
(2009) 01 RAJ CK 0088
In the Rajasthan High Court

Radhey Shyam and Others

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 28-01-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 300, 302, 304, 307, 323

Citation : (2009) CriLJ 1969 : (2010) 6 RCR(Criminal) 390 : (2009) 2 RLW 1451

Hon'ble Judges : Narendra Kumar Jain, J;Guman Singh, J

Bench : Division Bench

Judgement

Narendra Kumar Jain, J.—This appeal, on behalf of three appellants-Radheyshyam, Nandkishore and Ramhet, is directed against the impugned judgment and order dated 16th July, 2003 passed by the Additional District and Sessions Judge (Fast Track) No. 2, Baran, Headquarters Chhabra, in Sessions Case No. 40/2003, whereby they have been convicted and sentenced as under:

Accused Under Imprisonment Section

Radheyshyam 302 IPC To undergo life imprisonment and a fine of Rs. 100/- in default, to further undergo 15 days RI

325/34 To undergo 3 years RI and a IPC fine of Rs. 100/-; in default, to further undergo 15 days RI

323 To undergo 6 months RI and IPC a fine of Rs. 50/-; in default, to further undergo 10 days RI Nandkishore 302/34 Each of the accused to under -and Ramhet IPC go life imprisonment and to pay a fine of Rs. 100/-; in default, to further undergo 15 days RI

325/34 Each of the accused to under IPC go 3 years RI and to pay a fine of Rs. 100/-; in default, to further undergo 15 days RI

323 IPC Each of the accused to undergo 6 months RI and to pay a fine of Rs. 50/-; in default to further undergo 10 days RI

All the sentences were ordered to run concurrently.

2. The material facts necessary for disposal of the present appeal, in brief, are that a "parcha bayan" (Exhibit P1) of injured Prahlad (PW 1) was recorded on 19th June, 2001 at 1.20 a.m. at Bed No. 17 of Government Hospital, Khanpur by ASI Nathu Singh (PW-17), wherein it was stated by him that he is a resident of village Kirpuria. He stated that yesterday at about 7.00 p.m. he was sitting in his house; his elder brother Chhitar was also there in the house and, while they were sitting in the house, they heard hue and cry; upon hearing it, his brother Chhitar came out of the house and he saw Radheyshyam, Nandkishore and Ramhet abusing, his brother told as to why they are abusing and on this Radheyshyam inflicted a "gandasi" blow on the head of his brother Chhitar; thereafter Nandkishore and Ramhet also started giving lathi blows on his person; Chhitar fell down. He and his father Kanhaiyalal intervened but they were also beaten. Radheyshyam inflicted a "gandasi" blow on his person on the left leg. Nandkishore inflicted a lathi blow on his left hand. Nandkishore also inflicted "lathi" blow on his left leg. His father was also beaten by Ramhet. Ramkishan also started throwing stones. The incident was seen by Jamnalal and Damodar. These persons have inflicted injuries on their persons with the intention to kill them. They have inflicted injuries because of quarrel in between the children.

3. On the basis of above "parcha bayan", an FIR (Exhibit P-6) under Sections 307, 504, 336, 34. I.P.C. was registered at the Police Station Khanpur but, without putting any number on it, the same was forwarded to the concerned Police Station having jurisdiction over the place i.e. Police Station, Atru. Before FIR could be registered, the SHO, Khanpur, informed the Police Station, Atru, that injured; Chhitarlal has died, therefore, FIR No. 249/2001 (Exhibit P-7) was registered at the Police Station, Atru, under Sections 302, 307, 336, 504 and 34, I.P.C. and investigation commenced.

4. After completion of investigation, the police submitted a challan against four accused persons i.e. three appellants and one Ramkishan. The trial Court framed charges against the accused-persons for the offence under Sections 302, 323, 325/34, I.P.C. The accused persons denied the charges and claimed to be tried.

