

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.30 OF 2016

- 1) Manohar S/o Uttamrao Sadavarte,
Age-20 years, Occu:Labour,
R/o-Warudi, Tq-Paithan,
Dist-Aurangabad,
- 2) Uttam S/o Maroti Sadavarte,
Age-50 years, Occu:Labour,
R/o-Warudi, Tq-Paithan,
District-Aurangabad.

**...APPELLANTS
(Orig. Accused Nos.1 and 2)**

VERSUS

The State of Maharashtra

**...RESPONDENT
(Orig. Respondent)**

...
Ms. Poonam V. Bodke Patil Advocate for Appellants.
Mr. R.D. Sanap, A.P.P. for Respondent-State.
...

**CORAM: SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE OF RESERVING JUDGMENT : 13th JULY 2023

DATE OF PRONOUNCING JUDGMENT : 13th SEPTEMBER 2023

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Appeal has been filed by original accused Nos.1 and 2 challenging their conviction by the learned Additional Sessions Judge-4, Aurangabad on 26th November 2015 in Sessions Case No.380 of 2012 after holding them guilty of committing offence under Section 302, 326 read with Section 34 of the Indian Penal Code.

2. The prosecution story, in short, is that the informant Subhash is resident of Warudi, Taluka-Paithan, District-Aurangabad. His family consists of his wife and children. His brother Ashok resides adjacent to him with his wife, children and their parents. The accused persons are distantly related to them and reside in the same lane at some distance. His brother Ashok has two daughters. Around 2.00 a.m. on 4th June 2012 when Ashok's wife and daughter were sleeping on *Ota* (raised platform) situated in front of their house, accused No.1 Manohar with one child in conflict with law and their friend had pulled hand of daughter of Ashok with ill-intention. Ashok had lodged report regarding the said incident with MIDC Paithan Police Station. Accused No.1 had, therefore, grudge against Ashok and family.

3. It is the further prosecution story that around 8.30 p.m., on 2nd July 2012, Ashok, his wife Meerabai and mother Kantabai, PW-1 Subhash were sitting on *Ota* in front of their house and were taking dinner. Accused No.1 Manohar came there under drunken condition and started hurling abuses. Ashok and Subhash had tried to convince him, but he caught hold of the collars of their shirts near throat. When Subhash and Ashok were trying to rescue themselves, accused No.2 Uttam i.e. father of accused No.1 came there armed with two sword sticks (*gupti*). Accused No.2 Uttam gave one of the sword stick to accused No.1 Manohar and thereupon accused No.1 Manohar pierced the sword stick on the left side of the chest of Ashok. Thereafter, he pierced the sword stick in the back of Ashok. When Subhash went to rescue Ashok, accused No.2 Uttam pierced the sword stick twice in the left thigh of Subhash. Ashok as well as Subhash sustained bleeding injuries and they fell on the ground. Thereupon Meerabai came to rescue them but at that time accused No.2 Uttam inflicted blow of sword stick on the right side of abdomen of Meerabai. She had also sustained bleeding injuries and fell down. Thereafter Kantabai raised shouts and at that time another accused Babasaheb, who is cousin of accused

No.1 Manohar, caught hold the hands of Kantabai and accused No.1 Manohar gave blow of sword stick on her abdomen. Original accused No.3 Jijabai gave beating to Kantabai by fists and slaps. Kantabai also sustained bleeding injuries and fell down. Villagers took the injured to the Rural Hospital, Paithan. Somebody had informed the incident of assault to the Police Station and therefore, Police came to village Warudi and then they came to know that injured persons have been taken to Rural Hospital, Paithan, therefore, PW-12 PI Rajendra Kadam went to Hospital by deputing staff members in the village. It was noticed by PI Kadam that all the four injured persons had sustained serious injuries, even then he gave letter to the medical officer seeking permission to record their statements but it was certified by the medical officer that injured are not in a position to give statements. The medical officer at Rural Hospital, Paithan then referred all the injured to Ghati Hospital, Aurangabad. Along with the injured, PI Kadam had sent Police Naik Shri Lone to Ghati Hospital to record statements of the injured persons. However, upon reaching at Aurangabad the medical officer declared Ashok dead and the other injured persons were admitted for treatment. Thereafter Police Naik Shri Lone recorded the statement of Subhash and on the basis of the same the First Information

Report (for short "the FIR") was registered vide Crime No.87 of 2012 under Sections 302, 307, 326, 325, 323, 504 read with Section 34 of the Indian Penal Code. PI Kadam has then investigated the matter.

