
(2019) 10 CHH CK 0185

Chhattisgarh High Court

Case No: Criminal Appeal (CRA) No. 752 Of 2012

Sanjay And Ors

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

Date of Decision: Oct. 23, 2019

Acts Referred:

- Indian Penal Code, 1860 - Section 34, 302, 304, 323
- Code Of Criminal Procedure, 1973 - Section 313

Hon'ble Judges: Prashant Kumar Mishra, J; Gautam Chourdiya, J

Bench: Division Bench

Advocate: Rajeev Shrivastava, Dharmesh Shrivastava, Vikas Shrivastava

Final Decision: Allowed

Judgement

Gautam Chourdiya, J

01. Challenge in this appeal is to the judgment of conviction and order of sentence dated 7.8.2012 passed by Additional Sessions Judge, Sakti, Distt.

Janjgir-Champa (CG) in ST No.137/2011 whereby each of the appellants stands convicted under Section 302/34 of IPC and sentenced to undergo life

imprisonment plus fine of Rs.10,000/- with default sentence of six months' additional R.I.

02. Undisputed facts in this case are that at the time of incident marriage ceremony was going on in the house of Krishno Bhardwaj (PW-11) at the

village of Chhatturam (since deceased) and the accused persons. On the date of incident i.e. 13.5.2011 at about 7-8 pm music was being played in the

courtyard of Krishno Bhardwaj. At that time there was scuffle between Chhatturam and accused/appellant No.2 Vikas, upon which Chhatturam

assaulted accused Vikas with club on his left hand. It is also an admitted fact that on 13.5.2011 itself Chhatturam died in the night.

03. As per the prosecution case, on the date of incident i.e. 13.5.2011 at around 7-8 pm the villagers were dancing in the courtyard of Krishno Satnami

(PW-11) and while dancing, hand of accused Vikas got touched with Dhaniram (PW-9), on which Vikas (accused No.1) and his brother Vivek @

Vikki (accused No.3) started quarreling with Dhaniram (PW-9) which was intervened by Chhatturam. Thereafter, accused Vikas grappled with

Chhatturam, who were separated by Maniram, Saukhilal, Shriram, Motilal etc. It is said that during quarrel between accused Vikas and Chhatturam,

assault was made by Chhatturam with a club on left hand of Vikas as a result of which accused No.2 Vikas suffered injuries as mentioned in his

MLC Ex.P/21 prepared by PW-15 Dr. SL Nirala. The above fact is also admitted by accused Vikas in reply to Question Nos.94 to 96 in his statement

under Section 313 of CrPC. After this incident Chhatturam left the house of Krishno Satnami (PW-11) and returned to his house. Chhatturam was

sitting in his courtyard on the cot, at about 8.30 pm he asked his wife Sendurbai (PW-1) to serve him meal and at that time, accused No.2 Vikas with

Basula (adze) in his hand, accused No.1 Sanjay with club and accused No.3 Vivek empty handed, reached there. Accused No.3 Vivek having caught

Chhatturam fell him down from the cot on the floor, accused No.1 Sanjay with club and accused No.3 Vivek with hands and fists assaulted

Chhatturam. Accused No.2 Vikas assaulted Chhatturam with Basula on the back of his neck and near his waist. When wife of Chhatturam namely

PW-1 Sendurbai and his daughter Savita (PW-2) intervened to save Chhatturam, the accused persons pushed them away and after assaulting

Chhatturam fled from there. During the incident, on hue and cry being raised by PW-1 Sendurbai, her neighbours Shriram Bhardwaj, Maniram,

Saukhilal etc. came there and they also saw the accused persons running away from the house of Chhatturam. Immediately after the incident,

Chhatturam was taken to hospital at Hasaud where the doctors after examination declared him dead.

After about three hours of the incident, merged intimation Ex.P/23 and unnumbered FIR (Ex.P/24) were lodged by Sendurbai (PW-1) naming all the

accused persons as perpetrator of the crime. Spot map at the instance of PW-1 Sendurbai was prepared by the police vide Ex.P/1 and spot map at the instance of PW-3 Maniram was prepared by the police vide Ex.P/2. Spot map Ex.P/15 was prepared by the Patwari. Numbered FIR (Ex.P/18) was registered on 14.5.2011 at 18:00 hours against the accused persons under Section 302/34 of IPC. Inquest report Ex.P/4 was prepared on 14.5.2011 in presence of five witnesses mentioned therein. During inquest it was noticed that the deceased had suffered injury on back of his neck, near his waist caused by sharp edged weapon and there were 4-5 club injury marks on his back. Thereafter, the dead body was sent for postmortem which was conducted on the same day by PW-15 Dr. SL Nirala vide Ex.P/18 who noticed one incised wound of size 2 ½" x ½" x 3" at level of middle part of left sacro-iliac joint, another incised wound of size 2 ½" x ½" x 2 ½" on back of neck at the level of 2 nd cervical vertebra. He also noticed fracture of 2nd cervical vertebra with partial cut injury of spinal cord. In his opinion, the cause of death was hemorrhagic shock due to injury to vital organ of back of neck and the death was homicidal in nature.

04. During investigation, memorandum (Ex.P/6) of accused No.2 Vikas was recorded on 14.5.2011 which led to recovery of bloodstained Basula vide Ex.P/7. Memorandum (Ex.P/8) of accused No.1 Sanjay led to recovery of one bloodstained club vide Ex.P/9. As per seizure memo Ex.P/10, vest and full pant of accused No.2 Vikas having stains like blood were seized. As per seizure memo Ex.P/11, bloodstained and plain soil were seized from the place of occurrence. Under seizure memo Ex.P/12, half shirt and full pant of accused No.1 Sanjay Satnami having stains like blood were seized. Similarly, under seizure memo Ex.P/13, bloodstained vest and full pant of accused No.3 Vikek were seized.

