

(2023) 01 JH CK 0045

In the Jharkhand High Court

Case No : Criminal Appeal (D.B.) No. 341 Of 1993 (P)

Gahnu Mahto And Others

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision : 30-01-2023

Acts Referred:

Constitution Of India, 1950 — Article 21

Citation : (2023) 01 JH CK 0045

Hon'ble Judges : Sujit Narayan Prasad, J;Subhash Chand, J

Bench : Division Bench

Advocate : Anushka Sharma, Satish Prasad

Final Decision : Allowed

Judgement

Sujit Narayan Prasad, J

1. The instant appeal has been preferred under Section 374(2) of the Code of Criminal Procedure against the Judgment of conviction dated 25.06.1993 and Order of sentence dated 28.06.1993, passed by the Additional District & Sessions Judge-II, Godda, in Sessions Case No.12 of 1993 / 6 of 1993, whereby, the appellants have been found guilty and convicted for the offences under Section 302 read with Section 34 of the Indian Penal Code and upon hearing on the point of sentence, the appellants have been sentenced to undergo imprisonment for life for the offence under Section 302 read with Section 34 of the Indian Penal Code.

2. It requires to refer herein that the Appellant Nos. 1 and 6, namely, Gahnu Mahto and Radhika Mahto respectively, have been reported dead and, as such, the instant criminal appeal on behalf of the Appellant Nos. 1 and 6 stands abated, as would appear from order dated 11.03.2019 passed in the proceeding of the instant appeal. Therefore, the appeal is being pursued on behalf of Appellant Nos. 2, 3, 4, 5 and 7, namely, Vipin Bihari Mahto, Bhim Prasad Mahto, Arjune Prasad Mahto, Lakhiram Mahto and Ram Prasad Mahto.

3. The prosecution case is based on the fardbeyan of Bhukhal Mahto, father of the deceased, given before O/C Thakur Gangati, Subodh Kumar Jaiswal (P.W.-14) on 24.10.1991 at about 00:30 Hrs. (12:30 A.M. at night), wherein he has stated that on 23.10.1991 at about 06:30 p.m. accused Gahanu Mahto, Vipin Bihari Mahto, Bheem Mahto, Arjun Mahto, Lakhi Ram Mahto, Radhika Mahto and Ram Prasad Mahto had injured his youngest son Upendra Mahto badly by assaulting with sharp cutting weapon in the eastern Bahiyar of village Dhankaul.

It has further been stated that at about one hour before the occurrence, his son Upendra had gone out to see off Purohit Harihar Pandey up to Banskoula Bandh. At about 7:00 p.m. there was rumour in the village that Upendra has been murdered. When the informant came to the village, Thakur Besara (P.W.-3), Birbal Mahto (P.W.-1) and Sanichar Mahto (Not examined) told him that after seeing Lakhi Pooja at about 6:30 p.m., when they were coming back home through eastern Bahiyar they heard the cry of "save save" upon which all of them ran towards the direction of sound and saw all the above named accused persons fleeing away. Out of them, accused Gahanu Mahto was holding Kudal and Vipin Mahto was holding Khanti. They chased the accused persons and raised alarm but accused persons succeeded in escaping. Thereafter, above named three persons came back to place of occurrence where they found Upendra dead in injured condition in paddy field. By that time, many villagers had assembled there. On being informed, the informant along with other village men, went to the place of occurrence and found his son Upendra lying dead in paddy field and several bleeding injuries caused by sharp cutting weapon were over his head. Upendra's dhoti, accused Gahanu's tin (used to water the plant) and a red colour woolen shawl were found in the nearby area of site of occurrence. It has also been stated that there was a land dispute with accused Gahanu Mahto and Radhika Mahto prior to occurrence and accused persons had given threat of dire consequences several times and that the because of this the accused persons had killed his son.

On the basis of the fardbeyan, Meherma (Thakur Gangati) P.S. Case No.147/1991 dated 24.10.1991, was instituted for the offences under Sections 302/34 of the Indian Penal Code, against the accused persons Gahanu Mahto, Vipin Bihari Mahto, Bheem Mahto, Arjun Mahto, Lakhi Ram Mahto, Radhika Mahto and Ram Prasad Mahto and investigation was taken up. After investigation, the police submitted the charge-sheet in the case.

