

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 327 of 2009

**Md. Anwar
-Vs-
The State of West Bengal**

With

CRA 339 of 2009

**Sudhir Shaw
-vs-
The State of West Bengal**

With

CRA 347 of 2009

**Anup Shaw
-vs-
The State of West Bengal**

With

CRA 359 of 2009

**Bikash Paswan
-vs-
The State of West Bengal**

For the Appellant

: Mr. Abhijit Kumar Adhaya
Ms. Sudeshna Basu
Ms. Banani Bhattacharya
Ms. Upasana Das
(In CRA 327 of 2009)

For the Appellant : Mr. Arindam Sen
 Mr. Saurav Basu
 Mr. Asit Bera
 (In CRA 347 of 2009 & CRA 359 of 2009)

For the Appellant : Mr. Pritam Roy
 Ms. Arushi Rathore
 Ms. Triparna Roy
 (In CRA 339 of 2009)

For the State : Ms. Faria Hossain
 Mr. Anand Keshari

Judgment on : 05.05.2026

Ananya Bandyopadhyay, J.:-

1. These appeals are preferred against the judgment and order dated 30.04.2009 passed by the Learned Additional Sessions Judge, 6th Fast Track Court, Bichar Bhavan, Calcutta in Sessions Trial No.1 of October, 2007 arising out of Sessions Case No.68/2007, thereby convicting the appellants i.e., Anup Shaw, Sudhir Shaw under Section 304 (Part-II)/34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for 6 years each and also to pay a fine of Rs.3,000/- each in default to suffer further rigorous imprisonment for 6 months each and others appellants i.e., Bikash Paswan, Md. Anwar under Sections 324/34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for 3 years and also to pay a fine of Rs.2,000/- each in default to suffer further rigorous imprisonment for 6 months each.
2. The prosecution case precisely stated on 30.04.2007 at about 16:15 hours two groups of boys brawled over positioning in a playground at Lovers Lane

and K.P. Road beside Race-Course Ground, where a group of boys including the appellants were playing cricket and another group were to playing football simultaneously. Altercation aggravated when the group of boys i.e. the victims and the deceased in requested the appellants playing cricket to remove the stone which was not removed. Eventually, it was removed by the group of boys who had come to play football i.e. the victims and the deceased. The group of boys playing cricket formed an unlawful assembly being armed with stumps, cricket bats and brick bats and in furtherance of the common object assaulted those group of boys playing football as a result Md. Abir @ Md. Imran sustained severe head injury and Raja @ Md. Samir and Majid Alam also sustained injury. Md. Abir @ Md. Imran was removed to S.S.K.M. Hospital and there from to B.M. Birla Heart Research Centre where Md. Abir @ Md. Imran was declared brought dead and Majid Alam and Md. Samir @ Raja, the two injured persons were admitted at Ekbalpur Nursing Home.

3. On the basis of the statement of one Saddam Hossain (PW-2), Hastings P.S. Case No.94 dated 30.04.2007 was initiated against 15/20 unknown persons including the appellants for the offence under Sections 148/149/324/302 of the Indian Penal Code for investigation.
4. During the investigation 7 persons were arrested namely Bikash Paswan, Kushu Shaw, Md. Anwar, Anwar Ahmed, Anup Shaw, Sukdeb Dolui and Sudhir Kr. Shaw. Out of those 7 persons during identification parade, 2 persons namely Sukdeb Dolui and Kushu Shaw were not identified. The other 5 persons facing trial were duly identified by the witnesses. So, on

completion of the investigation charge-sheet was submitted against 5 persons namely Bikash Paswan, Md. Anwar, Anwar Ahmed, Anup Shaw and Sudhir Kr. Shaw for the offence under Sections 148/149/324/304(Part-II) of the Indian Penal Code with a further prayer implicating two accused persons namely Kushu Shaw and Sukdeb Dolui be discharged for want of sufficient evidence. On receipt of the charge-sheet, the aforesaid accused persons were discharged by the Ld. Court of Metropolitan Magistrate, 11th Court, Calcutta vide order dated 27.07.2007.

5. Charges were framed against 5 appellants namely Bikash Paswan, Md. Anwar, Anwar Ahmed, Anup Shaw and Sudhir Shaw under Sections 148/149/324/304 (Part-II) of the Indian Penal Code to which they pleaded not guilty and claimed to be tried.
6. In order to prove its case, the prosecution examined as many as 21 witnesses and examined certain documents while the defence had also examined five witnesses.
7. The Learned Advocates for the appellant/Md. Anwar in CRA 327 of 2009 submitted as follows:—
 - i. *“The prosecution examined as many as 19 witnesses to prove the case but the accused examined none.*
 - ii. *PW-2 Saddam Hossain whose evidence-in-chief says that Md. Abir @ Md. Imran fell down and there was a quarrel for removing of big stone that was lying there. That in his cross-examination he stated that at the time of T.I. Parade no similar persons were mixed up with the suspects.*

He further stated that he was at home and his grandparents told him to go to P.S.

- iii. That witness further stated that he saw the accused in the Maidan as well as in the jail. A suggestion was given that the accused was shown to the witness outside the Court but he denied so.*
- iv. PW-7, Tariq Hussain denied the fact that he was assaulted by Md. Anwar.*
- v. PW-8 Sk. Sikandar could not and/or did not identify the assailant who assaulted Md. Abir @ Md. Imran.*
- vi. PW-17, the Learned Magistrate who held T.I Parade about two months after the incident i.e., on 04.06.2007 that Saddam Hussain identified the appellant by touching his hand on their head and said that the appellant assaulted Majid Alam by fist and blows. The Learned Magistrate in his cross examination did not mentioned that U.T.P's meet with the other suspects were of similar age, same height and in similar dress. He also stated that during the T.I Parade witnesses did not say anything before him and also did not obtain any signature of the suspect in the T.I. Parade Memo.*
- vii. PW-14 and PW-15 were the doctors who treated Md. Abir @ Md. Imran who brought dead. PW-15 in his examination in chief stated that there was fracture in parietal and occipital suture and no other injury could be detected. He opined that the death was due to the effect of head injury. He was his cross examination stated that he did not mentioned in the post-mortem report as to whether the death was due to*

accidental, homicidal or suicidal. He volunteered that it was not possible to give exact time of death.

- viii. PW-16 was also another doctor attached to Ekbalpore Nursing Home, he did not give out any statement only as to the fact to the report which bears the handwriting of Dr. T.N Wangdi.*
- ix. Under Section 313 of Criminal Procedure Code was not done properly and the circumstances were not put clearly to show that the accused committed any offence.*
- x. From the scanning of entire evidence on record and from the statement made under Section 313 of Criminal Procedure Code, it was evident that the present appellant did not commit any offence and the death was due to injuries on the head which may be a fall on a big stone upon which he fell and which caused injuries on his head.*
- xi. The appellant submitted that the appellant was in custody for about 2 years and 7 months which covers his total sentence of 3 years under Section 324/34 of Indian Penal Code. The appellant also submitted that he had paid fine and as such he had completed the sentence that was pronounced by the Learned Judge although not admitting that he had committed any offence nor was present at the place of occurrence at the time of offence.*

Therefore, the appellant prays that he may be acquitted from the charges levelled against him including return of the fine”.

- 8. The Learned Advocates for the appellant/Anup Shaw in CRA 347 of 2009 and the appellant/Bikash Paswan in CRA 359 of 2009 submitted as follows:–

- i. *“The instant case viz. Hastings Police Station Case No.94 of 2007 dated 30.04.2007 culminating into Sessions Case No.68 of 2007 corresponding to Sessions Trial No. 01 of October 2007 was registered on the basis of the statement of one Saddam Hossain (who has been examined as PW-2) alleging inter alia that on 30.04.2007, at about 16:00 hours Saddam Hossain himself along with one Raja (PW-9), Majid Alam (PW-5), Sajad, Chotu alias Wasim Aslam (PW-4), Shoab alias Md. Soheb (PW-6) and Vicky alias Tarique Hossain alias Tarik Hossain (PW-7) and others all are of Ebrahim Road, Kolkata football beside Race Course Ground in between K.P. Road, Kolkata - 700023 went to play and Lover’s Lane. It was alleged that after reaching there they could find that 15-20 persons were playing cricket there and they allegedly requested them to remove one big stone from the field which was kept on the opposite side of the three stumps as this was causing problem for them to play football. It was further alleged that as a result of this an altercation ensued and it was again alleged that those persons became furious and suddenly attacked the complainant party with cricket bats, stumps, brick bats, etc, and as result of which, one Md. Abir alias Md. Imran, son of Md. Rafique of 26/1B, Ekbalpore Road, Kolkata-700023 sustained injury on his person at about 16:15 hours and fell down on the ground. Md. Sameer alias Raja (PW-9) and Majid (PW5) also sustained injuries. Sk. Javed (PW-11), Mehbooh Ahmed (not examined) and one Imtiaz (PW-10) removed Md. Abir alias Md. Imran to SSKM Hospital in a taxi whereas Saddam Hossain along*

with Shoab and Vicky removed two injured persons Sk. Raja and majid to Ekbalpore Nursing Home. Lastly it was alleged that subsequently the said Saddam Hossain came to know that Md. Abir alias Md. Imran at a later stage was removed to BM Birla Heart Research Centre where he allegedly expired. (Statement of Saddam Hossain, treated to be the complaint to register the First Information Report.

- ii. It was pertinent to mentioned that all the alleged assailants were unknown to the complainant as well as other alleged eye witnesses and injured witnesses. No specific name of the alleged assailants was ever mentioned in the First Information Report.*

Medical Evidences:

- iii. Saddam Hossain (PW-2), Chotu alias Wasim Aslam (PW-4), Majid Alam (PW-5) (injured witness), Shoab alias Md. Soheb (PW-6), Vicky alias Tarique Hossain alias Tarik Hossain (PW-7), Sk. Sikandar (PW-8), Md. Sameer alias Raja (PW-9) (injured witness) all have specifically stated about the altercation and due to scuffle Md. Abir alias Md. Imran fell down on the ground and confirms presence of a big stone at the spot. The inquest report which was specified only one injury i.e. on the right chest, hospital border, measuring 2" x 2". Sub Inspector B.T. Karmakar (PW-19) of Alipore Police Station, who allegedly held the inquest over the dead body of Md. Abir alias Md. Imran, has categorically mentioned during his cross examination for appellant Bikash Paswan to the effect that he did not saw any other injury apart from the injury on the chest, further confirmed that there was no bandage in any other body part. Be*

it noted that in the inquest report that it was specifically mentioned that the dead body of Md. Abir alias Md. Imran, was identified by the witnesses present over there to be that of the deceased.

iv. At that juncture it was most relevant to refer to the evidence of Dr. Bikash Mukherjee (PW-15), who held post-mortem over the corpse of the deceased and found the following injuries:

a) Abrasion tip of left shoulder measuring 3" x 1".

b) Abrasion $\frac{1}{4}$ " x $\frac{1}{4}$ " in the middle of left side of neck.

c) Abrasion $\frac{1}{2}$ " x $\frac{1}{2}$ ", 1" below the left elbow.

d) An occipital suture fracture.

e) Evidence of subdural hemorrhage on both sides of the brain, it was specifically mention by PW-15 that no other injury could be detected and specifically opined that the death was due to the injury, ante mortem in nature.

v. Keeping in view the self-contradictory statements of these two witnesses, viz. PW-19 and PW-15, it was doubtful as to whether the deceased was ever taken to B.M. Birla Heart Research Institute where he claimed to have expired and the inquest was done.

vi. It was most pertinent to mention that according to the post mortem report, the injuries noted to have been sustained by the deceased as mentioned in details hereinabove, it had been specifically deposed by the post-mortem doctor PW-15, during his cross examination for Appellant Sudhir Shaw and Anup Shaw that "occipital is on the back side of the head. The injury on the occipital may be caused due to fall

from height on stone or some hard substance. If a person is pushed forcibly and he falls on some hard substance including stone, this injury may be caused on occipital region. It is correct that among all the injuries the injury as mentioned at serial no. 4 viz. (An occipital suture fracture) in the PM report is vital. I have not mentioned in the PM report as to whether the death was due to accidental, homicidal or suicidal.....”

In view of the aforesaid deposition of the PW-15, the post mortem doctor and keeping in view the evidences of Saddam Hossain (PW-2), Chotu alias Wasim Aslam (PW-4), Majid Alam (PW-5) (injured witness) Shoab alias Md. Soheb (PW-6), Vicky alias Tarique Hossain alias Tarik Hossain (PW-7), Sk. Sikandar (PW-8), Md. Sameer alias Raja (PW-9) (injured witness), the most reasonable possibility of accidental death of the deceased, Md. Abir alias Md. Imran, during scuffle by falling on the stone or hard surface of the land cannot be ruled out. It is not out of place to mention that each of the witnesses as mentioned hereinabove, specific suggestions were put during their cross examination concerning the accidental death of Md. Abir alias Md. Imran, by falling on stone during alleged scuffle.

- vii. It was the settled position of law that if two views concerning the involvement of the accused persons in commission of the crime are reasonably possible keeping in view the evidences laid down during trial, the view which was most favourable to the accused person was to*

be adopted. In that regard the appellants wish to rely on the following judgments.

