

(2025) 09 GUJ CK 1072

In the Gujarat High Court

Case No : R/Criminal Appeal No. 1493, 1556 Of 2008

Mulubhai Punjabhai (Abated As Per Hon'ble Court's Order Dt.
30/09/2024) & Anr

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 15-09-2025

Acts Referred:

Indian Penal Code, 1860 — Section 34, 147, 148, 149, 299, 300, 302, 304, 304II,
323, 324, 337, 360, 361, 504
Code Of Criminal Procedure, 1973 — Section 313, 360, 361

Citation : (2025) 09 GUJ CK 1072

Hon'ble Judges : Ilesh J. Vora, J;P. M. Raval, J

Bench : Division Bench

Advocate : Dr. Hardik K Raval, LB Dabhi

Final Decision : Allowed/Disposed Of

Judgement

Ilesh J. Vora, J

1. Since, the facts of the case and issue involved in captioned appeals are identical and arise out of the same judgment, the appeals are taken up together and are being disposed of by this common judgment.

2. Vide judgment and order dated 28.03.2008, passed in Sessions Case No.108 of 1985, the Additional Sessions Judge at Jamkhambhaliya convicted and sentenced the appellants in the manner stated hereinafter:

Gagurama accused no. 3 (Criminal Appeal No. 1556 of 2008):

Conviction under Section

Punishment

Fine

In default of fine

Section 302 of IPC

Life Imprisonment

Rs.2,000/-

Simple imprisonment for 1 year

Accused No. 2 : Bhikharama (Criminal Appeal No. 1493 of 2008):

Conviction under Section

Punishment

Fine

In default of fine

Section 323 of IPC

RI for 6 months

Rs.500

SI for 15 days

The sentences of the appellants were ordered to run concurrently. Hence, these appeals.

3. The facts, leading to the present appeals, are as follows:

3.1 That, on 28.07.1985 at about 8:00 p.m, deceased Govind Kana and Bhikha Mulu allegedly killed by the eight accused at Village: Amrapar, Taluka: Jamjodhpur, District: Jamnagar (now Jamkhambhaliya) and also caused the injuries to the witnesses. The FIR came to be registered for the offences punishable under Sections 147, 148, 302, 323, 324, 504, 337 read with Sections 34 and 149 of the IPC.

According to prosecution case, on 28.07.1985 at about 8-00 p.m. the deceased Govindkana, Kanakala, Keshar Mulu and Bhikha Mulu, went into village market to purchase cigarates and tobacco. They came at the shop of Narbheram Jivandas and purchased the tobacco etc. While returning back, when they reached near the shop of Mansukh Nanji, the accused A1 Mulu Punja, Bhikharama A2, Gagurama A3 and Devsinh Rama came in their way and found standing in the opposite direction. The four accused were armed with sticks, spears (bhala). The other four accused A5 - Hamir Jiva, Natha Punja A6, Malde Punja A7 and Karsan Punja A8 were also standing in support of the accused Nos. A1 to A4. It is further case of the prosecution that, the accused A1 to A4, hurled abusive and confronted the complainant party. The complainant party requested them not to used filthy language. The accused thereafter got provoked and started assaulting Govindkana. He was injured by A1 - Mulu Punja and he had given a blow on the stomach as well as thy with the weapon spear. The accused A2 Bhima Rama,