05. The seized articles i.e. Basula and club were sent for examination to the doctor and after examination PW-15 Dr. SL Nirala opined that the injuries sustained by the deceased as mentioned in the postmortem report could be caused by the Basula vide Ex.P/19. However, as per his report Ex.P/20, the injuries explained in the postmortem report cannot be caused by bamboo wood stick (club). This doctor (PW-15) also medically examined

accused No.2 Vikas vide Ex.P/21 and noticed five abrasions over right shoulder, right supra- clavicular region, right side of upper abdomen, left side of neck, right temporal region and swelling over left hand, all of which were caused by blunt and hard object. According to the doctor, definite opinion can be given after x-ray examination and therefore, he advised for x-ray. Upon x-ray examination, PW-15 Dr SL Nirala found fracture of shaft of 4th metacarpal bone of left hand of accused No.2 Vikas vide Ex.P/22.

06. The seized articles were sent for chemical examination to Forensic Science Laboratory. As per FSL report Ex.P/34, except on Articles I & J i.e.

shirt and full pant of accused No.1 Sanjay, blood was found on all other articles.

07. After recording statements of the witnesses and completing the formalities of investigation, charge sheet was filed against all the

accused/appellants under Section 302/34 of IPC. The trial Court framed charge under Section 302/34 of IPC against the appellants, which was abjured by them and they pleaded for trial.

08. So as to hold the accused persons guilty, the prosecution examined 16 witnesses in all. Statements of the accused/appellants were also recorded

under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false

implication. In their defence, they stated that three girls of deceased family had eloped with their close relatives and married them and accused No.1

Sanjay being President of their community imposed fine on them. It was further stated that accused No.1 Sanjay is a government employee, accused

No.3 Vikek is Panchayat Secretary, the family members of the deceased are inimical to them; all the important witnesses are relatives of the

deceased, the family of the accused is well educated and financially sound, therefore, due to animosity the witnesses are deposing against them and as

such, they have been falsely implicated in this offence.

09. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment

convicted and sentenced the appellants as mentioned in para-1 of this judgment.

10. Counsel for the appellants submits as under:

(i) that as per autopsy report Ex.P/18, only two incised wounds were noticed by the doctor (PW-15 Dr. SL Nirala) on the person of the deceased

which were caused by sharp edged weapon allegedly being carried by accused No.2 Vikas as per eyewitnesses and therefore, accused No. 1 Sanjay

who is said to be having club and accused No.3 Vivek who was empty handed have falsely been implicated in this crime.

(ii) that in this case name of Vimla Kunwar (PW-6) was not mentioned in the FIR and after the incident she has been planted as an eyewitness to the

incident. Had she been present on the spot and witnessed the incident, her name must have been mentioned in the FIR.

(iii) that as per prosecution case itself at the time of incident PW-1 Sendurbai, PW-2 Savita and all other women of the village were taking meal at the

home of Krishno Satnami (PW-11) where marriage function was going on. PW-11 in para-9 of his deposition has also admitted the fact that at the

time of incident PW-1 Sendurbai, PW-2 Savita and PW- 6 Vimla, himself and others after hearing cries emanating from the home of deceased went

there and saw that the deceased was lying in pool of blood in his courtyard.

(iv) that as per statements of the witnesses, after the occurrence Chhatturam was being taken to hospital for treatment by motorcycle, but no

motorcycle was seized by the police. According to PW-4 Shriram Bhardwaj, blood on the motorcycle was washed out by him at the instance of

police. Thus, non-seizure of motorcycle despite being available, creates doubt on the prosecution case.

(v) that there is discrepancy regarding the place of occurrence in the statements of PW-1 Sendurbai, PW-2 Savita and other witnesses. According to

PW-1 Sendurbai the incident took place in the courtyard of the deceased whereas PW-2 Savita states that at the time of incident, her father

Chhatturam (deceased) was sitting on a cot in the courtyard adjacent to the lane in front of their house.

(vi) that admittedly, in the said incident accused No.2 Vikas also suffered grievous injuries as mentioned in Ex.P/21 and proved by PW- 15 Dr. SL

Nirala, but the prosecution has not explained those injuries which makes the case of the prosecution doubtful.

(vii) that in this case the prosecution has failed to prove that all the accused persons were sharing common intention of either committing murder of the deceased or of causing him some bodily injury. Only on account of their being previous enmity between the family of the deceased and that of the appellants, all the appellants have been falsely implicated in this crime.

(viii) that as per statements of the witnesses, the articles seized from the accused persons were not produced by the accused before the police. None of the memorandum statements and the seizure memos bears the crime number. Therefore, looking to the discrepancy in the evidence of the witnesses regarding memorandum, seizure and place of occurrence as well as non-mentioning of crime number in the said documents, the entire prosecution case becomes seriously doubtful.

(ix) that the ocular evidence does not find support from the medical evidence. According to the postmortem report (Ex.P/18) and evidence of PW-15

Dr. SL Nirala, autopsy surgeon, only two incised injuries were found on the body of the deceased which could be caused by sharp edged weapon

whereas the eyewitnesses state that the deceased was also assaulted by club as well as hand and fists by accused No.1 Sanajy & accused No.3

Vivek.

(x) that though as per FSL report (Ex.P/34), blood was found on the articles allegedly seized from the possession of the appellants, but there is no

serological report confirming the origin of blood and its group. Therefore, this circumstance loses its significance and cannot be taken against the

appellants.