Non Seizure of any alleged weapon of offence:

- viii. It was the specific evidence of the investigating officer (PW21) that after reaching the place of occurrence, he seized some articles viz. One Stone and brickbat in presence of witnesses. Further on the spot the said stone and brickbat were packed, sealed and labeled. He also claimed to have made search to seize the offending weapons, bat and stump but he did not get at the spot. It had been specifically admitted by the investigating officer during his further cross examination for accused Anwar Ahmed on 20.11.2008, that it was correct that no instrument regarding the cricket was recovered from the house of any of the accused persons.*
- ix. Therefore it can safely be concluded that the alleged assault, as attempted to be projected by the so called eye witnesses, could not be proved by the prosecution due to non-seizure of the incriminating articles as alleged and hence such improbability of such version of the eye witnesses consequently probabalizes the possibility of the accidental death of Md. Abir alias Md. Imran, by falling on stone or hard surface of the playground.*

Identification of Bikash Paswan

- x. During test identification parade, the appellant Bikash Paswan was identified by Md. Sameer alias Raja (PW-9), Shoab alias Md. Soheb (PW-6) and Sk. Sikandar (PW-8).*

- xi. *According to Md. Sameer alias Raja (PW-9), Bikash Paswan assaulted injured witness Majid Alam (PW-5) but Majid Alam (PW-5) could not identify Bikash Paswan. Since Majid Alam (PW-5) allegedly could identify appellant Anup Shaw. Further, Majid Alam (PW-5) did not state who assaulted him. Even Majid Alam (PW-5) did not state who assaulted Md. Sameer alias Raja (PW-9). Further, Majid Alam (PW-5) could not produce his discharge certificate during trial and even he did not hand over his blood stained wearing apparels to the police.*
- xii. *Again the injured witness Majid Alam (PW-5) has admitted that “it is correct that I have appeared in the court twice and thrice before my evidence in this court” hence, the identification of appellant Bikash Paswan during trial by Majid Alam (PW-5) loses all its value in the light of his such specific admission.*

Arguments concerning Test Identification Parade

- xiii. *It appeared from the evidence of PW-17 Anil Kumar Prasad, the then Metropolitan Magistrate, 14th Court, Calcutta, held test identification parade on 04.06.2007 which was admittedly 35 days after the alleged incident and such delay has not been explained by the investigating officer by adducing evidence showing cogent reason.*
- xiv. *The following particulars can be brought out from the evidence of PW-17 regarding the mode and manner of holding test identification parade of the accused persons of the present case:-*
 - a) *The test identification parade was held of all the accused persons at a time in a single row.*

- b) *The entire test identification was held and concluded from 3:50 pm till 4:25 pm on 04.06.2007 at Presidency Correctional Home and altogether seven witnesses i.e., PW-2, PW-7, PW-9, PW-4, PW-6, PW-5 and PW-8 participated in the test identification parade within such a short span of 35 minutes.*
- c) *During cross-examination of PW-17 for appellants Anup Shaw and Sudhir Shaw, it is specifically admitted –*
- a. *It was not specifically mentioned in the report that the under trial prisoners mixed with the suspects were of similar age, same height, of same sex and of similar dress. All the identifying witnesses viz. Saddam Hossain (PW-2), Chotu alias Wasim Aslam (PW-4), Majid Alam (PW-5) (injured witness), Shoab alias Md. Soheb (PW-6), Vicky alias Tarique Hossain alias Tarik Hossain (PW-7), Sk. Sikandar (PW-8), Md. Sameer alias Raja (PW-9) (injured witness), have accepted that fact.*
 - b. *It was further not mentioned in the report that after the identification by one witness, the position or the places of the suspects were changed.*
 - c. *It was not mentioned in the report that the suspects were offered to stand at the places of their choice at the time of test identification parade.*
 - d. *It was also not mentioned in the report that the suspects were offered to wear the dress of their choice.*

e. Lastly, the signatures of any of the suspects were not obtained on the test identification memo.

xv. In view of the aforesaid admission and/or admitted position as admitted in the evidence of the PW-17, the outcome of the test identification parade so held in the present case was absolutely vitiated for non-compliance of the legal mandates as per the settled position of law and therefore the benefit of doubt ought to have been extended to the appellants in respect of the present case.

xvi. Further, delay in holding test identification parade of the suspects without having any cogent explanation to that effect, the same itself vitiates the very essence of the test identification parade.

Regarding free fight and alleged assault by the appellants:-

xvii. Saddam Hossain (PW-2), Chotu alias Wasim Aslam (PW-4), Majid Alam (PW-5) (injured witness), Shoab alias Md. Soheb (PW-6), Vicky alias Tarique Hossain alias Tarik Hossain (PW-7), Sk. Sikandar (PW-8), Md. Sameer alias Raja (PW-9) (injured witness) during their examination have not specifically mentioned as to who assaulted whom and specifically who had assaulted the deceased and at best it can be concluded that there was a free fight over the issue of playing games amongst a large number of persons belonging to two or more groups out of which the deceased Md. Abir alias Md. Imran, might have sustained accidental injury resulting to his death. None of these acts can very well be said to be premeditated and the same took place on the spur of the moment. Under no stretch of imagination it can be said the accused

persons have shared common intention amongst themselves either to cause culpable homicide of the deceased or voluntarily causing hurt by dangerous weapons or means within the meaning of Section 324 of the Indian Penal Code.

None of the above witnesses have deposed that the accused persons jointly and/or severally that they have in any way facilitated and/or promoted the commission of the alleged offences. More so when none of the witnesses have said as to which of the accused have played the role to what extent.

Argument relating to sentence

xviii. In view in the judgment and order of sentence dated 30.04.2009, appellant Anup Shaw had been convicted under Section 304 Part II read with Section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 6 years whereas Bikash Paswan was convicted under Section 324 read with 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 3 years.

xix. It appeared from the record that the appellant Bikash Paswan was arrested on 30.04.2007 whereas the appellant Anup Shaw was arrested on 01.05.2007 and they remained in custody during trial and only on 18.08.2009 Anup Shaw was granted bail by this Hon'ble Court under Section 389 of the Code of Criminal Procedure and ultimately got released from custody on 21.08.2009 and hence Anup Shaw suffered detention of 2 years 4 months and 5 days whereas Bikash Paswan was granted bail on 24.06.2009 by this Hon'ble Court under Section

389 of the Code of Criminal Procedure and ultimately stood released from custody on 13.07.2009 and hence Bikash Paswan suffered detention of 2 years 2 months and 14 days. The incident took place way back in 2007 which was almost 18 years back when all the accused persons were of tender age and since such a long time has already lapsed, it was prayed that the quantum of sentence may be considered leniently, keeping in view the fact that both the appellants have already suffered substantive detention in connection with the present case.

Conclusion

In view of the above argument, appellant Anup Shaw (CRA 347 of 2009) and appellant Bikash Paswan (CRA 359 of 2009) may be acquitted from their respective charges of conviction for the ends of justice”.

9. The Learned Advocate for the State submitted as follows:-

- i. “The present case arises out of Hastings P.S. Case No.94 dated 30.04.2007 related to a dissension that started over a position or place of a playground between the accused persons group and another victim persons group on 30.04.2007 at about 16:15 hrs. The appellants Bikash Paswan, Mohammad Anwar, Anwar Ahmed, Anup Shaw, Sudhir Shaw allegedly assaulted the victims Saddam Hussein (PW-2) Wasim Aslam (PW-4) Majid Alam (PW-5) Md. Sohel (PW-6) Jarik Hussain (PW-7) Sk. Sikandar (PW-8) Md. Samir (PW-9) with cricket bat and wicket, bricks, stones and stumps on the playground causing hurt*

by dangerous means and inducing culpable homicide not amounting to murder and as a consequence 5 persons were Sent for trial and prosecuted under section 304 (Part-2)/ 324/ 34 of the Indian Penal Code 1973 during Session Trial Number 1st October, 2007. Thereafter, 21 prosecution witnesses were examined including injured person, the medical officer and the investigating officer subsequently after considering the evidence on record. The Learned Trial Court had acquitted Anwar Ahmed and convicted Anup Shaw, Sudhir Shaw were found guilty to the charge of the offence under Section 304 (Part-2)/34 and Bikash Paswan, Mohammad Anwar found guilty to the charge of the offence under Section 324/34 of the Indian Penal Code 1973.

Therefore, the appellants Anup Shaw and Sudhir Shaw were sentenced to suffer Rigorous imprisonment for 6 years each and to pay fined Rs.3,000/-. And Mohammad Anwar and Bikash Paswan were sentenced to suffer rigorous imprisonment for 3 years and fined Rs.2,000/-.

- ii. The present appeal had been preferred against the judgement and order dated 30.04.2009 in Session Trial No.1 /October/ 2007 arising out of Hastings P.S. Case No.94 dated 30.04.2007 under Section(s) 148/149/324/302 of the Indian Penal Code 1973. Where in the appellants convicted under Section 304 (Part-2)/34 and 324/34 of the Indian Penal Code 1973 and out of 4, 2 of them sentenced to suffer rigorous imprisonment for 6 years and pay fine of Rs.3,000/- and other*

two of them sentenced rigorous imprisonment for 3 years and pay fine of Rs.2,000/-.

- iii. *It was submitted that the conviction of the appellants under Section 304 (Part-2)/324/34 of the Indian Penal Code, 1973 stands fully justified as PW-2, PW-4, PW-5, PW-6, PW-7, PW-8, PW-9 clearly deposed that the appellants assaulted them with a cricket bat, bricks, stone, stumps resulting in culpable homicide not amounting to murder causing hurt by dangerous means and such testimony of the injured persons has a strong evidentiary value. Although the F.I.R., also narrated a subsequent attack on the complainants alleging assaulted with cricket bat, bricks, stone, stumps the core incident of causing hurt by dangerous means, culpable homicide not amounting to murder remains firmly proved through consistent eyewitnesses testimony and medical corroboration.*
- iv. *Any attempt to create doubt about the genesis of the F.I.R., was irrelevant, the case of assault resulted to hurt by dangerous means and culpable homicide not amounting to murder to the victims on the playground which remains consistently credible and corroborated by the evidence of PW-2, PW-4, PW-5, PW-6, PW-7, PW-8, PW-9.*
- v. *It was incorrect that there was no one present at the time of occurrence PW-2, PW-4, PW-5, PW-6, PW-7, PW-8, and PW-9 were independent witness who accompanied the injured persons to the hospital.*
- vi. *The medical evidence substantially corroborates the assault and culpable homicide not amounting to murder. PW-14, the first examined*

doctor who examined Md. Abir @ Md. Imran on 30.04.2007 who declared him brought dead. He has proved Exbt.-3. PW-15, on 01.05.2007 had conducted the post-mortem over the dead body of Md. Abir where he found five injuries on examination and had opined that the death was due to effect of head injury ante-mortem in nature the post-mortem report was proved by him which was Exbt.-6.

On 30.04.2007, PW-16 had proved that injury report Exbt.-7 and Exbt.-7/1 in respect of injured Md. Samir and Majid Alam respectively. The medical findings clearly aligned with and reinforced the eyewitnesses in the account of assault and culpable homicide not amounting to murder. Severity of the injuries of PW-2, PW-4, PW-5, PW-6, PW-7, PW-8, and PW-9 leaves no scope for doubt.

- vii. The contention was that the medical documents were improperly exhibited and was completely devoid of merit. When the Doctor who examined the victim Md. Abir has deposed and supported the Head injury which was ante-mortem in nature and also examined Md. Samir, Majid Alam had deposed and supported the injury. Therefore, it was a settled principle that procedural or technical lapses could not be permitted particularly when the oral evidence of the medical officer and the injured witnesses stands cleared and consistent in various judgements it had been held that insistence on rigid technical test could not override credible direct evidence which establishes the offence beyond reasonable doubt.*

viii. *Conclusion:- In the circumstances, the prosecution has established all essential ingredients of Sections 304 (Part-2)/324 read with Section 34 of the Indian Penal Code beyond reasonable doubt. The Learned trial court meticulously appreciated the evidence, and no perversity or legal infirmity exists in its judgement. Accordingly, the present appeal is liable to be dismissed, and the conviction and sentence of the appellants should be maintained”.*

10. A circumspection of the prosecution witnesses revealed as follows:-

- i. PW-1 deposed he was a photographer and posted at Photography Section, D.D. Lalbazar. He had taken the photograph of the P.O. as identified by S.I. A.S. Nayek, the I.O. of the case. The said two photographs were proved by him, which were marked as Mat. Exbt.-I and Mat. Exbt.-II and its negatives were marked as Mat. Exbt.-I/1 and Exbt.-II/1 respectively.
- ii. PW-2 deposed he was the informant and an eye witness. He along with PW-5, PW-6, PW-7 and others including the deceased went to play football opposite to Race Course. According to PW-2, the accused persons were already engaged in playing cricket in the playground. PW-2 and other witnesses requested the accused persons to remove the stone but when the accused persons did not remove the stone, the witnesses again requested to remove the stone but the accused persons started assaulting the witnesses. PW-2 categorically stated that the accused persons assaulted the deceased with cricket bat, stump, bricks and stones. Due to assault deceased fell. Deceased was

subsequently removed to hospital by PW-11, Mehemud, Ahmed and PW-10. PW-2 also stated that he along with other witnesses took PW-9 and PW-5 to Ekbalpore Nursing Home as they were also injured due to assault by the accused persons. PW-2 also stated that he subsequently went to Hastings P.S. being accompanied by his relative where he lodged complaint which was reduced into writing by the police officer. PW-2 also stated that he identified all the accused persons in jail.

- iii. During cross-examination PW-2, on behalf of accused Anup Shaw and Sudhir Shaw stated that quarrel between the parties started when the accused persons refused to remove the stone. It was the prosecution case that the quarrel between the parties started when the accused persons refused to remove the stone after the witnesses asked them to remove the stone. Suggestion was given to PW-2 that during quarrel deceased was pushed and he fell on the stone sustained injuries and it was also suggested that due to scuffling between the parties accused Anup Shaw sustained injury.

On behalf of accused Md. Anwar it appeared that PW-2 was specifically asked during cross-examination about the manner of identification during T.I.P. but he proposed to deal with the point regarding the identification in T.I.P. separately.

