(2014) 4 AJR 345 : (2014) 3 JLJR 467

Jharkhand High Court

Case No: Cr. Appeal (D.B.) No. 982 of 2003

Jagdish Nayak	APPELLANT
Vs	
The State of Jharkhand	RESPONDENT

Date of Decision: July 14, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 157, 313
- Evidence Act, 1872 - Section 134
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 299, 300

Citation: (2014) 4 AJR 345 : (2014) 3 JLJR 467

Hon'ble Judges: Prashant Kumar, J; Amitav Kumar Gupta, J

Bench: Division Bench

Advocate: B.M. Tripathy, Sr. Advocate, Nutan Sharma and N.K. Jaiswal, Advocate for the Appellant; Pankaj Verma, A.P.P, Advocate for the Respondent

Judgement

Amitav Kumar Gupta, J.
The present appeal has been preferred against the judgment and order of conviction and sentence dated 04.07.2003 and 05.07.2003 passed by Addl. Sessions Judge (F.T.C.-II), Hazaribagh in Sessions Trial No. 155/199.

2. The prosecution case, in brief, is that on 05.04.1990 at about 8.30-9.00 A.M. the informant, Gendo Mahto (P.W.-2) alongwith his father, Meghlal Mahto (deceased) and uncle, Ganesh Mahto were ploughing their land situated in Kodobhijha when all of a sudden Baijnath Mahto alias Khoda Mahto alongwith 5-6 persons came there variously armed with lathi, bhala, pharsa and gadasa and asked his father as to why he was ploughing the land to which his father did not reply. On persistence of Khoda Mahto his father replied that the soil had softened hence, they had to plough the land. It is alleged that the son-in-law of Khoda Mahto, whose name he does not know, ordered to assault with lathi whereupon Khoda Mahto, his son-in-law and Jagdish Nayak, Duler Chand Mahto, Chhotia Nayak, Sukar Mahto and Loda Mahto started assaulting the informant

and his father and uncle. It is alleged that Khoda Mahto and his son-in-law assaulted his father and Jagdish Mahto and his brother and Khoda Mahto assaulted and injured him with danda. Subsequently, Khoda Mahto and Jagdish assaulted and injured his uncle. He saw Khoda Mahto, his son-in-law and Sukar Mahto assaulting his father with lathi and gaita due to which his father sustained severe bleeding injuries on the head and died on the spot. It is stated that Karu Sao (P.W. - 1), son of Girdhari Sao who was present nearby in his land/field also saw the occurrence. P.W. - 2 ran shouting towards his village whereafter all the accused persons fled away. It is stated that earlier there was litigation regarding the land with the accused persons in which the case was decided in favour of his grand father.

On the basis of the aforesaid statement, Bishungarh P.S. Case No. 24/89 dated 04.05.1990 under Sections 147, 148, 149, 323, 325, 302 and 447 of the I.P.C. was registered and in course of investigation the dead body of the deceased, Meghlal Mahto, was sent for post-mortem. On completion of investigation charge-sheet was submitted against the accused persons. Cognizance was taken and the case was committed to the court of Sessions whereafter it was transferred to Addl. Sessions Judge, FTC-II, Hazaribagh for trial and disposal. Charge was framed against the accused persons to which they pleaded not guilty and claimed to be tried.

3. The prosecution examined altogether seven witnesses viz. P.W. 1-Karu Sao; P.W. 2-Gendo Mahto(the informant); P.W. 3-Churamal Mahto; P.W. 4-Dr. Ram Naresh Jha has proved the post-mortem report(Ext.-1); P.W. 5-Dr. S.N. Lal, has proved the injury report (Ext. - 3/1 and 3) of injured Gendo Mahto (P.W.- 2) injured Ganesh Mahto; P.W. 6 - Rajendra Vishnu Nanhe, the Investigating Officer proved the fardbeyan (Ext.-4) and formal F.I.R. (Ext.-5), Exhibits 6 and 7 are the requisition of the injury slip of injured Ganesh Mahto and Gendo Mahto, Ext.-8 the seizure list, Ext.-9 the inquest report and P.W. - 7 is Bodhan Yadav.