4. The Investigating Officer has thereafter executed the spot panchnama and recorded the statements, whereas the inquest panchnama was also got executed and the dead body of Ashok was sent for postmortem. The accused persons came to be arrested. During the custody, accused Nos.1 and 2, by separate memorandums, discovered two sword sticks, which came to be seized under panchnamas. The clothes of the deceased and injured as well as that of accused came to be seized under panchnamas. The injury certificates of the injured persons came to be collected and after the investigation was over, charge-sheet was filed against three persons.

5. After committal of the case when accused persons pleaded not guilty, trial has been conducted. The prosecution has examined in all 13 witnesses to bring home the guilt of the accused. Accused have given written say which was part of statement under Section 313 of the Code of Criminal Procedure. The accused persons have examined accused No.1 as defence

witness, as well as accused No.2 has also been examined as DW-2. After considering the evidence on record and hearing both sides, the learned trial Judge has held accused No.1 Manohar and accused No.2 Uttam guilty of committing offence under Section 302, 326 read with Section 34 of the Indian Penal Code. For the offence under Section 302 read with Section 34 of the Indian Penal Code, accused Nos.1 and 2 have been sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.5000/- each, in default of payment of fine, to undergo rigorous imprisonment for three months. For the offence under Section 326 read with Section 34 of the Indian Penal Code, accused Nos.1 and 2 have been sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs.2000/- each and in default of payment of fine, to undergo rigorous imprisonment for three months. Accused Nos.1 and 2 have been acquitted of the offence punishable under Sections 307, 323, 504 read with Section 34 of the Indian Penal Code. So also original accused No.3 Jijabai was acquitted of all the offences. The set off has been granted to both the accused under Section 428 of the Code of Criminal Procedure.

6. Heard the learned Advocate Ms. Poonam V. Bodke Patil

appearing for the appellants and learned APP Mr. R.D. Sanap appearing for the State.

7. It has been vehemently on behalf of the appellants that the learned trial Judge has not appreciated the evidence properly. The points which have been raised to challenge the conviction are as under:-

(1) Prosecution has failed to prove its case beyond reasonable doubt,

(2) The place of occurrence has not been proved including that of proof of spot panchnama,

(3) The contradictions and omissions in the testimony of the prosecution witnesses have not been considered,

(4) Injury to the back of Ashok as stated by PW-1 Subhash is not corroborated by inquest panchnama. In the FIR also it is not mentioned that Ashok had sustained injury to his back.

(5) For the first time PW-1 Subhash deposed about piercing of sword stick from the back of Ashok.

8. Learned counsel for the appellants further submitted that it was not considered by the learned trial Court that the case of the accused would fall under Exception 4 of Section 300 of the Indian Penal Code and therefore, the case would be under Section 304 Part II of the Indian Penal Code. The testimony of both the defence witnesses has not been considered which shows that it was the right of private defence that was exercised by them. DW-2 Uttam has specifically stated that when he learnt that the informant and his family were assaulting Manohar, he took sword stick and went to the spot to save his son. It was natural on the part of the father to carry any weapon to deter the mob and save his son. It cannot be said that the accused have exceeded their right of private defence.

9. It has been further submitted on behalf of the appellants that accused had sustained injuries and it has been admitted by PW-9 Dr. Manish Dabhade. He has admitted that he had received letter from the Investigating Officer for examining accused No.1 Manohar which is at Exhibit-117. The injury certificate of accused No.1 Manohar has not been placed along with the charge-sheet. Thus, the suppression of the same by the prosecution is violating the rights of the accused. The panchas engaged throughout were interested persons. Some of them were related to the informant

and therefore, it can be certainly said that the prosecution has not examined any independent witness to bring the true story on record.