caused injuries to witness Keshar Mulu by using a stone, thereafter, the accused appellant Gagurama gave a stick blow on the head of Bhikha Mulu and accused Devshi Rama - A4, gave a spear blow on the thigh of Kana Kala - complainant PW-6. Meanwhile, on account of hue and cry, the villagers came to their rescue. The accused Nos. 5 to 8, in order to resist the intervention of the villagers, threw stones on the witnesses as well as villagers. Thereafter, considering the situation, the accused fled away from the spot. In the said incident, Govind Kana and Bhikha Mulu sustained fatal injuries. Both the injured as well as witnesses, who have sustained injuries, had been taken to nearby Government Hospital and thereafter, shifted to Junagadh Civil Hospital. In the late night, during the treatment, the dying declaration of Govind Kana came to be recorded by PW-2 - Mansukh Vaghera. Govind Kana succumbed to injuries on the next day i.e. 29.07.1985. Bhikhu Mulu sustained a serious head injury and was throughout unconscious and after giving primary treatment to him, he was referred to Ahmedabad Civil Hospital, where he was admitted as indoor patient. During the treatment, he succumbed to his injuries on 05.08.1985. The witness Keshar Mulu was also referred to Ahmedabad Civil Hospital, as he was having a fracture injuries in his head. In such circumstances, the injured Kana Kala PW-6, lodged an FIR, inter-alia, alleging that, the accused had conspired and formed an unlawful assembly to kill his son Govind Kana and nephew Bhikha Mulu and in order to execute the conspiracy, they came at the place armed with deadly weapons and assaulted his son and nephew as well as Keshar Mulu and also injured him. In the FIR, it was specifically mentioned that, before one month, the accused Mulu Punja and Bhima Mulu had an altercation with respect to putting an electric motor on the common well and in said altercation, Bhima Mulu denied the permission sought to install electric motor and in order to take revenge, the accused assaulted them by deadly weapon.

3.3 After registration of the FIR, the investigation was entrusted to the PI - (PW.21) Harshadray Joshi. During the course of investigation, the IO recorded the statements of the witnesses, drew the panchnama of scene of offence and collected the blood samples and other things necessary for FSL, arrested the accused, at the disclosure statement, the accused discovered and recovered the weapons allegedly used in the commission of crime, obtained the medical case papers and upon receiving the FSL Report, filed a chargesheet against 7 accused and filed independent chargesheet against accused no.8 before the Juvenile Court. The case being exclusively triable by the court of sessions, committed to the Sessions Court, Jamnagar and same came to be culminated into Sessions Case No.108 of 1985.

