception-4 as embodied in Section 300 IPC which is sought to be applied in the present case. The essential ingredients to

attract Exception -4 and take it out from the purview of 'murder' as defined under Section 300 IPC are that the assault must be made without premeditation in the heat of passion on sudden quarrel. This essentially would be a matter depending upon fact and circumstances of every case. The proximity of dispute, quarrel and fight has to be so close that it leaves no time for the accused to premeditate the commission of offence. On the other hand, if the evidence shows that after the dispute, a preparation was made for commission of offence, the element of premeditation would creep in and rule out the applicability of Exception -4. The evidence of the present case, as has been looked into by us and as deposed by Rajkumari (PW5) & Janaki Bai (PW10) is that on the earlier part of the day, a dispute had arisen because of cattle trespassing in the field of Sahetram and Mahetram. It has also come in the evidence that at earlier point of time, on the same day, Sanjay along with some other persons had gone to the house of Sahetram and some fight possibly had taken place and both sustained injury and report was also lodged by them which is proved from the copy of FIR and the medical report filed as defence document. With this background, the evidence of Rajkumari (PW5) and Janaki (PW10) is that when they were standing outside the house, Sahetram and Mahetram came armed with weapons and the weapons were quite deadly one, being sharp edged weapon. Even if we assume that on account of cattle trespassing, some kind of dispute had arisen between the parties, the fight cannot be said to be sudden in nature. In fact, the manner in which the incident has happened shows that there was a revengeful act on the part of Sahetram and Mahetram. It is not a case that, at the spot, dispute suddenly arose and fight immediately started and in the heat of passion, without premeditation, one or two assaults were given, which led to death of Sanjay. It was well premeditated act in which the accused came armed with weapon. It is not a case that incident happened elsewhere far away from the house of deceased where Sanjay had arrived along with other accused. Therefore, we are unable to accept the submission that it would be a case covered under Exception -4 to Section 300 IPC.

21. The plausibility of defence, as has been argued, does not impress us. The story that the deceased had a quarrel with his own wife due to which his in-laws assaulted and killed him is wholly improbable because in that

event, own mother of deceased Sanjay would not falsely implicate third party and allow the real culprit to go scot free who had murdered her own son.

22. In the result, the appeal by **Appellant No.1- Sahetram** and **Appellant No.2- Mahetram** is dismissed. Their conviction is affirmed. As far as **Appellant No.3 Silwant Sing Nirgun @ Pappu** and **Appellant No.4- Sonuram Nirgun** are concerned, their appeal is partly allowed. Their conviction under Section 302 with the aid of 34 IPC is held unsustainable in law and they are acquitted of the charges of commission of murder. However, their conviction under Section 323 and 506-B IPC stands affirmed.

23. Appellant No.3- Silwant Sing Nirgun @ Pappu and Appellant No.4- Sonuram Nirgun are on bail. As appellant No.3- Silwant Sing Nirgun @ Pappu and Appellant No.4- Sonuram Nirgun before their release on bail had already undergone more than 4 months of imprisonment, their sentence for commission of offence under Section 506-B IPC is altered to the period already undergone by them. Their bail bonds stand discharged.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Rajani Dubey)
Judge