(xi) alternatively he submits that from the evidence, at the most appellant No.2 Vikas can be held guilty of causing bodily injuries to Chhatturam and

looking to the manner in which the incident occurred, it is clear that the incident occurred all of a sudden, in the heat of passion, on grave provocation

by the deceased himself. As such, the act committed by accused No.2 Vikas makes him liable for conviction under Section 304 Part-II of IPC i.e.

culpable homicide not amounting to murder. Since it has not been proved by the prosecution that the other accused/appellants were sharing common

intention with accused No.2 Vikas, they cannot be held guilty of the offence committed by accused Vikas and deserve to be acquitted of the charge

leveled against them. At the most, they can be held guilt under Section 323 of IPC for their individual criminal act.

Reliance has been placed on the decisions in the matters of Lakshmi Singh and others Vs. State of Bihar, (1976) 4 SCC 394, Kansa Behera Vs. State

of Orissa, (1987) 3 SCC 480; Kallikatt Kunhu Vs. State of Kerala, (2000) 3 SCC 5;0 Suresh Chaudhary Vs. State of Bihar, (2003) 4 SCC 128;

Ramsewak and others Vs. State of MP, (2004) 11 SCC 259; State of Rajasthan Vs. Bhanwar Singh, (2004) 13 SCC 147 ;Nagaraja Vs. State of

Karnataka, (2008) 17 SCC 277; Mahant Pathak @ Bulthu Pathak Vs. State of MP (Now CG), 2011(4) MPHT 1 (CG), Santosh Kumar and another

Vs. State of CG, 2015 (5) CGLJ 417 (DB) and Gurpal Singh Vs. State of Punjab, (2017) 2 SCC 36 5 and the decision dated 9th August, 2019 of the

Hon'ble Supreme Court in the matter of R. Jayapal Vs. State of Tamil Nadu and another in Criminal Appeal No.56 of 2010.

11. On the other hand, State counsel supporting the impugned judgment has submitted that the defence has utterly failed to establish that the

accused/appellants were falsely implicated in this crime. All the three eyewitnesses i.e. PW-1 Sendurbai, PW-2 Savita and PW-6 Ku. Vimla, who are

wife, daughter and niece of the deceased respectively, are the natural witnesses. The other witnesses have also seen the appellants soon after the

incident running away from the house of the deceased. If the evidence of the eyewitnesses are seen along with the inquest report and postmortem

report of the deceased, there is no reason to disbelieve the eyewitness account. The conviction of the appellants is strictly in accordance with law and

there is no illegality or infirmity in the impugned judgment warranting interference by this Court.

12. Heard counsel for the respective parties and perused the material on record.

13. The prosecution case is based on the evidence of eyewitness namely PW-1 Sendurbai (wife of deceased), PW-2 Savita Kumar (daughter of

deceased), PW-6 Kumari Vimla (niece and neighbour of deceased) which finds corroboration from the evidence of PW-7 Chandram, memorandum,

seizure, inquest report as well as medical evidence in the form of postmortem report and the statement of autopsy surgeon (PW-15 Dr. SL Nirala).

14. In this case, it is not disputed by the parties, proved by the prosecution and admitted by the accused persons in their statements under Section 313

of CrPC that the first incident occurred in the house of PW-11 Krishno Bharadwaj when the villagers including accused Vikas and PW-9 Dhaniram

were dancing in the marriage function and hand of accused Vikas got touched with Dhaniram, which led to scuffle between the two. It is not in

dispute that at that time Chhatturam (deceased) intervened and during this period, Chhatturam assaulted accused Vikas by club as a result of which

Vikas sustained injuries. As per MLC (Ex.P/21) accused Vikas sustained five abrasions over right shoulder, right supra-clavicular region, right side of

upper abdomen, left side of neck, right temporal region and swelling over left hand, all of which were caused by blunt and hard object. Upon x-ray

examination, PW-15 Dr SL Nirala found fracture of shaft of 4th metacarpal bone of left hand of accused No.2 Vikas vide Ex.P/22. The aforesaid

medical reports have been admitted by accused Vikas in his defence statement u/s 313 of CrPC.

15. So far as homicidal death of Chhatturam is concerned, from the evidence of the eyewitnesses (PW-1 Sendurbai, PW-2 Savita Kumari & PW-6

Kumari Vimla) coupled with the medical evidence in the form of postmortem report Ex.P/18 wherein the doctor noticed one incised wound of size 2

1½" x 1½" x 3" at level of middle part of left sacro-iliac joint, another incised wound of size 2 1½" x 1½" x 2 1½" on back of neck at the level of

2nd cervical vertebra, fracture of 2nd cervical vertebra with partial cut injury of spinal cord and opined that the cause of death was hemorrhagic shock

due to injury to vital organ of back of neck, the time of death was 12 to 24 hours prior to the postmortem examination, which correspond with the

eyewitness account, it stands proved that death of Chhatturam was homicidal in nature.

16. First this Court considers the eyewitness account rendered by PW-1 Sendurbai (wife of deceased), PW-2 Savita Kumar (daughter of deceased),

PW-6 Kumari Vimla (niece and neighbour of deceased). All these three eyewitnesses have categorically and consistently stated before the Court as

to the manner in which the incident occurred, accused Sanjay assaulted Chhatturam with club, accused Vikas assaulted by Basula on the back of his

neck & waist and accused Vivek by hands and fists. From perusal of their diary statements Ex.D/1, D/2 & D/3 respectively, this Court finds no major contradiction or omission in their Court statements which could make their evidence untrustworthy or doubtful.