4. The Sessions Court framed the charge against the appellant accused upon pleaded not guilty by the accused.

5. In order to prove the charge, the prosecution has examined as many as 23 witnesses and exhibited 69 documents:

Oral evidence

PW 8 - Exh.53

Bhupat Kanabhai, panch witness

PW 9 - Exh.55

Hamir Meraman, panch witness

PW 10 - Exh.57

Nathabhai Dudabhai, panch witness

PW 11 - Exh.59

Likha Aebhabhai, panch witness

PW 12 - Exh.63

Naga Goa, panch witness

PW 6 - Exh.41

Kanabhai Kalabhai

PW 7 - Exh.46

Lakha Karsan

PW 14 - Exh.79

Samat Parbat

PW 1 - Exh.20

Dr. Ajitkumar Nathalal Bunaviya

PW 3 - Exh.29

Dr. Vallabhghar Gopalghar Goswami

PW 4 - Exh.35

Dr. Kishore Aatmaram Raval

PW 13 - Exh.70

Dr. Mukesh Revshanker Mehta

PW 15 - Exh.80

Dr. Vinayakrao Vasudevrao Patil

PW 2 - Exh.23

Mansukhlal Jethalal Vaghera

PW 5 - Exh.39

Vallabh Lakshmanbhai Prajapati

PW 18 - Exh.96

Mehta Amit Valichanbhai

PW 19 - Exh.99

Haresh Umiyashanker Purohit

PW 20 - Exh.111

Jayantilal Shivalal Bavisi

PW 16 - Exh.91

Takhatsinh Balwantsinh

PW 17 - Exh.94

Ranchodji Madhaji

PW 21 - Exh.122

Harshdaray Karunashankar Joshi

PW 22 - Exh.144

Lalitaben Dayaram

PW 23 - Exh.149

Keshubhai Togaji Jadeja

Documentary evidence

Exh.21

Lakha Karsan Injury Certificate

Exh.24

Dying declaration of Govind Kana

Exh.25

Police Yadi

Exh.26

Dying declaration of Kesar mulu

Exh.27

Excerpt from Kesa mulu statement

Exh.28

Excerpt from Govind kana statement

Exh.30

Govind kana PM report yadi

Exh.31

Govind kana PM report form

Exh.32

Govind kana PM report

Exh.33

Diagram of Injury no.1

Exh.36

Treatment provided to accused

Exh.37

Accused Gagu rama Injury certificate

Exh.38

Accused Devshi rama Injury certificate

Exh.40

Depot Manager Receipt

Exh.54

Panchnama of place of incident

Exh.56

Panchnama of clothes of Kana kala and Govind kana

Exh.58

Panchnama of clothes and state of body of Bhima mulu

Exh.60

Panchnama of clothes of Bhima rama and Arrest panchnama of Gagu rama and Devshi rama

Exh.61

Discovery panchnama

Exh.62

Discovery panchnama

Exh.64

Inquest report of Bhima mulu

Exh.65

Inquest panchnama of body of Govind kana

Exh.66

Panchnama of house of Bhima rama

Exh.67

Panchnama of house of Ram samat

Exh.68

Panchnama of house of Mulu punja

Exh.71

Medical certificate of Bhima mulu

Exh.72

Medical certificate of Govind kana

Exh.73

Medical certificate of Kesar mulu

Exh.74

Injury certificate of Kana kala

Exh.75

Information given by Medical officer Junagadh to PI Junagadh

Exh.76

Yadi by medical officer to police after death of Govind kana

Exh.77

Information regarding transfer of Injured to Ahmedabad by medical officer, Junagadh

Exh.78

Information given to Executive

Magistrate, Junagadh to take Dying declaration

Exh.81

Medical form of Bhima mulu from Civil hospital, Ahmedabad

Exh.82

Bhima mulu PM form

Exh.83

Bhima mulu PM yadi

Exh.84

Bhima mulu PM report

Exh.85

Kesar mulu Injury certificate

Exh.92

Police yadi

Exh.93

Receipt of handing over of body of Bhima mulu

Exh.97

Birth certificate of accused Karsan panjabhai

Exh.98

Birth certificate of accused Maldev panjabhai

Exh.101-104

Xerox copy of pages no. 39, 62, 40, 61 from the Survey register of Amrapar Gram panchayat

Exh.105

Uparsarpanch of Amrapar gram panchayat

Exh.112

Letter regarding seeking information of well to Talati-cum-minister

Exh.113

Letter by Talati-cum-minister, Amrapar

Exh.115

True copy of the entry of Govind Gagji made on page no. 39 in the survey register

Exh.116

True copy of the entry of Govind Gagji made on page no. 40 in the survey register

Exh.117

True copy of the entry of Bhima Khima made on page no. 61 in the survey

register

Exh.118

True copy of the entry of Punja Jiva made on page no. 62 in the survey register

Exh.119

Birth certificate of Karsan punja

Exh.120

Birth certificate of Son of Punja jiva

Exh.123

List of treatment provided to Lakha karsan

Exh.124

Forwarding list of items to FSL

Exh.125

Forwarding notes

Exh.126

Receipt of list of articles by FSL

Exh.127

FSL classification report

Exh.128

FSL Serological classification report

Exh.129

Letter written to deputy engineer, GV board

Exh.130

Letter written by deputy engineer, Jamjodhpur

Exh.131

List given by accused Maldev punja and Karsan punja stating their birth dates

Exh.132

List of information from accused Karsan punja

Exh.133

Map of place of incident

Exh.134

Copy of report of a serious crime

Exh.135

Copy of list made to add Section 302 of IPC in FIR

Exh.137

Copy of list of Injured persons medical officer, Junagadh

Exh.138

Receipt of handing over of body of deceased Govind kana

Exh.139

Head constable, civil hospital yadi to PSO, Shahibaug

Exh.145

Original complaint by the complainant

6. After closure of the prosecution evidence, the appellants were questioned under Section 313 of the Cr.P.C. to which they stated that they have been falsely implicated in the offence and their defence was in total denial.