4. After commitment of the case to the Court of Session, charge was framed against the accused persons for the offences under Section 302/34 of the Indian Penal Code, and upon the accused persons" pleading not guilty and claiming to be tried, they were put to trial. However, accused Radhika has pleaded that on the day when the occurrence took place, he was suffering from ailment and was taking treatment at Katihar Hospital. In course of trial, 14 witnesses were examined by the prosecution, including the I.O. and the Doctor, who had conducted the post-mortem examination on the dead body of the deceased. The

defence has also examined one witness in this case.

5. Ms. Anushka Sharma, learned counsel for the appellants has submitted that learned trial court has considered the testimony of 14 witnesses altogether and considering the testimony to be trustworthy, has passed the judgment of conviction but while doing so, the learned trial court has failed to appreciate that the prosecution has not been able to prove the charge beyond all reasonable doubt on the basis of the testimony of P.W.-1 and P.W.-3 which has been considered to be consistent and corroboration with each other on the material points as both of them have averred that at the time of occurrence they were returning home from Lakhi Mela and heard sound of crying "save save" at the distance of about 25 yards from the place of occurrence. Thereafter, they ran in the direction of sound and there when their light fell on the accused persons, very first time, at that time accused persons were standing near the dead body and making preparation for leaving the place of occurrence.

The learned trial court has also considered that when these witnesses went ahead about 10 yards and raised alarm, at that time these witnesses and accused persons were facing each other. Learned trial court, therefore, has admitted that it was full moonlight night and these witnesses as well as the accused persons are resident of one and same village and well acquainted with each other. These witnesses have identified the accused persons in the full moonlight night while the accused persons were making preparation to leave the place and, thereafter, when the accused persons were running away.

The learned trial court has also considered that these witnesses have also seen accused Gahanu Mahto holding "Kudal", while accused Vipin Mahto holding Khanti and rest bare hand.

The learned trial court, on the basis of nature of injuries and cause of death, as has been opined by the Doctor, has found the sufficient evidence to prove the charge against the appellants but while doing so, the learned trial court has failed to appreciate the nature of injuries sustained by the deceased which are in long sized which cannot be given by Khanti or the Kudal. However, it has been submitted that Gahanu Mahto was having the Kudal but since he is no more, as such, no argument is being advanced on the injury as to whether it was sustained by Kudal or not, rather, the other accused persons, namely, Appellant No.2 was having Khanti in his hand, as such, the ground has been agitated that the nature of injury as has been shown while conducting the postmortem of the dead body of the deceased cannot be caused by Khanti.

It has further been submitted that proving of charge against the other accused persons is also not corroborated from the testimony of P.W.-1 and P.W.-3 wherein omnibus allegations have been levelled against Appellant Nos. 3, 4, 5 and 7 since there is no reference of any arms having been held by Appellant Nos.3, 4, 5 and 7, in view of the specific allegation levelled against Gahanu Mahto, Appellant No.1, (now deceased) and Vipin Bihari Mahto, Appellant No.2, who was having

Khanti in his hand.

The learned counsel for the appellants, therefore, submits that since there is no specific allegation as has been occurred by so called eye witness, i.e., P.W.-1 and P.W.-3, deposing against the culpability of the Appellant Nos. 3, 4, 5 and 7 but even then they have been convicted for commission of offence under Section 302 of the Indian Penal Code.

It has further been submitted that if the testimony of P.W.-1 is accepted to be true then also by taking into consideration the nature of injuries, the same cannot be caused by the arms like Khanti and, as such, the testimony of the eye witness is not being corroborated from the medical evidence so far as the nature of injury is concerned.

Learned counsel for the appellants, in the backdrop of the aforesaid fact, has submitted that the judgment of conviction and order of sentence passed against the appellants, therefore, is not sustainable in the eyes of law.

6. Per contra, Mr. Satish Prasad, learned Additional Public Prosecutor, appearing for the respondent State, has defended the order passed by the learned trial court by taking the ground that the learned trial court has considered the testimony of P.W.-1 and P.W.-3, who, in specific term, have corroborated what has been stated in the fardbeyan about the culpability of the appellants and, therefore, there is no error in the impugned judgment.