5. In support of its case, the prosecution examined PW-1 Prahlad, PW-2 Chhotabai, PW-3 Kanhaiyalal, PW-4 Babulal, PW-5 Hiralal, PW-6 Jamnalal, PW-7 Kailabai, PW-8 Kasturibai, PW-9 Damodar, PW-10 Bhojraj, PW-11 Kanhaiyalal, PW-12 Ali Hussain, PW-13 Maganlal, PW-14 Panchulal, PW-15 Gordhan, PW-16 Dr. Ajay Pareek, PW-17 Nathusingh, PW-18 Surendra Singh, PW-19 Abdulhaq, PW-20 Dr. Gaurishankar Chauhan and PW-21 Durga Shankar, and produced documentary evidence Exhibit P-1 "parcha bayan", Exhibit P-2 Site Plan, Exhibit P-3 seizure-memo of blood stained soil and ordinary soil, Exhibit P-4 statement u/s 161, Cr.P.C. of Damodar, Exhibit P-5 Receipt of articles deposited, Exhibit P-6 unnumbered-FIR registered at Police Station Khanpur, Exhibit P-7 FIR No. 249/2001 at Police Station Atru, Exhibit P-8 Inquest-report, Exhibit P-9 seizure-memo of blood stained clothes, P-10 memo of handing over the dead body,

Exhibit P-11 injury report of Chhitarlal, Exhibit P-12 Injury report of Kanhaiyalal, Exhibit P-13 injury report of Prahlad, Exhibit P-14 to Exhibit P-17 X-ray plates, Exhibit P-18 Postmortem report of Chhitarlal, Exhibit P-19-A copy of register having details of the stolen property recovered by the police, Exhibit P-20 to Exhibit P-23 arrest memo of accused Radheyshyam, Nandkishore, Ramkishan and Ramhet, Exhibit P-24 report of information given by accused Radheyshyam, Exhibit P-25 recovery memo of "gandasi" from Radheyshyam, Exhibit P-26 information report of accused Nandkishore, Exhibit P-27 seizure memo of "latth" from accused Nandkishore, Exhibit P-28 information report of accused Ramhet, Exhibit P-29 recovery memo of "latth" from accused Ramhet, Exhibit. P.30 FSL report. Thereafter statements of accused-persons were recorded u/s 313, Cr.P.C. No witness was examined in defence, but they produced and exhibited. Exhibit D-1 to Exhibit D-5, which are the statements of the prosecution witnesses," namely, Chhotabai, Kanhaiyalal, Jamnalal, Panchulal and Gordhan.

6. The learned trial Court, after hearing the arguments of both the parties and examining the record, acquitted the accused Ramkishan from all the charges, but convicted and sentenced the accused-appellants, as mentioned above.

7. Shri A. K. Gupta, the learned Counsel for the accused-appellants, contended that the learned trial Court committed an illegality in convicting and sentencing the accused-appellants. He contended that from the prosecution evidence itself it is clear beyond doubt that there was no enmity in between both the parties. The quarrel took place in between the children as per "parcha bayan" (Exhibit P-1) of injured himself. There was no common intention of the accused-persons to commit the crime. The motive is also not established at all in the present case. He further contended that the "parcha bayan" (Exhibit P-1) or FIR (Exhibit P-6) or FIR (Exhibit P-7) are concocted documents. The original-information furnished by the complainant party has been withheld by the prosecution. He contended that before recording "parcha bayan" (Exhibit P-1) by injured Prahlad, two informations were given by the complainant-party which have been withheld by the prosecution for the reasons best known to them and non-production of the same is fatal to the prosecution case. He alleged that the prosecution has changed the genesis of the case deliberately. In support of his submissions, he referred the statements of PW-1 Prahlad, PW-3 Kanhaiyalal, PW.-14. Panchu. PW-17 Nathu, PW-19 Abdulhaq. He contended that PW-1 Prahlad stated that they stayed for about one hour at Police Chowki, Badora, and a telephonic information was given at Police Station, Atru. PW-3 Kanhaiyalal stated that a report was given at Police Station, Badora, which is a chowki of Police Station, Atru, itself, where FIR can be lodged. PW14 Panchu has also stated that a report was lodged at Police Chowki, Badora. He, therefore, contended that the so-called report lodged at Police Chowki, Badora, or the copy of the police Rojnamcha where telephonic message at Police Station, Atru, was made from Badora Police Chowki, have not been placed on the record by the prosecution. He further contended that the "parcha bayan" (Exhibit P-1) was recorded by PW-17 Nathu, who, in his cross-examination, admitted that he received one letter through peon