7. Though opportunity was extended, no oral evidence being adduced by the appellants accused.

8. After hearing the parties and upon appreciation of the evidence, trial court did not believe the act of criminal conspiracy, rioting and unlawful assembly. The trial Court considering the independent role of appellant accused, convicted and sentenced the accused in the following manner :

(i) accused no. 1 Mulu Punja under Section 302 IPC for committing the murder of Govind Kana, (ii) accused no. 3 Gagurama held guilty for committing the murder of Bhikha Mulu (iii) the accused appellant Bhika Rama held guilty under Section 323 IPC for causing voluntary injury to the witness Keshar Mulu and (iv) accused No. 4 Devshi Rama found guilty under Section 324 IPC for causing voluntary injury to the witness. The trial Court acquitted the accused Nos. 6 and 7 of all charges. The Accused A5 Hamir Jiva, pending the trial, passed away. It is relevant to note that, A1 - Mulu Punja pending the appeal (Criminal Appeal No. 1556 of 2008) passed away and appeal qua him stands abated. The accused A4 Devshi Rama pending the appeal (Criminal Appeal No. 1493 of 2008) passed away and appeal qua him stands abated.

9. In the aforesaid facts, by preferring this appeal, the accused appellants Gagu Rama and Devshi Rama-original accused No. 2 and 3 are before this Court.

10. Dr. Hardik Raval, learned counsel appearing for and on behalf of the accused Gagu Rama and Bhikha Rama (original accused no.2 and 3 respectively) made the following submissions:

(i) That, the learned trial court convicted the accused Gagu Rama for the murder of Bhikha Mulu. The trial court while convicting the accused, observed that, the prosecution has successfully proved and established that the act of the accused would fall under Clause thirdly of Section 300 as the act by which death is done with intention of causing death and the injury was on the vital part of the body and same was caused by the stick and therefore, the accused intended to cause that particular injury. It is in these background facts, learned counsel submitted that, there was a single blow on the head and according to medical evidence, fracture injury was found in the right fronto parital region. That, in the present case, accused Gagu Rama sustained injuries over his eye and same has not been explained by the prosecution. There was no motive for the accused Gagu Rama to kill the deceased because the dispute with regard to electric motor was with the deceased Bhikha Mulu and accused Mulu Punja. In such circumstances, the accused did not have any intention to commit the murder, nor there was an intention of causing such bodily injury which likely to cause death. The deceased died after 12 days of the incident because of complications arose during the treatment period. Thus, therefore, the act of the accused would not fall under clauses of Section 300, but, it would fall under Section 304 Part II - Culpable homicide not amounting to murder. The appellant- accused Gagu Rama has already undergone 8 years of his imprisonment and therefore, learned counsel does not press the appeal on merits, but, he restricted his arguments on the question of sentence alone and prays that, the act of the accused does not travel beyond the punishment prescribed under Section 304 Part II of the IPC and requested this Court to set aside the conviction and sentence under Section 302 of the IPC and the accused may be punished under Section 304 Part II of the IPC.

(ii) That, the accused Bhikha Rama has been convicted and sentenced under Section 324 of the IPC and directed to undergo 6 months imprisonment with default sentence if he failed to pay the fine amount. The injury caused by the accused on the head of Kesar Mulu by using stone. It is in this connection, he drew the attention of this Court towards Sections 360 and 361, to contend that, having regard to the character of the accused and the sentence period, the trial court by exercising discretion, shall have to extend the benefit of probation and instead of sending him in jail, the accused may be ordered to released on probation of good conduct. That, Section 361 is mandatory in nature and if the trial court was not inclined to extend the benefit of probation, then, it should record in the judgment that, the case is not fit to extend the benefit.

Thus, at the appellate stage, having regard to the nature of offence, age, character and antecedents, the accused may be released on probation on the appropriate condition whatever deem it fit to the court.

11. In such circumstances, referred to above, Dr. Hardik Raval, learned counsel prayed that, the accused Gagu Rama, may be sentenced to the sentence he has already undergone and the accused Devshi Rama by extending the benefit of probation, instead of sending him in jail, he may be released on probation of

good conduct.