4. On closure of prosecution evidence the statement of the accused was recorded under Section 313 Cr.P.C. and the defence is of complete denial.

On the basis of the evidence on record, the learned trial court found all the seven accused guilty of the charges under Section 447 read with 149 of I.P.C. and convicted the present appellants for the offence under Section 302 read with 34 I.P.C., under Section 323 read with 34 I.P.C., and under Section 447 read with 149 I.P.C. and sentenced them to life imprisonment under Section 302 read with 34 I.P.C. and a fine of Rs. 500/- each in default thereof to undergo two months simple imprisonment however no separate sentence was passed under Section 447 read with 149 I.P.C. and under Section 323 read with 34 I.P.C.

5. Learned senior counsel, Sri Tripathi, while assailing the impugned judgment, has contended that the case is based on the sole testimony of P.W. - 2, the informant, who is the son of the deceased and is an interested witness. That there is material contradiction

in the testimony of P.W. - 2, vis-a-vis the narration in the fardbeyan; that Ganesh Mahto alleged to be a injured witness, has not been examined by the prosecution thus there is no corroboration of the testimony of P.W. - 2 neither P.W. - 1 - Karu Sao, alleged eye witness, has supported the testimony of F.W. 2 and P.W. - 1 has been declared hostile by the prosecution. That P.W. - 3 is a hearsay witness and P.W. - 7, who is an independent witness, has also been declared hostile as he has not supported the case of the prosecution. That the medical evidence does not corroborate the occular evidence of P.W. 2, as the injuries are not corroborated by the findings of P.W. - 4, the Doctor in the post-mortem report which is indicative of the fact that P.W. - 2 is not an eye witness to the occurrence. It has been argued that the other 5 accused persons, who were members of unlawful assembly, have been acquitted on the ground that they did not share the common object for causing the homicidal death of deceased Meghlal Mahto; that the trial court failed to appreciate the material contradiction in the testimony of P.W. - 2 and committed error in law by convicting the appellants under Sections 302 read with 34 IPC by holding that these appellants shared a common intention to cause the death of the deceased. It is further submitted that even if for arguments sake the prosecutions'' case is presumed to be true then the trial court failed to consider and appreciate the fact that only one injury was found on the deceased, which was caused by danda (stick) which is not a deadly weapon. Thus, in the given circumstances the offence under Section 302 of IPC is not made out against appellant Khoda Mahto and at best he is liable for the offence under Section 304 Part II of IPC. That no overt act of assault on vital part of deceased is alleged against Jagdish Nayak and Lachho Mahto and there is no material evidence to prove their guilt under Section 302 read with 34 IPC. It has also been submitted that there is an unexplained delay of 3 days in dispatch of F.I.R. to the court which is in contravention of the provision of Section 157 of Cr.P.C. and this creates ample doubt regarding the credibility and veracity of the prosecutions'' case. On the above grounds it has been contended that the appellants should be acquitted and the impugned judgment is fit to be set aside.

6. Per contra, the argument advanced by the learned defence counsel, the learned A.P.P. has argued that the learned trial court has scrutinized and after appreciating the evidence on record has given a clear finding that the other five accused persons had merely accompanied these appellants but they had not assaulted the deceased or any injured and in the absence of any overt act on the part of the other five accused to show that they shared the common object for committing murder of the deceased, acquitted them of the charge under Section 302/ 149 IPC and 323 IPC however the trial Court found them guilty for the offence under Section 447 read with 149 IPC and released them on probation on their furnishing bond of good conduct for one year. That by a reasoned order, the case of the appellants has been distinguished and the argument of the appellants that their case is in pari-materia with that of the co-accused is against the weight of the evidence on record. That P.W. - 2 and his uncle Ganesh Mahto sustained injuries due to the assault by the present appellants and the injury of P.W. 2 and Ganesh Mahto have been proved by P.W. - 5, vide Ext. - 3/1 and 3. That injured Ganesh Mahto could not be examined as

he died in course of trial, which has also been mentioned in the impugned judgment. That there is no material contradiction in the deposition of P.W. - 2 rather there are minor omissions which does not demolish the prosecutions'' case; that the presence of P.W. - 2 at the place of occurrence is corroborated by P.W. - 3 and P.W. - 7; that P.W. - 6 Investigating Officer found and seized blood stains from the place of occurrence as per seizure list (Ext - 8). The I.O. had prepared the inquest report (Ext. - 9); that the F.I.R. was lodged promptly and mere delay in sending the F.I.R. to the court does not destroy the credibility of the case of the prosecution. That the impugned judgment and order of conviction does not require any interference and the appeal is fit to be dismissed.