10. Alternatively, it has been prayed on behalf of the appellants that accused No.1 Manohar and accused No.2 Uttam are behind bars from 3rd July 2012 and 13th September 2012, respectively. They were aged 20 and 50 years respectively at the time of their arrest and therefore, considering the provisions of the Probation of Offenders Act, benefit be given to them by holding that the case would fall under Part-II of Section 304 of the Indian Penal Code. Reliance has been placed on the decision in ***Nand Lal and others vs. the State of Chhattisgarh*** (Criminal Appeal No.1421 of 2015, decided by the Hon'ble Supreme Court on 14th March 2023), wherein it was held that the non-explanation of the injuries on the person of accused is fatal and the benefit of the same should go to the accused.

11. Per contra, the learned APP strongly opposed the Appeal and supported the reasons given by the learned trial Judge in convicting the appellants. It is submitted that the trial Court has rightly appreciated the evidence and has dealt with each and every point raised by the appellants. The accused persons

appeared to be taking two contrary stands, at one place they are saying that they were not at all involved in the incident and at another breath they want to say that they have exercised their right of private defence. For exercising right of private defence the accused should admit their presence at the spot. Prosecution case rests on the testimony of three eye witnesses. PW-1 Subhash, PW-2 Meerabai and PW-3 Laxman. They stood corroborated as regards the fact that sword sticks were used. Accused No.1 Manohar had pierced the sword stick, after it was handed over to him by accused No.2 Uttam, on the left side of the chest of Ashok. Thereafter piercing was from the back of Ashok by him with the said sword stick. Meerabai was assaulted by accused No.2 and PW-1 Subhash was also assaulted by accused No.2 Uttam. Injured Kantabai was not examined, but evidence has come on record that she was assaulted by accused No.1 Manohar with the sword stick. The testimony of PW-1 Subhash, PW-2 Meerabai and PW-3 Laxman stands corroborated by medical evidence in the form of examining PW-9 Dr. Manish Dabhade, PW-10 Dr. Anil Patil, PW-11 Dr. Raghuveer Chandel. The postmortem report Exhibit-77 has been got proved through PW-10 Dr. Anil Patil. Taking into consideration the injuries noted in column No.17 of the postmortem report and

also the injuries which were got proved through PW-11 Dr. Raghuveer Chandel, when weapon like *gupti* / sword sticks were used, it cannot be said that the accused persons had no intention to kill. The incident had taken place in front of the house of the informant and not as stated in the submissions on behalf of the accused that it was in front of the house of the accused. Every non-explanation of injury to the accused is not fatal. Here, it has come on record that the injured persons were trying to rescue each other and therefore, possibility of causing injuries to the accused persons in the scuffle cannot be ruled out, for which the prosecution need not explain. Further those sword sticks have been recovered under Section 27 of the Indian Evidence Act in front of PW-6 Bhimrao and PW-7 Bappasaheb at the behest of accused Nos.1 and 2, respectively. Therefore, the evidence that was adduced to prove the guilt of the accused was beyond reasonable doubt and therefore, the conviction against the accused need not be interfered with.

12. The prosecution case is depending on the direct evidence. Though injured Kantabai has not been examined, it is required to be seen as to whether evidence in respect of injuries to her has been brought on record by the prosecution or not. The testimony of PW-1 Subhash – brother of deceased, PW-2 Meerabai – widow

of the deceased Ashok and PW-3 Laxman, who is the father of deceased and PW-1 Subhash, would show that there is consistency in saying that about a month prior to the incident accused No.1 Manohar had misbehaved with the daughter of deceased Ashok and PW-2 Meerabai, which incident was reported to MIDC Police Station, Paithan. In the cross-examination we have not found any serious challenge to the said fact about registration of the FIR against accused No.1 for earlier incident. According to these three witnesses, accused No.1 was having grudge against them as the said FIR was lodged against him. All of them then deposed about the incident dated 2nd July 2012. Deceased Ashok, PW-2 Meerabai, PW-1 Subhash and mother Kantabai were sitting in the veranda / *Ota* in front of their house for dinner around 8.00 to 8.30 p.m. Accused No.1 Manohar alone had come there under drunken condition and started hurling abuses to the children of Subhash and Ashok. They say that thereupon Ashok and Subhash had tried to convince him not to hurl abuses. At that time accused No.1 Manohar caught hold of collars of shirts of these two brothers. Thereafter accused No.2 Uttam came with two sword sticks. He gave one of the sword stick to accused No.1 Manohar and then Manohar had pierced the sword stick in the chest of Ashok. It appears that second

blow was given in back. According to PW-1 Subhash, he had tried to snatch sword stick from accused No.1 but at that time accused No.2 Uttam had pierced the sword stick, twice, on his left thigh. Ashok as well as Subhash sustained bleeding injuries and they fell down on the ground.