During the cross-examination on behalf of accused Anwar Ahmed specific question was raised about PW-2 going to police station and

- lodged the F.I.R. PW-2 during cross-examination stated that he went to B.M. Birla Hospital at about 04:00/04:30 p.m. to see the deceased.
- iv. PW-3 deposed he was a S.I. of police and works as a Plan Maker attached with Plan Making Section, D.D. Lalbazar. He had prepared the final plan in respect of the P.O. as identified by S.I. A.S. Nayek, the I.O. of the case. He had prepared sketch map, plan and blue print, were marked as Exbt.-2, Exbt.-2/1 and Exbt.-2/2 respectively.
 - v. PW-4 deposed he was one of the eye witnesses. He had also stated that at about 04:00 p.m. on 30.04.07 he went to play football at Race Course with PW-2, PW-5, PW-6, Sajad, Vicky, and the deceased and others. On reaching to the ground, they saw that appellants were playing cricket. There was a big stone, so they requested the appellants/accuseds and others to remove the stone as they wanted to play football but they did not remove the stone. So as the appellants/accuseds and others did not remove the stone, they started removed it but at that time the appellants started assaulted them with the cricket bat and stump. The appellants assaulted the victim/deceased surrounded him and he fell down on the ground. PW-5 and PW-9 were also injured, so he along with others removed them to Ekbalpur Nursing Home. Subsequently, he learnt from local people that the victim was shifted to R.G. Kar Hospital and thereafter to B.M. Birla where he died.
 - vi. During cross-examination PW-4, on behalf of accused Anwar Ahmed stated that they were 8 to 10 in numbers when they went to play

football. He also stated during cross-examination that he cannot say how many persons were playing cricket and specifically stated that he had withdrawn himself when they were assaulted the deceased and the witnesses.

During the cross-examination on behalf of accused Bikash Paswan certain formal questions were asked to PW-4 about his intimacy with PW-2. During cross examination of PW-4 specifically stated that he went back to his locality after leaving PW-5 and PW-9 at Nursing Home.

During cross-examination on behalf of accused Sudhir Shaw and Anup Shaw, PW-4 specifically stated that accused persons were already playing cricket when they reached the ground. He had also stated in the cross-examination that accused persons started assaulted the witnesses when they started removed the stone.

- vii. PW-5 was one of the eye witnesses to the occurrence who also sustained injuries due to the assault by the accused persons. PW-5 supported the version about the occurrence as stated by PW-2 and PW-4 and he also specifically stated that due to assault by the accused persons he sustained injuries by the side of his left eye and head. He also stated that PW-9 also sustained injuries on his head due to assault by the accused persons. He had specifically stated that along with PW-9 he was admitted at nursing home for two days and he also identified all the accused persons in the Court. He stated that he had identified accused Anup Shaw in jail during T.I. Parade.

- viii. During cross-examination PW-5 on behalf of accused Anwar Ahmed stated that the prescription and the discharge certificate of nursing home where he remained admit may be with his parents. He also stated during cross examination that the stone was kept in the boundary of the cricket field of the accused persons. He had further stated during cross-examination that when the accused persons were assaulting them, they fled away from that place to save themselves. He had also stated during cross-examination that when they were fled away, they saw deceased lying on the ground. He had denied the suggestion that he sustained injuries due to the fall from the cycle.

During cross examination on behalf of accused Anup Shaw and Sudhir Shaw, PW-5 specifically denied the suggestion that due to the scuffling between the witnesses and the accused persons deceased fell on the stone and sustained injuries.

During cross examination on behalf of accused Md. Anwar, he was asked question about the T.I. P. and he denied the suggestion that the accused persons were shown by the police officer before the T.I. Parade.

- ix. PW-6 had corroborated other witnesses about the manner of occurrence and according to him when they were removed the stone they were assaulted by the accused persons. He had also stated that when he running away along with others to save themselves and while running he saw that the deceased was injured on his head and fell on the ground. He also accompanied other witnesses including PW-5 and

PW-9 to Ekbalpur Nursing Home. During his evidence PW-6 specifically stated that accused Anup Shaw assaulted the deceased.

- x. During cross-examination on behalf of accused Anwar Ahmed PW-6 stated that he did not state before the police that the stone was kept on the opposite side of the stump. Remaining portion of the cross examination was more or less general in nature.

During cross-examination of PW-6 on behalf of accused Md. Anwar, he was asked question about the T.I.P., which he had already highlighted that he should deal the same separately.

The cross-examination on behalf of accused Anup Shaw and Sudhir Shaw PW-6 specifically stated that the stone was kept in the middle of the field where they were to play football.

- xi. PW-7 deposed he was an eye witness to the occurrence, had supported the versions of other witnesses as discussed above. He had specifically stated that deceased was assaulted with the cricket bat and the deceased immediately fall down on the ground. The assault according to PW-7 started by the accused persons when the witnesses were attempting to remove the stone. He also specifically stated that he and other witnesses ran away from the place. He had also stated about the assault on PW-5 and PW-9.
- xii. During the cross-examination, on behalf of accused Anup Shaw and Sudhir Shaw, PW-7 stated that the stone was kept by the accused persons to mark boundary. He had denied the suggestion about the quarrel between the witnesses and the accused persons.

- During cross-examination, on behalf of accused Anwar Ahmed PW7 stated he along with PW-4, Soadb, Sikendar, Raja and Majid went by bus in order to taken injured witnesses in the nursing home at Ekbalpore. He stated that PW-5 and PW-9 were medically treated after they reached at about 05:30/05:45 p.m. He had stated that the injury to PW-9 was stitched in his presence. He had denied the suggestion that on being tutored by the family member of the deceased, he had deposed falsely.
- xiii. PW-8 had also corroborated the evidence of other above mentioned witnesses and according to him also he went with other witnesses to play football. He had stated that the accused persons started assaulting them when they started removed the bricks. He had also stated about the manner in which the deceased was assaulted. He had specifically stated about the assault on PW-9, PW-5, PW-2, PW-4 and PW-6. He had also stated about the assault on deceased as a result of which the deceased fell on the ground.
- xiv. During cross-examination, on behalf of Md. Anwar, PW-8 stated that even though he was injured but was not treated by any doctor. He had denied the suggestion by the defiance that prior to T.I. Parade suspects was shown to him by the police. He had also stated that he identified accused Md. Anwar, Anwar Ahmed and Bikash Paswan in T.I. Parade.
- xv. PW-9 was another eye witness to the occurrence, who also sustained injury due to the assault by the accused persons. He had also

supported the version of the other witnesses about the occurrence and he also stated that while removing the stone the accused persons started assaulting them and as a result of which he sustained bleeding injury on his head and ear. The deceased was also assaulted. He had specifically stated about the manner of assault on the deceased and further stated that he along with other witnesses went to Ekbalpur Nursing Home where he and PW-5 were admitted for two days. He had identified accused Bikash Paswan, Anup Shaw and Md. Anwar during T.I. Parade and in the Court.

- xvi. During cross-examination, on behalf of accused Anup Shaw and Sudhir Shaw PW-9 denied that he stated to the police about the altercation between the parties. He denied the suggestion that the deceased fell down on the stone and he was injured.

During cross-examination on behalf of accused Md. Anwar, he was mainly asked about the manner of identification in T.I. Parade. During the cross-examination on behalf of accused Anwar Ahmed PW-9 had stated that when they reached Moidan, they saw the accused persons were preparing to play cricket but no cricket match was going on.

- xvii. PW-10 deposed he resided at 29B, Ekbalpur Road. The deceased was the son of the elder sister of his wife. On 30.04.07 in the evening when he was at home, local people informed him over telephone that the deceased was lying on the ground near the Race Course. On hearing, he immediately rushed to that ground but the deceased was not there and he learnt that the deceased was already taken to

hospital. So, he went to P.G. and saw that the victim/deceased lying on a stretcher and he was already dead. He was a staff of B.M. Birla Hospital and so he took him B.M. Birla hospital, where doctor on saw him and told him that the victim was already dead. At B.M. Birla Hospital doctor issued a document declaring the victim's dead, which was marked as Exbt.-3. On the following day, police came to mortuary and they wrote a document about the condition of the dead body. The signature of the witness on the inquest report was marked as Exbt.-4/1.

- xviii. During cross-examination PW-10 stated that he could not say the specific time he reached Moidan near Race Course. He went by Byke. There were no one on the ground who were known to him. It would have taken 20/30 minutes from his house to Moidan and from Moidan to P.G. Hospital. He saw the deceased at emergency unit of the hospital. He did not talk to the doctor in the emergency unit of the hospital. He did not ask any doctor in the emergency to treat the deceased. It will take about 10/15 minutes from P.G. Hospital to B.M. Birla by vehicle.

Police did not ask for his wearing apparel which he had worn on that day.

He worked as a ward boy at B.M. Birla. He did not take any permission from any doctor of S.S.K.M. Hospital or P.G. Hospital to shift the body from P.G. Hospital to B.M. Birla. He did not knows as to

exactly what time the deceased was taken from Moidan to P.G. Hospital before he reached to Moidan.

He did not make any statement before the police excepting the signature put by him at B.M. Birla mortuary in the inquest report.

- xix. PW-11 deposed he resided at Ekbalpur. He had gone to Moidan on being informed by a man that one man was lying in that Moidan. He went there and saw the deceased to whom he knew as he was resident of Ekbalpur. He shifted the deceased from the ground by a taxi to P.G. Hospital.
- xx. During cross-examination PW-11 stated that he made a statement before the police.
- xxi. PW-12 and PW-13 were declared hostile by the prosecution.
- xxii. PW-14 deposed he was posted at B.M. Birla Heart Research Centre as a post-graduate trainee. On 30.04.2007 he was on duty at Coronary Care Unit. He had examined the deceased and declared him brought dead. He prepared a report and put his signature, was marked as Exbt.-3 and Exbt.-3/1 respectively.
- xxiii. During his cross-examination PW-14 stated that he was not an attending doctor or salary doctor of B.M. Birla Heart Research Centre. He was aware about the norms to be followed when a patient was brought at B.M. Birla Heart Research Centre. If it was urgent case, the patient was directly brought to CCU and the patient party in the meantime informed at reception. All the patients of emergency were taken to CCU to diagnosis the exact problem. As per the official duty

roster he was on duty at CCU. When a patient was brought at CCU, after examination of the said patient further action if required then the reception was informed by the doctor examined the patient. The document Exbt.-3 was only maintained in the official record which was written by him.

It was correct that in Exbt.-3, it was not mentioned specifically who stated the history of the case. Patient was declared brought dead on 30.04.2007.

xxiv. PW-15 deposed he was posted at Calcutta Medical College and Hospital as Demonstrator in the department of Forensic and State Medicine. On 01.05.2007, he was on duty at Alipore Police Morgue. On 01.05.2007, he held the post mortem over the dead body of the deceased at Alipore Police Morgue. During the post-mortem examination he found the following injuries:-

- a) Abbreption tip of left shoulder measuring 3" x 1".
- b) Abbreption $\frac{1}{4}$ " x $\frac{1}{4}$ " in the middle of left side of neck.
- c) Abbreption $\frac{1}{2}$ " x $\frac{1}{2}$ ", 1" below the left elbow.
- d) Parital and occipital suture fracture.
- e) Evidence of subdural hemorrhage both side of brain.

No other injury could be detected. On examination he opined that the death was due to effect of head injury, ante-mortem in nature. He prepared the post-mortem report of the deceased which was marked as Exbt.-6.

xxv. During cross-examination PW-15 stated that the occipital was on the back side of head. The injury on the occipital might be caused due to fall from height on stone or some hard substance. If a person was pushed forcibly and he falls on some hard substance including stone, that injury might be caused on occipital region. It was correct that among all the injuries the injury as mentioned as serial no.4 in the P.M. report was vital. He had not mentioned in the P.M. report as to whether the death was due to accidental, homicidal or suicidal. It was correct that he had not mentioned the specific time of death of the deceased.

Police sent some relevant papers to the morgue from which he mentioned that case reference and the particulars. From the said police document he learnt about the history of the case. The document which was referred by him was death certificate which he had also mentioned in the P.M. report that the information was furnished as per death certificate. He had not mentioned in the P.M. report about the condition of the dead body whether it was brought from cold storage or it was fresh or it was decomposed.

xxvi. PW-16 deposed on 30.04.2007 he was attached with Ekbalpur Nursing Home as a Medical Superintendent. On that day, one Md. Samir was examined by Dr. Tshering Namgyal Wangdi at emergency unit of Ekbalpur Nursing Home Pvt. Ltd. The police information case sheet was written by Dr. Tshering Namgyal Wangdi. Dr. T.N. Wangdi on examination of the said Md. Samir appeared to have mentioned the

injury, which was marked as Exbt.-7. Majid Alam was examined by the said doctor on the same day, which report was marked as Exbt.-7/1.

- xxvii. During his cross-examination PW-16 stated that he did not personally treated that two patients appeared from those two documents. The time of attendance was mentioned in those two reports was 10:50 p.m., and 10:55 p.m., respectively. It was correct that apart from those two medical reports there were no other documents of Ekbalpur Nursing Home written by Dr. Tshering Namgyal Wangdi. The name of the Dr. Tshering Namgyal Wangdi was written in capital letter in the two reports and there was no signature of the said doctor.

He could not say whether those two reports were written by the said Dr. Tshering Namgyal Wangdi, not it was written by some staff of the Nursing Home.

- xxviii. PW-17 deposed he was the Ld. Magistrate who held the T.I. Parade on 04.06.2007 at the Presidency Correctional Home Compound at Alipore, in connection with case reference bearing G.R. Case No.958 of 2007.

First identifying witness was PW-2 and the identification by the said witness was held at 03:50 p.m. That witness identified the suspects Anup Shaw, Sudhir Shaw and Md. Anwar. On being asked that witness stated that on 30.04.07 at about 04/04:30 p.m., the incident took place and on that time he was in the field. An altercation was held and during the altercation accused Anup Shaw

assaulted the deceased by a cricket bat and accused Sudhir Shaw assaulted the deceased by wicket and accused Md. Anwar assaulted Majid Alam with fists and blows for which he could identify the suspects. The T.I.P. Memo in respect of the witness, PW-2 was marked as Exbt.-8.