7. The contention of learned defence counsel that the presence of the informant i.e. P.W. - 2 at the time and place of occurrence is doubtful as there is material contradictions in his testamony regarding the manner of assault is not acceptable, because on analysis and scrutiny of the evidence of witnesses, it is evident that P.W. ï¿½ 1 has testified that he was going to plough his land where the land of Meghlal (the deceased) is also situated and he had seen the dead body of Pane Mahto, the father of P.W. - 2, lying in the field and there was blood on the head of Pane Mahto. He had seen injured Ganesh in an unconscious state and P.W. - 2 had told him about the assault on him by danda (wooden stick) and he had also told him about the assault by Khoda Mahto. He has been declared hostile by the prosecution and he has been cross-examined, but his evidence regarding presence of P.W. - 2 who told him about the assault has not been disturbed. Likewise, P.W. - 3 has testified that he was also going to plough his land and on hearing the shouts of P.W. - 2 he had gone to the place of occurrence where he saw Pane Mahto lying dead with blood oozing out from the gaping head injury and he had seen Ganesh in an unconscious state. That Pane Mahto @ Meghlal Mahto is the same person. He has deposed that P.W. - 2 told him that Khoda Mahto, Jagdish, Dular Chand, Suhan Mahto, Mohan Mahto had assaulted Ganesh Mahto and Meghlal Mahto. That he had taken injured Ganesh and P.W. - 2 to the doctor. P.W. -7''s testimony is that P.W. - 2 had come running from the field to the village and upon query he had stated that his father had been killed and he and Ganesh Mahto were also assaulted and P.W. - 7 had seen injury on P.W. - 2. Though P.W. - 7 has been declared hostile but nothing has been elicited in cross-examination by the defence to dislodge his testimony regarding disclosure by P.W. - 2 with respect to assault on P.W. - 2 and his father and Ganesh. P.W. - 6 is the I.O. and his testimony shows that he had inspected the place of occurrence and had found two ploughs lying on the land where the alleged ''maarpeet had taken place and two ploughs were lying respectively in the nearly fields. P.W. - 6 had testified regarding seizure of blood stained soil (Ext. - 8) from the place of occurrence and he had prepared the Inquest Panchnam (Ext. -9). This corroborates the testimony of P.W''.s - 1 and 3, who have stated that they had also gone to plough the land and the testimony of P.W. - 2 that he along with his father Pane Mahto (the deceased) and Ganesh Mahto had gone to plough the land at Khodo - Vita.

8. The aforesaid testimony of the witnesses amply demonstrates the presence of P.W. - 2 at the place of occurrence. P.W. - 6, the Investigating Officer, has proved the injury slip (Ext. - 7/1) for medical examination of P.W. - 2 and P.W. - 5, the Doctor, has proved the injury report (Ext. - 3/1) pertaining to the injury found on P.W. - 2 which are as follows:-1. Swelling on left calf, 2. Abrasion on left hand 2"x 2", 3. Pain on right forearm, 4. Swelling on left ankle, 5. Pain in back and chest. P.W. - 5 opined that the injuries were simple in nature.

This supports the testimony of P.W. - 2 that he was also assaulted with lathi and sustained injuries. He had told P.W. - 1 about the assault on him and P.W. - 7 has also stated about seeing the injury on P.W. - 2 and P.W. - 3, as noticed above, has testified that he had taken P.W. - 2 and injured Ganesh to the Doctor i.e. P.W. - 5 who has proved the injury report (Ext. - 3) of Ganesh Mahto.