It has been submitted that even though there is some discrepancy in between the testimony of the witnesses with the medical evidence, the same cannot vitiate the trial.

It has been submitted that specific allegation has been levelled against the appellants who have murdered the deceased by giving assault as also there is specific allegation about holding Khanti by the Appellant No.2 Vipin Bihari Mahto and other accused persons were also named by the independent witnesses and if on the basis of the aforesaid fact, the learned trial court, after taking into consideration the charge having been framed under Section 302 of the Indian Penal Code along with Section 34 thereof, has found the appellants guilty of the offence, the judgment of conviction cannot be said to suffer from an error.

7. We have heard the learned counsel for the parties, perused the documents available on record as also the finding recorded in the impugned judgment and the testimony of the witnesses as is available in the Lower Court Record having been called for by this Court.

8. This Court, before proceeding to examine the legality and propriety of the impugned judgment, deems it fit and proper to refer the position of law with respect to the fundamental principle to establish the charge for commission of offence as it is the bounden duty of the prosecution to establish the charge so levelled beyond all reasonable doubt and only then the accused persons can be convicted for commission of offence, as has been held by Hon'ble Apex Court in

Datar Singh v. State of Punjab reported in (1975) 4 SCC 272 at paragraph 3 which reads hereunder as:-

"3. It is often difficult for courts of law to arrive at the real truth in criminal cases. The judicial process can only operate on the firm foundations of actual and credible evidence on record. Mere suspicion or suspicious circumstances cannot relieve the prosecution of its primary duty of proving its case against an accused person beyond reasonable doubt. Courts of justice cannot be swayed by sentiment or prejudice against a person accused of the very reprehensible crime of patricide. They cannot even act on some conviction that an accused person has committed a crime unless his offence is proved by satisfactory evidence of it on record. If the pieces of evidence on which the prosecution chooses to rest its case are so brittle that they crumble when subjected to close and critical examination so that the whole superstructure built on such insecure foundations collapses, proof of some incriminating circumstances, which might have given support to merely defective evidence cannot avert a failure of the prosecution case."

It is, thus, evident that while proving the charge, it is the bounden duty of the prosecution to prove the charge beyond all reasonable doubt and only then the person against whom the allegations have been leveled, is to be convicted.

It is also settled position of law that after considering the testimony of the witnesses, if two views are possible, the view which is in favour of the accused person, is to be accepted, as has been held by Hon'ble Apex Court in the case of Allarakha K. Mansuri v. State of Gujarat reported in (2002) 3 SCC 57.

The Hon'ble Apex Court, in the aforesaid judgment has laid down the principle that if two views are possible and the trial court has taken one, the High Court should not interfere in the judgment of the trial court, for reference, paragraph 6 thereof requires to be referred herein which reads hereunder as :-

"6. The settled position of law regarding the powers to be exercised by the High Court in an appeal against the order of acquittal is that though the High Court has full powers to review the evidence upon which an order of acquittal is based, it will not interfere with an order of acquittal because with the passing of an order of acquittal the presumption of innocence in favour of the accused is reinforced. The High Court should be slow in disturbing the finding of the fact arrived at by the trial court. The golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. In our country it is not a jurisdictional limitation on the appeal court but a Judge-made guideline of circumspection. In Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793] this Court held: (SCC p. 800, para 7)

"7. This Court had ever since its inception considered the correct principle to be applied by the Court in an appeal against an order of acquittal and held that the

High Court has full powers to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon that evidence the order of acquittal should be reversed. The Privy Council in *Sheo Swarup v. King Emperor* [AIR 1934 PC 227 (2)] negatived the legal basis for the limitation which the several decisions of the High Courts had placed on the right of the State to appeal under Section 417 of the Code. Lord Russell delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an Appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". He further pointed out at p. 404 that, "the High Court should and will always give proper weight and consideration to such matters as: (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses". In *Sanwat Singh v. State of Rajasthan* [AIR 1961 SC 715] after an exhaustive review of cases decided by the Privy Council as well as by this Court, this Court considered the principles laid down in *Sheo Swarup* case [(1973) 2 SCC 793] and held that they afforded a correct guide for the appellate court's approach to a case against an order of acquittal. It was again pointed out by Das Gupta, J. delivering the judgment of five judges in *Harbans Singh v. State of Punjab* [AIR 1962 SC 439] :

"In many cases, especially the earlier ones the Court has in laying down such principles emphasised the necessity of interference with an order of acquittal being based only on "compelling and substantial reasons" and has expressed the view that unless such reasons are present an appeal court should not interfere with an order of acquittal (vide *Surajpal Singh v. State* [1951 SCC 1207]; *Puran v. State of Punjab* [(1952) 2 SCC 454].

