

(2016) 02 AHC CK 0148
In the Allahabad High Court
Case No : Criminal Appeal No. 46 of 2002

Roop Singh Pandey and Others	Vs	APPELLANT
The State of U.P.		RESPONDENT

Date of Decision : 29-02-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, Section 433, Section 82, Section 83
Penal Code, 1860 (IPC) — Section 300, Section 302, Section 304, Section 307, Section 323, Section 326, Section 34, Section 379, Section 457, Section 504, S

Citation : (2016) 02 AHC CK 0148

Hon'ble Judges : Surendra Vikram Singh Rathore and Pratyush Kumar, JJ.

Bench : Division Bench

Advocate : S.P. Pandey, K.S. Pawar, P.C. Chauhan, Rajiv Mishra, Soniya Mishra, U.P. Singh and V. Shrotria, for the Appellant; Govt. Advocate, Anurag Shukla, Arvind Shukla, R.P. Misra and V.K. Mishra, for the Respondent

Final Decision : Dismissed

Judgement

Surendra Vikram Singh Rathore, J.—1. Mr. Rajiv Mishra and Mrs. Soniya Mishra, learned counsel for the appellants and Mr. Umesh Verma, learned Additional Government Advocate and Mr. Anurag Shukla, learned counsel for the complainant were heard.

2. Under Challenge in the instant criminal appeal is the judgment and order dated 24.12.2001 passed by learned Additional Sessions Judge Court No. 4, Hardoi, in Session Trial No. 410 of 2000, arising out of Case Crime No. 04 of 2000, Police Station Pali, District Hardoi whereby all the appellants were convicted for the offence under Section 302 read with 34 IPC and were sentenced with imprisonment for life.

3. During pendency of the instant appeal, appellant No. 1 Roop Singh Pandey died therefore, vide our order dated 22.02.2016 the appeal so far as it relates to appellant No. 1 Roop Singh Pandey was abated.

4. Now the appellant No. 2 Vijay Singh Pandey, appellant No. 3 Chandra Sen and appellant No. 4 Surya Sen are before us who are sons of Roop Singh Pandey (since dead).

5. In brief, the case of the prosecution was that the complainant Smt. Usha Pandey lodged an FIR scribed by one Bankey Lal son of Satyadeo and gave it at Police Station-Pali, District Hardoi on 08.09.2000 at about 13.10 hours alleging therein that on 08.01.2000 at about 12.15 p.m. her husband Krishna Murari Pandey and his uncle Roop Singh Pandey had indulged into some altercation on the dispute of the partition of the three logs of Babool wood. On this altercation Roop Singh Pandey the appellants exhorted his sons (surviving appellants) to kill Krishna Murari Pandey then Roop Singh Pandey and his sons started giving blows of axes on the deceased Krishna Murari Pandey. On the alarm raised by the complainant herself and also by her husband, Brahma Prakash son of Ram Niwas and Roop Singh Pandey son of Hakim Singh Pandey and several other persons rushed towards the place of occurrence and witnessed the incident. All the accused persons ran away from there. Because of the injuries sustained by the husband of the complainant he died on the spot. Leaving the dead body at the place of occurrence under the supervision of her family members complainant Smt. Usha Pandey went to police station to lodge the FIR.

6. On the basis of this FIR, the case was registered and investigation proceeded. From the place of occurrence the logs of Babool tree were taken into custody and its memo was prepared on 13.03.2000. Place of occurrence was inspected and its site plan was prepared. Inquest proceedings were conducted and after completing the necessary formalities the dead body was sent for postmortem which was conducted on 09.01.2000 at about 9:30 a.m. wherein duration of death was reported to be about one day old. According to the postmortem report the following ante-mortem injuries were found on the body of deceased Krishna Murari Pandey:--

"i) Incised wound 9 cm x 2 cm x bone deep on the forehead underlying bone fractured (frontal bone).

(ii) Incised wound 4 cm x 1 cm on the right eye brow underlying bone was fractured.

(iii) Incised wound 5 cm x 2 cm x bone deep on the nose and left side of face underlying maxilla and nasal bone were fractured.

(iv) Incised wound 4 cm x 1 cm x bone deep on the left side of head 4 cm above left ear underlying temporal bone found fractured.

(v) Incised wound 6 cm x 1.5 cm on the chin underlying mandible bone was fractured.

(vi) Incised wound 2 cm x 1 cm x muscle deep on the right side of front of neck.

(vii) Incised wound 5 cm x 1 cm x muscle deep on the front of neck.

(viii) Incised wound 2 cm x 1 cm on the top of left shoulder.

(ix) Multiple contusions varying from 3 cm x 2 cm to 6 cm x 2 cm on the left front of thigh.

(x) Multiple contusions on the right thigh varying from 3 cm x 2 cm x 6 cm x 2 cm.

(xi) Contusions 15 cm x 5 cm on the left dorsal of upper arm."

In the opinion of the doctor death occurred due to shock and haemorrhage as a result of ante-mortem injuries.

7. During course of investigation vide order dated 11.02.2000 accused Vijay Singh Pandey was taken on police remand. He was inquired about the weapon of offence then he offered to get the same recovered on 12.02.2000. Thereafter on the same day the police party took him from the police station at about 8.25 a.m. and on his pointing out four axes were recovered which were used by all the accused persons in the commission of the instant offence.

8. After concluding the investigation charge-sheet was filed against all the accused persons.

9. The defence of the accused persons was of total denial and their false implication in the instant case. It was suggested that the deceased was murdered in the intervening night of 07/08-01-2000 by unknown persons and they have been falsely implicated.

10. In order to prove its case, the prosecution has examined PW-1 Smt. Usha Pandey, the complainant, PW-2 Brahma Prakash, an eye witness of this incident, PW-3 Head Constable Sohan Lal Pushkar, who has prepared the chik report and G.D. of this case, PW-4 Pramod Kumar Singh, the Investigating Officer of this case, PW-5 Dr. B.B. Tripathi, who had conducted the postmortem on the body of the deceased, Krishan Murari Pandey.

11. No reason for their false implication was furnished by the appellants in their statements under Section 313 Cr.P.C. in defence D.W. -1 Head Constable Sohan Lal Pushkar was examined who has proved entry of register No. 8 of police station Pali, District Hardoi to show that deceased Krishna Murari Pandey had criminal antecedents. He has stated that the following cases were pending against the deceased Krishna Murari Pandey:--

"(i) Case Crime No. 128 of 1976, under Section 457 IPC, charge-sheet was filed.

(ii) Case Crime No. 33 of 1993, under Sections 323, 504, 506 IPC, charge-sheet was filed.

(iii) Case Crime No. 55 of 1983, under Section 379 IPC, charge-sheet was filed.

(iv) Case Crime No. 82 of 1984, under Section 307 IPC, charge-sheet was filed. However, the accused was acquitted. On the basis of this defence evidence it was

suggested that the deceased Krishna Murari Pandey was a habitual offender so he had many enemies who have committed his murder and the appellants have been falsely implicated in this case."

12. After appreciating the evidence on record, learned trial court has convicted the appellants as above, hence, the instant appeal.

13. Before proceedings further we would like to mention the inter-se relationship of the complainant side and the appellants. Complainant Smt. Usha Pandey is the wife of Krishna Murari Pandey (deceased). Appellant Roop Singh Pandey was the real uncle of Krishna Murari Pandey. The surviving appellants Vijay Singh Pandey, Chandrasen and Suryasen are sons of Roop Singh Pandey so the present appellants were the first cousins of the deceased.

14. Submission of the learned counsel for the appellants was that the presence of PW-1 Smt. Usha Pandey and PW-2 Brahma Prakash on the scene of occurrence was highly doubtful. They are related and chance witnesses therefore, the learned trial court has committed a factual and legal error in convicting the appellants on the basis of the evidence of such eye witnesses. It has also been argued that in the alternative even if the court reaches the conclusion that the offence has been committed by the appellants then this offence would not go beyond the purview of Section 304 part I IPC as incident has taken place on the spur of the moment because of the dispute regarding partition of logs of Babool wood.

15. It has also been argued that in the postmortem report several contusions were also found on the body of the deceased but the prosecution has utterly failed to explain as to how these contusions were caused on the body of the deceased. It has also been argued that non-explanation of these contusions make the defence case probable that the deceased was done to death in the intervening night of 7/8-01-2000 by unknown persons.

16. Learned A.G.A. and Sri Anurag Shukla learned counsel for the complainant have vehemently argued that the presence of Smt. Usha Pandey and Brahma Prakash was very natural and incident has taken place at a short distance from the house of the deceased and a kothari of PW-2 Brahma Prakash was shown in the site plan and it is situated towards the north of the place of occurrence. Therefore, the presence of both these witnesses on the scene of occurrence was very natural and there was no reason to falsely implicate the members of their own family sparing the real assailants. It has also been argued that the brutal manner in which the offence has been committed and Krishna Murari Pandey was done to death leaves no ground to hold that the offence would not fall under Section 304 part I IPC. The brutal manner in which the injuries were caused to the deceased leads to the only conclusion that the appellants intended to cause death of the deceased so the offence would fall under Section 302 IPC.

17. In view of the rival submissions the evidence of the prosecution has to be evaluated. In the instant case, prompt FIR has been lodged by PW-1 Smt. Usha

Pandey. The incident of this case is alleged to have taken place on 08.01.2000 at about 12.15 p.m. and the FIR of this case was lodged within 55 minutes of the incident at the police station which was at a distance of about one kilometer from the place of occurrence. On the same day the inquest proceedings were conducted and in the said inquest proceedings the date and time of FIR has correctly been mentioned. However, the column of time of report was left blank in the police form No. 33 (Exhibit Ka-9). Several annexures are prepared alongwith inquest and if in one annexure the time of registration of the case could not be mentioned then the same cannot made basis to hold that the FIR was not lodged at the time as claimed by the prosecution. The purpose of inquest proceedings is entirely different. So in our considered opinion the FIR in this case was lodged with promptness and all the accused persons with their respective weapons were named in the FIR. FIR in every criminal trial is a very important document. Though it is not a substantive piece of evidence but definitely it plays a vital role in appreciation of the evidence. Therefore, the law expects a prompt FIR to be lodged because it eliminates chances of false implication and cooking up of a false case.

18. In the instant case, the postmortem was conducted in the following morning at 9.30 a.m., therefore, this ground to disbelieve the time of origin of the FIR does not appeal to reason. It has also been argued that in the examination-in-chief PW-1 Smt. Usha Pandey has stated that after the incident she got the FIR scribed at the place of occurrence thereafter she has stated that logs of Babool wood were taken away by the police and after that she went to the police station alongwith written report and lodged the FIR. But when we scrutinized this part of the evidence of PW-1 Smt. Usha Pandey the conclusion is irresistible that in the examination-in-chief the questions were put in wrong seriatim by the prosecutor. Because the logs of wood were taken into custody by the police on 13.03.2000 i.e. after more than two months of the incident. So it cannot be believed that the FIR came into existence after 13.03.2000 when the logs of wood were taken into custody by the police. Therefore, PW-1 Smt. Usha Pandey in her statement has proved the written report (Exhibit Ka-1) and has stated that after the incident she got it scribed by Bankey Lal who came after few minutes of the incident hearing the noise and by the time Bankey Lal reached at the place of occurrence accused persons had fled away so after getting the FIR scribed she must have gone to the police station to lodge the FIR it was only human error on the part of the prosecutor that before putting the question as to when she went to lodge the FIR he first preferred to prove the factum of recovery of the wood logs from the place of occurrence. So this was virtually a mistake and by no stretch of imagination it can be presumed that the FIR was lodged after 13.03.2000. So this argument to create doubt regarding the origin of the FIR also has no substance.

19. A prompt F.I.R. lends credence to the prosecution case because a prompt F.I.R. eliminates all the chances of cooking up of a false story. Hon"ble the Apex Court in the case of Meharaj Singh v. State of U.P. reported in , (1994) 5 SCC

188 while emphasizing the importance of recording a prompt FIR the Supreme Court observed as under:--

"FIR in a criminal case and particularly in murder case is a vital and valuable piece of evidence for the purpose of appreciating evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eye witnesses if any. Delay in lodging FIR often result in embellishment, which is a creature of an afterthought. On the account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version of exaggerated story."

In *Thulia Kali v. State of Tamil Nadu* reported in , (1972) 3 SCC 393 the Supreme Court observed as under:--

"..... first information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the report can hardly be overestimated from the standpoint of the accused."

Similarly in *Kishan Singh through LRs v. Gurpal Singh and others* reported in , (2010) 8 SCC 775 the Supreme Court held that "Prompt and early reporting of the occurrence by the informant with vivid details gives assurance regarding truth of its version. In case there is some delay in recording the FIR the complainant must give an explanation for the same. Undoubtedly, delay in lodging FIR does not make the complainant's case improbable when such delay is properly explained."

Hon"ble the Apex court in the case of *Nanhe v. State of Uttar Pradesh* reported in , 1973 (3) SCC 317 has held that a prompt F.I.R. eliminates the chances of cooking up of a false story.

20. Great stress has been laid by the learned counsel for the appellants on the point that PW-1 Smt. Usha Pandey was not present on the scene of occurrence. But when we scrutinized her evidence then it is clear that there was some dispute regarding partition of the Babool wood for which the deceased was going to the place where the wood logs were lying. Since the partition of the said wood has to take place, therefore, she apprehended some quarrel due to which she also accompanied her husband. The Investigating Officer in his cross examination has stated that PW-1 Smt. Usha Pandey was accompanying her husband and this fact finds support from the narration of the FIR wherein Smt. Usha Pandey has mentioned in the FIR that she and her husband raised alarm then other persons reached there. So even in the FIR she has claimed to be an eye witness of this incident. PW-2 Brahma Prakash has also supported the case of the prosecution and has fully corroborated the evidence of PW-1.

21. PW-1 in his FIR itself has mentioned that on her alarm and on the alarm of

her husband the other persons also reached there. This part of the FIR (Exhibit Ka-1) has been challenged on the ground that there is a slight cutting in the FIR at this place. Cardinal principle of appreciation of the evidence is that it has to be evaluated keeping in mind the ground realities. We cannot appreciate the evidence keeping in mind an idealistic state which is virtually not in existence. A lady whose husband has been murdered within her view would definitely be in a state of shock and if in such a mental state she has dictated an FIR or in such a charged atmosphere where the dead body of the deceased was lying if any mistake has been committed in dictating the FIR by the complainant or by the scribe while scribing the FIR then it by itself cannot be a ground to hold that it was a manipulation. This mistake would have assumed importance if the corresponding cutting or over writing would have emerged in the chik report also but there is absolutely no such cutting or over writing in the chik report. In our considered opinion, this submission of the learned counsel for the appellants to disbelieve the presence of the complainant at the place of occurrence has no force.

22. The evidence of these two eye witnesses has been challenged on the ground that both these witnesses were closely related to the deceased. PW-1 Smt. Usha Pandey is the widow of the deceased while the deceased was real maternal uncle of PW-2 Brahma Prakash. It has also been argued that both these witnesses were chance witnesses and therefore their evidence ought to have been rejected on this score alone. There is no dispute to the fact situation that PW-1 Smt. Usha Pandey is the widow of the deceased Krishna Murari Pandey and the deceased was the real maternal uncle of PW-2 Brahma Prakash who has a room near the place of occurrence. According to the case of the prosecution and according to the evidence of PW-2 he was present at his room alongwith one Roop Singh Pandey who also happens to be the relative of the deceased, however, he has not been produced in support of the case of the prosecution. It has come in evidence that the residential house of PW-2 Brahma Prakash is situated at a different place in the village and on this ground it has been argued that his presence on his room shows that he was a chance witness. We are not the least impressed with this submission. PW-2 has stated that he has his agricultural land at the place where this room is constructed. During day time at about 12.15 p.m. if he was present at his room to look after his field then his presence cannot be doubted. At this juncture we would like to consider legal aspect regarding the evidence of related witnesses and chance witnesses.

23. Hon''ble Apex Court in the case of Vikram Singh and others V. State of Punjab reported in , (2010) 3 SCC 56 has cited paragraph 3 of its earlier pronouncement in the case of Rana Pratap and Others V. State of Haryana reported in , 1983 (3) SCC 327 which reads as under:--

"There were three eye witnesses. One was the brother of the deceased and the other two were a milk vendor of a neighbouring village, who was carrying milk to the dairy and a vegetable and fruit hawker, who was pushing his laden cart along

the road. The learned Sessions Judge and the learned Counsel described both the independent witnesses as chance witnesses implying thereby that their evidence was suspicious and their presence at the scene doubtful. We do not understand the expression "chance witnesses". Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere chance witnesses". The expression "chance witnesses" is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are "chance witnesses" even where murder is committed in a street is to abandon good sense and take too shallow a view of the evidence."

Reference may also be made to the pronouncement of Hon"ble Apex Court in the case of Thangaiya V. State of Tamil Nadu reported in , (2005) 9 SCC 650 and the Hon"ble Apex Court has observed in para 8 which is reproduced as under:

"Coming to the plea of the accused that PW-3 was "chance witness" who has not explained how he happened to be at the a legged place of occurrence, it has to be noted that the said witness was an independent witness. There was not even a suggestion to the witness that he had any animosity towards the accused. In a murder trial by describing the independent witnesses as "chance witnesses" it cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence."

24. It is unbelievable that closely related witnesses would spare the real assailants and would falsely implicate the members of their own family in such a heinous crime that too without any reason for false implication.

25. The argument that PW-1 and PW-2 were related witnesses has absolutely no force in the peculiar facts of this case. Admittedly, the appellants and the deceased were the members of the same family pedigree. The grand father of the deceased Krishan Murari Pandey were three real brothers. His grand father was Daljeet Singh and Udai Singh was real brother of Daljeet Singh. Roop Singh

Pandey was son of Udai Singh and Man Singh was son of Daljeet Singh. Deceased Krishna Murari was son of Man Singh and the other three appellants are sons of Roop Singh Pandey. So any person who had any relationship with the deceased was also closely related with these appellants too. So in the peculiar facts of this case this ground of attack has no force.

26. A careful scrutiny of the testimony of PW-1 or PW-2 shows that both these witnesses have fully supported the case of the prosecution and they have faced the test of cross-examination successfully and nothing material could be extracted in their cross-examination to doubt their presence or their reliability. PW-1 Smt. Usha Pandey has stated in her evidence that her husband was aware that partition of the babool wood shall take place so she was also accompanying her husband. She has given such a natural reply and she has stated that during the altercation the accused persons were very angry but she never expected or anticipated that they shall kill her husband because they were of their own family. She has also stated that she had seen the accused persons before the altercation started at that time she was at a distance of about 5-6 paces. During cross-examination the Investigating Officer has also stated that PW-1 Smt. Usha Pandey was present with her husband and this statement has not been challenged by giving any suggestion that this part of the statement was wrong and it does not find place in the case diary. PW-2 Brahma Prakash has also fully supported the case of the prosecution. It has come in evidence of PW-1 and PW-2 that while the deceased was being given blows of axe then they stopped PW-1 Smt. Usha Pandey because they apprehended that she shall also be killed. PW-2 Brahma Prakash was also asked questions during cross-examination as to why he did not make any effort to save his maternal uncle. Then he has replied that he apprehended that accused persons shall also kill him if he intervened. This apprehension of the witnesses cannot be said to be baseless because the accused persons were brutally giving blows of axe to their own family member then any other person who was only related to the deceased would naturally apprehend the same consequences if he intervened. The fact that PW-1 Smt. Usha Pandey was stopped by PW-2 Brahma Prakash and Roop Singh Pandey was neither mentioned in the FIR nor this fact came into investigation and the place where she was caught hold by these persons has not been shown by the Investigating Officer in this site plan. It was not very important aspect and this fact has come only during cross examination of the witnesses. The witness PW-1 Smt. Usha Pandey herself has not considered this fact to be important to state during her examination-in-chief and it was extracted during cross-examination only. So it was not supposed to be mentioned in FIR. FIR is not an encyclopedia of the entire case of the prosecution.

27. The defence theory that the deceased was done to death in the intervening night of 7/8-01-2000 at some unknown place by some unknown persons because he was a criminal, has absolutely no legs to stand. The defence has come with a definite case that after the incident the FIR came into existence in consultation with Bankey Lal and on the behest of police they were falsely implicated in this

case. But in the entire evidence there is no suggestion as to why the police was inimical to them what was the enmity of the complainant with the appellants which worked as a motive for their false implication. In the statement under Section 313 Cr.P.C. none of the appellants has stated that he has been falsely implicated because of enmity. No such enmity could be suggested by any of the appellants. It has also come in evidence that the surviving appellants are the sons of deceased appellant Roop Singh Pandey. Roop Singh Pandey had two other sons namely Indrasen and Ganesh but no effort was made to implicate them as accused in the instant case. This fact also provides supports to the case of the prosecution that no effort was made to falsely implicate any innocent person.

28. The evidence of the Investigating Officer shows that the accused persons after the incident absconded and process under Sections 82 and 83 Cr.P.C. were procured. The attachment was executed on 28.01.2000. The other two appellants Chandrasen and Suryasen were arrested in Lucknow in a case of Railway Act. Vijay Singh was taken on police remand on 11.02.2000 and on his pointing out the recovery of weapons of offence was made on 12.02.2000. The appellants could not put any suggestion as to why the police in consultation with Bankey Lal got this FIR scribed and implicated them. So it is only a bald suggestion which does not find any support either from the evidence or from any other circumstances.

29. In defence D.W. -1 was produced to prove the alleged criminal history of the deceased which shows following cases against deceased: (i) Case Crime No. 128 of 1976, under Section 457 IPC, charge-sheet was filed, (ii) Case Crime No. 33 of 1993, under Sections 323, 504, 506 IPC, charge-sheet was filed. (iii) Case Crime No. 55 of 1983, under Section 379 IPC, charge-sheet was filed and (iv) Case Crime No. 82 of 1984, under Section 307 IPC, charge-sheet was filed. However the accused was acquitted. Deceased was not named accused in two cases. The incident of the instant case pertains to the year 2000 so two cases in which the deceased Krishna Murari Pandey was not named had taken place about 16 to 17 years prior to the registration of this case and likewise the case under Section 323 IPC was registered about 7 years prior to this incident. Case under Section 457 IPC was registered about 24 years prior to this case. So this huge time gap was considerably long to make any enmity, if any, on the basis of these minor cases to make it stale. So we are of the considered view that because of such long interval it cannot be presumed that any person for such offences after such a long gap would have killed the deceased Krishna Murari Pandey.

30. Great emphasis has been laid on the point that apart from the incised wounds there were some other injuries which were contusions on both thighs and on one arm. Such minor contusions may be result of fall or while he was being attacked he might have made an effort to save him and in that process he might have sustained blows by blunt part of axe. So presence of these contusions cannot be made a ground to disbelieve the otherwise reliable

testimony of the prosecution witnesses. PW-1 in her cross examination has stated that some axe blows were given from the other side. She has stated that blows were given from the side of its handle. It is argued that this fact was neither mentioned in the FIR nor was stated by the complainant in her statement. So it was an improvement and ought not to be believed. We are of the view that in the postmortem it is only the duration of death which is reported. The time as to when these contusions were caused whether it were caused in the same incident or the deceased had received these injuries prior to the incident, cannot be ascertained. No question was put to the doctor that the duration of these contusions was also the same which was the duration of death. So in our considered opinion it cannot be a ground to disbelieve the evidence of the two eyewitnesses.

31. It has also been argued that some houses of independent persons were there near the place of occurrence but none of them has been made a witness. It is true that some houses of other persons are situated near the place of occurrence but experience remind us that independent persons avoid to become witness in such cases as they do not want to invite enmity of the accused persons. On this point reference may be made to the pronouncement of Hon''ble Apex Court in the case of Shiv Ram v. State of U.P. , 1998 SCC Pg 149 wherein Hon''ble Apex Court has observed as under : Nowadays it is a common tendency that no outsider would like to get involve in a criminal case much less in the crime of present magnitude. Therefore it is quite natural that no independent witness will come forward to assist the prosecution. It is well settled that the evidence of witnesses cannot be discredited only on the ground that they are close relatives of the deceased persons but what is required in such situation is that the Court must scrutinize the evidence of such witnesses with utmost care and caution.

32. In another case Appa v. State of Gujarat, AIR 1988 SC Pg 698 Hon''ble Apex Court observed that "Experience reminds us that civilized people are generally insensitive when crime is committed even in their presence. They withdraw from both, victim and vigilant. They keep themselves away from the Court. They take crime as a civil dispute. This kind of apathy of general public is indeed unfortunate but it is everywhere whether in village life or town and city. One cannot ignore this handicap. Evidence of witnesses has to be appreciated keeping in view such ground realities. Therefore, the Court instead of doubting the prosecution case where no independent witness has been examined must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any suggested by the accused.

33. Hon''ble Apex Court in the case of Mano Dutt and Another v. State of Uttar Pradesh reported in , (2012) 4 SCC 79 has again occasion to consider this aspect and has observed in para 32 as under:

"32. Another argument with regard to the appreciation of evidence is that the material witness having not been examined and the entire prosecution story being based upon the statements of PW-1 and PW-2, who are the interested

witnesses, the entire prosecution evidence suffers from a patent infirmity in law. Again, we are not impressed by this contention, primarily for the reasons afore-recorded. Furthermore, it may also be noticed that non-examination of any independent witness, in the facts of the present case, is not fatal to the case of the prosecution."

Submission of the learned counsel for the appellant was that people of the vicinity have not been produced as witnesses. In the similar circumstances Hon'ble Apex Court in the case of Mohammad Mian v. State of Uttar Pradesh reported in , (2011) 2 SCC 721 has observed in para 21 as under:--

"21. Concededly, PW-6 did not record the statement of any of the persons of the immediate neighbourhood. He admitted to this fact in his cross-examination. We cannot, however, ignore the sad but basic truth that the so-called independent witnesses tend to stay away and are not willing to come forth as they often face grave consequences. The prosecution has therefore, perforce, to fall back on the testimonies of witnesses who are friends or family members of the victim."

So non-examination of other witnesses would not adversely affect the case of the prosecution and the same cannot be made a ground to disbelieve the otherwise reliable evidence of the witnesses produced by prosecution.

34. Therefore in our considered opinion the case of the prosecution was proved and the learned trial court has not committed any mistake in holding that the prosecution was successful in proving its case beyond reasonable doubt.

35. Now the last limb of the argument has to be considered. It has been argued that the offence committed by the appellants would fall within the purview of Section 304 part I IPC. On this point learned counsel for the appellants has placed reliance on the pronouncement of Hon'ble the Apex Court in the case of Arumugam V. State represented by Inspector of Police, Tamil reported in , 2009 (1) JIC 894 (SC) and has drawn our attention towards para 15. Relevant part of para 15 of the judgment which is being reproduced as under:--

"The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the fight occurring in Exception 4 to Section 300 IPC. is not defined in the I.P.C. it takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and

there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

(emphasis added by us)

36. Now to decide this question medical evidence is very material. The postmortem report shows that most of the incised wounds were given on the vital part of the body with deadly weapon like axe and blows were given with such a huge force that in almost all the injuries underlying bones were fractured. It is true that it is a case of sudden quarrel but in the instant case accused persons have acted with brutality and have taken undue advantage of such sudden quarrel. Eight incised wounds were caused to the deceased on vital parts.

37. In support of his submissions, learned counsel for the complainant Sri Anurag Shukla, has placed reliance on the pronouncement of Hon"ble Apex Court in the case of Mohd. Asif V. State of Uttaranchal reported in , 2009 (3) JIC 24 (SC) and has drawn our attention towards paragraphs Nos. 14 and 16 of the judgment which are being reproduced as under:--

"The question with regard to finding out the intention on the part of the accused to cause death depends upon the facts and circumstances of each case. No hard and fast rule can be laid down therefor. Section 300 of the Code provides that subject to the exceptions contained therein culpable homicide would be murder if the act by which the death is caused is done with the intention of causing death. Exception 1 thereto providing for a situation when culpable homicide is not murder. In terms of Exception 1, culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident. The said provision is, however, subject to the following:

First - That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.- That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.- That the provocation is not given by anything done in the lawful exercise of the right of private defence.

The Explanation appended thereto states that whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact. It is not a case of exercise of right of private defence. The provocation was not given by a thing done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant. The provocation, if any, was sought for by the offenders. In this case, appellant and Iqbal must be held to have known that it was so imminently dangerous that it

must, in all probability, cause death or such bodily injury as is likely to cause death.

What is meant by "imminently dangerous" which, in all probability, cause death or such bodily injury as is likely to cause death came up for consideration before this Court in *Virsa Singh v. State of Punjab*, 1958 CriLJ 818, wherein it was held:

(15)...We quote a few sentences earlier from the same learned judgment:

No doubt, if the prosecution prove and act the natural consequences of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with intent alleged.

That is exactly the position here. No evidence or explanation is given about why the appellant thrust a spear into the abdomen of the deceased with such force that it penetrated the bowels and three coils of the intestines came out of the wound and that digested food oozed out from cuts in three places. In the absence of evidence, or reasonable explanation, that the prisoner did not intend to stab in the stomach with degree of force sufficient to penetrate that far into the body, or to indicate that his act was regrettable accident and that he intended otherwise, it would be perverse to conclude that he did not intend to inflict the injury that he did. Once that intent is established (and no other conclusion is reasonably possible in this case, and in any case it is a question of fact), the rest is a matter for objective determination from the medical and other evidence about the nature and seriousness of the injury."

A bench of this Court in *Kesar Singh and Anr. v. State of Haryana*, 2008(6) SCALE 433 applied the standard laid down in *Virsa Singh* (supra) to hold:

To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300, "thirdly":

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

Once these four elements are established by the prosecution (and, indisputably, the burden is on the prosecution throughout) the offence is murder under

Section 300, "thirdly". It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury is actually found to be proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death....

Applying the aforementioned principles, we have no doubt in our mind that it is not a case which attracts the provisions of Section 304 Part II of the IPC or Section 326 thereof

It is not a case where the intervening ailment was wholly unconnected with the injury. On the other hand, in *Manubhai Atabhai V. State of Gujarat*, AIR 2007 SC 2437, this Court clearly held:

Merely because a single blow was given that does not automatically bring in application of Section 304 Part I IPC.

We, therefore, are of the opinion that the appellant has rightly been found guilty of commission of an offence under Section 302 of the IPC."

38. Therefore, when we go through the injuries caused by the appellants in the instant case the conclusion is irresistible that the injuries were caused with an intention to kill. Intention of the accused has to be gathered from the weapon used part of the body hit and the force which was applied in giving such blows. When we applied these tests in the instant case then it leads to the only conclusion that the blows were given to the deceased with an intention to kill. Reference on this point may be made to the pronouncement of Hon''ble Apex Court in the case of *Jage Ram and Others V. State of Haryana* reported in (2015) 11 SCC 366 and has observed in para 12 of the said judgment. Relevant part of para 12 of the judgment is being reproduced as under:--

"it is not essential that fatal injury capable of causing death should have been caused. Although the nature of injury actually caused may be of assistance in coming to a finding as to the intention of the accused, such intention may also be adduced from other circumstances. The intention of the accused is to be gathered from the circumstances like the nature of the weapon used, words used by the accused at the time of the incident, motive of the accused, parts of the body where the injury was caused and the nature of injury and severity of the blows given, etc."

39. Reference on this point may be made to the pronouncement of Hon''ble Apex Court in the case of *Swarn Kaur V. Gurumukh Singh & Others* reported in , (2013) 12 SCC 732 and has drawn our attention towards para 41 of the judgment. Relevant part of para 41 is being reproduced as under:--

"intention is always lodged in the mind of the accused but, to gather the intention one of the relevant factors which the court looks into is the nature of injury inflicted on the deceased."

40. Keeping in mind the nature of several injuries, we are of the view that intention of the accused persons was to cause death of Krishna Murari and they all shared a common intention and have acted in furtherance of their common intention and caused his death.

41. After going through the entire evidence and the impugned judgment, we are fully satisfied that the learned trial court has rightly held the case of the prosecution to be proved and has rightly convicted the appellants. So the appeal has absolutely no force and deserves to be dismissed. This appeal is hereby dismissed. All the appellants are in custody. They shall serve out their sentence as imposed by the learned trial court.

42. Since the appellants have remained in custody for about 16 years, therefore, we hope and trust that the jail authorities shall immediately move the Government for commutation of their sentence. Competent authority shall take decision thereon, in accordance with law within a period of two months thereafter in exercise of powers under Section 433 Cr.P.C.

43. Office is directed to certify this judgment forthwith to the court concerned and to send back the lower court record to ensure compliance.