Thereafter, witness Taruk Hossain @ Vicky was called at 03:55 p.m. on the same day and he identified only one suspect Anup Shaw. On being asked that witness stated that on 30.04.07, the incident took place and on that time he was present in the field and saw that accused Anup Shaw was assaulted the deceased by wicket for which he could identify the suspect Anup Shaw. The T.I.P. Memo in respect of the witness Taruk Hossain @ Vicky was marked as Exbt.-8/1.

Then, witness Md. Samir @ Raja was called at 04:00 p.m. on the same day and he identified the suspect Anup Shaw, Md. Anwar and Bikash Paswan. On being asked that witness stated that on 30.04.07, the incident took place and the accused Anup Shaw was assaulted the deceased by cricket bat and he tried to separate him but the deceased was assaulted by accused by Md. Anwar by stump. Accused Bikash Paswan assaulted one Md. Majid Alam, Soheb with bat and stump for which he could identify the suspect. The T.I.P. report in respect of the witness Md. Samir @ Raja was marked as Exbt.-8/2.

Thereafter, witness Washim Aslam @ Chhatu was called and he identified only one suspect namely Anup Shaw. He also made a statement which he had recorded and also the procedure followed by

him while holding the identification parade. The T.I.P. report in respect of the witness Washim Aslam @ Chhatu was marked as Exbt.-8/3.

Thereafter, witness Md. Soheb was called and he identified the suspects namely Anup Shaw, Md. Anwar, Bikash Paswan and Sudhir Shaw. He also made a statement which he had recorded and also the procedure followed by him while holding the identification parade. The T.I.P. report in respect of the witness Md. Soheb was marked as Exbt.-8/4.

Thereafter, witness Majid Alam was called and he identified only one suspect namely Anup Shaw. He also made a statement which he had recorded and also the procedure followed by him while holding the identification parade. The T.I.P. report in respect of the witness Majid Alam was marked as Exbt.-8/5.

Thereafter, witness Sk. Sikandar was called and he identified the suspects namely Md. Anwar, Bikash Paswan and Anwar Ahmed. He also made a statement while identifying the suspect and he had recorded the same. The T.I.P. report in respect of the witness Sk. Sikandar was marked as Exbt.-8/6.

The witnesses were called one by one from outside of the jail gate at the T.I.P. ground and he asked him to identify the suspect. After the identification by the witnesses he kept outside the view and hearing from the other identifying witnesses. The T.I.P. was conducted without collusion of any person including the police personnel. The

arrangement for T.I.P. was made by the Controller at Presidency Correctional Home.

xxix. PW-18 deposed he resided at 29/B/H/3, Ekbalpur Road, Calcutta – 23. He was a shoe maker. He knew the deceased. On 01.05.2007, he along with Sk. Imtiaz had been inside the morgue of B.M. Birla and one S.I. was there. They identified the dead body of the deceased which was kept inside of that morgue of B.M. Birla. On their identification, police prepared a report of the dead body of the deceased which was marked as Exbt.-4/2.

xxx. PW-19 deposed on 01.05.2007, he was posted at Alipore P.S. as S.I. of Police. On that date, he held inquest over the dead body the deceased at B.M. Birla Heart Research Centre. He held the inquest in presence of the witness namely Sk. Imtiaz and Md. Sarfaraz. The dead body was identified to him by the Constable V167 K.C. Dey. After the inquest was conducted by him. He prepared a inquest report which was marked as Exbt.-4.

xxxi. During his cross-examination PW-19 stated that he did not removed the bandage as mentioned in his inquest report to saw as to whether there was any injury. He had not noted the document, sent by him with the dead body for the post-mortem, in that inquest report. He did not ask for taking the photographs of the dead body.

They received the requisition from Hastings P.S. for conducted the inquest but he had not produced any G.D. Entry. He did not record the statement of the two witnesses of inquest report. He had received

the document regarding the treatment from the hospital authority. He had mentioned the time of the conducting the inquest in the inquest report. He did not see any other injury apart from the injury on the chest. There was no bandage in any other body part. He had not mentioned the cause of death in the column no.5.

- xxxii. PW-21 deposed he was a Sub-Inspector of Police, posted at Hastings P.S. On 30.04.07, he received information over telephone to the affect that there was a disturbance going on at Bekary road in front of Stable. He made the G.D. Entry in respect of the information received over telephone being G.D. entry No.2236 dated 30.04.07. After recording the G.D., he rushed to the spot under the instruction of O/C, Hastings P.S. On the spot i.e. Bekary Road in front of stable, he saw a gathering about 30/40 people. One man from the gathered namely Saddam Hossain came forward and he made a statement with regard to the incident. He recorded his statement on the spot, which was marked Exbt.-1.

In the meantime O/C, Hastings P.S. and AC1 (South Dev.) came to the spot. The incident was disclosed to them and on hearing the same he entrusted with investigation of that case by the O/C on the spot itself. Thereafter he also interrogated Sk. Sikandar and recorded his statement on the spot. He also recorded the statement of Wasim Aslam PW-4. Thereafter he along with Sk. Sikandar and Saddam Hossain went to B.M. Birla Heart Research Centre. He learnt that Md. Abir was taken there but he was declared brought dead and so he

collected his death certificate. Thereafter on the same date he went to S.S.K.M. Hospital from the B.M. Birla Heart Research Centre to verify as to whether Md. Abir was treated there but he did not get any document for treatment of S.S.K.M. Hospital in respect of Md. Abir. Thereafter he went to the P.O. i.e. the playground situated between Lovers Lane and Khidirpur road beside race course. From the P.O., he seized some articles namely one stone and brick bat in presence of the witnesses namely Surendar Chowhan and Talim Saha under a seizure list which were marked as Exbt.-5. On the spot one stone and brick bat were packed, sealed and labeled.

He also interrogated some passerby as they could not say anything related to the incident, their statement was not recorded by him. He also made search to seize the offensive weapons i.e. bat and stump but he did not get at the spot. Thereafter he went to Ekbalpur Nursing Home to interrogate and to record the statement of injured persons namely Majid and Sk. Raja but as they were under treatment of the doctor he could not record their statement on that date. So he returned back to P.S. and at the P.S. he made a return G.D. bearing No. 2240 dated 30.04.07. Thereafter he registered case on the basis of the F.I.R., being Hastings P.S. Case No.94 dated 30.04.07 for the offence under Sections 148/149/324/302 of the Indian Penal Code against 15/20 unknown persons. Formal F.I.R., was drawn up and the formal F.I.R., filled up by him and it bears his signature, which was marked as Exbt.-9. He handed over the seized items to the

Malkhana. He sent a requisition to O/C, Alipore P.S. for holding inquest over the dead body and the post mortem over the dead body of Md. Abir Imran. He also sent a requisition for sending a plan maker and photographer through A.C., D.D.I.

On 01.05.07 he went to Kantapukur Morgue and recorded the statement of Constable Kartik Chandra Dey who identified the dead body before the doctor who conducted the post mortem. Thereafter he went to the P.O. and at the P.O., S.I., G.C. Gorai came to the spot and he identified the P.O. to him. He prepared the rough sketch map. Thereafter, he went back to the P.S. He left the P.S. with the Addl. O/C, Hastings P.S. for further investigation being accompanied by SK. Sikandar and Saddam Hossain and he arrested two accused persons namely Bikash Paswan and Tushu Saha on being identified by Sk. Sikandar and Saddam Hossain. On the arrest of accused Bikash Paswan and Tushu Shaw he interrogated them and they took them to the crossing of Sent George Terrace and Canel road and on being identified by accused Bikash aswas and Tushu shaw from there he arrested accused Md. Anwar and Anwar Ahmed. At the time of arrest of those accused persons he had prepared the memo or arrest after observing all the formalities. Thereafter he came back to P.S. along with arrested accused persons. The four accused persons were put up in the lock up.

On the same date i.e. on 01.05.07 at about 18:15 hrs., on receipt of a source information he went to Hastings Crossing and he arrested

one another accused Sikdev Dolui and after observing all the formalities. He prepared the memo of arrest and after arrest of the accused, with the accused he came back to the P.S. On returned to P.S., he learnt that S.I. A.C. Sarkar had arrested accused Anup Shaw. During interrogation of Anup Shaw he learnt that he had injury on his head. On the following day, the arrested accused persons were produced before the Court of Ld. C.J.M.

He identified the seized articles which were seized by him i.e. the big stone and the brick bat. At that stage the sealed packet was opened by breaking the seal thread and from inside the packet three pieces brick bats were taken out and witness on saw the same identified that those were the said brick bats which were seized by him and marked as Mat. Exbt.-IV/2 collectively. At the time of seizure of those articles, the brick bats on the packet was labeled and the label bearing his signature and the signature of two witnesses which were marked as Mat. Exbt.-IV/2 collectively and Mat. Exbt.-IV/3 respectively.

Another sealed packet contained the big stone which was seized by him. At that stage the sealed packet with label was opened by breaking the seal and thread and on saw the same therein, the witness identified saying that stone seized by him which was marked as Mat. Exbt.-III/2 and witness identified his signature on the label on the packet. The signature of the witness on the label on the packet was marked as Mat. Exbt.-III/3.

- xxxiii. DW-1, Bikash Paswan was one of the accused. He had stated that on 30.4.2007, he was in the hospital as his sister delivered a baby on that date and he returned home from the hospital only at 8/8.30 p.m.
- xxxiv. DW-2, Dr. Ujjal Kr. Roy was posted as Gynecologists at Sambhunath Pandit Hospital on 30.4.2007. He had proved the discharge certificate issued in the name of Rekha Paswan and had stated that the said patient was admitted under his care.
- xxxv. DW-3, Gouranga Sarkar was a constable and was posted at Hastings PS. He had produced some medical document as called for by the defence on behalf of accused Anup Shaw
- xxxvi. DW-4, Dr. P.K. Sarkar was a professor in the department of surgery at R.G. Kar Medical College and Hospital. On 04.05.07, he was posted as Associate Professor in the department of surgery at S.S.K.M. Hospital. He had proved O.P.D. ticket of SSKM Hospital and an emergency ticket in the name of accused Anup Shaw which are Exbt.-B and Exbt.-C respectively marked with objection.
- xxxvii. DW-5 was accused Anup Shaw. He had stated that on 30.04.07 he along with some other para boys went to Moidan adjacent to race course to play cricket at about 2.30 p.m. But at about 04:30 p.m., while they were playing some other boys came there to play foot ball. Those boys asked them to make the boundary short by keeping those bricks inside kept by them as their boundary. When they said that after their match is completed and they go, those boys could play foot ball but they started scuffling with them due to which one of them fell

on the brick there. When they saw one of them fell on the ground they started assaulting them due to which he sustained injury on his head. He was treated at a hospital at Gardenrich. He had made a complaint at Hastings P.S.

11. PW-4 materially corroborated PW-2. He specifically stated that the accused persons assaulted the witnesses with cricket bat and stump when they attempted to remove the stone and that the deceased was surrounded and assaulted, causing him to fall on the ground. PW-4 also spoke about removal of the injured persons to nursing home and subsequent transfer of the deceased to R.G. Kar Hospital and thereafter to B.M. Birla Hospital where he succumbed to the injuries. In cross-examination PW-4 reiterated that the assault commenced when the witnesses started removing the stone.
12. PW-5 and PW-9, both injured witnesses, occupy a position of considerable evidentiary significance. PW-5 stated that he sustained injuries on the side of his left eye and head due to assault by the accused persons and that PW-9 also sustained head injuries. He identified the accused persons both during T.I. Parade and in Court. PW-9 similarly stated that while removing the stone the accused persons assaulted them causing bleeding injuries on his head and ear. He too identified accused persons during T.I. Parade and in Court. Their testimony carries intrinsic assurance because an injured witness ordinarily does not shield the actual assailant and falsely implicate another.
13. PW-6, PW-7 and PW-8 substantially corroborated the prosecution narrative. PW-6 stated that when they attempted to remove the stone the accused persons assaulted them and while running away he saw the deceased

injured on his head and lying on the ground. PW-7 specifically stated that the deceased was assaulted with cricket bat and immediately collapsed. PW-8 corroborated the manner of assault and also spoke about injuries suffered by PW-2, PW-4, PW-5, PW-6 and PW-9.

14. The medical evidence furnished by PW-15, the post-mortem doctor, is of decisive significance. During post-mortem examination he found abrasion injuries over the shoulder, neck and elbow together with parital and occipital suture fracture and bilateral subdural haemorrhage. He unequivocally opined that death was caused due to head injury which was ante-mortem in nature. The injuries noted in the post-mortem report are entirely compatible with the ocular version that the deceased was assaulted with hard and blunt objects including cricket bat, stump and stones.
15. During cross-examination PW-15 stated that the occipital injury might be caused if a person falls on a hard substance including stone. The defence sought to rely heavily upon this answer. However, such statement merely acknowledges a theoretical possibility. It does not nullify the direct ocular testimony of multiple witnesses who consistently stated that the deceased was assaulted prior to his fall. The medical evidence cannot be dissected in fragments divorced from the surrounding circumstances. Even if the final impact occurred due to a fall consequent upon assault, the chain of causation remains intact.
16. The evidence relating to Test Identification Parade also substantially strengthens the prosecution case. PW-17, the learned Magistrate who conducted the T.I. Parade, deposed that the witnesses identified various

accused persons including Anup Shaw, Sudhir Shaw, Md. Anwar, Bikash Paswan and Anwar Ahmed. He specifically stated that the witnesses were called one by one and after identification they were kept away from the sight and hearing of other identifying witnesses. He further stated that the T.I. Parade was conducted without collusion with police personnel. The fairness of the T.I. proceeding thus stands reasonably established.