from Khanpur Hospital, written by the Doctor, which was recorded in "rojnamcha" and thereafter he proceeded for Hospital but the said letter or the copy of "rojnamcha" have not been placed on the record by the prosecution, which creates serious doubt on the prosecution case. He submits that there were only three injuries on the person of the deceased out of which one injury was found to be fatal; and, the present case appears to be a case of over-implication of the accused-persons. He contended that the accused-persons, namely, Nandkishore and Ramhet were not present at the spot but they were falsely implicated subsequently in the "parcha bayan" recorded by PW-17 Nathu. He also contended that his submission is also proved from the fact that there is delay in sending the first information report to the Magistrate concerned. The FIR was registered at the Police Station, Atru, on 19-6-2001 at 1.30 p.m. but the same reached before the Civil Judge (Junior Division) and Judicial Magistrate, 1st Class, Atru, on 20th June, 2001 at 9.15 a.m., whereas the distance in between both was only two furlongs. He, therefore, contended that non-production of above referred documents/letter/copy of "rojnamcha" is fatal to the prosecution case and the entire order of conviction passed by the learned trial Court is liable to be set aside by giving the benefit of doubt to the accused-persons. In alternative, he contended that as per Exhibit P-18, the postmortem-report, there were only three injuries and fatal injury is stated to have been inflicted by Radheyshyam and, looking to the documents and the facts and circumstances of the present case where the incident took place all of a sudden, without any premeditation of mind, the conviction of the accused-persons u/s 302, I.P.C. is bad in law and is liable to be set aside. As per his submission, at the most, the accused Radheyshyam can be convicted for the offence u/s 304, Part I or II of the I.P.C. and in view of the fact that he has already undergone imprisonment for more than 7 years, he may be awarded sentence of imprisonment already undergone by him. So far as other two accused persons, namely Nandkishore and Ramhet are concerned, he contended that they have falsely been implicated in the case, therefore, the order of their conviction passed by the trial Court is liable to be set aside. He contended that in absence of any premeditation of mind or motive, their conviction with the aid of Section 34, I.P.C. is liable to be set aside. In support of his submissions, the learned Counsel for the appellants relied upon Gurmail Singh and Others Vs. State of Punjab, and Abani K. Debnath and Anr. v. State of Tripura 2005 AIR SCW 6163 : 2006 Cri LJ 314.

8. The learned Counsel for the State supported the impugned order of conviction and sentence against the accused-appellants passed by the trial Court and contended that there is no force in any of the arguments of the learned Counsel for the appellants and this appeal is liable to be dismissed. He referred the statements of the witnesses, namely, PW-1 Prahlad, PW-3 Kanhaiyalal, another eye-witness PW-6 Jamnalal, whose name was mentioned in the first-information-report, and the statement of other eyewitnesses, namely. PW-2 Chhotabai, PW-7 Kailabai and PW-8 Kasturibai, and contended that the fatal injury on the person of Chhitarlal was inflicted by accused Radheyshyam. The presence of accused

Nandkishore and Ramhet is also established and they also inflicted injuries not only on the person of the deceased but also on the persons of injured Prahlad and Kanhaiyalal, therefore, there is no merit in this appeal and the same is liable to be dismissed.

9. We have considered the submissions of the learned Counsel for the parties and examined the impugned Judgment as well as the record of the trial Court.