12. Mr. L.B. Dabhi, learned APP vehemently opposed the appeal and contended that, the appellant accused Gagu Rama and others armed with deadly weapons, with premeditated mind, indiscriminately assaulted the deceased Govind Kana and deceased Bhikha Mulu and also caused voluntary injuries to the witnesses. That, the prosecution has succeeded in proving the charge against the accused beyond reasonable doubt and the trial court upon appreciation of evidence, has rightly convicted the accused Gagu Rama for the murder of Bhikha Mulu. The medical evidence proves that, the injuries found on the body of the deceased were sufficient in ordinary cause of nature and the said injuries were on the vital part of the body and therefore, the trial court has rightly presumed that the injuries were intended to cause death and therefore, there is no merits in the submission that the act of the accused was culpable homicide not amounting to murder. So far as extending the benefit of probation is concerned, it was submitted that, the accused Bhikha Rama had caused serious injury to Kesar Mulu and the injury inflicted on the head of the witness and therefore, at this stage, the benefit, as claimed, is not available.

In such circumstances, referred to above, Mr. L.B. Dabhi, learned State counsel prays that, there being no merits in the appeal and same may be dismissed.

13. Before dealing with the rival contentions, it would be useful to analyse the evidence of some of the relevant witnesses.

(a) Kana Kala (PW.6):- This witness is the uncle of the deceased Bhikha Mulu and father of deceased Govind Kana. In the chief examination, he has stated that, on 27.07.1985 at about 8:00 p.m., he along with his son deceased Govind Kana and nephew - Bhima Mulu and Keshar Mulu went to shop of Narbheram Jivandas and after purchasing a tobacco and cigarette, they came nearby the shop of Mansukh Nanji and at that time, four accused namely Bhima Rama, Mulu Punja, Gagu Rama and Devshi Rama armed with deadly weapons, were standing on the road and beside them, the other four accused were found standing in support of principal accused. The accused started hurled abusive and tried to cordon them and while raising objection, on the issue of hurled abusive, the accused Mulu Punja armed with sphere, gave a blow on the stomach of the deceased Govind Kana and the second blow being administered on his thigh. Thereafter, accused appellant Gagu Rama armed with stick, gave a blow on the head of Bhikhu Mulu. In the said scuffle, the accused Bhikha Rama and Devshi Rama also had caused injuries to the witnesses and the accused no.5 to 8 who were standing in support of principal accused, threw stones and on account of hue and cry, the witness Nathiben, Mohan Deva, Karsan Kara and Arshi Maya came to their rescue and thereafter, the accused fled away from the spot. The witness has further stated that, his son Govind Kana due to sustaining of the injuries, died on the next day at Junagadh Hospital and his nephew Bhikha Mulu had also sustained head injury and was throughout unconscious and he was referred to Ahmedabad Civil Hospital for further treatment and died after 12 days of the incident. The witness

has further stated that, the accused Devshi Rama had given a blow on his thigh by sphere and the accused Bhikha Rama caused injuries to Keshar Mulu by using stone. So far motive part is concerned, the witness has stated that, the dispute about putting electric motor on the common well was cropped up before one month of the incident between Mulu Punja and Bhikha Mulu as Bhikha Mulu had objected against putting of the electric motor on the well. The witness in his testimony, stated that, the complaint of this incident being disclosed by him to the police which he produced at Exh.145. The cross-examination of the witness was done at length, but, his credential about his presence at the spot and role attributed to the accused are not in any manner shaken in the cross-examination.

(b) Dr. Mukesh Mehta (PW.13):- This witness in his chief-examination, has stated that, being a Medical Officer at Junagadh Hospital, he had given treatment to deceased Bhikha Mulu on 27.08.1985. Upon examination, the condition of Bhikha Mulu was serious and was having a head injury in the nature of CLW on the left parital region and fracture was found on the right fronto parital region. The witness has further stated that, he has referred the injured to the Civil Hospital, Ahmedabad for further treatment. So far as injured Keshar Mulu is concerned, the witness has stated that, the injured was having a fracture injury over his scalp and he was also referred to Ahmedabad Civil Hospital.