17. Learned counsel for the appellants has argued that these three eyewitnesses are not natural witnesses because as per PW-11 Krishno Bharadwaj, at the time of incident they were taking meals in the house of PW-11. However, the said argument is not acceptable for the reason that PW-11 has been declared hostile by the prosecution and he has not supported the prosecution case. As per diary statement of PW-11, though not exhibited, he is not an eyewitness to the incident, he came at 9 pm to his house on the date of incident where he was informed by daughter of the deceased that the accused persons have committed murder of Chhatturam. In his diary statement he has nowhere stated that at the relevant time, wife and daughter of the deceased i.e. PW-1 and PW-2 were taking meals in his house. For the first time in the Court he is making statement that they were taking meals at the time of incident in his house. Therefore, the evidence of this witness does not inspire confidence of the Court and as such, the accused cannot draw any benefit of his statement.

18. The eyewitness account gets due corroboration from the promptly lodged merger intimation Ex.P/23 and FIR Ex.P/24 which were lodged by eyewitness PW-1 Sendurbai just three hours after the incident. These documents have been duly proved by the prosecution. In the merger intimation and FIR, the lodger of the report has categorically stated as to the manner in which the incident occurred naming all the three accused/appellants as perpetrator of the crime.

19. Learned counsel for the appellants has argued that there is discrepancy in the statements of PW-1 & PW-2 regarding the place of occurrence.

According to statement Ex.D/1 of PW-1 Sendurbai, at the time of incident the deceased was sitting in the courtyard outside his house whereas in the

FIR (Ex.P/24) she has stated that the deceased was sitting on a cot outside his house and according to PW-2 Savita, at the time of incident the

deceased was sitting on a cot in the courtyard adjacent to the lane in front of their house.

If the statement of PW-6 Ku. Vimla, who is niece and neighbour of the deceased, is seen, she has stated that at the time of incident the deceased was sitting on a cot in the courtyard in front of his house. Ex.P/15 spot map prepared by PW-12 PK Banjare, Halka Patwari, has been duly proved by him as well as by PW-7 Chandram. In para-4, PK Banjare (PW-12) has categorically stated that in front of house of the deceased, there is open courtyard which is the place of incident and has been marked with red ink by him in the spot map. Further, as per Ex.P/1 spot map prepared by the investigating officer (PW-16 NS Rajput) in presence of witnesses, it is also clear that there is open courtyard in front of house of the deceased where the deceased was sitting on a cot at the time of incident. PW-16 has duly proved the said spot map. Therefore, considering the overall facts and circumstances of the case, the oral and documentary evidence on record, this Court does not find any major contradiction in the statements of PW-1 Sendurbai and PW-2 Savita regarding description of the place of incident. Even otherwise, as per Ex.P/11 plain and bloodstained soil were seized from the place of incident i.e. the courtyard of house of the deceased, which were sent for chemical examination to FSL and as per report of the FSL (Ex.P/34), blood was found on the soil seized from the spot. Thus, the argument of the appellants' counsel in this regard being without substance is rejected.

20. As regards the argument of the appellants' counsel that name of PW-6 Vimla is not mentioned in the FIR lodged by PW-1 Sendurbai and therefore, PW-6 appears to be a planted witness by the investigating agency, it is not in dispute that PW-6 Vimla is niece in relation of the deceased and her house is adjacent to the house of the deceased. According to her, on the date of incident while she was standing in front of her house about 3-4 hands away from the deceased who was sitting in his courtyard, the accused persons reached there, accused Sanjay assaulted the deceased with club, accused Vicky fell down the deceased from cot and beat him with hands and fists. She states that accused Vikas assaulted the deceased with Basula on back of his neck and waist, on which blood started oozing from the injuries. At that time, PW-1 Sendurbai and PW-2 Savita were also

present in the house. Her version is fully consistent with the evidence of PW-1 & PW-2. Her diary statement Ex.D/3 was recorded on the next day of incident i.e. 14.5.2011 in which she has stated the same thing. There is no contradiction or omission in her court statement as compared to her diary statement. Thus, in the given facts and circumstances of the case, keeping in view the statements of PW- 1 Sendurbai, PW-2 Savita, diary statement Ex.D/3 of PW-6 Vimla, her presence on the spot being natural as she is immediate neighbour and niece of the deceased, mere non-mentioning of name of this witness (PW-6) in the FIR cannot be considered fatal to the case of the prosecution or lead to an inference of she being a planted witness by the prosecution.

21. The law is fairly well settled that FIR is not supposed to be an encyclopedia of the entire events and cannot contain the minutest details of the events. When essentially material facts are disclosed in the FIR that is sufficient. FIR is not substantive evidence and cannot be used for contradicting testimony of the eye witnesses except that may be used for the purpose of contradicting maker of the report. The question whether a person was implicated by way of afterthought or not must be judged having regard to the entire factual scenario in each case. Therefore, non-naming of one or few of the accused persons in the FIR or non-mentioning of certain details of the incident is no reason to dis-believe the testimony of crucial witnesses.

22. PW-7 Chandram has also supported the prosecution case. He states that upon hearing the commotion ekj Mkys] ekj Mkys when he came out of his house, he saw accused/appellants coming out of the house of Chhatturam and moving away. He states that accused Sanjay was carrying club, accused Vicky was empty handed and accused Vikas was holding Basula. He states that the accused persons after coming out of the house of Chhatturam, were going towards their house and while they were passing by his house, accused Sanjay was staying ges'kk ds fy, jkLrk lkQ gks x;k gS] [kre dj fn, gSA (Hamesha ke liye rashta saaf ho gaya hai, khatam kar diye hai.). This has also been narrated by this witness in his diary statement

Ex.D/4. He states that thereafter, he reached the house of Chhatturam and saw Chhatturam lying on the floor in the courtyard in front of his house

with sharp cut injuries over his waist and back of neck and he was informed by Sendurbai that Chhatturam has been assaulted by accused Sanjay with club, accused Vicky with hands and fists and accused Vikas with Basula. In cross-examination this witness remained firm and nothing could be elicited from him to make his evidence doubtful. There is no major contradiction or omission in his court statement. His evidence also lends due support to the evidence of eyewitnesses (PW-1, PW-2 & PW-6).