10. As per the prosecution case, initially a "parcha bayan" (Exhibit P-I) of injured Prahlad (PW-1) was recorded in the Hospital at Khanpur by PW-17 Nathusingh, ASI, Police Station Khanpur, wherein he stated that accused-persons inflicted injuries on their persons as a result of quarrel in between the children. Radheyshyam inflicted a "gandasi" blow on the person of his brother Chhitarlal (deceased) on his head. Nandkishore and Ramhet also inflicted injuries by "lathis". Thereafter Chhitar fell down. Prahlad further stated that accused-persons also inflicted injuries on his person and on the person of his father Kanhaiyalal (PW-3). The statement of PW-1 Prahlad was recorded wherein he stated that there was a quarrel on the date of incident in between his wife Chhotabai and wife of accused Radheyshyam. Thereafter Radheyshyam, Ramhet, Nandkishore and Ramkishan, all the four accused-persons, started abusing them. He was at his home. His wife, his Bhabhi (sister-in-law) Kasturibai and mother Kailabai were also present at their home. The deceased Chhitarlal was also present at the home. The accused-persons started abusing them and, on hearing hue and cry, his brother Chhitarlal came out of the home and asked the accused-persons as to why they are abusing them and, on his asking, the accused persons started beating him. He also came out of the house and saw Radheyshyam inflicting a "gandasi" blow on the head of deceased Chhitarlal; he also saw accused Nandkishore, Ramhet and Ramkishan inflicting injuries on his person by lathis. He further stated that he and his brother Chhitar were taken to hospital in a tractor of Panchu by Mangilal, Panchu, Gordhan and Kanhaiyalal. Panchu made a telephonic call from Badora to Atru. He stated that they did not lodge any report at Police Chowki, Badora; PW-2 Smt. Chhotabai was not named in the "parcha bayan" (Exhibit P-I), although she was wife of Prahlad, but she was examined by the prosecution as eye-witness; she narrated that all the four accused-persons started abusing them and, on hearing hue and cry, her brother-in-law Chhitarlal came out of the house and asked the accused-persons as to why they are abusing them and on it the accused-persons started beating Chhitarlal and also injured-persons Prahlad and Kanhaiyalal. Radheyshyam gave a "gandasi" blow on the head of Chhitarlal. Her husband Prahlad was beaten by accused Radheyshyam and Nandkishore. The accused Ramkishan inflicted injury on the person of Kanhaiyalal, her father-in-law. PW-3 Kanhaiyalal is injured eye-witness, who stated that Radheyshyam inflicted two "gandasi" blows on the person of deceased Chhitarlal. Radheyshyam and Ramhet also inflicted "lathi" blows on the person of Chhitar. Nandkishore and Ramkishan were armed with "lathis". He and Prahlad, both, were present on the spot. He specifically stated in his examination-in-chief that he does not know as to why the quarrel took place.