The use of the words "compelling reasons" embarrassed some of the High Courts in exercising their jurisdiction in appeals against acquittals and difficulties occasionally arose as to what this Court had meant by the words "compelling reasons". In later years the Court has often avoided emphasis on "compelling reasons" but nonetheless adhered to the view expressed earlier that before interfering in appeal with an order of acquittal a court must examine not only questions of law and fact in all their aspects but must also closely and carefully examine the reasons which impelled the lower courts to acquit the accused and should interfere only if satisfied after such examination that the conclusion reached by the lower court that the guilt of the person has not been proved is unreasonable."

It is also settled position of law that if there is any doubt about commission of the crime, the benefit is to be given to the accused persons, as has been held by

Hon'ble Apex Court in Sharad Birdhichand Sarda v. State of Maharashtra reported in (1984) 4 SCC 116 at paragraphs 162 and 163 which are required to be referred which read hereunder as:-

"162. Moreover, in M.G. Agarwal case [AIR 1963 SC 200] this Court while reiterating the principles enunciated in Hanumant case [(1952) 2 SCC 71] observed thus:

"If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt."

In Shankarlal [(1981) 2 SCC 35, 39] this Court reiterated the same view thus: [SCC para 31, p. 44: SCC (Cri) p. 322]

"Legal principles are not magic incantations and their importance lies more in their application to a given set of facts than in their recital in the judgment."

163. We then pass on to another important point which seems to have been completely missed by the High Court. It is well settled that where on the evidence two possibilities are available or open, one which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt.

... .."

9. This Court, on the basis of the aforesaid principle, is now proceeding to examine the legality and propriety of the impugned judgment by which the appellants have been convicted for commission of offence under Section 302/34 of the Indian Penal Code and have been directed to undergo life imprisonment.

It is evident from the prosecution story that the father of the deceased, namely, Bhukhal Mahto, P.W.-2, has stated in the fardbeyan that accused Gahanu Mahto, Vipin Bihari Mahto, Bheem Mahto, Arjun Mahto, Lakhi Ram Mahto, Radhika Mahto and Ram Prasad Mahto had assaulted his younger son Upendra Mahto badly by sharp cutting weapon in the eastern Bahiyar of Village Dhankoul at about 6:30 p.m. and the deceased succumbed to injuries. It is the specific allegation levelled in the fardbeyan that the accused persons were armed with sharp cutting weapon and assaulted the deceased.

The P.W.-2, informant and father of deceased Upendra Mahto, in his testimony, has stated that his son Upendra Mahto died on 23.10.1991 it was full moon night while he was coming back home through Bahiyar.

He has stated in his deposition that Birbal Mahto and Shanichar Mahto have informed him that all the accused persons had murdered his son in paddy Bahiyar and when they approached the place of occurrence, all the accused persons took their heels and when the informant reached to the place of occurrence, he saw his son lying dead and blood was spread over the paddy field.

He has further stated that on the same night at about 12:30 Hrs. he went to Police Station and narrated the occurrence to the Sub-Inspector of Police but Sub-Inspector of Police neither wrote anything nor came to site of occurrence in the night. Rather, the Sub-Inspector came in the morning on next day where the fardbeyan of P.W.-2 was recorded at his residence which was taken down by the Sub-Inspector but the same was not read over to him. However, he made his signature over it.

In cross-examination, he has stated that puja of Lord Satyanarayan was performed at 4:00 p.m. by Harihar Pandit of village Pakaria which is situated at a distance of one kilometer across the river from village Dhankoul.

It was stated that the place where the dead body was lying is in the south west corner of the "Mela" at a distance from about 200 yards from the "Mela". The site of Mela is just adjacent to the house of Raja Kishun Mahto.

He has further stated that at about 7:00 p.m. when Birbal Mahto and other persons came to inform him, he was sitting in verandah and after their disclosure, wife of Upendra Mahto started weeping and then villagers assembled there.