This apart, PW-4 Shriram Bhardwaj also states that upon hearing the commotion while he was going to the house of Chhatturam, he saw the accused persons coming out of the house of Chhatturam, at that time accused Vikas was holding Basula in his hand, accused Sanjay was carrying club and accused Vivek was empty handed. He further states that the accused persons were going towards their house saying that they have killed one person. In cross-examination also he remained firm on this statement. In his diary statement (though not exhibited) which was recorded on 14.5.2011 also this witness has stated the above fact. Therefore, there being no omission or contradiction in his court statement, there is no reason to disbelieve this witness on the aforesaid aspect of the matter.

23. Learned counsel for the appellants has vehemently argued that according to the autopsy surgeon PW-15 Dr. SL Nirala he found one incised wound of size 2 ½" x ½" x 3" at level of middle part of left sacro- iliac joint and another incised wound of size 2 ½" x ½" x 2 ½" on back of neck at the level of 2nd cervical vertebra including fracture of 2nd cervical vertebra with partial cut injury of spinal cord. In his opinion, the cause of death was hemorrhagic shock due to injury to vital organ of back of neck. However, according to the eyewitnesses (PW-1, PW-2 & PW-6), the deceased was also assaulted with club by accused Sanjay but no club injury was noticed on the person of the deceased by the doctor which makes it clear that the eyewitnesses are not stating the truth and accused Sanjay and Vivek have been falsely implicated in this crime.

Though as per postmortem report (Ex.P/18), no club injury was noticed by the autopsy surgeon on the body of the deceased, but as per Ex.P/4 i.e. inquest report, while conducting inquest apart from the incised wounds on neck and waist of the deceased, as many as 4-5 club injury marks were

noticed on the back of the deceased. PW-4 Shriram Bhardwaj and PW-5 Motiram Bhardwaj, who are witnesses to the inquest have stated before the

Court that they were present at the time of inquest and had seen club injury marks on the back of deceased. PW-15 NS Rajput, I.O. who prepared

inquest report has also proved the same. Thus, the statements of eyewitnesses (PW-1, PW-2 & PW-6) that the deceased was also assaulted with

club by Sanjay finds corroboration from the inquest report Ex.P/4, its witnesses PW-4 Shriram Bhardwaj, PW-5 Motiram Bhardwaj and PW-15 NS

Rajput, I.O. who prepared the inquest report. It is a well settled principle of law that the medical evidence cannot be given preference over the ocular

evidence unless the latter completely refutes any possibility of such occurrence whereas in this case the ocular evidence finds due corroboration from

other material available on record. Therefore, the aforesaid argument of the appellants' counsel being without substance is rejected.

24. So far as the arguments of the appellant's counsel that the eyewitness being interested witnesses, their evidence cannot be relied upon is

concerned, it is well settled principle of law the evidence of an interested witness should not be equated with that of a tainted evidence or that of an

approver so as to require corroboration as a matter of necessity. All that the Courts required as a rule of prudence, not as a rule of law, was that the

evidence of such witness should be scrutinized with care and caution. It has to be realized that related and interested witness would be the last

persons to screen the real culprits and falsely substitute innocent ones in their places. Indeed there may be circumstances where only interested

evidence may be available and no other, e.g. when an occurrence takes place at midnight in the house when the only witnesses who could see the

occurrence may be the family members. In such cases it would not be proper to insist that the evidence of the family members should be disbelieved

merely because of their interestedness. But once such witness was scrutinized with care and the Court was satisfied that the evidence of the

interested witness have a ring of truth such evidence could be relied upon even without corroboration.

Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence

has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (See Anil Rai Vs. State of Bihar, (2001) 7 SCC

318; State of U.P. Vs. Jagdeo Singh, (2003) 1 SCC 456; Bhagalool Lodh & Anr. Vs. State of U.P., (2011) 13 SCC 206; Dahari & Ors. Vs. State of

U. P., (2012) 10 SCC 256; Raju @ Balachandran & Ors. Vs. State of Tamil Nadu, (2012) 12 SCC 701 ;Gangabhavani Vs. Rayapati Venkat Reddy

& Ors., (2013) 15 SCC 298; Jodhan Vs. State of M.P., (2015) 11 SCC 52).

25. From the evidence on record it is seen that the accused/appellants had a motive for commission of the offence. It is not in dispute that the first

incident took place in the house of PW-11 Krishno Bhardwaj when the villagers including accused Vikas and Dhaniram (PW-9) were dancing and the

hand of Vikas got touched with Dhaniram, on which scuffle took place between the two which was intervened by Chhatturam. During this process,

Chhatturam assaulted accused Vikas by club as a result of which Vikas suffered injuries as per MLC Ex.P/21. The prosecution witnesses as well as

the accused persons in their statements under Section 313 of CrPC have also admitted the fact that in the first incident, accused Vikas sustained

injuries as mentioned in Ex.P/21. Thus, there was a strong motive with the accused persons who belong to the same family, to commit the crime.