17. The investigation conducted by PW-21 also cannot be said to suffer from any infirmity affecting the core of the prosecution case. PW-21 deposed regarding receipt of telephonic information, recording of G.D. Entry, visit to the place of occurrence, recording of statements of witnesses, seizure of one big stone and brick bats from the place of occurrence under seizure list Exhibit-5 and registration of Hastings P.S. Case No.94 dated 30.04.2007 under Sections 148/149/324/302 of the Indian Penal Code. He further narrated the arrest of accused persons and preparation of seizure labels. The seized materials were later identified in Court.
18. The defence sought to create doubt by relying upon certain omissions in investigation and certain answers extracted during cross-examination. It was elicited that PW-19 did not remove the bandage during inquest and that PW-15 did not specifically mention in the post-mortem report whether the death was homicidal, accidental or suicidal. Such omissions, however, are not of such nature as to destroy the otherwise cogent prosecution evidence. Deficiencies in investigation do not necessarily enure to the benefit of the accused unless prejudice is shown to have been caused or the foundation of the prosecution case is rendered doubtful.

19. The defence version, however, suffers from inherent improbabilities when tested against the totality of evidence. Firstly, the defence version does not satisfactorily explain the severe cranial injuries including parital and occipital fracture and bilateral subdural haemorrhage sustained by the deceased. Secondly, the consistent testimony of numerous eye witnesses, including injured witnesses, specifically attributes overt acts to the accused persons. Thirdly, the identification evidence during T.I. Parade and before Court substantially corroborates the prosecution witnesses. Lastly, the defence version itself admits the occurrence of scuffling and the presence of the parties at the place of occurrence, thereby narrowing the controversy to the manner in which injuries were caused.
20. The prosecution case emerges from an incident which took place on 30.04.2007 at the Maidan adjacent to the Race Course, where a group of young men including the deceased had gone to play football and found another group, comprising the accused persons, occupying a portion of the ground for playing cricket. The evidence on record reveals that the immediate source of discord centred around certain stones and brick pieces which had been placed to demarcate the cricket boundary. What began as a disagreement over use of the playground rapidly escalated into physical violence resulting in fatal head injuries to the deceased and injuries to several prosecution witnesses.
21. The prosecution case fundamentally rests upon the testimony of a cluster of eye witnesses, several of whom were themselves injured during the occurrence. The genesis of the incident appears from the evidence of PW-2,

PW-4, PW-5, PW-6, PW-7, PW-8 and PW-9. Their evidence consistently discloses that on 30.04.2007 they had gone to the Maidan adjacent to the Race Course for playing football and found the accused persons already occupying the field for playing cricket. A dispute arose over removal of stones and brick pieces kept on the field for demarcating the cricket boundary. The prosecution witnesses consistently stated that when they attempted either to remove the stone or requested the accused persons to do so, the accused persons reacted violently and assaulted them with cricket bats, stumps, stones and brick bats.

22. PW-2, the informant and one of the injured witnesses, furnished the foundational narrative of the prosecution case. He stated that he, along with PW-5, PW-6, PW-7 and the deceased, had gone to the Maidan for playing football. According to him, the accused persons were already present there for playing cricket. PW-2 stated that they requested the accused persons to remove a stone lying on the field, but the request was refused. When the witnesses themselves attempted to remove the obstruction, the accused persons became aggressive and started assaulting them. PW-2 specifically attributed assault upon the deceased by means of cricket bat, stump, stones and bricks. He further stated that the deceased collapsed on the ground due to such assault and was subsequently removed to hospital. He categorically stated that the deceased was assaulted by the accused persons with cricket bat, stump, bricks and stones and, as a consequence, fell on the ground. His evidence further establishes that injured witnesses including PW-5 and PW-

9 were removed to Ekbalpur Nursing Home and thereafter he lodged the complaint at Hastings Police Station.

23. The cross-examination of PW-2 does not dilute the essential substance of his testimony. The defence suggested that during a quarrel the deceased was pushed and accidentally fell upon a stone. PW-2 denied the suggestion. Significantly, the defence suggestion itself accepts the existence of a confrontation at the place and time alleged by the prosecution. The controversy, therefore, is not with regard to the occurrence of the incident, but with regard to the manner in which the fatal injury was sustained.
24. PW-4 materially corroborated the testimony of PW-2. He stated that when the witnesses attempted to remove the stone from the field, the accused persons assaulted them with cricket bat and stump. PW-4 further stated that the deceased was surrounded and assaulted and thereafter fell on the ground. He also spoke about removal of PW-5 and PW-9 to Ekbalpur Nursing Home and the transfer of the deceased to hospital. During cross-examination, PW-4 reiterated that the accused persons initiated the assault when the witnesses attempted to remove the stone. His evidence remained unshaken on this aspect.
25. The testimony of PW-5 and PW-9 possesses added evidentiary value because both of them were injured during the occurrence. PW-5 stated that he sustained injuries on the side of his left eye and head due to assault by the accused persons and that PW-9 also suffered injuries on his head. He stated that both of them were admitted to nursing home for two days. PW-5 identified the accused persons both during T.I. Parade and before the Court.

PW-9 similarly stated that the accused persons assaulted them while they were removing the stone and that he sustained bleeding injuries on his head and ear. He too identified the accused persons during T.I. Parade and in Court.

26. The significance of the evidence of PW-5 and PW-9 lies not merely in the fact that they sustained injuries, but in the natural assurance that accompanies the testimony of a witness who himself suffers during the incident. Their presence at the place of occurrence stands established beyond uncertainty. Their evidence also dispels the defence suggestion that the prosecution witnesses were subsequently introduced or falsely implicated the accused persons.
27. PW-6, PW-7 and PW-8 further reinforced the prosecution narrative. PW-6 stated that the accused persons assaulted the witnesses when they attempted to remove the stone and that while running away he saw the deceased injured on his head and lying on the ground. PW-7 specifically stated that the deceased was assaulted with cricket bat and immediately fell on the ground. PW-8 stated that the accused persons assaulted the deceased and several prosecution witnesses including PW-2, PW-4, PW-5, PW-6 and PW-9 and the injuries suffered by them. Their evidence demonstrates continuity in the prosecution account and excludes the possibility of a fabricated version subsequently developed through deliberation.
28. Certain variations do appear in the testimony of the witnesses regarding peripheral details, such as the exact positioning of the stone, whether cricket was actively being played or preparations were being made for a match and

the precise sequence in which some witnesses fled from the field. Such variations are wholly consistent with ordinary human perception. A truthful account narrated by multiple witnesses seldom unfolds in mechanical uniformity. The law does not require reproduction of events with mathematical precision. What assumes significance is whether the witnesses remain consistent on the essential features of the prosecution case. In the present matter, the evidence uniformly establishes that the altercation arose over removal of the cricket boundary markers and that the accused persons thereafter assaulted the deceased and the injured witnesses.

29. Though minor variations appear regarding whether cricket was actively being played or preparations for cricket were underway, such discrepancies are wholly natural and insignificant. Human recollection is not expected to reproduce events with photographic precision. What remains consistent throughout the evidence is the central narrative that the dispute originated over the cricket boundary marked by stones or brick pieces and that the accused persons assaulted the deceased and the injured witnesses during the altercation.
30. The formal witnesses lend support to the prosecution structure. PW-1 proved the photographs of the place of occurrence while PW-3 proved the sketch map and plan of the place of occurrence. PW-10 and PW-11 proved the removal of the deceased to hospital. PW-14, attached to B.M. Birla Heart Research Centre, proved that the deceased was brought dead and the corresponding document was marked as Exhibit-3.

31. The medical evidence furnishes substantial corroboration to the ocular testimony. PW-15, the post-mortem doctor, found abrasion injuries over the shoulder, neck and elbow together with parital and occipital suture fracture and bilateral subdural haemorrhage. He opined that death was caused due to head injury which was ante-mortem in nature. The nature of injuries noted in the post-mortem report unmistakably indicates the application of significant force upon the head of the deceased.
32. During cross-examination, PW-15 stated that injury to the occipital region might occur if a person fell on a hard surface such as a stone. The defence attempted to derive support from this answer in order to advance the theory of accidental fall. Such argument does not withstand scrutiny when examined in the context of the evidence as a whole. The doctor merely acknowledged a possible mechanism by which such injury could occur. He did not state that the injuries were necessarily accidental. More importantly, the prosecution witnesses consistently stated that the deceased was assaulted before he fell. Therefore, even if impact with the ground contributed to the fatal injury, the fall itself formed part of the assaultive transaction initiated by the accused persons.
33. The evidence relating to Test Identification Parade lends further assurance to the prosecution case. PW-17, the learned Magistrate who conducted the T.I. Parade, stated in detail the procedure followed during identification. According to him, the witnesses were called individually, kept outside the hearing and visibility of each other after identification and the parade was conducted without interference from police personnel. Several witnesses

identified accused persons including Anup Shaw, Sudhir Shaw, Md. Anwar, Bikash Paswan and Anwar Ahmed. The fairness of the T.I. proceedings could not be seriously impeached during cross-examination.

34. The investigative evidence also aligns with the prosecution version. PW-21, the Investigating Officer, stated that after receiving telephonic information regarding disturbance near Bekary Road, he recorded G.D. Entry and rushed to the place of occurrence, recorded the statement of the informant, visited the hospital, seized stones and brick bats from the place of occurrence and registered Hastings P.S. Case No.94 dated 30.04.2007 under Sections 148/149/324/302 of the Indian Penal Code. The seized stone and brick bats were subsequently produced and identified before the Court. The seizure assumes significance because the eye witnesses consistently stated that stones and brick pieces were used during the assault.
35. The seizure of stones and brick bats from the place of occurrence assumes importance because the eye witnesses consistently stated that such objects were used during the assault. The recovery therefore provides corroborative assurance to the prosecution version.
36. The evidence adduced on behalf of the defence does not substantially impair the prosecution case. DW-1 attempted to establish that accused Bikash Paswan was at the hospital where his sister had delivered a child. DW-2, Dr. Ujjal Kr. Roy proved the discharge certificate relating to Rekha Paswan. However, the evidence falls short of establishing a complete and uninterrupted alibi covering the relevant time of occurrence. The plea of alibi must exclude every reasonable possibility of presence at the place of

occurrence. The defence evidence does not attain such certainty. However, the evidence merely establishes that Rekha Paswan was admitted under his care. It does not conclusively establish the continuous presence of accused Bikash Paswan at the hospital during the relevant time of occurrence. The plea of alibi must be proved with absolute certainty so as to completely exclude the possibility of presence of the accused at the place of occurrence. The defence evidence falls substantially short of such standard.

37. DW-3 produced certain medical documents relating to accused Anup Shaw while DW-4 proved O.P.D. ticket and emergency ticket of S.S.K.M. Hospital relating to accused Anup Shaw. The defence attempted to use these documents to suggest that accused Anup Shaw himself sustained injuries during the altercation. However, mere existence of injuries on an accused person does not probabilise innocence. In a free fight or violent altercation injuries on either side are not uncommon. The defence did not establish that such injuries were of such nature as would probabilise the prosecution version being wholly false.
38. DW-5, accused Anup Shaw himself, entered the witness box and stated that while they were playing cricket some boys came there to play football and requested them to shorten the boundary by removing the bricks. According to him, when they declined, scuffling ensued and one of the boys fell upon the bricks. He further stated that thereafter they themselves were assaulted and he sustained injury on his head.
39. The defence version, however, does not satisfactorily explain the extensive cranial injuries sustained by the deceased. Nor does it account for the

consistent testimony of multiple eye witnesses, including injured witnesses, who specifically attributed overt acts to the accused persons. The defence evidence, at its highest, establishes that there was mutual confrontation between the parties. It does not probabilise that the deceased sustained fatal injuries solely by accidental fall independent of assault.

40. An additional feature of significance is that the prosecution witnesses had no discernible reason to falsely implicate the accused persons while allowing the actual perpetrators to escape. The incident occurred in broad daylight on a public playground. Several witnesses sustained injuries. Their conduct immediately after the occurrence, including removal of the injured to hospital and lodging of complaint without delay, appears natural and consistent with the ordinary course of human behaviour.
41. The cumulative effect of the evidence leaves no reasonable uncertainty regarding the participation of the accused persons in the assault. The prosecution evidence derives support from four interlocking circumstances: first, the consistent ocular testimony of multiple eye witnesses; second, the evidence of injured witnesses whose presence at the scene is firmly established; third, the medical findings which corroborate the nature of assault described by the witnesses; and fourth, the identification evidence and seizure of incriminating materials from the place of occurrence.
42. Viewed in its entirety, the evidence establishes that the quarrel over removal of stones and brick pieces from the playground culminated in a concerted assault by the accused persons upon the deceased and the prosecution witnesses, during which the deceased sustained fatal head injuries. The

defence version does not create a competing probability sufficient to displace the prosecution case.

43. The central question which falls for determination in the present appeal is whether the evidence adduced by the prosecution satisfies the constituent ingredients of the offences punishable under Sections 304 Part II/34 and 324/34 of the Indian Penal Code and whether the learned Trial Court was justified in recording conviction thereunder. The answer, in the considered view of this Court, must be rendered in the affirmative.
44. The prosecution evidence, when evaluated in its legal and factual continuum, establishes three foundational circumstances with sufficient clarity: first, that the appellants actively participated in the assault upon the deceased and the injured witnesses; secondly, that the assault was carried out jointly and in concert; and thirdly, that the nature of the assault was such as to attract the knowledge contemplated under Section 304 Part II of the Indian Penal Code.
45. The Hon'ble Supreme Court, in the case of **SHRIKRISHNA vs. STATE OF MADHYA PRADESH**¹ has made the following observations: -

“5.1.2. While Section 302 deals with the punishment of murder, Section 304 is about punishment for culpable homicide not amounting to murder. The offence under Section 304, IPC is punishable in its Part I as well as in Part II. When the prosecution proves the death of the person in question and further that such

¹2026 SCC OnLine SC 42

death was caused by the act of the accused, and that the accused knew that such act is likely to cause death, the offence would be punishable under Section 304 Part II.