Upon this, Mohan Thakur, Babban Thakur, Vijay Mahto and Chakradhar Mahto came to his house and thereafter, he, along with other co-villagers including those three persons who had informed him, went to the place of occurrence at 7:30 p.m. where he found his son lying dead.

He has admitted that proceeding under Section 107 Cr.P.C. between him and accused Radhika Mahto and Vipin was going on the date of occurrence and also on the date of recording of the deposition

P.W.-2 is the author of the prosecution story and is the formal witness.

P.W.-3, namely, Thakur Besra has stated in his examination-in-chief that after hearing alarm he ran towards the direction from where the alarm had come and had seen that Gahanu Mahto was having Kudali in his hand and Vipin Mahto was having Khanti in his hand.

He has stated that he had rushed to the place of occurrence and saw there that the blood was oozing from the head of the deceased Upendra Mahto and he was having several injuries over his body and was dead.

He has further stated that on alarm several people had assembled there.

He has been cross-examined in which he has deposed about the story of occurrence.

P.W.-4 namely, Kaushlya Devi, has stated at paragraph-2 that she had seen Gahanu Mahto, Vipin Mahto, Bhima Mahto, Arjun Mahto, Radhika Mahto, Ram Prasad Mahto and Lakhi Ram Mahto assaulting the deceased Upendra Mahto.

She has stated that after seeing the occurrence of assault being given to the

deceased Upendra Mahto, she raised alarm upon this several persons came but she cannot disclose the name of those persons.

She, in her cross-examination, has stated that after seeing the incident, she rushed to the house of deceased and apprised the family members about the murder of the deceased Upendra Mahto.

It is, thus, evident that P.W.-4 has not disclosed that which accused was having which arms, as has been stated by P.W.-3 wherein it has been stated that Gahnu Mahto was having Kudal and Vipin Bihari Mahto was having Khanti in their hands.

P.W.-5, namely, Chhedi Prasad Mahto, is the hearsay witness and he has seen the dead body.

P.W.-6, namely, Mansukh Mahto, is the seizure witness who has proved the seizure lists which have been marked as Ext.-2 and 2/1. Yashoda Devi, has been examined as P.W.-7, who has stated at paragraph-2 that when she along with Kaushalya Devi reached to the place of occurrence, she saw that Gahanu Mahto was assaulting Upendra Mahto with Kudali and Vipin was assaulting with Khanti. She has stated that Bhim Mahto, Arjun Mahto, Radhika Mahto, Ram Prasad Mahto and Lakhi Ram Mahto were also assaulting.

She has been cross-examined in which she has stated at paragraph-7 that the accused persons had taken away the spade (Kudal). She has also stated that the occurrence took place in the dark night and she had seen the Kudali blow and Khanti blow being given upon deceased Upendra Mahto.

She has also stated that the blow from Khanti was given on the head and by Kudali in the back side and at the hand. She has stated that Birban Mahto, Thakur Besra, Shanichar Mahto, Deonarayan Mahto, Baleshwar Mahto, Sikandar Mahto, Chhedi Mahto and Girijashankar Mahto were in the fair (Mela) and hearing the alarm, they reached to the place of occurrence.

Bilasi Devi and Babban Thakur have been examined as P.W.-8 and 9 respectively, who are the hearsay witnesses.

Girija Shankar Mahto has been examined as P.W.-10. He has stated that he had seen Gahnu Mahto, Vipin Mahto, Bhim Mahto, Arjun Mahto, Radhika Mahto, Ram Prasad Mahto and Lakhi Ram Mahto assaulting the deceased and after seeing him they started fleeing away. He has stated in his cross-examination that all the accused persons were assaulting the deceased by surrounding him from all sides and save and except the deceased there was none.

P.W.-11 Raju Mahto, and P.W.-12 Nagendra Mahto are the seizure witness who have identified their signatures upon the seizure list and their signatures have been marked as Ext.3 and 3/a respectively.