13. Here, now the objection has been raised on behalf of the accused that in the FIR it is not stated that the second blow was to the back of the deceased Ashok and also there is no mention about the same in the inquest panchnama. Important point to be noted is that inquest panchnama Exhibit-36 came to be exhibited as it was admitted by the defence, because of the same it appears that the prosecution had not examined the panchas to the inquest panchnama as well as PSI Shelke who was present at the time of execution of Exhibit-36. Now accused are estopped from giving any different interpretation to the said document. Further, from postmortem report Exhibit-77 which has been proved by PW-10 Dr. Anil Patil, it can be seen that the third injury in Column No.17 is :

" stab injury present over right side of back at middle part, situated 27 cm. from external accepal potrubance and 15 cm. medial end of scapula and 6 cm. right lateral to vertebral column, obliquely placed, margins clean cut,

infiltrated with of size 1 cm. x 0.3 cm. x cavity deep. Direction of wound is medially forward and downward. Both angles acute. "

. There is no specific cross-examination to PW-10 Dr. Anil Patil on the line now the point is agitated. Rather in the cross-examination it has been asked whether the third injury caused to the middle portion of the back of the deceased and he has answered in the affirmative and then he says that due to that injury there is possibility of oozing of blood and due to that possibility of smearing of undergarments of injured with blood, but there were no blood stains to the back side of the underwear of the deceased. These questions will not rule out the injury concerned. Further, the injury that was fatal is required to be considered and out of the three injuries noted in Column No.17 of the postmortem report, the first injury appears to be fatal which was to the left side of the chest over 8th rib, vertically oblique edges clean cut. The internal injuries show that the right pleura was punctured and there was penetrating wound over posterior aspect of middle lobe of right lung, running forward, medially and inferiority. The probable cause of death has been given as "Shock and haemorrhage due to stab injury to right lung." Therefore, we do not find any substance in the point

raised on behalf of the defence that the injury to the back was not mentioned in the FIR as well as in the inquest panchnama.

14. All the above three witnesses i.e. PW-1 Subhash, PW-2 Meerabai and PW-3 Laxman would further say that after both the brothers fell down, PW-2 Meerabai came to rescue them but accused No.2 Uttam had inflicted blow of sword stick on her right side of the abdomen. She also sustained bleeding injury and Kantabai was assaulted by accused No.1 Manohar on her abdomen by sword stick, who had also then sustained bleeding injury. A lengthy cross-examination of these witnesses has been taken, but as regards the sequence of incident is concerned these witnesses have not given a different version. As regards cross-examination of PW-3 Laxman is concerned, he has stated that he was inside the house and when he came out after hearing the noise, he found that Subhash and Ashok had fallen on the ground. Therefore, if we consider that he had come to the spot little late, yet he is the eye witness to the injuries to PW-2 Meerabai and also to his wife Kantabai. The fact which has been elicited in the cross-examination of these witnesses by asking question would rather strengthen the prosecution story as PW-1 Subhash in his cross-examination has said that when the first

attack was made on Ashok, they were nearby to him. He had seen accused No.2 when accused No.2 was at a distance of about 5 ft. from him. Subhash has said that he had not tried to resist accused No.2, but this might be due to sudden happenings of the events which they had not contemplated as they were sitting for taking dinner at the relevant time. He has further stated that Meerabai, Kantabai and he himself were admitted to Ghati Hospital for about seven days. Merely because they were annoyed with accused No.1 for his misbehaviour with daughter of Ashok, it cannot be said that accused No.1 would have been falsely implicated. They had already taken legal recourse against accused No.1 Manohar and therefore, possibility of false implication is ruled out.