There is no reason for quarrel. There was no earlier incident which took place one or two days prior to the date of incident. He, in his cross-examination, admitted that his statement was recorded by the police after 8 to 10 days from the date of incident. He did not go to Police Station, Khanpur, for lodging the report. Jamnalal (PW-6), who was named in "parcha bayan" (Exhibit P-1) by injured Prahlad, stated that he knows deceased Chhitarlal, complainant and accused-party. He was at his home and he saw that Kana and Radheyshyam both were quarrelling. Thereafter Chhitar came and Radheyshyam inflicted "gandasi" blow on the parietal region of Chhitar; thereafter Ramhet, Ramkishan and Nandkishore also came and started beating Chhitar. Prahlad intervened but accused also inflicted injuries on his person. Chhitar died. In his cross-examination, he admitted that at the time of incident, he was taking rest at his bed. He denied that the portion A to B in his statement Exhibit D-3 is wrong. PW-7 Kailabai was not named in the FIR but she was examined as eye-witness by the prosecution; she narrated the same incident that all the four accused-persons inflicted injuries on the person of deceased and injured-persons. The fatal injury on the person of deceased Chhitar was inflicted by Radheyshyam by weapon i.e. "gandasi". PW 8 Kasturibai was also examined as eye-witness by the prosecution and she also narrated the same story as narrated by other prosecution witnesses and stated that the accused Radheyshyam inflicted a "gandasi" blow on the person of deceased and other accused-persons also inflicted injuries on his person as well as on the person of injured Prahlad and Kanhaiyalal. PW-14 Panchulal stated that when he came in his village in the evening then some ladies of the village told him that a quarrel is going on and when he reached at the place of incidence he saw Chhitarlal lying on the ground; he had sustained four injuries. He was unconscious. Chhitarlal died at about 2.00 p.m. in the night. He, in his cross-examination, admitted that it is correct that a report of the incident was lodged at Police Chowki, Badora. PW-16 Dr. Ajay Pareek proved the injury-report of deceased (Exhibit P-11), the injury-reports of injured Kanhaiyalal and Prahlad (Exhibit P-12) and (Exhibit P-13), respectively. As per the X-ray report (Exhibits P-5 and P-6 of injured Prahlad), the injuries were found to be grievous in nature inflicted by blunt object. He also conducted the postmortem of deceased Chhitarlal and proved his postmortem-report (Exhibit P-18). PW-17 Nathusingh proved Exhibit P-1 "parcha bayan" of Prahlad recorded by him on 19th June, 2001 at Khanpur Hospital. He, in his cross-examination, admitted that he had no information about the incident before recording "parcha bayan" of injured. He stated that he received one letter through peon from the Doctor of Khanpur Hospital. Thereafter he reached the Hospital after making necessary entry in the "rojnamcha". He denied having received any telephonic message from the Police Chowki, Badora. PW-19 Abdulhaq, SHO-Police Station, Atru, was also examined in the case, who narrated the entire story of investigation conducted by him. He, in his cross-examination, admitted that on 19th June, 2001 he reached the village Kirpuria after making necessary entry in the "rojnamcha"; he had received an information that one quarrel had taken place in the village; he denied that any information was

received by him on telephone from Police Chowki, Badora. He stated that FIR was registered on 19th June, 2001 at 1.30 p.m. and on that date the necessary postal letters had already been dispatched and FIR was sent only on the next date i.e. 20th June, 2001. It is relevant to mention that the lower Courts timings were from 7'o clock to 12'o clock in the morning. The FIR was registered at 1.30 p.m. and the Court was already closed by that time on that date.

11. As per the postmortem-report (Exhibit P-18), deceased Chhitarlal sustained following three injuries:

1. Incised wound 2" x 1/2" x Bone deep Over right parietal
2. Lacerated wound 1" x 1/2" x Bone deep Over right side of forehead
3. Abrasion 1/2" x 1/2" over ankle right

12. The cause of death as opined by the Doctor is as under:

In my opinion mode of death is coma and cause of death is Head injury.

13. The injuries sustained by injured Prahlad (PW-1), as per the Exhibit P-13 are as under:

1. Lacerated 2 1/2" x 1/2" x Over upper part of leg? Blunt A red scar wound bone deep left over knee right Adv. X-ray-leg left - forearm left & Palm left
2. Lacerated 1/2" x 1/2" x 1/4" Over knee left Simple Blunt wound 3. Abrasion 1/2" x 1/2" Over post aspect Simple Blunt forearm left 4. Abrasion 1/4" x 1/2" Over posterior aspect Simple Blunt forearm left 5. Swelling Diffuse Over Palm Left ? Blunt 6. Swelling Diffuse Over upper 1/2 of ? Blunt forearm

Adv. X-ray 1. Leg Upper part AP & lateral 2. Forearm upper 1/2 AP & lateral 3. Adv. X-ray Palm Left AP & lateral Open on seynsding reorthse of Injury Nos. 1, 5, 6 given often

Duration of injuries is about within 6 hours.