(c) Dr. V.V. Patil (PW.15):- Deceased Bhikha Mulu succumbed to his injuries on 05.08.1985 when he was admitted in the Civil Hospital. The autopsy was conducted by Dr. Pankaj Sirolawala. After the post-mortem, the doctor settled at USA on permanent basis. In such circumstances, upon service of summons, the witness Dr. V.V. Patil being a production witness and was having knowledge about handwriting of Dr. Pankaj, examined by the prosecution to prove the contents of P.M. Report (Exh.84). Referring to the contents of the P.M. Report, the witness found a fracture in the parital bone in a triangular shape and also found fracture in the right parital region and other bruise injuries on the other part of the body.

According to opinion of the doctor, the external injuries corresponding to the internal injuries were cumulatively sufficient to cause death in the ordinary course of nature and cause of death was head injuries and its complications thereof.

(d) Dr. Kishor Atmaram (PW.4):- This doctor had examined the appellant Gagu Rama and accused Devshi Rama for the injuries sustained by them in the said incident. The accused Gagu Rama after his arrest, was produced before the doctor on 01.08.1985 for medical examination. The doctor found the injury in the nature of CLW (2cm X 0.5 cm-muscle deep) on the left eye and same was simple in nature and it could be possible by hard substance.

14. It is the contention that, the trial court has committed manifest error of law in convicting the accused under Section 302 of the IPC as the act of the appellant Gagu Rama cannot be said to have intended to cause that particular injury to the deceased, nor, the act by which the death was caused, is done with intention to

cause death or such bodily injury as is likely to cause death and therefore, at the most, the act of the accused would fall under Section 304 Part II of the IPC which provides for the punishment of culpable homicide not amounting to murder. Learned counsel does not raise the dispute about the incident and death of Bhikha Mulu caused by the accused. Thus, so far as accused Gagu Rama is concerned, the prosecution has successfully proved and established beyond reasonable doubt that the death of Bhikha Mulu was homicidal and it was caused by the accused Gagu Rama. Thus, the issue falls for our consideration is as to whether the act of the accused is murder or culpable homicide not amounting to murder as defined under Section 304 Part I and II of the IPC. It is settled position of law that, while determining the issue of culpable homicide or murder, the courts have to keep in focus key words used in Section 299 and 300 of the IPC. The difference between the murder and culpable homicide has been succinctly explained in the case of State of A.P. vs. Rayavarapu Punnayya (1976) SCC 382. In para-12, the Supreme Court held and observed that,

"In the scheme of IPC, culpable homicide is genus and "murder" its specie. All murder is culpable homicide, but no vice a versa. For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called culpable homicide of the first degree. This is the gravest form of culpable homicide, which is defined in Section 300 as murder. The second may be termed as culpable homicide of the second degree. This is punishable under the first part of Section 304. Then, there is culpable homicide of third degree. This is lowest type of culpable homicide and the punishment provided for it is also the lowest amongst the punishment provided for the third degrees and same is punishable under Section 304 Part II of the IPC. Section 300, says about when the offence is murder and when it is culpable homicide not amounting to murder. Section 300 begins by stating that, the circumstances when the culpable homicide turns out into murder which is punishable under Section 302 of the IPC and exception in the same section says when the offence is not murder but culpable homicide not amounting to murder under Section 304 IPC."