26. As regards memorandum and seizure, memorandum (Ex.P/6) of accused No.2 Vikas was recorded on 14.5.2011 which led to recovery of

bloodstained Basula vide Ex.P/7; memorandum (Ex.P/8) of accused No.1 Sanjay led to recovery of one bloodstained club vide Ex.P/9, as per seizure

memo Ex.P/10, vest and full pant of accused No.2 Vikas having stains like blood were seized; as per seizure memo Ex.P/11, bloodstained and plain

soil were seized from the place of occurrence. Under seizure memo Ex.P/12, half shirt and full pant of accused No.1 Sanjay Satnami having stains

like blood were seized. Similarly, under seizure memo Ex.P/13, bloodstained vest and full pant of accused No.3 Vikek were seized.

PW-4 Shriram Bhardwaj, who is a witness to memorandum and seizure, has duly supported the prosecution case in respect of memorandum and

seizure. Further, as per FSL report Ex.P/34, except on Articles I & J i.e. shirt and full pant of accused No.1 Sanjay, blood was found on all other

articles. Though serological report is not available on record, but the same cannot be said to be fatal to the prosecution case for the reasons that the prosecution has duly proved memorandum and seizure from the appellants, as per FSL report blood was found on the seized articles, the accused persons have failed to offer any explanation in this regard in their statements under Section 313 of CrPC, as observed above they had a motive with them and the eyewitnesses have clearly stated about the act of the appellants.

27. Learned counsel for the appellants has argued that Chhatturam was alive after the incident while he was being taken to hospital at Hasaud for treatment on motorcycle but neither the said motorcycle was seized nor the clothes of PW-4 Shriram and PW-10 Saukhilal, who had taken Chhatturam in injured condition on motorcycle to hospital, were seized. Therefore, the said lapse on the part of the prosecution creates doubt as to who committed murder of Chhatturam because while being taken to hospital, he was alive.

The aforesaid argument is not acceptable for the reasons that present case is not based on circumstantial evidence but based on eyewitness account who have specifically stated about the individual act of the accused persons. There is no suggestion or evidence adduced by the defence that the persons who had taken the deceased on motorcycle i.e. PW-4 Shriram and PW-10 Saukhilal had any ill-will or animosity against Chhatturam on account of which they would have killed Chhatturam. In this case, as observed above, the evidence of the eyewitnesses is duly corroborated by the other oral and documentary evidence. Therefore, in the given facts and circumstances of the case and the material available on record, non-seizure of motorcycle or clothes of PW-4 Shriram and PW-10 Saukhilal having blood stains cannot be said to be fatal to the prosecution case.

28. In their statements under Section 313 of CrPC the accused persons have stated that three girls of deceased family had eloped with their close relatives and married them and accused No.1 Sanjay being President of their community imposed fine on them. It was further stated that accused No.1 Sanjay is a government employee, accused No.3 Vikek is Panchayat Secretary, the family members of the deceased are inimical to them; all the important witnesses are relatives of the deceased, the family of the accused is well educated and financially sound, therefore, due to animosity the

witnesses are deposing against them and as such, they have been falsely implicated in this offence. However, no witness was examined by them in defence and no such suggestion regarding their false implication due to previous enmity or animosity was put to the witnesses during cross-examination by the defence. Even otherwise, keeping in view the unrebutted and consistent evidence of the eyewitnesses (PW-1 Sendurbai, PW-2 Savita and PW-6 Vimla) which stands corroborated from the evidence of PW-4 Shriram, PW-7 Chandram, memorandum, seizure and other attending circumstances, the defence taken by the accused persons regarding their false implication due to previous enmity between the parties cannot be accepted.

29. In the matter of Lakshmi Singh and others (supra), the prosecution case was considered doubtful due to non-explanation of injuries suffered by the accused and further failure of the prosecution to send bloodstained earth for chemical examination particularly when the entire case hinged on fixing the situs of assault. However, the said judgment is not applicable to the facts of the present case as in this case, the injuries suffered by accused Vikas as mentioned in his MLC Ex.P/21 have been duly explained by the prosecution through its witnesses as discussed above, the same were admitted by accused Vikas in his statement under Section 313 of CrPC while replying to questions No.94 to 96. Further, the present case does not depend upon circumstantial evidence but based on eyewitness account. As discussed in the preceding paragraphs, the place of occurrence has also been duly proved by the prosecution.

30. The judgment relied upon by counsel for the appellants in the matter of Kansa Behera (supra) is also of no help to him because in the said matter, conviction of the appellant was based on weak type of circumstantial evidence and considering the fact that group of the blood found on the seized articles could not be proved by serologist's report, the prosecution case was held doubtful. However, in the present case, though group of blood found on the articles seized at the instance of the appellants could not be ascertained by serologist's report but their involvement in the crime in question has been proved beyond reasonable doubt through eyewitness account duly supported by other oral, medical and documentary evidence.

31. In the matter of Kallikant Kunhu (supra), murder was allegedly committed by use of dagger belonging to the accused but it was found without having any bloodstains enclosed in a sheath near the place of occurrence and therefore, the prosecution case regarding place of occurrence due to these two important factors was held to be improbable. However, in the present case, there is no doubt as to the place of occurrence which has been duly proved by the eyewitnesses as well as the spot map and the evidence of the investigating officer as discussed above. Therefore, this judgment is also not applicable to the facts of the present case.

32. In the case of Suresh Chaudhary (supra), there was triple murder, conviction was based on the sole testimony of eyewitness (PW-8) who was relative of two deceased and an interested witness, presence of PW-8 at the spot was doubtful, his evidence was shaky and suffered from the vice of omission and contradictions, bloodstained articles were not sent for chemical examination, though deceased persons suffered multiple gunshot injuries but only one empty cartridge was found which was neither seized nor sent to ballistic expert and in these circumstances, the prosecution case was held doubtful and the accused was acquitted by the Hon'ble Supreme Court.