14. The injury sustained by injured Kanhaiyalal as per Exhibit P-12 are as under:

1. Bruise 2" x 1/2" Over upper Simple Blunt and part back Scar over thigh

15. From the above referred facts and circumstances, it appears that there was no enmity in between both the parties. As per Exhibit P-1 "parcha bayan", there was a quarrel in between the children of both the parties. As per the statement of PW-1 Prahlad there was a quarrel in between his wife Chhotabai and the wife of accused Radheyshyam. If the statement of the prosecution witnesses are reconciled then it appears that there was quarrel in between the children which resulted into the quarrel in between the ladies of both the parties and ultimately accused-persons started abusing to opposite party and, on hearing hue and cry, deceased Chhitar came out of his house and accused-persons started beating him. The injured Prahlad also came out of the house and he was also beaten by

the accused. One injury was also found to be inflicted on the person of Kanhaiyalal. From perusal of the injury-report (Exhibit P-11) of the deceased coupled with the statement of Dr. Ajay Pareek (PW-16), it appears that the deceased sustained seven injuries, but, as per the postmortem-report (Exhibit P-18) he sustained only three injuries, which have been reproduced hereinabove. As per the opinion of the Doctor, the cause of death was head injury, which was inflicted by accused Radheyshyam. As per the X-ray report and Injury report of injured Prahlad, he sustained six injuries; and out of them, injuries Nos. 5 and 6 were found to be grievous in nature caused by blunt object and as per the statement of injured Prahlad (PW-1) himself the same was inflicted by Nandkishore. The other injuries were found to be simple in nature. The injured Kanhaiyalal sustained only one injury i.e. bruise, as referred above.

16. So far as the submission of the learned Counsel for the appellants about withholding of so-called earlier two informations, as contended by him on the basis of statements of PW-1 Prahlad, PW-3 Kanhaiyalal and PW-14 Panchulal are concerned, it appears from the statement of PW-19 Abdulhaq, SHO, Police Station, Atru, that he was not aware as to whether any telephonic message was received by him from Police Chowki-Badora. PW-17 Nathusingh also stated that it is wrong to say that any telephonic message was received at Police Station, Khanpur, from" Police Chowki, Badora. Although from the statements of PW-3 Kanhaiyalal and PW-14 Panchulal it appears that the information was given by them at Police Chowki-Badora, but from the record and on minute scrutiny of entire prosecution evidence it is not clear whether the so called information or report was received at Police Chowki, Badora, and, in absence of it, it cannot be presumed that any report, which was lodged, has been withheld by the prosecution in the present case.

17. In view of the above, we do not find any force in the submission of the learned Counsel for the appellants that any information or copy of "Rojnamcha" or other material document has been withheld by the prosecution in the present case.

18. So far as the submission of the learned Counsel for the appellants regarding absence of motive or common intention in the present case is concerned, we find force in his submission and we are of the view that this is a case where the incident took place as a result of quarrel in between the children and ladies of both the parties; and the deceased, without any premeditation of mind, came out of his house and asked the accused-persons as to why they are abusing and on It the accused-persons inflicted injuries on their persons. In these circumstances, we find that in absence of any common intention or motive the learned trial Court committed an illegality in convicting the accused-persons for the offence u/s 302, I.P.C. or Section 302 with the aid of Section 34, I. P. C, and the order of punishment for the said offence is liable to be set aside. However, from the oral as well as documentary evidence, and medical evidence, it is clear that death of Chhitar was homicide and fatal injury was caused by accused

Radheyshyam, therefore, he is liable to be convicted u/s 304, I.P.C. So far as remaining two accused-persons Nandkishore and Ramhet are concerned, accused Nandkishore is liable to be convicted for the offence u/s 325, I.P.C. and accused Ramhet for the offence u/s 323, I.P.C.