5.1.3. Section 304, IPC has two parts namely; Section 304 Part I and Section 304 Part II. The distinction between these two Parts of Section 304, IPC is required to be considered having regard to the provisions of Sections 299 and 300, IPC. Whether the offender had intention to cause death or he had no such intention brings out the vital distinction.

....

5.4. The High Court was correct in its approach in holding the appellant guilty for the offence punishable under Section 304 Part II, IPC by assessing the individual role on his part. Having regard to the evidence on record regarding the role played by the appellant and the injuries caused by him on the head of the deceased by using *lathi*, he could be presumed to have acted with an intention to cause death or such bodily injury which he knew that it would be of such kind and nature that would cause, in ordinary course, the death of the person to whom it is caused. However, the degree of the offence in the facts and circumstances of the case, could not be said to be partaking the offence of murder under Section 302, but the offence committed would be punishable under Section 304 Part II, IPC.

5.5. The way as the sequence of events happened in the instant case and since the offence by the appellant was committed in the midst of commotion and group clash, it could be legitimately inferred that the appellant acted without any premeditation as such to cause the death of Ram Singh, although in eye of law, having regard to the kind of weapon used and the nature of injury inflicted, which corresponded to the weapon used, knowledge could be inferred in law. Even according to the prosecution, the incident occurred when the deceased came to the house of the appellant, to question him, when some others also gathered and there was a free fight. In fact, the appellant suffered serious injuries to his head in the same transaction.

5.6. For the aforesaid reasons, the impugned judgment and order of the High Court convicting the appellant for the offence under Section

304 Part II, IPC is justified and warrants no interference. It is sustained.”

46. The Hon’ble Supreme Court, in the case of **HUSSAINBHAI ASGARALI LOKHANDWALA vs. STATE OF GUJARAT**², has made the following observations :-

“23. In so far Hussainbhai is concerned, what is discernible from the record is that he was a young man of 18 years of age at the time of the incident studying in Class 12. There was a history of matrimonial dispute between his sister and brother-in-law Abbasbhai. It is natural for a young man to be emotionally upset to see his sister allegedly ill-treated by her in-laws and when the deceased and Abbasbhai came to their residence leading to the ruckus, it is not difficult to visualize the state of mind of Hussainbhai as well of his father Asgarali. The tension was building up since morning as Abbasbhai was first insisting that his wife Oneja should come to his house and then insisting on the cupboard key of the Ahmedabad house to be handed over to him. It is important to note that the incident had taken place inside the residence of Asgarali (and then spilling over onto the street in front) and not in the residence of Idrishbhai. It is quite possible that as a young man, Hussainbhai was overcome by emotion which led him to physically attack the deceased and his son (brother-in-law). The fact that the incident was not premeditated is buttressed by the happening thereof inside the residence of Asgarali. Besides there was only a stab wound each on the stomach of the deceased and PW-5. The knife was not directed by Hussainbhai at the upper portion of the bodies of the deceased and PW-5.

24. We are in agreement with the view taken by the High Court that the entire incident had occurred in the heat of the moment and that neither party could control their anger which ultimately resulted into the fateful incident.

25. That being the position and since the High Court had brought down the charge from Section 304 Part I IPC to Section 304 II IPC, we feel that it would be in the interest of justice if the sentence of the appellant Hussainbhai Asgarali Lokhandwala is further modified to the

² 2024 INSC 609

period of incarceration already undergone by him while maintaining the conviction.”

47. The Hon’ble Supreme Court, in the case of **DATTATRAYA vs. STATE OF MAHARASHTRA**³ has made the following observations:-

“21. From every available evidence, which was placed by the prosecution, it is a case where a sudden fight took place between the husband and wife. The deceased at that time was carrying a pregnancy of nine months and it was the act of pouring kerosene on the deceased that resulted in the fire and the subsequent burn injuries and the ultimate death of the deceased. In our considered opinion, this act at the hands of the appellant will be covered under the Fourth Exception given under Section 300IPC i.e. “Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner”.

22. The act of the appellant is not premeditated, but is a result of sudden fight and quarrel in the heat of passion. Therefore, we convert the findings of Section 302 to that of 304 Part II, as we are of the opinion that though the appellant had knowledge that such an act can result in the death of the deceased, but there was no intention to kill the deceased. Therefore, this is an offence which would come under Part II not under Part I of Section 304IPC.”

48. The Hon’ble Supreme Court, in the case of **ANBAZHAGAN vs. STATE**⁴, has made the following observations:-

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

(1) When the court is confronted with the question, what offence the accused could be said to have committed, the true test is to find out the intention or knowledge of the accused in doing the act. If the intention or knowledge was such as is described in Clauses (1) to (4) of Section 300 of the IPC, the act will be murder even though only a

³(2024) 14 SCC 286

⁴ 2023 SCC OnLine SC 857

single injury was caused. To illustrate : 'A' is bound hand and foot. 'B' comes and placing his revolver against the head of 'A', shoots 'A' in his head killing him instantaneously. Here, there will be no difficulty in holding that the intention of 'B' in shooting 'A' was to kill him, though only single injury was caused. The case would, therefore, be of murder falling within Clause (1) of Section 300 of the IPC. Taking another instance, 'B' sneaks into the bed room of his enemy 'A' while the latter is asleep on his bed. Taking aim at the left chest of 'A', 'B' forcibly plunges a sword in the left chest of 'A' and runs away. 'A' dies shortly thereafter. The injury to 'A' was found to be sufficient in ordinary course of nature to cause death. There may be no difficulty in holding that 'B' intentionally inflicted the particular injury found to be caused and that the said injury was objectively sufficient in the ordinary course of nature to cause death. This would bring the act of 'B' within Clause (3) of Section 300 of the IPC and render him guilty of the offence of murder although only single injury was caused.

(2) Even when the intention or knowledge of the accused may fall within Clauses (1) to (4) of Section 300 of the IPC, the act of the accused which would otherwise be murder, will be taken out of the purview of murder, if the accused's case attracts any one of the five exceptions enumerated in that section. In the event of the case falling within any of those exceptions, the offence would be culpable homicide not amounting to murder, falling within Part 1 of Section 304 of the IPC, if the case of the accused is such as to fall within Clauses (1) to (3) of Section 300 of the IPC. It would be offence under Part II of Section 304 if the case is such as to fall within Clause (4) of Section 300 of the IPC. Again, the intention or knowledge of the accused may be such that only 2nd or 3rd part of Section 299 of the IPC, may be attracted but not any of the clauses of Section 300 of the IPC. In that situation also, the offence would be culpable homicide not amounting to murder under Section 304 of the IPC. It would be an offence under Part I of that section, if the case fall within 2nd part of Section 299, while it would be an offence under Part II of Section 304 if the case fall within 3rd part of Section 299 of the IPC.

(3) To put it in other words, if the act of an accused person falls within the first two clauses of cases of culpable homicide as described in Section 299 of the IPC it is punishable under the first part of Section 304. If, however, it falls within the third clause, it is punishable under the second part of Section 304. In effect, therefore, the first part of this section would apply when there is 'guilty intention,' whereas the

second part would apply when there is no such intention, but there is 'guilty knowledge'.

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

(5) Section 304 of the IPC will apply to the following classes of cases: (i) when the case falls under one or the other of the clauses of Section 300, but it is covered by one of the exceptions to that Section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression 'sufficient in the ordinary course of nature to cause death' but is of a lower degree of likelihood which is generally spoken of as an injury 'likely to cause death' and the case does not fall under Clause (2) of Section 300 of the IPC, (iii) when the act is done with the knowledge that death is likely to ensue but without intention to cause death or an injury likely to cause death. To put it more succinctly, the difference between the two parts of Section 304 of the IPC is that under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while under the second part, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the offence punishable under the second part of Section 304 of the IPC, the accused need not bring his case within one of the exceptions to Section 300 of the IPC.

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

(7) The distinction between culpable homicide (Section 299 of the IPC) and murder (Section 300 of the IPC) has always to be carefully borne in mind while dealing with a charge under Section 302 of the IPC. Under the category of unlawful homicides, both, the cases of culpable homicide amounting to murder and those not amounting to murder would fall. Culpable homicide is not murder when the case is brought within the five exceptions to Section 300 of the IPC. But, even though none of the said five exceptions are pleaded or prima facie established

on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of Section 300 of the IPC to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any one of the four clauses of Section 300 of the IPC, namely, 1stly to 4thly, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under Section 299 of the IPC.

(8) The court must address itself to the question of mens rea. If Clause thirdly of Section 300 is to be applied, the assailant must intend the particular injury inflicted on the deceased. This ingredient could rarely be proved by direct evidence. Inevitably, it is a matter of inference to be drawn from the proved circumstances of the case. The court must necessarily have regard to the nature of the weapon used, part of the body injured, extent of the injury, degree of force used in causing the injury, the manner of attack, the circumstances preceding and attendant on the attack.

(9) Intention to kill is not the only intention that makes culpable homicide a murder. The intention to cause injury or injuries sufficient in the ordinary course of nature to cause death also makes a culpable homicide a murder if death has actually been caused and intention to cause such injury or injuries is to be inferred from the act or acts resulting in the injury or injuries.

(10) When single injury inflicted by the accused results in the death of the victim, no inference, as a general principle, can be drawn that the accused did not have the intention to cause the death or that particular injury which resulted in the death of the victim. Whether an accused had the required guilty intention or not, is a question of fact which has to be determined on the facts of each case.

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

(12) In determining the question, whether an accused had guilty intention or guilty knowledge in a case where only a single injury is inflicted by him and that injury is sufficient in the ordinary course of

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

49. The Hon’ble Supreme Court, in the case of **KRISHNAMURTHY vs. STATE**⁵, has made the following observations:-

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

12. Accordingly, this appeal is allowed to the extent and in the manner that the conviction of the appellant is altered to that of the offence punishable under Section 304 Part II IPC. The appellant is accordingly sentenced to imprisonment for a term of 10 years and to pay a fine in the sum of Rs 10,000. The appellant has already undergone imprisonment for a longer term. Thus, the appellant may be released immediately.”

50. The Hon’ble Supreme Court, in the case of **MAJOR SINGH vs. STATE OF PUNJAB & ANR.**⁶ has made the following observations :-

“**12.** The prosecution has established that the death of the deceased was homicidal. As per the post mortem report, the deceased had suffered eight injuries. Dr. Aman Kapoor (PW 2) states in the report that the main injury was on the head and both the eye witnesses Sukhraj Singh (PW 3) and Charanjit Singh (PW4) have claimed the appellant had hit their father on his head with a 'Bahi'. The recovery of 'Bahi', i.e. the weapon used to cause the fatal injury to the deceased

⁵(2022) 8 SCC 664

⁶ [2022] 6 S.C.R. 800.

was recovered by police only after the appellant had confessed about the place of hiding.

13. We are, thus, satisfied that the prosecution has, beyond reasonable doubt, established the occurrence in the manner as set up. The deceased died due to the injury caused by accused. The only question which requires our consideration is with regard to whether the case falls within the ambit of culpable homicide amounting to murder punishable under section 302 IPC as has been held by High Court or it was culpable homicide not amounting to murder punishable under section 304 IPC, as has been pleaded by the counsel for the appellant in the alternative.

14. Distinction between whether an offence is culpable homicide amounting to murder or culpable homicide not amounting to murder has been dealt by this Court recently in the case of Mohd. Rafiq vs. State of Madhya Pradesh³ after taking into consideration earlier judgments on the point. The Court held that even though it is difficult to distinguish whether the punishment for offence would fall under section 302 or section 304 of IPC, there is a subtle distinction of degree of intention and knowledge involved in both the crimes. Relevant paragraphs of the judgment are reproduced below:

Para 13 The considerations that should weigh with courts, in discerning whether an act is punishable as murder, or culpable homicide, not amounting to murder, were outlined in *Pulicherla Nagaraju @ Nagaraja Reddy v State of Andhra Pradesh*. This court observed that:

"29. Therefore, the Court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases.

There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put

forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder are treated as murder punishable under Section 302.

The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances; (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention."

15. Intention plays a vital role in criminal jurisprudence. An offence may not be said to be committed if the prosecution fails to prove the intention to commit that crime. Intention is pivotal to decide whether the accused has committed culpable homicide amounting to murder or culpable homicide not amounting to murder. Along with intention, knowledge and the degree of crime, i.e. how the deceased was killed, plays an important role in deciding.

16. In the present case, the appellant had no intention to kill his uncle. Lack of intention can easily be seen through the acts committed by the appellant. He was furious about getting yelled by his uncle a day before, which acted as a provocation for the accused. The appellant was armed with a wooden leg of the cot in his hand which cannot be termed as a dangerous weapon.

He had given a single blow to the deceased and therefore it cannot be said that the appellant had intention of killing the deceased who was his own uncle. Maybe he wanted to punish his uncle for the reprimand, he received the previous day. Further it cannot be said that the appellant had the knowledge that the deceased would die through a single blow.

17. We are thus of the opinion that the deceased is not liable to be convicted under section 302 IPC but would be liable to be convicted under section 304 PartII IPC.”