15. It has been submitted on behalf of the accused that the spot of occurrence is different and the photograph shows different situation. We do not agree with the same. The testimony of these three witnesses would clearly show that the incident had taken place in front of their house. At the time of spot panchnama, some blood drops were found on the cement concrete road which was 50 to 60 ft. away from *Ota*. Here, we can contemplate that when such incident takes place, it need not

be confined to one place. A person may run to avoid the blow or even after the incident takes place he may go at a distance in injured condition. That does not change the spot of occurrence. The reliance has been placed by the accused on blood stains which were found near the house of one Shamrao Aher in the spot panchnama Exhibit-20, which is 10 to 20 ft. away from the house of the deceased, but the same will not show that the informant's side was in any way aggressive. The distance between the house of the accused and the informant is much more than that though it is in the same lane. In the cross-examination of PW-1 Subhash, he has stated that house of the accused is situated to the west at a distance of about 200 ft. from their house. Therefore, the question of right of private defence has to be considered from a different angle and not from the point that the informant's side was aggressor. It is absolutely not suggested to these three witnesses that anyone of them was armed with weapon. The other suggestion that accused No.1 had come in auto rickshaw and then he had abused to certain children who tried to climb the auto rickshaw from behind and the lady members from the family of the informant mistakenly taking that accused No.1 was abusing them and then attacking on DW-1, has been denied by PW-1, PW-2 and PW-3 specifically.

Here it is to be noted that time which accused have stated regarding the arrival of accused No.1 in auto rickshaw is between 6.30 p.m. to 7.30 p.m., whereas the incident in question is alleged to have taken place between 8.00 to 8.30 p.m.

16. The testimony of PW-1, PW-2 and PW-3 stood corroborated by the medical evidence. PW-9 Dr. Manish has stated that he had examined Subhash, Kantabai and Meerabai at a quick succession between 9.40 p.m., 9.45 p.m. and 9.48 p.m. on the same day. PW-9 Dr. Manish has noticed following injuries on the person of PW-1 Subhash:-

“(1) Stab injury left side of thigh admeasuring 2 x 0.5

x 4 cm. Pointed and sharp object and sharp and deep margin.

(2) Stab injury on medial aspects of thigh, admeasuring 2 x 0.5 x 6 cm. Sharp and deep margin “

. PW-9 Dr. Manish has deposed that age of both the injuries was within 2 to 3 hours and nature of both the injuries was simple. Both the injuries were caused by sharp and pointed object.

17. PW-9 Dr. Manish has noticed following injuries on the person of Kantabai:-

"(1) Stab injury left side above the areola of breast admeasuring 2 x 0.5 x 2 cm. Pointed and sharp object and sharp and deep margin.

(2) Stab wound on right side just below the rib at right hypochondrium, admeasuring 1 x 0.2 x 3 cm. Sharp and deep margin."

. PW-9 Dr. Manish has then deposed that age of both the injuries was within 1 to 2 hours and nature of both the injuries was simple. Both the injuries were caused by sharp and pointed object.

18. PW-9 Dr. Manish has noticed following injuries on the person of PW-2 Meerabai:-

"(1) Stab injury lateral to chest below rib admeasuring 2 x 1 x 4 cm. Pointed and sharp object and sharp and deep margin.

(2) Stab injury on left side of leg, admeasuring 1 x 0.5 x 4 cm. Sharp and deep margin".

. PW-9 Dr. Manish has then deposed that age of both the injuries was within 2 to 3 hours and nature of both the injuries was simple. Both the injuries were caused by sharp and pointed object.

19. Thus, the situs stated by the witnesses and the medical officer matches. All of them had sustained stab injuries, which are definitely possible by sword stick. Of course the medical officer has admitted that in stab injury the depth is always greater than the length of the injury. He has stated that after 1½ hours from his treatment, injured Meerabai, Subhash and Kantabai were conscious and oriented. It was tried to be then contended that the FIR is belated and the statements of the witnesses have also been taken belatedly. However, there is no such pin pointing question to PW-12 PI Kadam. Rather, he has stated that he had gone to Primary Health Center to record the statement of the injured but it was certified by the medical officer that the injured are not in a position to give statement. There is no reason to disbelieve him. We can also understand that immediately after the incident there would be some kind of mental shock so also the injured would be more concerned with the injuries sustained and treatment thereto and therefore it was

not expected that within fraction of minutes there should be FIR. Reasonable time would always be considered in favour of the prosecution. Rather in his cross-examination PW-9 Dr. Manish has admitted that along with the injured, family members had accompanied. There were about 100 people accompanying the injured persons and the condition of Ashok was critical than other injured persons. He had made inquiry about the history of the assault and made entry about the same in the MLC Register. Though he has brought the MLC Register, there was no entry in the same, that has been so extracted in the cross-examination. But when the Police had also arrived, he might not have paid attention to writing the history of assault.