19. The Hon'ble Supreme Court in Gurmail Singh and Others Vs. State of Punjab, , in the facts and circumstances of that case, set aside the conviction of accused u/s 302, I.P.C. and convicted him for the offence u/s 304, Part II of the I.P.C. Paras 7, 8 and 10 of the judgment are reproduced as under:

7. The facts found by the High Court are that on an indecent joke being cut by accused 4 with Jagir Kaur, wife of P. W. Bogha Singh on the day previous to the date of occurrence, P. W. Bogha Singh and his brother P. W. Gura Singh both went to the house of the accused to complain against the misbehaviour of accused 4. That is the genesis of the quarrel, Dispute thus was between Bogha Singh and Gura Singh on the one hand and the accused on the other. Deceased Tej Singh was nowhere in the picture. There was no animosity against him. There could not have been even a passing thought of causing any injury to Tej Singh. The High Court found as a fact that Tej Singh appeared on the scene after the accused assaulted Bogha Singh and Gura Singh. In fact, according to the High Court when Tej Singh attempted to intervene to save Bogha Singh and Gura Singh from further harm a blow with a barchha was given by accused 1 Gurmail Singh which landed on Tej Singh. There is nothing to indicate in the evidence that Gurmail Singh ever intended to cause any injury to Tej Singh assuming transmission of malice is inferable. Undoubtedly there could be presumption of transmission of malice but in the facts found could it ever be said that accused 1 Gurmail Singh intended to commit murder of Tej Singh? The answer obviously being in the negative, para 1 of Section 300 would not be attracted. But it was said that the case would be covered by para 3 of Section 300 in that Gurmail Singh intended to cause an injury and the injury intended to be inflicted was proved to be sufficient in the ordinary course of nature to cause death. This argument is often raised for consideration by this Court and more often reliance is placed on Virsa Singh Vs. The State of Punjab, We would have gone into the question in detail but in Jagrup Singh Vs. State of Haryana, . Sen, J. after examining all the previous decisions on the subject, observed that in order to bring the case within Part III of Section 300, I.P.C., it must be proved that there was an intention to inflict that particular bodily injury which in the ordinary course of nature was sufficient to cause death. This view was further affirmed in a decision rendered in Randhir Singh alias Dhire Vs. State of Punjab, We are of the opinion that in the facts found by the High Court it could not be said that accused 1 Gurmail Singh intended to cause that particular bodily injury which in fact was found to have been caused. May be, the injury inflicted may have been found to be sufficient in the ordinary course of nature to cause death. What ought to be found is that the injury found to be present was the injury that was intended to be inflicted. It is difficult to say with confidence in the present case keeping in view the facts found by the High Court that accused 1 Gurmail Singh

intended to cause that very injury which was found to be fatal.

8. Now the question then is what is the offence committed by accused 1 Gurmail Singh. He had wielded a weapon like barchha. The injury landed on the chest and penetrated deep into the chest cavity. When accused 1 wielded a weapon like a barchha he must be presumed to know that he was likely to cause an injury which was likely to cause death. Undoubtedly, as it was pointed out by Mr. Mulla that accused 1 is a very young man shown to be aged about 19 years in the judgment of the learned Sessions Judge, having regard to all the circumstances and the facts found by the High Court, it may be said that accused 1 is shown to have committed an offence u/s 304, Part II, I.P.C. In our opinion the sentence of five years" rigorous imprisonment would be adequate sentence.

9. ...

10. Accordingly, this appeal is partly allowed. Conviction of accused 1 Gurmail Singh for having committed an offence u/s 302, I.P.C. and sentence of rigorous imprisonment for life and a fine of Rs. 3,000 in default to suffer rigorous imprisonment for 1 1/2 years, is set aside but he is convicted for an offence u/s 304, Part II of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for five years and a fine of Rs. 500, in default to suffer rigorous imprisonment for six months.