From the evidence alluded, it is clear that P.W. -2 had sustained injury due to assault and was present at the place of occurrence .

9. In this context, it is pertinent to state that it is settled proposition of law as enshrined in Section 134 of the Evidence Act that it does not require any particular number of witness to prove a given fact as our legal system is based on the principle that evidence is to be weighed and not counted and conviction can be based on sole testimony if it is found trustworthy, credible and inspires confidence.

10. The contention of learned counsel that there is unexplained delay of three days in despatch of F.I.R. and this creates a doubt regarding the veracity of the prosecutions'' case is also not acceptable because the alleged occurrence took place on 04.05.1990 at 8:00 - 8:30 a.m. and the fardbeyan was recorded at 11:30 a.m. This shows that F.I.R. was promptly lodged. No doubt the F.I.R. was received in the court on 07.05.1990 but no suggestion has been given by the defence to P.W. - 6 that the F.I.R. was ante-timed or was lodged after deliberations. Neither any question has been put to P.W. - 6 regarding the delay in despatch of FIR. No suggestion has also been given to P.W. - 2 that the fardbeyan was recorded after deliberation or F.I.R. was concocted with a motive to falsely implicate the accused. In the absence of any cross-examination on this aspect no prejudice has been caused to the defence and the delay in sending the F.I.R. does not demolish or taint the prosecutions'' case.

11. From the evidence of P.W. - 4, the doctor, who conduced post-mortem over the dead body of Meghlal Mahto, he found the following injuries:-

(I) Lacerated wound 1" x 1/2" x 3/4" bone deep over the beginning of right parietal bone and fracture of right parietal bone present.

Signs of putrefaction like greenish patch were present on both flanks of abdomen. On dissection there was haematoma just below the vertebra of the spinal chord. All other internal viscera was intact and pale; Heart chamber was empty; stomach contained food

and the time elapsed since death was 24 hours. Cause of death was neurological shock due to thrust over head.

12. It is not disputed that the deceased died a homicidal death and as discussed above P.W. - 2 is the sole eye witness to the occurrence as injured Ganesh Mahto could not be examined and P.Ws. - 2 and 7 in their cross-examination have testified that Ganesh Mahto died 6-7 years after the occurrence.

The contention of the learned counsel, that non-examination of the injured Ganesh by the prosecution is fatal to the prosecution''s case is rather misplaced because, as noticed above the witnesses have stated that they had seen injuries on Ganesh Mahto and P.W. - 5, the doctor has proved the injury report of Ganesh Mahto, which is Ext-3. In fact the testimony of Ganesh Mahto would have strengthened the case of the prosecution.

13. The testimony of P.W. - 2, discloses that on 04.05.1990, he along with Pane Mahto and Ganesh Mahto had gone to plough the land at Khodobhijha and accused Khoda Mahto, Lachho, Mohan, Jagdish, Sukkal, Dulaal, Chhopia and Lodha came there and all were armed with lathi. Khoda Mahto asked them not to plough the land whereupon, Lachho exhorted ''what are you looking at - kill them!'' and all the accused started assaulting. That Khoda Mahto assaulted with lathi on the head of his father, Lachho gave lathi blow on the back and Jagdish assaulted with lathi on back and legs of his father. That Khoda Mahto assaulted with lathi on the head of his uncle Ganesh Mahto. That Khoda, Lachho and Mohan assaulted him and he sustained injuries on his back, left leg and arms. That due to the assault his father Pane Mahto @ Meghlal Mahto died and Ganesh became unconscious. That they had gone to the hospital and police station and P.W. - 7 had '' gone with him to the police station.

It is apparent that in the deposition of P.W. - 2, there is variation and infirmity vis a vis the narration in the fardbeyan wherein he has stated that the accused had come armed with lathi (stick), bhala (spear), farsa and gaita.

In the fardbeyan P.W. - 2''s narration is that Khoda''s son-in-law i.e. Lachho had exhorted by saying (ye log aiyse nahi manega maaro lathi se) when translated it means the exhortation was to assault with lathi (stick) whereas in his deposition, he has made improvements and embellishment by stating that Lachho Mahto had exhorted and uttered ''dekhate kva ho maar daalo'' which means he had exhorted to kill (maar daalo).

The utterance and articulation and use of word for (maaro) assault by Lachho Mahto in fardbeyan by P.W. - 2 and articulating the word ''kill them'' (maar daalo) in his deposition, is definitely an improvement and embellishment as the word ''maaro'' simplicitor means to assault and ''maar daalo'' means to kill. The intent and meaning of both the words are inherently distinct and different.

However, P.W. - 2''s testimony that appellant Khoda Mahto had assaulted with lathi on the head of his father causing a gaping wound is corroborated by the medical evidence

i.e. the post-mortem report. As per the testimony of P.W. - 4, the doctor, it is evident that only one injury was sustained by the deceased and no injuries were found on the back and the leg, which does not corroborate the testimony of P.W. - 2 that Lachho and Jagdish had assaulted his father on the back and leg with lathi.

P.W. - 2 has deposed that his uncle, i.e. injured Ganesh had sustained wound on the head and this is corroborated by the injury report (Ext. - 3/1), as P.W. - 5 the doctor found lacerated wound over the middle of the head of Ganesh; swelling over left forearm, swelling over left knee; swelling over right ankle and the injuries were found to be simple in nature. P.W. - 2 has deposed that the said injury was caused by Lachho and Jagdish and his testimony on this point has remained intact and has not been disturbed in cross-examination.

P.W. - 2 has testified that Khoda, Lachho and Mohan assaulted him but in the fardbeyan he has not stated that he was assaulted by Lachho and Mohan.

14. Admittedly, there is some variation, improvements and embellishment in the deposition of P.W. - 2 but it is necessary to take notice of the fact that the testimony of P.W. - 2 was recorded after nearly 10 years of the occurrence and in such circumstances., due to efflux of time over so many years, it is natural that some contradiction, exaggerations, inconsistencies or embellishments is bound to occur but if such exaggeration does not change the prosecution story or convert it into an altogether new story, allowance can be made for such variations. On this aspect it would be relevant to refer to the decision in the case of Sheesh Ram and Others Vs. The State of Rajasthan, wherein the Hon''ble Apex Court have held in (para 11) "It is trite that the maxim falsus in uno, falsus in omnibus has no application in India. It is merely a rule of caution. It does not have the status of rule of law....."

In the said decision, the Hon''ble Apex Court, in the aforesaid paragraph has referred to para 12 in the case of Rizan and Another Vs. State of Chhatisgarh, through The Chief Secretary, Govt. of Chhatisgarh, Raipur, Chhatisgarh, , the extract of para 12 is as follows:-

"12.....even if a major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a member of other co-accused persons his conviction can be maintained. It is the duty of the Court to separate the grain from the chaff. Where the chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno, falsus in omnibus has not received general acceptance nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence

which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence" (see Nisar Ali Vs. The State of Uttar Pradesh,)".

15. In the aforementioned case, it has been held that even if the witnesses are related to each other and interested witnesses, it is well settled that the evidence of interested witnesses is not always suspect rather it must be scrutinized with caution and can be accepted if it is found reliable. It was also held that though the witnesses had improved the prosecution story to some extent, but the improvement or the exaggerated version could be safely separated from the main case of the prosecution. If evidence of a witness is to be disbelieved merely because he has made some improvement in his evidence there would hardly be any witness on whom reliance can be placed by the courts. In the instant case admittedly the testimony of P.W. - 2 is to some extent punctuated, to an extent, with prevarication embellishment, but the settled principle is that it is the duty of the court to separate the truth from the falsehood i.e. the grain from the chaff.

Thus in view of the legal proposition the argument of the learned defence counsel that the P.W. - 2 is related and interested witness and there is material contradictions in his testimony vis-a-vis fardbeyan is answered accordingly and responded to in the light of the ratio laid down in the aforementioned decision.