Dr. Mantu Kumar Tekriwal, who had conducted the postmortem examination on the dead body of the deceased, has been examined as P.W.-13, has stated that he had found following anti-mortem injuries on the body of the deceased:-

- (i) A long sharp cut from anterior aspect of right ear to vertex bone visible 8" x 2".
- (ii) A long sharp cut at the posterior aspect of right ear size 6" x 3" bone visible.
- (iii) A long sharp cut at occiput more deviated to left 6" x 2" bone visible.
- (iv) A sharp cut at the left temporal region 6" x 2" x bone exposed.
- (v) A sharp cut at right shoulder 2" x 2" x bone visible.
- (vi) Fracture of left forearm both radius and ulna.
- (vii) Fracture of right thumb.
- (viii) Blood clot in right ear.

He has stated that the time of occurrence is 48 hours from the time of postmortem. He has stated that such injuries may have been caused by the sharp cutting weapon such as Gandasa and Farsa, meaning thereby, the incised wound can be given by sharp cutting weapon. He has stated that such type of injuries cannot be caused by blunt edge weapon.

The I.O. Subodh Kumar Jaiswal has been examined as P.W.-14 who had prepared the inquest report and proved the inquest report as also First Information Report.

He has stated in the cross-examination that Birbal Mahto had not stated before him that he had gone to house of deceased and had informed Upendra's father about the occurrence.

One defence witness namely Jung Bahadur Singh, D.W.-1 was examined on behalf of defence who has stated that accused Radhika Mahto was taking treatment at Katihar Hospital on the date of occurrence.

10. The learned trial court has considered the testimony of P.W.-1 and P.W.-3 particularly and corroborating it from the testimony of P.W.-13 Dr. Mantu Kumar Tekriwal, has passed the order of conviction.

11. This Court, therefore, is now to consider as to whether the testimony of P.W.-1 and P.W.-3 can be said to be trustworthy to establish the charge by taking together the testimony of the Doctor, P.W.-13.

So far as the testimony of P.W.-1, Birbal Mahto, is concerned, he has stated about the story of commission of occurrence by taking the name of the accused persons as under paragraph-2.

He has stated in his deposition that he has seen the occurrence, as would appear from paragraph-3, but no such statement has been given before the Investigating Officer by the P.W.-1, namely, Birbal Mahto, as would appear from paragraph-25 of the deposition of the I.O., wherein it has been stated that no such statement has been given before the Investigating Officer by the P.W.-1 and, therefore, the testimony of P.W.-1 cannot be considered to be trustworthy,

reason being that the Investigating Officer has stated otherwise in specific term that Birbal Mahto, P.W.-1 has stated in his deposition that he had narrated about the incidence by going to the house of Upendra Mahto.

He has also stated that he had not found any Gandasa and, as such, there is no seizure of the said Gandasa.

Learned trial court has given emphasis upon the testimony of P.W.-3 wherein it has been stated by him that he had seen the occurrence of assault having been given by Gahanu Mahto who was having Kudali and Vipin Bihari Mahto, who was having Khanti in their hands.

Accused Gahanu Mahto since has died, as such, we are not discussing about his culpability, however, the culpability of Vipin Bihari Mahto, Appellant No.2 is being considering along with other appellants. The specific allegations have been levelled in the testimony as recorded under paragraph-2 thereof that Vipin Mahto was having Khanti in his hand and was assaulting the deceased.

Likewise, P.W.-4 has taken the name of appellants, as would appear from the statement made at paragraph-2 but if the testimony of P.W.-3 and P.W.-4 will be taken together, it would be evident that P.W.-3 has deposed about having Khanti with Vipin Bihari Mahto and has not stated about the other accused persons, the appellants herein, about holding of any arms by them.

While on the other hand, P.W.-4 has stated that she had seen the occurrence and the accused persons, namely, Gahanu Mahto, Vipin Mahto, Bhima Mahto, Arjun Mahto, Radhika Mahto, Ram Prasad Mahto and Lakhi Ram Mahto were assaulting the deceased Upendra Mahto but from which weapon the assault was being given by the accused persons has not been stated.

12. This Court now is proceeding to scrutinize that what is the basis of conviction of Vimal Bihari Mahto, Appellant No.2.

Admittedly herein, there is no allegation that Appellant Nos. 3, 4, 5 and 7, namely, Bhim Prasad Mahto, Arjune Prasad Mahto, Lakhiram Mahto and Ram Prasad Mahto were armed with any weapon. However, P.W.-4, namely, Kaushalya Devi, has stated that all the accused persons were assaulting the deceased but not stated that all the appellants were armed with any arms like Gandasa, Farsa etc. However, P.W.-

3 has stated that Vipin Mahto, Appellant No.2 was having Khanti in his hand.