20. Prosecution story is further supported by PW-10 Dr. Anil Patil who conducted autopsy. Reference about his testimony has already been made and therefore need not be reproduced. Further support is in the testimony of PW-11 Dr. Raghuveer Chandel who was attached to Ghati Hospital as Chief Medical Officer. He has given the injuries noted by him on the person of Subhash, Kantabai and Meerabai and as regards Ashok, he states that Ashok was brought dead. He had noted injuries on the person of Ashok. Further, PW-13 Dr. Abhijit Chincholi had

deposed that he examined PW-1 Subhash, PW-2 Meerabai and injured Kantabai. He was the treating doctor. There is nothing in the cross-examination which will give a contrary version regarding the injuries on the persons of those injured.

21. Thus, taking into consideration the parts of the body of these injured persons which received the injuries, the learned Sessions Judge has come to the conclusion that offence under Section 326 of the Indian Penal Code has been proved against both the accused as there was common intention which occurred at the spur of moment when PW-2 Uttam handed over one of the sword stick out of the two which he had brought from the house and then attack was made. Therefore, as regards offence under Section 302 of the Indian Penal Code is concerned, though the blows were given by accused No.1 Manohar, yet when the weapon was provided to him by his father, accused No.2 Uttam, it has been held to be a murder i.e. culpable homicide amounting to murder.

22. Now, it has been tried to be submitted that the case would fall under the exceptions and thereby the offence that would be at the most made out, would be under Section 304 Part II of the

Indian Penal Code. We do not agree with the said submission. The weapon that is used is sword stick (*gupti*). It is not the weapon which is ordinarily kept in anybody's house. Further, there was a very short period between accused No.1 hurling abuses, trying to be convinced by PW-1 Subhash and deceased Ashok and then he catching hold collars of shirt of both of them and the arrival of accused No.2 Uttam with two sword sticks. It indicates that the intention was to kill. Accused No.2 Uttam could have arrived without weapon also to save his son but he arrived with two sword sticks, supplied one to the son and thereafter both the accused used it independently on the deceased and injured persons. Therefore, the intention is very clear. The case will not fall under any of the exceptions to Section 300 of the Indian Penal Code.

23. Here itself we would like to consider the testimony of PW-6 Bhimrao and PW-7 Bappasaheb, who are the panchas to the panchnamas under Section 27 of the Indian Evidence Act regarding discovery of sword sticks by accused Nos.1 and 2, respectively. Accused No.1 has discovered the said weapon which was kept behind the T.V. in his house and accused No.2 has discovered the weapon from below heap of wooden sticks of

Neem tree in his field. Here the further aspect that is required to be noted is that accused No.1 Manohar came to be arrested on 3rd July 2012 i.e. on the next day of the incident itself but accused No.2 appears to be absconding and ultimately came to be arrested on 13th September 2012 and therefore the discoveries are on different occasions. The cross-examination of these two witnesses has not shattered their examination-in-chief. Therefore, it has been proved through them as well as from the testimony of PW-12 Investigating Officer Kadam that accused Nos.1 and 2 had made voluntary statement and discovered the sword sticks. Of course C.A. reports are not supporting the prosecution completely as regards the sword stick is concerned, as the blood stains were not detected. But the basic nature of the evidence which C.A. reports afford is corroborative in nature.

24. Learned Advocate for the appellants is relying on the decision in in ***Nand Lal and others vs. the State of Chhattisgarh*** (supra). The ratio laid down cannot be disputed, however, it can be said firstly, that in order to explain the injuries, those injuries might have been substantial. Simple injuries need not be explained at all. Admittedly there would

have been some scuffle when the witnesses are saying that one by one they were trying to rescue each other. The accused have not tried to bring evidence on record as to what nature of injury accused No.1 had sustained. There was an attempt to put questions in cross-examination of PW-9 Dr. Manish, but he deposed that he had not brought the details. When both the accused had examined themselves in defence, they could have certainly asked for witness summons to be issued to bring the nature of the injury allegedly sustained by accused No.1 Manohar, on record. Here, the arrest panchnama of accused No.1 makes a mention that there was an injury to the left elbow. This might be a very simple injury which need not be explained at all and therefore, the ratio laid down in ***Nand Lal and others vs. the State of Chhattisgarh*** (supra) cannot be made applicable to the facts of this case.