33. Similarly, in the matter of Ramsevak and others (supra), the eyewitnesses were closely related to the deceased, there were contradictions in their testimonies, their presence at the scene of incident was doubtful, there was contradiction between ocular and medical evidence as also absence of blood on the spot despite the deceased having suffered major incised wound leading to severance of blood vessels and amputation of hand near wrist on the spot and in these circumstances, the accused was held entitled for acquittal.

34. In the case of Bhanwar Singh (supra), presence of material prosecution witnesses at the spot was doubtful, there was unexplained delay of more than one day in lodging FIR, medical evidence was at total variance with ocular evidence and therefore, the acquittal of the accused by the High Court was held to be just and proper by the Hon'ble Supreme Court.

35. In the matter of Mahant Pathak (supra), this Court considering the fact that there were many contradictions in the statements of the material prosecution witnesses and overall conduct of these witnesses is not worth reliance, observed that evidence of an infirm witness does not become

reliable merely because it has been corroborated by a number of witnesses of the same brand; for, evidence is to be weighed not counted and

therefore, after due appreciation of the overall evidence recorded a finding of acquittal in favour of the appellant.

36. In the present case, it is not in dispute that eyewitnesses (PW-1 Sendurbai, PW-2 Savita and PW-6 Vimla) are wife, daughter and niece of the

deceased respectively. As observed above, they have consistently stated as to the manner in which the incident occurred, each of the accused

persons took active part in assaulting the deceased. Their evidence finds due corroboration from the promptly lodged merged intimation Ex.P/23 & FIR

Ex.P/24 lodged and proved by PW-1 Sendurbai naming all the accused persons and describing their act. Their testimony further gets support from the

statements of PW-7 Chandram & PW-9 Shriram who immediately after the incident saw the appellants coming out of the house of deceased, accused

Sanjay was carrying club, accused Vikas having Basula and accused Vivek @ Vicky was empty handed and while they were moving away, accused

Sanjay was saying that they have killed one person. On the memorandum statements of the accused, seizure was made of certain articles at their

instance as well as from the place of occurrence, which were subsequently found stained with blood as per FSL report Ex.P/34 except the Articles I

& J i.e. shirt and fullpant seized from accused Sanjay. The eyewitnesses account also finds due support from the postmortem report Ex.P/18 wherein

corresponding injuries were noticed by PW-15 Dr. SL Nirala (autopsy surgeon) who proved the same as well as the inquest Ex.P/4 duly proved by

PW-4 Shriram Bhardwaj and PW-5 Motiram Bhardwaj, who are witnesses to the inquest as well as by PW-16 NS Rajput, I.O. who prepared inquest

report. Thus, keeping in view the aforesaid ocular and medical evidence, and other corroborative piece of evidence, the judgments relied upon by the

counsel for the appellants in the matters of Suresh Chaudhary, Ramsevak and others; Bhanwar Singh and Mahant Pathak (supra) being entirely

distinguishable on facts from the present case are of no help to him.

37. Placing reliance on the decision of Division Bench of this Court in Santosh Kumar and another (supra) learned counsel for the appellants has

argued that considering the facts and circumstances of the case leading to commission of the offence, the fact that assault was made on the deceased by the accused persons subsequent to the incident of quarrel which took place about half an hour prior in the house of Krishno Bhardwaj (PW-11) between accused Vikas and Dhaniram (PW-9), the fact that accused Vikas did not make repeated assaults on the deceased and he did not act in a cruel or unusual manner, the incident occurred in the heat of passion without any premeditation, at the most accused Vikas can be held guilty under Section 304 Part-II of IPC. Further, considering the fact that accused Vikas is in jail since 14.5.2011, his sentence may be reduced to the period already undergone by him.

So far as accused/appellants Sanjay and Vivek are concerned, learned counsel for the appellants placing reliance on the decision in the matter of

Nagaraj (supra) argued that these appellants cannot be held guilty of the offence committed by accused Vikas by application of Section 34 of IPC. In

the matter of Nagaraj (supra), the prosecution case was that the appellant (accused No.3) along with accused Nos.1 and 2 due to previous ill will in

furtherance of their common intention caused the death of deceased at the wine shop where the appellant was employed. Accused No.1 is said to

have assaulted the deceased with an iron rod on his head and other parts of the body whereas accused Nos. 2 & 3 assaulted him with fists and kicks.

Their appeal before the High Court was dismissed. However, in appeal before the Hon'ble Supreme Court by appellant (accused No.3), considering

the fact that presence of the appellant at the wine shop was natural; accused No.1 and the deceased were customers of the said shop; no common

grudge of accused persons against the deceased was established by the prosecution, the appellant was held guilty under Section 323 of IPC in place of

302/34 of IPC. In this case, the Hon'ble Supreme Court observed that mere exhortation by one of the accused persons that they would not leave the

deceased till he died, cannot be a ground to rope in all the accused persons with the aid of Section 34 of IPC and the prosecution is bound to prove the

factum of common intention amongst the accused persons. It further observed that though common intention can develop suddenly on the spot but for

that its origin has to be proved and if there is no evidence on record as to how the quarrel started, formation of common intention on the spot cannot

be inferred and that past enmity can be a relevant factor for inferring common intention but it depends upon the facts of each case.

38. Learned counsel for the appellants has argued that in the present case also, there is no evidence on record to show that accused Sanjay and Vivek

were sharing common intention with accused Vikas of killing the deceased; both Sanjay and Vivek are said to have assaulted the deceased on his non-

vital parts; even Vivek was not having any weapon and was empty handed; accused Sanjay is said to have assaulted the deceased with club but no

such injury was noticed in the postmortem report (Ex.P/18) by the autopsy surgeon (PW-15 Dr. SL Nirala) and therefore, in these circumstances,

their conviction with the aid of Section 34 of IPC is not legally sustainable and at the most they can be held guilty under Section 323 of IPC for

voluntarily causing simple hurt to the deceased.