Admittedly, the Doctor has found the incised wounds, i.e., long sharp cut from anterior aspect of right ear to vertex bone visible 8" x 2", long sharp cut at the posterior aspect of right ear size 6" x 3" bone visible, long sharp cut at occiput more deviated to left 6" x 2" bone visible and sharp cut at the left temporal region 6" x 2" x bone exposed. Now the question arises that the Appellant No. Nos. 3, 4, 5 and 7, namely, Bhim Prasad Mahto, Arjune Prasad Mahto, Lakhiram Mahto and Ram Prasad Mahto were having no arms, having not been stated

about the same by any of the witnesses then how the culpability of these appellants have been found to be proved by the learned trial court, there is no reason to that effect in the impugned Judgment.

The conviction of a person warrants that the specific allegation to be by the deposition of the witnesses and not on the basis of omnibus allegation since it is the question of life and personal liberty which is the fundamental right as guaranteed under Article 21 of the Constitution of India.

13. This Court, therefore, after going through the judgment passed by the learned trial court, is of the view that no reason has been assigned proving the culpability of the Appellant Nos. 3, 4, 5 and 7, namely, Bhim Prasad Mahto, Arjune Prasad Mahto, Lakhiram Mahto and Ram Prasad Mahto in commission of crime by taking into consideration the nature of injury and the reason of death which has been said to be caused by assault with sharp cutting weapon and none of the witnesses since has uttered a word that these appellants were having any arms in their hands, therefore, according to our considered view, the finding of conviction against the Appellant Nos. 3, 4, 5 and 7, namely, Bhim Prasad Mahto, Arjune Prasad Mahto, Lakhiram Mahto and Ram Prasad Mahto is without any evidence.

14. So far as the finding of conviction against Vipin Bihari Mahto, Appellant No.2, is concerned who has been shown to have given Khanti blow, the Khanti is a type of instrument made up of iron rod which is being used for digging the soil having flat sharp edge at one end. It is about 3 to 4 feet long in size. The blow given by Khanti will not cause incised wound, rather, the incised wound will be caused by a sharp cutting weapon either Farsa, Gandasa or Sword or even by Kudali (spade).

The injuries, if given by Khanti, the same may cause a deep injury over the body or if given over the head, the injury will be said to be given by hard and blunt substance and if the injury given by hard and blunt substance is there, the same will not be in nature of incised wound having long incised as is in the case in hand, as per the medical report narrated by the Doctor, P.W.-13.

The reference of the injury to be given in the nature of incised wound find mentioned in Modi A Textbook of Medical Jurisprudence and Toxicology wherein the description of incised wound has been given while the assault if caused by Khanti, will not be in the nature of incised wound having long incise, for ready reference the aforesaid description is being referred herein.

"25.5.7 Incised or Slash Wounds

An incised or slash wound is defined as orderly solution of skin and tissue by a sharp cutting weapon drawn across the skin. It may either be produced by light sharp cutting instruments such as knife, razor, scissors, or heavy sharp cutting weapons such as sword, gandasa (chopper). axe, hatchet, scythe, kookri or any object such as a broken piece of glass or metal which has a sharp, cutting

pointed or linear edge and are mostly intentionally inflicted. The cutting edge of a knife may be completely or partly sharp and partly blunt and the other edge may be blunt, serrated, scalloped or hollow, all these variations affect the shape of the wound."

15. The corroboration which has been considered by the learned trial court of the testimony of P.W.-3 with the evidence of the Doctor who had found the injuries anti-mortem in nature, as referred hereinabove, according to our considered view, cannot be said to be proper in view of the fact that the nature of injury found on the body of the deceased is long incise in nature which cannot be caused from Khanti which Vipin Bihari Mahto, Appellant No.2, was having with him.

The position of law although is settled that the ocular evidence is to prevail upon the medical evidence but the said principle is said to be applicable if there is corroboration or there is minor difference in one testimony of ocular witness and the testimony of the Doctor. But, herein, the testimony of the Doctor wherein the nature of injury which has been found is not being matched with the injury which may be sustained from Khanti blow and, therefore, the non-consideration of that part by the learned trial court will amount to creating doubt regarding the cause of death said to have been caused by Khanti blow alleged to have been given by the Appellant No.2, Vipin Bihari Mahto.