25. Now turning towards evidence in defence, DW-1 Manohar has given in detail, according to him why the incident took place. It is to be noted that in his examination-in-chief he has stated that Ashok was in drunken condition and Ashok was beating him by means of stump on his hands, legs, thighs etc. But there is no documentary evidence to support the same. He then says that

somebody had informed the fact to his father and within two minutes his father came. Manoarh then says that his father was making request to Ashok, Subhash and Laxman and three ladies that not to assault his son otherwise he would die. They did not pay attention and started beating. In the meantime Ashok picked up a big stone lying at the side of road and when he was about to throw it on the head of Manohar and Manohar was unable to move due to assault, his father took out sword stick from inside his shirt and gave blow of the same to Ashok. As a result of said blow, Ashok fell down along with stone. Manohar again says that after Ashok fell down the other three ladies and Subhash were still beating him. His father had given blow to them also by sword stick. He says that as those persons were about to kill him, his father made attack to save him. This entire story was never put to these prosecution witnesses together. That means it was put in piecemeal and they have denied the same. Accused No.1 / DW-1 Manohar has solely blamed his father for the attack with sword stick and according to him only one sword stick was used. In his examination-in-chief he has clearly stated that he has not used any *gupti* (sword stick). But then he has not stated that the discovery of the sword stick is not by him at all. When he enters the witness box then he should put forth his entire

story and it should not be left at any point of time. In his cross-examination he has admitted that he had sustained abrasion to his left hand, leg and it was bleeding injury. As regards abrasion is concerned, certainly attack by the sword stick is not justifiable at all. His version that Ashok fell down with the stone does not get supported by PW-10 Dr. Anil Patil who conducted the autopsy. In the cross-examination Dr. Anil Patil has further admitted that Ashok died due to injuries suffered by him by means of sword stick in that incident.

26. DW-2 Uttam is accused No.2. He has stated that one boy had come to his house while saying that the relatives of Ashok are beating Manohar. He realized that due to previous dispute those persons might be beating his son and when he was in his house he thought that those persons would beat him also and therefore he took the *gupti* (sword stick) from his house, concealed it under his shirt and went to the spot. It is to be noted that the discovery panchnama Exhibit-54 and 55 by him gives the length of the sword stick as 25 cm. having 16 cm. blade and 9 cm. handle, width of the blade was 1 cm. How this could have been concealed in his shirt, is a question. Now DW-2 Uttam improves the story by saying that even after his request

all these persons were not leaving Manohar but PW-3 Laxman was present armed with sickle and he was threatening the people who were gathered, not to intervene and when Uttam as well as Manohar were requesting not to beat Manohar, his son was not spared. Ashok threw the stick from his hand and then picked up a stone, then PW-2 Uttam took out sword stick and showed it to Ashok, still Ashok was not moved and started to go ahead towards Ashok, then Uttam gave blow of sword stick to Ashok from back side. PW-2 Uttam then corrected himself by saying that he gave the blow to Ashok from front side. It was asked to him what Meerabai, Kantabai and Nandabai were doing, he says that they were engaged in beating his son. Uttam had beaten them and Subhash also. He has not given any reason as to why he had still given the blow of sword stick to the injured persons. He admits that after the incident he fled away. He has stated that he had tried to save life of his son. The cross-examination would show that he has conveniently changed his version and he as well as DW-1 Manohar tried to say that many people had gathered at the spot when the incident was going on. There is no reason given by the accused persons as to why they have not examined any of those eye witnesses to support their version.