15. After referring the aforesaid decision, the difference between two terms was further elucidated in Rampal vs. State of U.P. (2012) 8 SCC 289. Paras-16 and 21 of the judgment read thus:

"16. that the safest way of approach to the interpretation and application of Section 299 and 300 IPC is to keep in focus the key words used in various clauses of the said sections. Minutely comparing each of the clauses of Sections 299 and 300 IPC and drawing support from the decisions of the Court in Virsa Singh v. State of Punjab [AIR 1958 SC 465: 1958 Cri. LJ 818] and Rajwant Singh v. State of Kerala [AIR 1966 SC 1874 : 1966 Cri LJ 1509], speaking for the court, R.S. Sarkaria, J. neatly brought out the points of distinction between the two offences, which have been time and again reiterated. Having done so, the Court said that wherever the court is confronted with the question whether the offence

is murder or culpable homicide not amounting to murder, on the facts of a case, it [would] be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to culpable homicide as defined in Section 299. If the answer to this question is in the negative, the offence would be culpable homicide not amounting to murder, punishable under the First or Second part of Section 304, depending respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the cases come within any of the Exceptions enumerated in Section 300, the offence would still be culpable homicide not amounting to murder, punishable under the first part of Section 304 IPC. It was, however, clarified that these were only broad guidelines to facilitate the task of the court and not cast-iron imperative."

"21. Sections 302 and 304 of the Code are primarily the punitive provisions. They declare what punishment a person would be liable to be awarded, if he commits either of the offences. An analysis of these two sections must be done having regard to what is common to the offences and what is special to each one of them. The offence of culpable homicide is thus an offence which may or may not be murder. If it is murder, then it is culpable homicide amounting to murder, for which punishment is prescribed in Section 302 of the Code. Section 304 deals with cases not covered by Section 302 and it divides the offence into two distinct classes, that is (a) those in which the death is intentionally caused; and (b) those in which the death is caused unintentionally but knowingly. In the former case the sentence of imprisonment is compulsory and the maximum sentence admissible is imprisonment for life. In the latter case, imprisonment is only optional, and the maximum sentence only extends to imprisonment for 10 years. The first clause of Section 304 includes only those cases in which offence is really murder, but mitigated by the presence of circumstances recognized in the Exceptions to Section 300 of the Code, the second clause deals only with the cases in which the accused has no intention of injuring anyone in particular. In this regard, we may also refer to the judgment of this Court in the case of *Fatta v. Emperor* [AIR 1931 Lah 63]"

16. Recently, in the case of *Chunni Bai Vs. State of Chhattisgarh* (AIR 2025 Supreme Court 2370), the Supreme Court, after referring the observations made in the case of *Rayavarapu Punnayya and Rampal Singh* (supra), in Para-21, observed thus:

"21. From the above extracts, it can be understood that one of the criteria to determine, in any given case, as to whether the act amounts to murder or culpable homicide not amounting to murder is the presence or absence of intention of the offender. If the intention to cause death or to cause such bodily injury as is likely to cause death or the knowledge, which obviously has to be a

conscious one, that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury, comes out aloud and clear in the case, it would be most appropriate to categorise it as a case of murder under Section 300 IPC in which event, penal provision of Section 302 IPC would be attracted. On the other hand, if the "intention" in causing the death or to causing such bodily injury is not so clear, the case will fall under the less stringent category of "culpable homicide not amounting to murder" as punishable under Section 304 IPC."

17. The facts of this case so far as appellant-accused Gagu Rama is concerned, are to be considered on the touchstone of the law which has been laid down by the Supreme Court.

18. We have examined the role attributed to the appellant-accused Gagu Rama and according to prosecution case, he inflicted a stick blow on the head of Bhikha Mulu. It is not the case of prosecution that, the repeated blows were being inflicted on the person of the deceased. The accused Gagu Rama has nothing to do with the common well and the dispute of putting an electric motor. Thus, the inference would arise that, he was present at the place in support of the principal accused Mulu Punja who had fight with Bhikha Mulu because Bhikha Mulu has strong objection in putting the electric motor on the common well. It is evident that Gagu Rama appellant accused sustained injuries over his eyes. The deceased Bhikha Mulu died after 12 days of the incident due to complication arise during the treatment. In such circumstances, having regard to the injuries sustained by the deceased and the manner in which a single blow being caused on the head of the deceased, it is difficult to hold that the appellant accused intended to cause death nor it can be said that he intended to cause that particular injuries. However, the knowledge could be attributed on the part of the accused that by inflicting such kind of injuries, might result into death. Therefore, having regard to the peculiar facts and circumstances of present case and on appreciation of the evidence on record, clause thirdly of Section 300 cannot be applicable, as a result, we set aside the conviction of the appellant under Section 302 IPC and sentence of life awarded thereunder. Instead, we convict the appellant accused Gagu Rama under Section 304 Part-II of IPC. It is reported that the accused appellant has undergone more than 8 years of his imprisonment and presently, he is on bail. In that view of the matter, ends of justice would be met by awarding sentence already undergone to the appellant accused. The sentence of fine along with default clause is concerned.