16. In the judgment rendered by Hon'ble Apex Court in the case of Baliraj Singh v. State of Madhya Pradesh reported in (2017) 14 SCC 291 wherein the Hon'ble Apex Court has observed by taking into consideration the postmortem report wherein there was a punctured wound just below the angle of right mandible over the right side of neck $1\frac{1}{2} \times 3$ and on dissection, he found that major artery was punctured and trachea was cut. There was haematoma underlying the whole side of neck and in the opinion of the doctor, the injury was caused by a sharp-piercing object. In his evidence, the doctor (PW 13) confirmed that cause of death was due to excessive haemorrhage from the punctured wound over the right side of neck caused by sharp-piercing object and due to punctured major blood vessel over right side of neck.

The Hon'ble Apex Court has further observed that it has not been observed that the seized lathi contained any sharp edges with iron coated. Even it was not sent for examination of Dr R.K. Dixit (PW 13) to ascertain whether the fatal injury could be resulted by it. Moreover, the record says that the blood on the bloodstained cap of deceased seized from the place of occurrence did not tally with that of the deceased. The Sub-Inspector who conducted the seizure proceedings and prepared seizure memo has not been examined by the prosecution. The Hon'ble Apex Court although has considered the settled proposition in criminal jurisprudence that ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been

caused in the manner alleged and thereby discredit the eyewitnesses.

In that case the nature of injury, contradiction about the time of arrival of the witnesses, contradictions between the ocular and medical evidence, non-examination of the police officer who conducted seizure and subsequent improvement by one of the eyewitnesses casts a serious doubt on the prosecution's case and, therefore, the accused has been discharged from the criminal liability.

The Hon'ble Apex Court while considering the same has also put reliance upon the judgment rendered in the case of Solanki Chimanbhai Ukabhai v. State of Gujarat reported in (1983) 2 SCC 174 wherein it has been observed that the medical evidence is only to prove that the injury could not have possibly been caused in the manner alleged and thereby discredit the eye witness.

17. Here, in the facts of the given case also, the nature of injury as has been shown by the Doctor, P.W.-13, is not such an injury said to be caused by Khanti blow, as has been alleged to have been given by the Appellant No.2 Vipin Bihari Mahto. Therefore, it cannot be said that the prosecution has been able to prove the charge against the Appellant No.2 Vipin Bihari Mahto beyond all shadow of doubt on the basis of the reason as referred hereinabove.

18. This Court, after taking into consideration the principle to establish the charge beyond all shadow of doubt and the same cannot be said to have been proved by the prosecution on the basis of the discussion made hereinabove, therefore, the finding recorded to the effect for proving the culpability of the Appellant No.2 Vipin Bihari Mahto, is not being established beyond all shadow of doubt and having not been considered by the learned trial court, the judgment of conviction against the Appellant No.2 Vipin Bihari Mahto, therefore, suffers from error.

19. This Court, on the basis of the discussion made hereinabove, is of the view that in the facts and circumstances of the case and as per the discussion made hereinabove, the prosecution has not been able to prove the charge levelled against the Appellant No.2 Vipin Bihari Mahto beyond all shadow of doubt. Therefore, the judgment of conviction passed against the Appellant No.2 Vipin Bihari Mahto also requires interference.

20. For the foregoing reasons, the impugned Judgment of Judgment of conviction dated 25.06.1993 and Order of sentence dated 28.06.1993, passed by the Additional District & Sessions Judge-II, Godda, in Sessions Case No.12 of 1993 / 6 of 1993, convicting and sentencing the Appellant Nos. 2, 3, 4, 5 and 7, namely, Vipin Bihari Mahto, Bhim Prasad Mahto, Arjune Prasad Mahto, Lakhiram Mahto and Ram Prasad Mahto for the offences under Section 302/34 of the Indian Penal Code, are hereby, quashed and set aside.

21. This appeal is accordingly, allowed. The appellants are discharged from criminal liability.

22. Let the Lower Court Records be sent back to the Court concerned forthwith, along with a copy of this Judgment.