27. The accused persons have then tried to put forth the plea of right of private defence. As the plea of right of private defence has been raised, in this connection we would like to consider the legal position on this point. In ***Raj Singh vs. State of Haryana and others, (2015) 6 S.C.C. 268***, the Hon'ble Apex Court, in Paragraph No.16, has held as under:-

" 16. The right of private defence is codified in Sections 96 to 106 IPC. Section 96 declares that "nothing is an offence which is done in exercise of the right of the private defence". Section 97 states that every person has right of defence of person as well as of property. Section 100 describes the situations in which the right of private defence of body extends to the extent of voluntarily causing of death. To claim right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The law of private defence does not require that the person assaulted or facing apprehension of an assault must run away for safety. It entitles him to defend himself and law gives him right of private defence. There is no right of private defence where there is no apprehension of danger. Necessity of averting and impending danger must be present, real or apparent. "

. Further, in the said decision note has been taken of the earlier decisions in Paragraph Nos. 17 and 18 as follows:-

"17. Elaborating the scope of right of private defence, in *Dharam v. State of Haryana*, (2007) 15 SCC 241 in paragraphs (18) and (19) it was held as under:-

"18. Thus, the basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon a host of factors like the prevailing circumstances at the spot, his feelings at the relevant time, the confusion and the excitement depending on the nature of assault on him, etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence.

19. It is trite that the burden of establishing the plea of self-defence is on the accused but it is not as onerous as the one that lies on the prosecution. While the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea of self-defence to the hilt and may discharge the onus by showing preponderance of probabilities in favour of that plea on the

basis of the material on record (see *Munshi Ram v. Delhi Admn.*(AIR 1968 SC 702), *State of Gujarat vs. Bai Fatima* (1975) 2 SCC 7) and *Salim Zia v. State of U.P.* (1979) 2 SCC 648)."

18. In *Bhanwar Singh v. State of M.P.*, (2008) 16 SCC 657, in paragraphs (50) and (60) it was held as under:-

"50. The plea of private defence has been brought up by the appellants. For this plea to succeed in totality, it must be proved that there existed a right to private defence in favour of the accused, and that this right extended to causing death. Hence, if the court were to reject this plea, there are two possible ways in which this may be done. On one hand, it may be held that there existed a right to private defence of the body. However, more harm than necessary was caused or, alternatively, this right did not extend to causing death. Such a ruling may result in the application of Section 300 Exception 2, which states that culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. The other situation is where, on appreciation of facts, the right of private defence is held not to exist at all.

60. To put it pithily, the right of private defence is a defence right. It is neither a right of aggression nor of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private

defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self-creation. Necessity must be present, real or apparent". (emphasis added)

The same view is also expressed in the cases of Biran Singh v. State of Bihar, AIR 1975 SC 87, Wassan Singh v. State of Punjab, (1996) 1 SCC 458, Sekar v. State, (2002) 8 SCC 354, Buta Singh v. State of Punjab, AIR 1991 SC 1316 and James Martin v. State of Kerala, (2004) 2 SCC 203."

28. Further, in ***Pappu vs. State of M.P., (2006) 7 SCC 391***, the applicability of Exception 4 of Section 300 of the Indian Penal Code has been considered as follows in Paragraph Nos.12 and 13:-

"12. For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

13. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is

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

or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'. ”

29. Further, in ***Jassa Singh and others vs. State of Haryana (2002) 2 SCC 481***, Exception 2 of Section 300 of the Indian Penal Code was considered and it has been observed that if only it comes within Exception 2 to Section 300 of the Indian Penal Code, the gravity of the offence be reduced and the acts committed by the assailants would come within the purview of culpable homicide not amounting to murder. Of course this was the case wherein right of private defence to protect the property was mainly agitated and in the present case the appellants want to state that the right of private defence was used to protect the life of accused No.1 Manohar. Therefore, taking into consideration the above said legal point, the facts are required to be re-assessed once again.

30. The right of private defence should always be proportionate. If the other person is armed then so much of the assault is permitted which will disarm him. Here, first of all even if we consider the alternative theory that was put forward regarding the defence of right of private defence, yet no such circumstance has been proved which would show that whatever

act has been done by either P.W.1 or by deceased was with the specific intention. There was no question of danger to the life of accused No.1 Manohar. Accused have not attempted to lodge a report in respect of the alleged incident, therefore the said defence raised cannot be considered. Rather the prosecution was successful in proving the offence beyond reasonable doubt. Hence the conviction awarded to accused Nos.1 and 2 is perfectly legal, based on sound principles of law and correct appreciation of evidence. It does not require any kind of interference. There is no merit in the present Appeal and it deserves to be dismissed.

31. The Appeal is dismissed.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE