

(2015) 08 OHC CK 0032
In the Orissa High Court
Case No : CRLA No. 466 of 2008

Bijaya Patra and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 05-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313(1)(b)
Evidence Act, 1872 — Section 154
Penal Code, 1860 (IPC) — Section 302, 304, 326, 34, 457

Citation : (2015) 08 OHC CK 0032

Hon'ble Judges : Vinod Prasad, J;Raghubir Dash, J

Bench : Division Bench

Advocate : Milan Kanungo, S. Das, P.R. Singh, S.K. Mishra and A.K. Mohanty, for the Appellant; Dipak Kumar, Additional SC, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Raghubir Dash, J—This Criminal Appeal filed by the Appellants is directed against the impugned judgment and order dated 29.9.2008 passed by the learned Ad hoc Additional Sessions Judge, Fast Track Court No. II, Cuttack in S.T. Case No. 78 of 2007 (arising out of G.R. Case No. 547 of 2006 in the Court of J.M.F.C.(R), Cuttack corresponding to Cuttack (Sadar) P.S. Case No. 131 of 2006) by which they have been convicted under Sections 302, 326 and 457 read with Section 34 of the I.P.C. and have been sentenced as follows:--

The sentences are directed to run concurrently.

2. The case of the prosecution, as narrated in the F.I.R., is that on 3.6.2006 night informant Laxmidhar Patra along with his brother Sanjay Patra (deceased), their parents Sarojini Patra (since dead) and Bishnu Charan Patra, his wife Banalata Patra and deceased Sanjay's wife Manasi Patra and minor son Sujit Patra were sleeping in their house. At about 2.00 A.M. Bijaya Patra (A-1) and his son Pupun Patra (A-2) along with some unknown persons broke open the door of the house, entered inside and started assaulting everyone with sword giving out that they

would eliminate the entire family. They dealt three blows on the deceased Sanjay as a result of which he died at the spot and three other house inmates sustained injuries. Before escaping from the house they snatched away one gold chain and ear rings which deceased's wife was wearing. It is alleged that on previous occasions the Appellants had threatened that they would kill all the members of the informant's family.

3. F.I.R. was lodged on 4.6.2006 at 8.00 A.M. In course of investigation, the I.O. (P.W.16) examined witnesses, visited the spot, seized bloodstained earth and apparels from the spot, held inquest over the dead body and sent it for post mortem, seized wearing apparels of the deceased, arrested the accused persons on 5.6.2006 and seized one "Katuri" which is said to be one of the weapons of offence, seized the wearing apparels of the accused persons, and seized bed-head tickets in respect of injured persons, namely, Bishnu Charan Patra, Sarojini Patra and Manasi Patra from S.C.B. Medical College and Hospital, Cuttack. On completion of investigation charge-sheet was submitted on 28.09.2006.

4. Appellants defence is one of denial. Appellant No. 2 has taken plea of alibi claiming that in the occurrence night he was not present in his house.

5. Prosecution has examined 20 witnesses, out of whom P.W.1, the informant, P.W.12, informant's wife, P.W.2, informant's father (an injured), P.W.3, deceased's wife (another injured) and P.W.4, minor son of the deceased, are the eye witnesses to the incident. Informant's mother, another injured, died before she could be examined at the trial. Some other important witnesses are P.W.17, the doctor who had conducted post mortem, P.Ws.11, 18 and 20, the doctors who examined the injured persons and P.W.16, the Investigating Officer. The defence has examined four witnesses. D.Ws.1 to 3 are co-villagers who have stated that immediately after the incident the informant's mother, while inviting them to the spot, had alleged that there was a dacoity in her house. D.W.4 is from another village who has claimed that in the occurrence night A-2 had stayed in her house.

6. Learned Court below did not accept P.W.1 to be an eye-witness to the incident but accepted P.Ws.2, 3 and 4 as eye witnesses. Relying on their testimony and finding the same to be corroborated by medical evidence and also finding the testimony of the defence witnesses to be unworthy of credence learned sessions court convicted the Appellants as aforestated.

7. Learned counsel for the Appellants challenges the sustainability of the impugned judgment mainly on the following grounds:--

"(i) Testimony of the eye-witnesses suffers from material discrepancy.

(ii) The motive behind the commission of the crime, as alleged by the prosecution, is not found to be strong enough for believing that the Appellants were driven by such motive to commit house braking in night and deal fatal blows to the inmates of the house, who are none other than their agnates as well

as immediate neighbours.

(iii) Important independent witnesses have been dropped and those who have been examined have not corroborated the interested witnesses to the extent they were expected to give such corroboration.

(iv) So far the identification of the Appellants is concerned, prosecution claim is shrouded with suspicion.

(v) The factum of seizure of one katuri is not supported by independent seizure witnesses and blood stain found on the seized weapon is not proved to be of human origin and yet learned trial court accepted it to be an weapon of offence even though, neither in the F.I.R. nor in Section 161, Cr.P.C. statements of the eye-witnesses there was any mention about use of katuri as weapon of offence.

(vi) The evidence of child witness (P.W.4) has not been carefully evaluated keeping in mind that he was very much susceptible to tutorization.

(vii) The allegation of breaking open the door to make entry into informant's house is false inasmuch as there is no proof of presence of any mark of violence on or any damage caused to the door leaf.

(viii) Proper evaluation of the evidence of the defence witnesses, would make the prosecution case wholly unreliable."

8. While the learned counsel for the Appellants, reiterating the grounds taken in the appeal memo, urges for setting aside the judgment of conviction contending that the prosecution has failed to prove its case against them beyond all reasonable doubts, learned counsel for the State argues in support of the findings recorded by the learned court of sessions and forcefully submits that the appeal is devoid of merits.

9. P.Ws. 2, 3 and 4 have stated in clear terms that the Appellants, accompanied by two other unidentified persons, forced open a door of their house by giving blows from outside and entered into the room where informant's parents with their minor grandsons were sleeping and both the Appellants, being armed with sword/katuri, went on giving blows to the informant's parents and when informant's brother (the deceased) and his wife appeared on the scene of assault to intervene they were also assaulted repeatedly by the weapon they were armed with as a result of which the persons assailed sustained injuries and the deceased died at the spot.

10. That the injured persons and the deceased sustained such injuries as mentioned below against each of their names is not in dispute:--

"Injury on P.W.2

(i) Incised wound of size 5" x 3" x 1" over left arm with fracture of humerus.

Injury on P.W.3

- (i) Incised wound of size 6" x 3" x 1 1/2" over left arm (longitudinally situated)
- (ii) Incised wound of size 3" x 1 1/2" x 1 1/2" over left forearm below elbow joint (transversely situated)

Injury on Late Sarojini Patra

- (i) Incised wound of size 2"x 1 1/2" x 1" over deltoid region.

Injury on the Deceased

(a) External injuries

- (i) Cut wounds placed obliquely on the antero-lateral aspect of left elbow joint extending from lateral epicondai of humerus to the upper shaft of ulna of the size 14 c.m. long and 8 c.m. depth. The lateral epicondai, the upper end of ulna and the radius under it cut cleanly along with muscles, vessels, and nerves.
- (ii) Cut wound placed obliquely, on left parietal head of size 8 c.m. x 1 c.m. x skull deep located 11 c.m. above the lateral end of left eye brow and 2 c.m. lateral to the middle eye of vortex.
- (iii) A cut wound placed almost vertically over the right mastoid area involving the right pinna of ear measuring 4 c.m. x half c.m. x skull deep.
- (iv) Abraded contusion 3 c.m. x 1 c.m. on the right shoulder tip.

(b) Internal injuries

- (i) Under external injury No. ii the skull bone revealed a cut fracture and diffused subdural haemorrhage over the whole of cerebrum.
- (ii) Under the external injury No. iii the skull bone revealed a cut fracture which is limited to the outer table of skull."

The opinion of the doctor about the cause of the death of the deceased, which is not challenged by the defence, is to the effect that the external injury Nos. (i), (ii) and (iii) and their corresponding internal injuries are combinedly fatal in ordinary course of nature while external injury Nos. (ii) and (iii) are individually fatal in ordinary course of nature. It is further opined that the death was due to shock and haemorrhage resulted from the injuries and the death occurred about 6 to 12 hours before the time of post mortem. The doctor further opined that the katuri, seized in the case and sent to the doctor for his observation and opinion, could cause the external injury Nos. (i) to (iii), if used as a weapon of offence.

11. It is not disputed that the above mentioned injuries were caused at about the alleged time in the night between 3.6.2006 and 4.6.2006 by some assailants who, being armed with weapons, had trespassed into informant's house and indiscriminately dealt blows to the deceased and the injured persons. The defence has, however, tried to make out a case through D.Ws. 1 to 3 that in the occurrence night some unknown persons committed dacoity in the house in

question and in course of committing dacoity the victims might have sustained the injuries. It is their further claim that in the occurrence night there was no supply of electricity in the locality. D.W.1 claims that in that night at about 1 A.M. informant's mother with bleeding injuries came to wake him up by knocking at his door and on his opening the door she told that there was dacoity in her house. The witness further claims, and it is corroborated by D.Ws. 2 and 3, that he called D.Ws. 2 and 3 to come with him saying that dacoity had taken place in informant's house. These D.Ws. further say that on their way to the spot house, they woke up accused Bijay Patra and being accompanied by Bijay Patra and his wife they all came to informant's house and that by the time of their arrival the injured persons had already been taken to the hospital.

12. Learned counsel for the Appellants tries to cash in on the evidence of D.Ws. submitting that their trustworthiness cannot be questioned inasmuch as their testimony could not be demolished by way of cross-examination. Learned counsel rightly submits that evidence of these defence witnesses was not dealt with by the learned trial court. Therefore, credibility of these witnesses has to be examined carefully.

Though these witnesses claim that soon after the incident D.W.1 was told by none other than one of the injured that there was a dacoity in their house committed by some unknown persons and even though the accused persons were arrested by the police one day after the incident on the allegation that they had trespassed into the house in question and injured the inmates resulting in the death of the deceased and when these D.Ws., in clear terms stated that they were aware that the police had come to their village for investigation, none of these witnesses came forward to make statement before the I.O. that according to their information dacoity was committed in the informant's house by some unknown persons.

D.Ws.1 to 3 say that in the occurrence night they took accused Bijay with them to the informant's house to see the victims of the dacoity. Thus, the defence admits that accused Bijay was told in the very night of occurrence that dacoity was committed in informant's house. Yet, no suggestion to that effect was put to any of the prosecution witnesses though they were subjected to lengthy cross-examinations. The said accused even failed to state during his examination, under Section 313(1)(b), Cr.P.C., that in the occurrence night he was told by D.Ws.1 to 3 that there was a dacoity in informant's house. Under such circumstances, it is very difficult to place reliance on the testimony of D.Ws.1 to 3 inasmuch as what they have claimed to have heard from informant's mother seems to be afterthought.

13. Defence plea of alibi taken by the other accused, namely, Bikram Patra, through the testimony of D.W.4 needs careful consideration. She has claimed that in the evening preceding the occurrence night Bikram Patra reached her house, which is about 45 Kms. away from the spot village, and stayed in her house for the entire night and in the following morning being intimidated over

telephone that there was a murder in his village he left for his village. In cross-examination D.W.4 has stated that about 15 days after the occurrence she had met the defence lawyer and told him that throughout the occurrence night accused Bikram was with her in her house. Learned trial court has rightly taken notice of the fact that the defence lawyer did not put any suggestion to the prosecution witnesses that in the occurrence night accused Bikram Patra was in the house of D.W.4. In addition to it, accused Bikram, at the time of his examination under Section 313(1)(b), Cr.P.C., has simply stated that at the time of occurrence he was absent in his house, but omitted to specify the place where he was in that night. So, this plea of alibi is afterthought. Learned trial court has extensively dealt with the evidence of D.W.4 and assigned reasons as to why she should not be relied on. Some of the reasons so assigned are quite tenable. In addition thereto, the defence plea of alibi introduced through D.W.4 appears to be afterthought. So, no reliance can be placed on her testimony.

14. On the question of proper identification of the culprits it is argued by the learned counsel for the Appellants that the victims' claim that the Appellants did not conceal their face by using mask is unbelievable inasmuch as the other two persons found in the company of the Appellants had, admittedly, covered their face by using mask. The Appellants being first cousins and immediate neighbours of the victims, it is submitted, they were presumably aware that they would be easily recognized and identified and, therefore, it is not believable that the Appellants, who allegedly made a premeditated attempt, preferred not to cover up their faces. Tenability of this submission is to be considered by taking into consideration the other attending facts and circumstances. F.I.R. was lodged about 6 hours after the incident. The incident took place in between 1.00 A.M. and 2.00 A.M. Police Station is located at a distance of 18 Kms. from the spot. Before lodging of the F.I.R. the victims of assault were shifted to the hospital. Under such circumstances, it cannot be said that there was unreasonable delay in lodging the F.I.R. It is also not argued that there was unreasonable delay in placing the F.I.R. before the Magistrate. The I.O., on his part, has recorded the statements of the victims on 4.6.2006, soon after the registration of the case. The prosecution is found to be very much consistent in its stand that both the Appellants, being accompanied by two unidentified persons who had used mask, had made forced entry into the informant's house. Therefore, no reasonable doubt can be entertained with regard to the appellants' identity.

The other plank of argument relating to identity of the culprits is that in the occurrence night there was disruption in the supply of electricity to the village which is claimed to have been sufficiently proved by D.Ws.1 to 3. No doubt these witnesses, while deposing in court, have made such statements with further addition that when they reached at the spot house they found one lantern burning inside the spot room. This defence plea also appears to be afterthought. No suggestion to that effect was made to the eye-witnesses during their cross-examination. Such an explanation was not given by either of the accused persons during their examination under Section 313(1)(b), Cr.P.C. P.Ws.1 and 2 in their

deposition had asserted that at the time of assault there was electricity in the house. But that was not challenged by way of putting any suggestion to them during their cross-examination. Therefore, this defence plea is also found to be unacceptable.

15. By examining the defence witnesses, attempt has been made to demolish the evidentiary value of the eye-witnesses which are otherwise found to be very clear and cogent. Burden of establishing the guilt is on the prosecution. But that theory cannot be carried so far as to hold that the prosecution must lead evidence to rebut all possible defences. It is rather the duty of the defence to cross-examine the prosecution witnesses in that behalf (Bharat Singh Vs. State of U.P., AIR 1972 SC 2478 : (1972) CriLJ 1704 : (1973) 3 SCC 896 : (1973) SCC(Cri) 574 : (1972) SCC(Cri) 198). In this case the Investigating Officer was not cross-examined on the defences taken through the D.Ws.

16. Now, we shall deal with the defence argument on the aspect of absence of motive. It is argued that though there is some vague reference to existence of land dispute between the two families nothing has been proved to show that, as a matter of fact, the parties were in such dispute. P.W.1 has stated that due to land dispute the two families were not pulling on well. At the same time he admits that there was no civil suit, nor was there any village meeting in connection with such dispute. Though P.W.1 has stated that 2-3 years back he had heard that one F.I.R. was lodged by his parents against the accused persons, but he has failed to give any reference showing existence of any criminal litigation between the two families. P.W.2, informant's father, has also stated that the two families are not pulling on well due to land dispute. But, he also fails to give any particular about such dispute. However, it is not suggested to either of the two witnesses that there was no ill feeling between the two families on account of any land dispute. Considering the blood relationship between the two families and the fact that there is no denial that the families have got joint family immovable property, and in the absence of suggestion that the two families are pulling on well and that there is no land dispute between them, it cannot be said that there is no discontentment between the two families. So, it is difficult to say that there was complete absence of motive. But at the same time, sufficient materials suggesting presence of adequate motive that impelled the Appellants to commit the alleged crime are not available on record. In Ranganayaki Vs. State by Inspector of Police, AIR 2005 SC 418 : (2004) 8 SCALE 734 : (2004) 12 SCC 521 , it is held that if there be any motive which can be assigned, the adequacy of that motive is of little importance. Motive is the emotion which impels a man to do a particular act. Such impelling cause need not necessarily be proportionally grave to do grave crime. In Badam Singh Vs. State of Madhya Pradesh, AIR 2004 SC 26 : (2004) CriLJ 22 : (2003) 8 JT 547 : (2003) 9 SCALE 222 : (2003) 12 SCC 792 , the apex Court observed that existence of motive losses significance when there is reliable ocular testimony. The existence or absence of motive acquires some significance regarding the probability of the prosecution case where the ocular testimony appears to be doubtful. Therefore,