16. In the attending circumstances it is also pertinent to take notice of the decision in State of Rajasthan Vs. Babu Meena, and Lalu Manjhi vs. State of Jharkhand (2003) 2 SCC 40 wherein it has been held that law of evidence does not require any particular number of witnesses to be examined in proof of a given fact and when faced with the testimony in the case of a single witness, the court may classify the oral testimony into three categories, viz. (i) wholly reliable (ii) wholly unreliable (iii) neither wholly reliable nor wholly unreliable and it was held that in the first two categories there may be no difficulty in accepting or discarding the testimony of a single witness and as far as the third category of witness is concerned, the court has to be cautious and look for corroboration in material particulars by reliable testimony, direct or circumstantial before acting upon the testimony of a single witness.

17. In the instant case as discussed above, P.W. - 2"s testimony regarding the assault with lathi on the head of Pane Mahto @ Meghlal Mahto has not been controverted in cross-examination and in fact P.W."s 1, 3 and 7, though P.Ws. - 1 and 7 have been declared hostile, but as discussed above their testimony on this aspect has remained intact even in their cross-examination. Thus, the embellishments and improvements in P.W. - 2"s testimony does not demolish the material aspect of the prosecution case.

It is reiterated that the evidence of P.W."s -1, 3 & 7 does corroborate the fact that P.W. - 2 and Ganesh Yadav were injured and they have testified that they had reached the place soon after the occurrence.

18. The deceased sustained lacerated wound over the head in the right parietal and fracture of right parietal bone and P.W. - 2 has stated about assault with lathi on the head by appellant Khoda Mahto which has not been dented by the defence.

19. Admittedly the deceased died on account of a single blow of lathi, thus in the given situational fact it is pertinent to refer to the decision in the case of Gurmukh Singh Vs. State of Haryana, , where death occurred, as a consequence of single blow, in the said case Supreme Court enumerated certain factors to be considered for passing appropriate sentence, as per para 23 of the said judgment:-

"23. There 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 ensured 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 relation;

m) The conduct and behaviour of the accused after the incident. Whether the accused had taken the injured/deceased to the hospital immediately to ensure that he/she gets proper medical treatment?

These are the some of the factors which can be taken into consideration while passing appropriate sentence upon the accused".

In the said case, the Court held that there was no premeditation, and there was a fatal blow on the head and accordingly the punishment was altered from imprisonment for life under Section 302 to imprisonment for 10 years under Section 304 Part II of the IPC

These factors were considered and discussed in the case of Chenda @ Chanda Ram Vs. State of Chhatisgarh, , and the Apex Court while analyzing and discussing the provision of Section 299 and clause thirdly of Section 300 and also took note of the applicability of Exception 4 to Section 300 of IPC which reads as follows:-

"Exception 4- 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"s having taken undue advantage or acted in a cruel or unusual manner.

Explanation - It is immaterial in such case which party offers the provocation or commits the first assault."

In the said case at para - 14, the medical findings were as follows:-

"1. cut wound on the head of size 4" x 3" bone deep

2. floated swelling on head and nose and on both the eyes.

3. there was fracture in skull on both sides of cuttle bone, in bail of skull and also in the bone of nose.

4. fractures were also found in the left parietal and oxy-petal bones of the skull and there were total five fractures in the skull

5. the doctor in the said case opined that such injury can be caused by one blow with the weapon of offence, the injury was sufficient in the ordinary course of nature to cause death".

The Supreme Court held that there was only one blow and after considering that the occurrence took place on spur of the moment without any pre-mediation and there was no criminal background or adverse history and there was no other act of cruelty in the conduct on the part of the appellant accordingly the punishment was altered from Section 302 IPC to 304 Part II IPC.

In the case of Pappu Vs. State of Madhya Pradesh, while discussing the provision of Exception 4 of Section 300 IPC held that Exception 4 of Section 300 can be invoked if death is caused (i) without premeditation, (ii) in a sudden fight, (iii) without the offenders having taken undue advantage or acted in a cruel or unusual manner and (iv) the fight must have been with the persons killed.

In Hemraj vs. State (Delhi Admn.) 1990 SCC (criminal 713) in para 14 it has been held that:-

"the question is whether the appellant would 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 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."