20. In Abani K. Debnath's case 2006 CriLJ 314 (supra), the Hon"ble Supreme Court, in the facts and circumstances of that particular case, set aside the conviction of accused u/s 302, I.P.C. and convicted him u/s 304 II, I.P.C. Paras 4 and 5 of the judgment are reproduced as under:

4. The common intention as is well known in criminal jurisprudence is the premeditated meeting of mind. No doubt the common intention can also be formed on the spot. But in the instant case since the original quarrel was between Anil Das PW 1 and Amar Denath A-5, in our view, it is difficult to say that there was common intention either premeditated or formed on the spot with regard to the murder of Ranjit Das. We have already noted that Ranjit Das was an inter -venor to save Anil Das and in such a situation the incident appeared to have been in a spur of moment. By no stretch of imagination, it can be said that the murder of Ranjit Das can be said to be with the common intention of A-1 and A-5. From the evidence on record it clearly appears that the dao blow was dealt by only A-1. If at all a conviction u/s 302, I.P.C. is maintained, the death was resulted by an independent act of A-1. In such a situation, A-5 cannot be roped with the aid of Section 34, I.P.C. We are clearly of the view that a conviction of A-5 u/s 302, I.P.C. with the aid of Section 34, I.P.C. is not sustainable and, therefore, conviction qua A-5 u/s 302/34. I.P.C. is set aside.

5. This leads us to consider as to under what Section of law A-1 Abani K. Debnath is liable to be convicted in a given facts of the case. The prosecution evidence clearly discloses that the dao blow dealt by A-1 is preceded by a mutual quarrel. We have already noted that there was no common intention to kill Ranjit

Das. From the nature of injuries it is disclosed that A-1 dealt only one dao blow perhaps in the spur of moment. The incident had taken place on 10-8-1990 and the deceased succumbed to injury on 15-8-1990 after a lapse of 7 days. Taking the prosecution evidence and medical evidence cumulatively we are of the view that the conviction of A-1 also cannot be fell u/s 302, I.P.C. but at the most u/s 304, Part II. We accordingly convert the sentence of A-1 Abani K. Debnath u/s 302, I.P.C. to that one u/s 304, Part II, I.P.C. and sentence him to suffer R. I. for five years. The fine amount imposed by the trial Court and affirmed by the High Court is maintained. It is stated at the Bar that A-1 has undergone about 18 months" imprisonment, if that is so, he will be entitled to get the benefit of Section 428, Cr.P.C.

21. In view of the above discussions, we are of the view that the learned trial Court has committed an illegality in convicting and sentencing the accused-appellants for the offence under Sections 302, 302/34, 325/34 and 323, I.P.C. and therefore, the impugned order of the trial Court is set aside; and accused appellant Radheyshyam is convicted for the offence u/s 304 II, I.P.C., and accused Nandkishore for the offence u/s 325, I.P.C. and accused Ramhet for the offence u/s 323, I.P.C. The accused-appellant Radheyshyam is in custody since 27th June, 2001 and he has already undergone the imprisonment of more than seven and half years. The accused-appellant Nandkishore and Ramhet remained in custody for three and half months during trial of the case and, after their conviction by the trial Court and before granting bail to them by this Court, they further remained in custody for one year two months seven days, thus both of them have also undergone the imprisonment of one and half year. In these circumstances, in our view, the ends of justice will meet in case they are sentenced to imprisonment for the period already undergone by them.

22. Consequently, the appeal is partly allowed. The accused Radheyshyam is convicted and sentenced u/s 304, Part II, I. P. C to rigorous imprisonment of seven and half years already undergone by him. The accused Nandkishore is convicted and sentenced u/s 325, I.P.C. to rigorous imprisonment of one and half year already undergone by him. The accused Ramhet is convicted and sentenced u/s 323, I.P.C. to rigorous imprisonment of six months, which he has already undergone.

23. The accused-appellant Nandkishore and Ramhet are on bail and their bail-bonds are discharged. Accused-appellant Radheyshyam is in custody, therefore, it is directed that he be set at liberty forthwith if his custody is not required in any other case.