39. So far as offence committed by accused Vikas is concerned, it is not in dispute that initially there was quarrel between accused Vikas and

Dhaniram (PW-9) while they along with other villagers were dancing at the marriage ceremony in the house of Krishno Bhardwaj (PW-11) and hand

of Vikas got touched with Dhaniram which was intervened by Chhatturam (deceased) and in this process, Chhatturam assaulted accused Vikas with

a club which resulted in injuries to Vikas as per Ex.P/21. After this incident, Chhatturam returned to his house and was sitting in his courtyard on a

cot. However, being enraged by the act of Chhatturam, accused Vikas, armed with lethal weapon Basula along with other accused Sanjay who was

armed with club and Vivek who was empty handed, reached the house of Chhatturam where accused Vikas assaulted on back of neck and wrist of

Chhatturam with Basula which proved to be his cause of death.

Thus, considering the facts and circumstances of the case, the manner in which the incident occurred, the motive available with accused Vikas; the

time gap between the two incidents i.e. about half an hour; the weapon used by him for assault on the deceased; the part of the body where the

assault was made i.e. vital part neck which proved to be his cause of death and the force with which the assault was made; it can safely be inferred

that accused Vikas was having intention to cause such bodily injury to Chhatturam which would result in his death though he may not have knowledge

that the bodily injuries being so caused by him would lead to his death. Being so, the act of accused Vikas falls within exception 4 to Section 300 of

IPC i.e. culpable homicide not amounting to murder and makes him liable for conviction under Section 304 Part-I of IPC.

40. Now it is to be seen whether other accused Sanjay and Vivek can be held guilty of the same offence committed by accused Vikas i.e. 304 Part-I

of IPC by invoking the provisions of Section 34 of IPC.

41. The ingredients of Section 34 are that there should be criminal act i.e. either committing the act or omitting to commit the act, which is an offence

under IPC, that criminal act is done by more than one person and that criminal act is done in furtherance of common intention of all, meaning thereby

that the persons should have decided in advance about the commission of the act and every one of them have acted keeping in mind that common

intention. The common intention may be inferred either from direct evidence or from the surrounding circumstances and the conduct of the parties.

Therefore, whether an act is in furtherance of the common intention is an incident of fact and not of law. {Dani Singh Vs. State of Bihar, 2005 SCC

(Cri) 127 and Pardeep Kumar Vs. Union Admn. (2007) 1 SCC (Cri) 41}.

To attract mischief of Section 34 of IPC two things need to be established : (i) common intention to commit an offence; and (ii) participation in

commission of the offence. Where these two ingredients were satisfied, even overt act on part of some of the persons sharing the common intention

was not necessary. {Sunny Kapoor Vs. State (UT of Chandigarh), (2006) 10 SCC 182.}

A pre-concert in the sense of a distinct previous plan is not

necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with

reference to the facts of the case and circumstances of the situation. {Sheoram Singh Vs. State of UP, (1973) 3 SCC 110}.

42. Keeping in view the principles of law enunciated in respect of applicability of Section 34 of IPC, if we analyze the act of accused Sanjay and

Vivek in commission of the offence, it is observed that they accompanied main accused Vikas to the place of occurrence, accused Sanjay was having

club in his hand, though accused Vivek was empty handed, it is he (Vivek) who having caught hold of Chhatturam fell him down from the cot on the floor and then all the accused started beating Chhatturam with hands and fists. Accused Sanjay assaulted repeatedly with club on the back of Chhatturam whereas accused Vikas made a fatal assault on back of neck and waist of Chhatturam with Basula. Further, as per consistent and un rebutted evidence of PW-7 Chandram and PW-4 Shriram after the incident they saw the accused persons coming out of the house of Chhatturam and while they were going towards their house with respective weapons in their hands, accused Sanjay was saying that they have killed one person forever. Thus, considering the overall facts and circumstances of the case, the conduct of accused Sanjay and Vivek during commission of the offence and subsequent thereto in light of principle of constructive and joint criminal liability envisaged under Section 34 of IPC, we have no hesitation in holding that these appellants (Sanjay and Vivek) assaulted the deceased in furtherance of their common intention with accused/appellant Vikas. As such, they are also liable to be convicted for the same offence which has been committed by accused Vikas i.e. under Section 304 Part-I of IPC.

43. As for the sentence, considering the act of the appellants where they with common intention armed with deadly weapon entered the house of the deceased and assaulted him brutally, the gravity of the offence, its impact on the society at large, the maximum sentence provided under Section 304 Part-I of IPC, this Court is of the view that sentence of 10 years' RI would be just, proper and commensurate with the criminal act committed by them in the given facts and circumstances of the case while keeping the fine amount of Rs.10,000/- imposed by the trial Court with default stipulation intact.

44. Resultantly, the appeal is allowed in part. Accused/appellant No.2 Vikas is held guilty under Section 304 Part-I of IPC instead of Section 302 of IPC and other accused/appellants No. 1 & 3 Sanjay and Vivek @ Vicky are convicted under Section 304 Part-I read with 34 of IPC in place of Section 302/34 of IPC. Each of them is sentenced to undergo R.I. for 10 years plus fine amount of Rs.10,000/- with default stipulation as awarded by the trial Court. The impugned judgment stands modified to the above extent. Appellants No. 1 & 3 are reported to be on bail, therefore, their bail

bonds stand cancelled and they are directed to be taken into custody forthwith to serve out the remainder of the sentence. Since appellant No.2 Vikas

is already behind the bars, no further order regarding his arrest or surrender etc. is required to be passed.