In the said case the Doctor had opined that the injury was sufficient in ordinary course of nature to cause death but in the facts of the case the conviction under Section 302 convicted the accused under Section 304 Part II and sentenced him to undergo rigorous imprisonment for seven years.

20. In the instant case, it is apparent from the testimony of P.W. - 2 that appellant Khoda Mahto had given a lathi blow on the head of the deceased and Lachho Mahto and Jagdish Mahto had given lathi blows on the back and legs, but as discussed above the assault on back and leg is not corroborated by the medical evidence.

21. The Trial Court in the impugned judgment while placing reliance on the decision of Supreme Court in Periaswamy vs. State of Tamilnadu (1996) AIR SCW 4097 has given a finding that possibility of one injury on account of multiple blow of weapons can occur.

In this connection it is relevant to state that the findings of the trial court is not sustainable in this case in view of the evidence of P.W. - 2 who has not stated that Lachho Mahto and Jagdish Mahto had also given lathi blows on the head of the deceased neither he has testified regarding multiple blows of lathi by Khoda Mahto. On the contrary, P.W. - 2 has categorically deposed about a single blow on the head by lathi by Khoda Mahto which is also corroborated by the medical evidence.

22. The trial court drew the inference that a single injury can be caused by multiple blows and convicted the appellants on the ground that the appellants acted in furtherance of common intention to cause the death of the deceased.

In the attending circumstances and emergent broad features of the case it is necessary to analyze and discuss whether all the appellants acted in furtherance of common intention of all of them to cause the homicidal death of the deceased?

In this context it is necessary to state the legal position that Section 34 applies when a criminal act is done in furtherance of common intention of all, then everyone of them is equally responsible. Section 35 requires the existence of the knowledge or intent in each accused before he can be held liable if knowledge or intent is necessary to make the act

criminal. The essence of Section 34 is prior concert or meeting of mind to do an act. Secondly, the presence of the person in such company and thirdly the participation of co-accused in the criminal act. It is settled principle that common intention may develop on the spur of the moment but it must be anterior in time to the commission of offence and can be deduced from the act or conduct of the accused, as it is difficult in most cases to prove the intention of the individual and it has to be inferred by the Court from the attending facts and circumstances of a given case.

23. At times a person may join his companion to do an unlawful act but when a criminal act is done by one of the persons which was done by him at the spur of the moment, springing out of the independent act of the doer of which the other participants had no contemplation, they can not be liable for the act of such person merely because he or they were present on the spot.

24. In the backdrop of the delineated broad parameters for applicability of principle of joint liability under Section 34 IPC, and on analysis of the evidence adduced in the instant case, in view of the discussions made in the foregoing paragraphs it is clear that P.W. - 2 has testified that Lachho Mahto exhorted to kill (maar daalo) whereas, in the FIR, which is the first version of P.W. - 2, he has stated that Lachho Mahto ordered to assault with lathi (maaro lathi se). It has been pointed out in the forgoing paragraph (Para 14) that the intent and meaning of the aforesaid exhortation/articulation are distinctly different. P.W. - 2 has made embellishment and improvements in his deposition vis-a-vis the narrations in F.I.R. though the substratum of the prosecution case has remained intact.

25. There was only articulation, utterance or exhortation by Lachho Mahto, as evidenced, neither Lachho Mahto nor Jagdish Nayak made any brutal assault on the deceased, had Lachho Mahto and Jagdish Nayak shared the common intention to cause the death of the deceased, then they would have also participated by giving lathi blows on the deceased. In fact, the evidence unfolds that they did not indulge in any overt and the medical evidence shows that the deceased died of neurological shock due to thrust on the head which was due to a single lathi blow.

The trial court in the impugned judgment has recorded that there was also fracture of right vertical bone which is factually incorrect and not in consonance with the findings in the post-mortem (Ext. - 1)

26. In Harpal Singh Vs. Devinder Singh and another, the Supreme Court held in the said case that the co-accused exhorted the accused to attack the deceased but in all probabilities, he did not intent to cause more harm than grievous hurt. Accordingly, it was held that the accused would not be convicted under Section 302/ 34 I.P.C. but he was certainly guilty under Section 326 read with 34 I.P.C.