19. The appellant accused Bhikha Rama has been convicted and sentenced under Section 323 of the IPC and according to the prosecution case, he had caused head injuries by using stone on the person witness Keshar Mulu. The accused is claiming the discretion relief of probation as provided under Section 360 of the Cr.P.C. The contention on this aspect raised is that the learned Trial Court has not followed the mandatory provisions of Sections 360 and 361 of Cr.P.C. The

provision casts a duty upon the court to give benefit of probation and if it is not possible to do so, then, special reasons shall require to be recorded. The appellants are farmers and having regard to their age, the circumstances of the case and character of the offender and in absence of any past antecedents and during the pendency of the appeal proceedings, no any incident being reported, the benefit of probation require to be extended which would serve the purpose of reformation.

20. Section 361 cast upon the duty upon the court, where in any case, the court decided to exercise discretion under Section 360 of the Cr.P.C., the provision says that, in any case, where the court could have dealt with the accused under Section 360 and yet does not want to grant the benefit of the said provision, then it shall record in its judgment the specific reasons for not having done so. In the facts of the present case, this has apparently not being done, in as much as, the trial court overlooked the provisions of Section 360 and 361 of the Cr.P.C. and mandatory duty cast on the trial court has not been performed. The offence is of the year 2006 and trial concluded on 30.09.2009 and the accused admittedly, having no any past antecedents and during the pendency of the appeal, nothing adverse reported against them. Looking to the facts and circumstances of the present case, we see no reason to apply the provision of Section 360 of the Cr.P.C. even at the appellate stage. Thus, therefore, it would meet ends of justice, the accused guilty under Section 323 are not sent to jail, but released on probation under Section 360. Thus, while upholding their conviction, we direct that, instead of sentencing them to imprisonment, the appellants- accused shall be released on probation provided they shall execute a bond in the sum of Rs.5,000/- each before the trial court and one surety of the like amount to the satisfaction of the trial court with an undertaking to appear and receive the sentence when they called upon to do so during the period of 6 months and in the meantime shall keep good behaviour and peace for a period of 6 months and shall not commit any offence during the period of probation. If the appellants-accused failed to comply with the aforesaid condition, it will result in the revocation of this order and follow the consequences.

21. For the reasons aforementioned, the conviction appeal i.e. Criminal Appeal No.1556 of 2008 filed by the original accused A3 Gagu Rama allowed in part. The conviction of the appellant accused under Section 302 and sentenced of life awarded by the learned Additional Sessions Judge, Jamkhambhaliya in Sessions Case No.108 of 1985 is set aside. The appellant is convicted under Section 304 Part-II of the IPC and so far as sentence is concerned, ends of justice would be met by awarding sentence to a period already undergone to the appellant accused. The order of fine amount and default sentence awarded by the Trial Court is hereby confirmed. The appellant is presently on bail. The bail bond stands cancelled and surety is discharged. There is no need him to surrender. Accordingly, the appeal filed by Gagu Rama appellant accused is allowed in the aforesaid terms. So far as conviction appeal i.e. Criminal Appeal No.1493 of 2008 filed by Bhima Rama is concerned, he has been extended the benefits of

probation in terms of Para-20 of this judgment and accordingly, in the aforesaid directions and terms, his appeal stands disposed of. The Registry shall send the case records to the concerned Trial Court.