we move on to examine on the reliability of the ocular testimony keeping in mind the arguments advances by the learned counsels assailing the trustworthiness of the prosecution witnesses.

17. In the F.I.R. it is stated that the Appellants and their companions entered into the house by braking open a door. The I.O. has stated that at the time of spot visit he did not find any damage either to the door or the chain fitted thereto. P.W.3 was sleeping in the room into which the culprits made their entry. He claims to have seen the actual entry of the culprits. He has stated that in that night he heard the sound of giving push blows to the door from outside and due to such blows the door opened. In his cross-examination he has stated that the accused persons entered into his room after braking open the door with further addition that the door got opened after two pushes were given from outside. P.W.4, who was sleeping in the very room with P.W.2 also states that the door opened after some pushes were given from outside. In cross-examination he has stated that due to pushes given to the door the hook of the door leaf collapsed and the door opened. It is pertinent to mention here that the informant was sleeping in another room. He had no direct knowledge as to how the door got opened. So, his narration in the F.I.R. that the culprits entered inside by breaking the door is hearsay in nature. The evidence of the eye-witnesses (P.Ws.2 and 4) reveals that the door leaf was not damaged though the culprits forced open the door by giving pushes from outside. Therefore, absence of mark of violence or any damage to the door leaf is quite insignificant.

18. In the F.I.R. it is stated that the accused persons were armed with sword. Also before the police the witnesses stated that the accused persons were armed with sword. The I.O. searched the Appellants' house and seized one Katuri. The independent witnesses to the seizure (P.Ws. 6 and 7) have not supported the factum of seizure of Katuri from Appellants' house. It is suggested to the I.O. but denied by him that he did not seize any Katuri from Appellants' house. Learned trial court allowed learned Public Prosecutor's prayer under Section 154 of Evidence Act to cross-examine both the independent witnesses to the seizure of the weapon of offence. Both the witnesses appear to be literate. They have put their signatures in English. The way they have deposed in the Court makes it clear that they consciously kept themselves at a distance from making any statement that might go against the accused persons. These two witnesses are found to be wholly untrustworthy. The I.O. has proved the seizure of the katuri from the Appellants' house. He has also proved that the katuri was sent to Forensic Science Laboratory for examination. The C.E. report reveals that stain of blood was available on the katuri but the origin of the blood could not be determined.

Learned counsel for the Appellants has argued that the eye-witnesses are not consistent on the weapon of offence used by the assailants and, therefore, their testimony becomes suspicious. It is submitted that though in the F.I.R. it is clearly stated that the culprits were armed with sword and before the police the

eye-witnesses claimed that the culprits were armed with sword, while deposing in the Court they, in order to connect the seized katuri with commission of the crime, have changed their version saying that the culprits were armed with katuri as well. It is further argued that through the Investigating Officer the contradiction in the testimony of the eye-witnesses on the weapon of offence has been duly brought on record. Putting emphasis on this contradiction learned counsel for the Appellants submits that in the darkness it was not humanly possible on the part of victims to identify either the culprits or the weapon of offence used in the commission of crime and, therefore, no reliance should be placed on their testimony.

It is true that in the F.I.R. and also during investigation the victims have alleged that the Appellants were armed with sword. But while they were subjected to cross-examination they were unable to say as to whether the weapon of offence was fitted with wooden handle. It implies that when in the dead hour of the night the culprits broke open their house, made entry being armed with weapons and suddenly laid attack on them, the witnesses were apparently in a state of confusion. It is quite possible that without having the scope of minute observation of the weapons they assumed that the culprits were armed with sword. The katuri seized in this case is 2 feet in length, the iron portion being 16 inch in length. Observing the shape and size of the katuri the witnesses might have taken it for a sword. The following observation made in *Bharat Singh Vs. State of U.P.*, AIR 1972 SC 2478 : (1972) CriLJ 1704 : (1973) 3 SCC 896 : (1973) SCC(Cri) 574 : (1972) SCC(Cri) 198 is quite relevant for the purpose of appreciation of such evidence:--

"It is common experience that in the confusion of the moment witnesses are prone to make errors especially if seized by sudden fear."

The katuri seized in this case may not be a weapon used in this case but the eye-witnesses have been able to establish that in the occurrence night the Appellants being armed with sharp cutting weapon like a sword had inflicted the injuries. Save and except the discrepancy regarding the weapon of offence there is no other discrepancies in the testimony of the eye-witnesses to make their testimony unworthy of credence.

19. As regards the child witness (P.W.4) though it is submitted that he has been thoroughly tutored, there is no sufficient material appearing from his testimony showing that he was tutored. His presence in the room wherein the incident occurred is not challenged. At the time of incident he was below 7 years of age. His statement was recorded by I.O. just on the day following the occurrence night nullifying the possibility of coaching or tutorisation. It is not a case where the prosecution entirely depends on the testimony of the child witness. Other eye witnesses are there to corroborate the child's testimony, who has withstood the test of a long grilling cross-examination. There is nothing to disbelieve his testimony.

20. On the dropping of important independent witnesses it is argued that charge-sheet cited witnesses, namely, Ramesh Das and Dusmanta Patra have been kept from the witness box and for their non-examination no explanation is forthcoming. Learned counsel for the State submits that these two witnesses are not eyewitnesses whereas all the eye-witnesses have been examined by the prosecution who have adduced reliable evidence. Therefore, it is submitted, no adverse inference can be drawn from non-examination of these two witnesses. According to the prosecution, these two witnesses are the informant's neighbours who, immediately after the incident, were informed by the informant that the accused persons having trespassed into their house mercilessly assaulted his family members. On a vetting of the LCR it is found that the learned Public Prosecutor filed a memo on 24.1.2008 declining to examine witness Ramesh Das and few others on the ground that they are all post occurrence witnesses which the learned trial court seems to have accepted vide order passed on the same day. As for the other witness namely, Dushmant Patra, no such memo is forthcoming. Be that as it may, it is experienced often that independent and disinterested witnesses, particularly co-villagers, show their reluctance to speak out the truth if it has the tendency to incriminate someone with whom they have cordial relationship whereas such witnesses willingly come forward with all efforts to absolve someone from criminal liability. Therefore, testimony of the eye-witnesses examined in this case, two of them being injured and one a child witness, should not be viewed with suspicion merely for want of corroboration from some witnesses who are supposed to give evidence on hearsay matters.

21. Inviting attention to the statement made by P.W.1 before the trial court that he had informed the police station over telephone prior to lodging of the F.I.R., it is argued that Ext. 1 (the F.I.R.) is hit under Section 161, Cr.P.C. There is nothing on record to show that the telephonic information constituted all the ingredients of an F.I.R. It is not elicited from the Investigating Officer as to whether any Station Diary Entry was made on the basis of telephonic information, if any, received at the police station. Rather, on being asked, the I.O. denies to have received any telephonic message before lodging of the F.I.R. On the other hand, it is quite clear that upon receiving the F.I.R. (Ext. 1) at the police station the police swung into action. Therefore, Ext. 1 cannot be said to be hit under Section 161, Cr.P.C.

22. Pressing into service the aforestated weak points in the prosecution case, learned counsel for the Appellants has made efforts to impress upon us that credibility should not be attached to the testimony of the victims of this case. According to him, such testimony, if analysed giving due consideration to the weak points highlighted by the Appellants, would appear to be deficient of establishing the prosecution case beyond reasonable doubts. To meet such submission, suffice it is to say that while it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. Some flaws showing imperfectness in the prosecution

evidence are bound to take place because the witnesses are prone to commit errors. A guilty person ought not to be allowed to escape merely because the prosecution evidence suffers from some infirmities which are found to be either insufficient or too weak to create a reasonable doubt.

23. The last but the most forceful contention raised by the learned counsel for the Appellants is that in the facts and circumstances of the case, the act allegedly committed by the Appellants does not warrant an order of conviction for the offence under Section 302 read with Section 34 of I.P.C. It is argued that the motive shown is not sufficient to presume that the Appellants committed the act either with the intention of causing death of the deceased or with the intention of causing bodily injury to the deceased and the bodily injury intended to be inflicted is sufficient in ordinary course of nature to cause his death or that he did the act with the intention of causing such bodily injury as he knew to be likely to cause death of the deceased. At the most, it is argued, they may be presumed to have done the act of assault with the knowledge that such act is likely to cause death.

In this regard, it may be repeated that, in this case, there is no clear evidence as to from what immediate cause the occurrence originated. However, it is clear that there was a kind of dissension between the two families due to dispute over their immovable property. The Appellants are found to have committed house breaking at night and after making entry into the house being armed with sharp cutting weapon they went on giving blows to inmates of the house whosoever they came across. Though it is alleged that at the time of giving assault they were making declaration that they would eliminate the entire family they did not do any harm to the minors who were sleeping in the very room where the assault took place. Since they were armed with sharp cutting weapon and there was no resistance from the side of the victims they could have killed all the persons who were sleeping in that room, if at all they had the intention to eliminate the entire family. From the facts and circumstances of the case, there can be an inference that a common intention of the Appellants was to inflict injuries to the inmates of the house. They used sharp cutting weapon while inflicting injuries to the victims which displays that they did so with the knowledge that such act was likely to cause death. The act was committed in furtherance of such common intention. In the process the deceased received fatal injuries. It is not spelt out in the evidence as to who was the author of the fatal injuries like external injury Nos. (ii) and (iii) on the person of the deceased. It is doubtful whether any higher degree of mental culpability can be attributed to the conjoint performance of the Appellants. Under such facts and circumstances, it cannot be said that their common intention was to cause death or to cause such bodily injury as is likely to cause death of the deceased, though there is a valid presumption that they had knowledge that they were likely to inflict fatal injuries and thereby likely to cause death of any of the victims including the deceased.

24. In the result, the conviction of the Appellants for the offence punishable under Section 302, I.P.C. is not sustainable. However, they are found guilty of having committed the offence punishable under Section 304 (Part-II) read with Section 34 of I.P.C. So far their conviction under Sections 326 and 457 of I.P.C. is concerned, the impugned order does not warrant any interference. But we are constrained to observe that instead of framing charge under Section 457, I.P.C. the proper charge, in the face of the materials available on record, should have been under Section 460 of I.P.C. which is a graver offence punishable with imprisonment for life or with imprisonment of either description for a term which may extend to ten years and fine.

25. In the result, the appeal is allowed in part. The order of conviction under Section 302, I.P.C. and the sentence for life imprisonment awarded therefore are set aside and in their place the Appellants are found guilty of the offence punishable under Section 304 (Part-II) read with Section 34 of I.P.C. and each of them is sentenced to undergo R.I. for 10(ten) years. Rest parts of the order of conviction and sentence stand confirmed. Needless to mention that the Appellants are entitled to the benefit of set off as ordered by the learned trial court.

The Criminal Appeal is disposed of accordingly.

Vinod Prasad, J.

I agree.