27. In the case of Rajagopalswamy Konar and another Vs. State of Tamil Nadu, in the attending facts of case where there was land dispute between members of a family as a

result of which deceased was attacked by the accused in which one accused stabbed the deceased person and others caused simple injury with a stick, it was held that conviction of both the accused under Section 302/ 34 I.P.C. was not proper, other accused was convicted under Section 324 I.P.C.

28. It is necessary to point out that though P.W. - 2 has stated in F.I.R. that there was a litigation with the accused persons with respect to land and in his testimony he has stated that he had shown the documents of the land to P.W. - 6-Investigating Officer, but P.W. - 6 has testified that P.W. - 2 had not produced any documents regarding the said land. On this aspect suggestion has been given by the defence to P.W. - 2, in para 7 of cross-examination, that the land was in fact in the name of Khoda Mahto to which P.W. - 2 has given evasive reply by testifying that he does not know about this. He has made a contrary statement to the effect that no case was filed earlier and his father had filed a case regarding the land but he does not know about it. This vacillating and evasive answers of P.W. - 2 can only lead to the inference and preponderance of the probabilities that the land was legally not in possession P.W. - 2''s family and the said land was a bone of contention between the informant''s family and the accused persons.

29. It is not disputed that the appellants had come to the place of occurrence and objected to the ploughing of land. It is P.W. - 2''s testimony that they had come armed with lathi and not with any deadly weapons. As noticed, the assault on the head was made by appellant Khoda Mahto and there was no repetition of assault which shows that the appellant did not act in a cruel or took undue advantage. The assault took place at the spur of the moment and the conduct and the circumstances do not suggest that it was assault on account of premeditation. The appellant Khoda Mahto does not have any adverse criminal history.

In the attending material facts and relevant circumstances the ingredients for applicability of Exception 4 of the Section 300 IPC is made out and it is held that the case at hand falls within Clause (b) of the Section 299 IPC and not within Clause thirdly of Section 300 IPC.

It is relevant to point out that there is no medical finding that the injury was sufficient to cause death in the ordinary course of nature neither has the prosecution given any suggestion to this effect to P.W. - 4.

30. In the backdrop of the evidence on record it cannot be inferred that appellant Khoda Mahto had intention to cause such a injury as to cause the death of the deceased but the knowledge that such injury on the head was likely to cause the death cannot be ruled out and the offence comes within the ambit of Section 304 Part II I.P.C.

31. The appellant Lachho Mahto had exhorted to assault but the probability is that his intent was to cause hurt and he could not have envisaged the fatal consequences which would result in delivering a lathi blow on the head of the deceased resulting in the death of the deceased. There was no brutal or deadly assault by Lachho Mahto and jagdish

Mahto nor does the medical evidence prove that multiple blows were sustained by the deceased. The testimony of P.W. - 2 that Ganesh Mahto was assaulted by Lachho Mahto and Jagdish Nayak has remained intact and P.W. - 5 has testified that the injuries of P.W. - 2 and Ganesh Mahto were simple in nature.

32. On consideration of the evidence as analyzed

and discussed above, as well as the judicial pronouncements, this Court sets aside the conviction under Section 302 read with 34 of I.P.C. of appellant Khoda Mahto and holds him guilty for offence under Section 304 Part II of I.P.C. Appellant Khoda Mahto is sentenced to undergo rigorous imprisonment of 10 years. Since he has remained in custody for more than 10 years the sentence of fine of Rs. 500/- is waived.

33. In view of the evidence and discussions made above the appellant Lachho Mahto and Jagdish Nayak are acquitted of the charges under Section 302 read with 34 I.P.C.

However, the conviction of the appellants Khoda Mahto, Lachho Mahto and Jagdish Nayak under Sections 447, 149 IPC and 323 read with 34 IPC is, hereby, affirmed.

34. Appellants Jagdish Mahto and Khoda Mahto are directed to be released forthwith from custody if not wanted in any other case. Appellant Lachhu Mahto is on bail and he is discharged of the liabilities of the bail bonds.

35. The appeal is partly allowed with modification to the extent noted above.