51. The Hon’ble Supreme Court in the case of **STATE OF RAJASTHAN vs. LEELA RAM @ LEELA DHAR**⁷ made the following observations:-

“12. In *Mahesh Balmiki Alias Munna v. State Of M.P . (2000) 1 SCC 319*, this Court while deciding the question of whether a single blow with a knife on the chest of the deceased would attract Section 302 IPC, held thus:

“9. ... there is no principle that in all cases of a single blow Section 302 IPC is not attracted. A single blow may, in some cases, entail conviction under Section 302 IPC, in some cases under Section 304 IPC and in some other cases under Section 326 IPC. The question with regard to the nature of offence has to be determined on the facts and in the circumstances of each case. The nature of the injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury is caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention or knowledge of the offender and the offence committed by him. In the instant case, the deceased was disabled from saving himself because he was held by the associates of the appellant who inflicted though a single yet a fatal blow of the description noted above. These facts clearly establish that the appellant had the intention to kill the deceased. In any event, he can safely be attributed the knowledge that the knife-blow given by him was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death.”

⁷ 2019 13 SCC 13

....

“15. In *Pulicherla Nagaraju Alias Nagaraja Reddy v. State Of A.P . (2006) 11 SCC 444*, this Court while deciding whether a case falls under Section 302 or 304 Part I or 304 Part II IPC, held thus:

“29. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters — plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with

reference to individual cases which may throw light on the question of intention. Be that as it may.”

.....

"18. The High Court has, in our view, proceeded entirely on the basis of surmise in opining that the death was caused without premeditation and on the spur of the moment. In arriving at that inference, the High Court has evidently ignored the evidence, bearing upon the nature of the incident, the consistent account that it was the respondent who had inflicted the blow, the weapon of offence and the vital part of the body on which the injury was inflicted. The fact that the co-accused, Rajesh and Jagdish, have been acquitted by the trial court, is in our view no reason to doubt the testimony of all the eyewitnesses which implicated the respondent. The death was attributable to the assault by the respondent on the deceased, during the course of the incident. Having regard to the above facts and circumstances of the case, it is evident that the injury which was caused to the deceased was [within the meaning of Section 300 Fourthly] of a nature that the person committing the act knew that it was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death."

52. The Hon'ble Supreme Court, in the case of ***AMIRUDDIN vs STATE (DELHI ADMINISTRATION) (2009)***⁸ has made the following observations:-

"5. As far as the Trial Court is concerned, there is not much discussion as to under which provision of law the accused shall be convicted. He was convicted for the offence of murder. The High Court has considered certain facts and come to the conclusion that the offence is of murder. Two aspects of the evidence mainly weighed with the High Court. Firstly that the accused had made an utterance to the following effect:

‘YEH ROJ ROJ KI LARAI KHATAM KER DETA HOON’.

6. It is true that this utterance can mean that he wanted to eliminate the victim but it can also mean in general parlance to bring an end to the fight. This utterance in our considered view cannot lead to the conclusion that the intention of the accused was to kill the deceased.

⁸ 2019 SCC ONLINE SC 1295

There is only one blow given to the deceased and that blow was given on the back of the deceased. Unfortunately, the blow was such that it went through the back and cut the aorta. If it had missed the aorta, probably the deceased would not have died.

7. We are of the view that the fact that there was a single blow and no attempt was made to give another blow and there is no evidence to show that the appellant was prevented from giving another blow indicates that his intention was not to kill the deceased.

8. The second aspect of the matter is whether the act of giving the blow with the knife was so imminently dangerous as to impute knowledge to the accused that would lead to the death of the deceased. It bears repetition that one blow was given and that too at the back. It cannot be said that the blow was so imminently dangerous as to impute knowledge to the appellant that he was committing such an act which would cause the death of the deceased.

9. In view of the above discussion, we are of the view that the accused should have been held guilty of committing the offence punishable under Section Part II of Section 304, IPC.

53. The Hon'ble Supreme Court in the case of **RAMPAL SINGH vs. STATE OF UTTAR PRADESH**⁹, has made the following observations: -

“23. An important corollary to this discussion is the marked distinction between the provisions of Section 304 Part I and Part II of the Code. Linguistic distinction between the two parts of Section 304 is evident from the very language of this section. There are two apparent distinctions, one in relation to the punishment while other is founded on the intention of causing that act, without any intention but with the knowledge that the act is likely to cause death. It is neither advisable nor possible to state any straitjacket formula that would be universally applicable to all cases for such determination. Every case essentially must be decided on its own merits. The Court has to perform the very delicate function of applying the provisions of the Code to the facts of the case with a clear demarcation as to under what category of cases, the case at hand falls and accordingly punish the accused.

⁹(2012) 8 SCC 289

24. A Bench of this Court in *Mohinder Pal Jolly v. State of Punjab* [(1979) 3 SCC 30 : 1979 SCC (Cri) 635 : AIR 1979 SC 577] stating this distinction with some clarity, held as under:

“11. A question now arises whether the appellant was guilty under Part I of Section 304 or Part II. If the accused commits an act while exceeding the right of private defence by which the death is caused either with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death then he would be guilty under Part I. On the other hand if before the application of any of the Exceptions of Section 300 it is found that he was guilty of murder within the meaning of clause ‘Fourthly’, then no question of such intention arises and only the knowledge is to be fastened on him that he did indulge in an act with the knowledge that it was likely to cause death but without any intention to cause it or without any intention to cause such bodily injuries as was likely to cause death. There does not seem to be any escape from the position, therefore, that the appellant could be convicted only under Part II of Section 304 and not Part I.”

25. As we have already discussed, classification of an offence into either part of Section 304 is primarily a matter of fact. This would have to be decided with reference to the nature of the offence, intention of the offender, weapon used, the place and nature of the injuries, existence of premeditated mind, the persons participating in the commission of the crime and to some extent the motive for commission of the crime. The evidence led by the parties with reference to all these circumstances greatly helps the court in coming to a final conclusion as to under which penal provision of the Code the accused is liable to be punished.”

54. The Hon’ble Supreme Court, in the case of **GURMUKH SINGH vs. STATE OF HARYANA**¹⁰ has made the following observations: -

“13. Section 304 IPC reads as under:

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

¹⁰(2009) 15 SCC 635

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

14. This Court had an occasion to deal with cases of similar nature. In *Jagrup Singh v. State of Haryana* [(1981) 3 SCC 616 : 1981 SCC (Cri) 768] the accused had inflicted a single blow in the heat of moment in a sudden fight with blunt side of gandhala on the head of the deceased causing his death. According to the opinion of the doctor this particular injury was sufficient in the ordinary course of nature to cause death. But, according to this Court, the intention to cause such an injury that was likely to cause death had not been made out. This Court altered the conviction of the accused from Section 302 IPC to Section 304 Part II IPC and the accused was directed to suffer rigorous imprisonment for a period of seven years.

15. In *Gurmail Singh v. State of Punjab* [(1982) 3 SCC 185 : 1982 SCC (Cri) 680] the accused had no enmity with the deceased. The accused gave one blow with the spear on the chest of the deceased causing his death. The injury was an incised wound. The Sessions Judge convicted the accused under Section 302 IPC and sentenced him to rigorous imprisonment for life. The High Court affirmed the same. This Court, while taking into consideration the age of the accused and other circumstances, converted the conviction from Section 302 IPC to one under Section 304 Part II IPC and sentenced him to suffer rigorous imprisonment for five years and a fine of Rs 500, in default to suffer rigorous imprisonment for six months.

16. In *Kulwant Rai v. State of Punjab* [(1981) 4 SCC 245 : 1981 SCC (Cri) 826] the accused, without any prior enmity or premeditation, on a short quarrel gave a single blow with a dagger which later proved to be fatal. This Court observed that since there was no premeditation, Part 3 of Section 300 of the Penal Code could not be attracted because it cannot be said that the accused intended to inflict that particular injury which was ultimately found to have been inflicted. In the facts and circumstances of that case, the conviction of the accused was altered from Section 302 to that under Section 304 Part II IPC and the accused was sentenced to suffer rigorous imprisonment for five years.

17. In *Jagtar Singh v. State of Punjab* [(1983) 2 SCC 342 : 1983 SCC (Cri) 459] the accused on the spur of the moment inflicted a knife-blow on the chest of the deceased. The injury proved to be fatal. The doctor opined that the injury was sufficient in the ordinary course of nature to cause death. This Court observed that:

“8. ... The quarrel was of a trivial nature and even in such a trivial quarrel the appellant wielded a weapon like a knife and landed a blow in the chest. In these circumstances, it is a permissible inference that the appellant at least could be imputed with a knowledge that he was likely to cause an injury which was likely to cause death.”

This Court altered the conviction of the appellant from Section 302 IPC to Section 304 Part II IPC and sentenced the accused to suffer rigorous imprisonment for five years.

18. In *Hem Raj v. State (Delhi Admn.)* [1990 Supp SCC 291 : 1990 SCC (Cri) 713] the accused inflicted single stab injury landing on the chest of the deceased. The occurrence admittedly had taken place on the spur of the moment and in heat of passion upon a sudden quarrel. According to the doctor the injury was sufficient in the ordinary course of nature to cause death. This Court observed as under:

“14. The question is whether the appellant could be said to have caused that particular injury with the intention of causing death of the deceased. As the totality of the established facts and circumstances do show that the occurrence had happened most unexpectedly in a sudden quarrel and without premeditation during the course of which the appellant caused a solitary injury, he could not be imputed with the intention to cause death of the deceased or with the intention to cause that particular fatal injury; but he could be imputed with the knowledge that he was likely to cause an injury which was likely to cause death. Because in the absence of any positive proof that the appellant caused the death of the deceased with the intention of causing death or intentionally inflicted that particular injury which in the ordinary course of nature was sufficient to cause death, neither clause I nor clause III of Section 300 IPC will be attracted.”

This Court while setting aside the conviction under Section 302 convicted the accused under Section 304 Part II and sentenced him to undergo rigorous imprisonment for seven years.

19. In *Abani K. Debnath v. State of Tripura* [(2005) 13 SCC 422 : (2006) 2 SCC (Cri) 257] this Court, in somewhat similar circumstances, while converting the sentence from Section 302 IPC to one under Section 304 Part II IPC observed as under:

“5. This leads us to consider as to under what section of law A-1 Abani K. Debnath is liable to be convicted in the given facts of the case. The prosecution evidence clearly discloses that the dao-blow dealt by A-1 was preceded by a mutual quarrel. We have already noted that there was no common intention to kill Ranjit Das. From

the nature of injuries, it is disclosed that A-1 dealt only one dao-blow perhaps on the spur of the moment. The incident had taken place on 10-8-1990 and the deceased succumbed to the injury on 15-8-1990 after a lapse of 7 days. Taking the prosecution evidence and medical evidence cumulatively, we are of the view that the conviction of A-1 also cannot fall under Section 302 IPC but at the most under Section 304 Part II. We accordingly convert the sentence of A-1 Abani K. Debnath under Section 302 IPC to one under Section 304 Part II IPC and sentence him to suffer RI for five years. The fine amount imposed by the trial court and affirmed by the High Court is maintained. It is stated at the Bar that A-1 has undergone about 18 months' imprisonment, if that is so, he will be entitled to get the benefit of Section 428 CrPC."

20. In another case *Pappu v. State of M.P.* [(2006) 7 SCC 391 : (2006) 3 SCC (Cri) 283] this Court observed as under:

"13. ... 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 IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

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

15. Considering the factual background of the case at hand it will be appropriate to convict the appellant under Section 304 Part II IPC, instead of Section 302 IPC as has been done by the trial court

and affirmed by the High Court. Custodial sentence of eight years would meet the ends of justice.

16. The appeal is allowed to the aforesaid extent.”

21. In the instant case, the occurrence had taken place on the spur of the moment. Only the appellant Gurmukh Singh inflicted a single lathi-blow. The other accused have not indulged in any overt act. There was no intention or premeditation in the mind of the appellant to inflict such injuries to the deceased as were likely to cause death in the ordinary course of nature. On consideration of the entire evidence including the medical evidence, we are clearly of the view that the conviction of the appellant cannot be sustained under Section 302 IPC, but the appropriate section under which the appellant ought to be convicted is Section 304 Part II IPC.

22. Before we part with the case, we would like to clearly observe that we are not laying down that in no case of single blow or injury, the accused cannot be convicted under Section 302 IPC. In cases of single injury, the facts and circumstances of each case have to be taken into consideration before arriving at the conclusion whether the accused should be appropriately convicted under Section 302 IPC or under Section 304 Part II IPC.

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

- (a) Motive or previous enmity;
- (b) Whether the incident had taken place on the spur of the moment;
- (c) The intention/knowledge of the accused while inflicting the blow or injury;
- (d) Whether the death ensued instantaneously or the victim died after several days;
- (e) The gravity, dimension and nature of injury;
- (f) The age and general health condition of the accused;
- (g) Whether the injury was caused without premeditation in a sudden fight;
- (h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;
- (i) The criminal background and adverse history of the accused;

- (j) Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of shock;
- (k) Number of other criminal cases pending against the accused;
- (l) Incident occurred within the family members or close relations;
- (m) The conduct and behaviour of the accused after the incident. Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment?

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

24. The list of circumstances enumerated above is only illustrative and not exhaustive. In our considered view, proper and appropriate sentence to the accused is the bounded obligation and duty of the court. The endeavour of the court must be to ensure that the accused receives appropriate sentence, in other words, sentence should be according to the gravity of the offence. These are some of the relevant factors which are required to be kept in view while convicting and sentencing the accused.

25. When we apply the settled principle of law which has been enumerated in the aforementioned cases, the conviction of the appellant under Section 302 IPC cannot be sustained. In our considered view, the appellant-accused ought to have been convicted under Section 304 Part II IPC instead of under Section 302 IPC.”

55. The Hon’ble Supreme Court, in the case of **KALU RAM VS. STATE OF RAJASTHAN**¹¹ has made the following observations: -

“7. But then, what is the nature of the offence proved against him? It is an admitted case that the appellant was in a highly inebriated stage when he approached the deceased when the demand for sparing her ornaments was made by him. When she refused to oblige he poured kerosene on her and wanted her to light the matchstick. When she failed to do so he collected the matchbox and ignited one matchstick but when the flames were up he suddenly and frantically poured water to save her from the tongues of flames. This conduct cannot be seen divorced from the totality of the circumstances. Very probably he would not have anticipated that the act done by him would have escalated to such a proportion that she might die. If he had ever intended her to die he would not have alerted his senses to

¹¹(2000) 10 SCC 324

bring water in an effort to rescue her. We are inclined to think that all that the accused thought of was to inflict burns to her and to frighten her but unfortunately the situation slipped out of his control and it went to the fatal extent. He would not have intended to inflict the injuries which she sustained on account of his act. Therefore we are persuaded to bring down the offence from first degree murder to culpable homicide not amounting to murder.

8. We therefore alter the conviction from Section 302 IPC to Section 304 Part II IPC. Both sides conceded that the appellant is continuing in jail. We impose a sentence of rigorous imprisonment for seven years on him. It is for the jail authorities to count whether the period he had already undergone would be sufficient to complete the period of sentence imposed by us and if so, the jail authorities shall release him from jail. Otherwise he will continue in jail until completion of the period of seven years of imprisonment. The appeal is disposed of accordingly.”

56. The Hon’ble Supreme Court, in the case of **CHAMRU BUDHWA vs. STATE OF MP**¹² has made the following observations :-

“3. The injury inflicted by the Appellant on the head of the deceased proved fatal and both the Courts below came to the conclusion that the Appellant was guilty of the offence under Section 302 of the Indian Penal Code. The opinion of the doctor was that the injury inflicted by the Appellant on the head of the deceased was sufficient in the ordinary course of nature to cause death and that to cause such an injury a heavy blunt weapon must have been used with moderate force or a light weapon of that type must have been used with great force.

It was therefore held that the Appellant must have intended the actual consequences of the blow given by him on the head of the deceased and that fact together with the knowledge that the bones of an old man are brittle and are likely to break was sufficient to establish the offence under Section 302 of the Indian Penal Code against the Appellant.

4. It appears that the Appellant did not plead any exception mentioned in Section 300 of the Indian Penal Code. The circumstances however as found by the Courts below were that there was a severe exchange of abuses between the parties preceding the incident, that during the

¹² AIR 1954 SC 652

abuse the tempo rose and both the parties came out of their respective houses in anger and that in the course of the quarrel the Appellant dealt the fatal blow on the head of the deceased with his lathi. Even though the circumstances were such as not to bring the case within Exception 1 to Section 300 of the Indian Penal Code it appears that the crime was committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the appellant's having taken undue advantage or acted in a cruel or unusual manner thus bringing the case within Exception 4 thereto with the result that the offence committed was culpable homicide not amounting to murder. The Appellant therefore could not be convicted of having committed an offence under Section 302 of the Indian Penal Code.

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

57. Section 304 of the Indian Penal Code operates in the field of culpable homicide not amounting to murder. Part II of the provision is attracted where death is caused by an act done with the knowledge that it is likely to cause death, though without intention to cause death or such bodily injury as is likely to cause death. The distinction between “intention” and “knowledge” is neither artificial nor merely semantic. The distinction is rooted in the degree of mental awareness accompanying the act.
58. In the present matter, the evidence of PW-2, PW-4, PW-5, PW-6, PW-7, PW-8 and PW-9 consistently reveals that the appellants acted collectively during the assault. They simultaneously participated in attacking the deceased and

the injured witnesses with available objects including bats, stumps, stones and brick bats. The assault was neither isolated nor individualistic. It was a concerted act emerging from a shared and contemporaneous purpose.

59. The existence of common intention is further reinforced by the manner in which the appellants surrounded the deceased and jointly assaulted him. The conduct of the accused persons before and during the occurrence unmistakably demonstrates community of action and unity of purpose. Once such common intention is established, each participant becomes vicariously liable for the acts committed in furtherance of the shared intention.
60. The ingredients of Section 324 of the Indian Penal Code are equally satisfied from the evidence on record. Section 324 of the Indian Penal Code criminalises voluntarily causing hurt by dangerous weapons or means. The expression “dangerous weapon or means” is not confined to conventional weapons alone. The determination depends upon the manner of use and the capacity of the object to inflict bodily harm.
61. In the present matter, the prosecution witnesses consistently stated that cricket bats, stumps, stones and brick bats were used during the assault. When used as instruments of violence, such objects undoubtedly acquire the character of dangerous weapons or means within the meaning of Section 324 of the Indian Penal Code. PW-5 and PW-9 sustained injuries on the head and face due to such assault. Their evidence remained unshaken during cross-examination and stands corroborated by medical documentation.
62. The contention of the defence that the occurrence was merely a mutual scuffle equally fails to advance the case of the appellants. The existence of a

quarrel or sudden provocation does not extinguish criminal liability where the response assumes disproportionate and violent dimensions. The law draws a distinction between a mere exchange of blows and an assault involving dangerous weapons directed towards vital parts of the body. The present case unmistakably falls within the latter category.

63. The evidence relating to identification of the accused persons also deserves careful consideration. PW-17, the learned Magistrate who conducted the Test Identification Parade, described the procedure adopted during the T.I. proceedings with precision. The witnesses were called individually, isolated from each other after identification and the proceedings were conducted without police interference. Multiple witnesses identified the appellants during T.I. Parade and subsequently reaffirmed such identification before the Court.
64. The legal significance of a Test Identification Parade lies in its corroborative value. Though substantive evidence is the identification before the Court, T.I. Parade serves to strengthen the trustworthiness of witnesses who identify previously unknown accused persons. In the present case, the identification evidence assumes considerable reliability because it is supported not only by T.I. proceedings but also by consistent ocular testimony and surrounding circumstances.
65. The prosecution case also receives corroboration from the seizure of incriminating materials. PW-21 seized stones and brick bats from the place of occurrence under seizure list Exhibit-5. Such seizure directly corresponds

with the prosecution version regarding the weapons used during the assault. The physical evidence thus aligns with the oral testimony.

66. The defence evidence does not create any substantive dent in the prosecution case. The plea of alibi advanced through DW-1 and DW-2 remains inconclusive and incomplete. The evidence adduced does not exclude the possibility of presence of accused Bikash Paswan at the place of occurrence. Similarly, the medical documents relating to accused Anup Shaw merely establish that he sustained injuries. They do not probabilise innocence nor negate the prosecution version.
67. DW-5, accused Anup Shaw, admitted that there was a confrontation regarding the cricket boundary and that one of the boys fell during the altercation. Thus, even the defence version substantially acknowledges the genesis of the incident spoken to by the prosecution witnesses. The divergence lies only in the attempt to minimise the nature of assault and attribute the fatal injury to accidental fall. Such defence, however, stands contradicted by the overwhelming weight of ocular and medical evidence.
68. Section 304 of the Indian Penal Code operates in the field of culpable homicide not amounting to murder. Part II of the provision is attracted where death is caused by an act done with the knowledge that it is likely to cause death, though without intention to cause death or such bodily injury as is likely to cause death. The distinction between “intention” and “knowledge” is neither artificial nor merely semantic. The distinction is rooted in the degree of mental awareness accompanying the act.

69. Intention postulates a conscious objective directed towards a particular consequence. Knowledge, on the other hand, denotes an awareness of the probable consequences of an act, even though such consequence may not be the desired end of the actor. Thus, where the surrounding circumstances reveal absence of premeditated design to kill, yet disclose an assault of such intensity and nature that death becomes a likely consequence known to the assailants, culpability travels into the domain of Section 304 Part II of the Indian Penal Code.
70. The evidence on record unmistakably reveals that the occurrence arose spontaneously over a quarrel concerning removal of stones and brick pieces placed on the playground for marking the cricket boundary. The materials do not indicate prior enmity, pre-arranged conspiracy or premeditated design to eliminate the deceased. At the same time, the conduct of the appellants cannot be diluted into a mere minor altercation devoid of criminal knowledge.
71. The prosecution witnesses consistently stated that the appellants assaulted the deceased with cricket bats, stumps, stones and brick bats. The assault was directed upon vulnerable parts of the body, particularly the head region. PW-7 specifically stated that the deceased was assaulted with cricket bat and immediately fell on the ground. PW-2, PW-4, PW-6 and PW-8 also spoke about the assault upon the deceased by means of hard blunt objects.
72. The medical evidence of PW-15 assumes decisive significance in this context. The post-mortem doctor found parital and occipital suture fracture together with bilateral subdural haemorrhage. These are not superficial or accidental

injuries of trivial dimension. Cranial fracture accompanied by intracranial haemorrhage necessarily indicates application of substantial force upon a vital part of the body. The head is universally recognised as a vulnerable region of the human anatomy and assault upon such region with hard blunt objects inherently carries the likelihood of fatal consequence.

73. The knowledge attributable to the appellants must therefore be assessed not in abstraction, but in the context of the weapon used, the part of the body targeted and the degree of force employed. A group of persons assaulting another with cricket bats, stumps, stones and brick bats cannot plausibly claim absence of awareness regarding the likely consequence of such acts. Even if death was not the intended objective, the knowledge that such assault was likely to cause death clearly emerges from the surrounding circumstances.
74. The defence sought to contend that the deceased may have sustained the fatal injury by falling upon a stone during the scuffle. This argument does not persuade the Court for multiple reasons.
75. Firstly, the ocular testimony of several eye witnesses consistently establishes assault preceding the fall. Secondly, even the medical evidence does not exclude assault as the cause of injury. The doctor merely acknowledged the possibility that such injury might occur if a person fell upon a hard surface. A hypothetical possibility elicited during cross-examination cannot displace otherwise cogent ocular evidence. Thirdly, in criminal jurisprudence, causation is not confined to the final physical impact alone. Where an assault initiates the chain of events leading to death, criminal liability does

not stand interrupted merely because the fatal impact occurred upon contact with the ground.

76. Thus, even assuming that the occipital injury was intensified due to impact with the stone surface after the fall, the fall itself was the direct consequence of the assault perpetrated by the appellants. The causal connection between the unlawful act and the death of the deceased remains intact and unbroken.
77. The conviction under Section 304 Part II of the Indian Penal Code, therefore, stands firmly supported both on facts and in law.
78. The applicability of Section 34 of the Indian Penal Code also stands clearly established from the evidence on record. Common intention is seldom capable of direct proof and ordinarily manifests itself through conduct, participation and surrounding circumstances. The law does not require proof of long-standing premeditation. Common intention may develop suddenly during the course of the occurrence itself.
79. In the present matter, the evidence of PW-2, PW-4, PW-5, PW-6, PW-7, PW-8 and PW-9 consistently reveals that the appellants acted collectively during the assault. They simultaneously participated in attacking the deceased and the injured witnesses with available objects including bats, stumps, stones and brick bats. The assault was neither isolated nor individualistic. It was a concerted act emerging from a shared and contemporaneous purpose.
80. The existence of common intention is further reinforced by the manner in which the appellants surrounded the deceased and jointly assaulted him. The conduct of the accused persons before and during the occurrence

unmistakably demonstrates community of action and unity of purpose. Once such common intention is established, each participant becomes vicariously liable for the acts committed in furtherance of the shared intention.

81. The ingredients of Section 324 of the Indian Penal Code are equally satisfied from the evidence on record. Section 324 of the Indian Penal Code criminalises voluntarily causing hurt by dangerous weapons or means. The expression “dangerous weapon or means” is not confined to conventional weapons alone. The determination depends upon the manner of use and the capacity of the object to inflict bodily harm.
82. In the present matter, the prosecution witnesses consistently stated that cricket bats, stumps, stones and brick bats were used during the assault. When used as instruments of violence, such objects undoubtedly acquire the character of dangerous weapons or means within the meaning of Section 324 of the Indian Penal Code. PW-5 and PW-9 sustained injuries on the head and face due to such assault. Their evidence remained unshaken during cross-examination and stands corroborated by medical documentation.
83. The contention of the defence that the occurrence was merely a mutual scuffle equally fails to advance the case of the appellants. The existence of a quarrel or sudden provocation does not extinguish criminal liability where the response assumes disproportionate and violent dimensions. The law draws a distinction between a mere exchange of blows and an assault involving dangerous weapons directed towards vital parts of the body. The present case unmistakably falls within the latter category.

84. The evidence relating to identification of the accused persons also deserves careful consideration. PW-17, the learned Magistrate who conducted the Test Identification Parade, described the procedure adopted during the T.I. proceedings with precision. The witnesses were called individually, isolated from each other after identification and the proceedings were conducted without police interference. Multiple witnesses identified the appellants during T.I. Parade and subsequently reaffirmed such identification before the Court.
85. The prosecution evidence, therefore, forms a complete and internally consistent evidentiary framework. The ocular testimony of multiple witnesses remains mutually corroborative. The injured witnesses establish the occurrence from within the zone of violence itself. The medical evidence confirms the fatal nature of the head injuries. The T.I. Parade establishes identity. The seizure of stones and brick bats reinforces the prosecution version regarding the manner of assault. The defence evidence does not generate any reasonable doubt capable of displacing the prosecution case.
86. In such circumstances, the Learned Trial Court correctly concluded that the appellants, acting in furtherance of their common intention, voluntarily caused hurt to the injured witnesses by dangerous weapons and further committed culpable homicide not amounting to murder with the knowledge that their acts were likely to cause death.
87. The conviction under Sections 304 Part II/34 and 324/34 of the Indian Penal Code, therefore, does not suffer from any legal infirmity requiring appellate interference. The findings recorded by the learned Trial Court are

fully supported by the evidence on record and by settled principles governing criminal jurisprudence.

88. The appeal, accordingly, stands dismissed. The judgment of conviction and order of sentence are affirmed.
89. Accordingly, these criminal appeals being CRA 327 of 2009, CRA 339 of 2009, CRA 347 of 2009, CRA 359 of 2009 are dismissed. However, the sentence is modified to the extent of incarceration undergone by the appellants.
90. There is no order as to costs.
91. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
92. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)