

(2010) 12 OHC CK 0021

In the Orissa High Court

Case No : Criminal Appeal No's. 183 of 1998 and G.A. No. 29 of 2001

Santosh Kumar Das

APPELLANT

Vs

State of Orissa
 State of Orissa Vs Tulu @ Tulasi
Prasad Das and Others

RESPONDENT

Date of Decision : 22-12-2010

Acts Referred:

Penal Code, 1860 (IPC) — Section 141, 147, 148, 149, 302

Citation : (2011) 1 OLR 426 Supp

Hon'ble Judges : Pradip Mohanty, J;B.K. Patel, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.K. Patel, J.—All the five appeals are directed against the judgment and order passed by the learned Sessions Judge, Kalahandi-Nuapada at Bhawanipatna in S.C. No. 78 of 1996. Altogether eight accused persons were facing charges under Sections 147, 148, 324 read with 149, 307 read with 149 and 302 read with 149 I.P.C. before the learned trial court.

2. By the impugned judgment Appellants Rudra Prasad Das, Rohit Barik and Manatu @ Dayanidhi Barik were convicted under Sections 302 read with 34 I.P.C. and were sentenced to undergo imprisonment for life. Appellants Rohit Barik and Santosh Kumar Das were convicted under Sections 307 read with 34 I.P.C., whereas Appellant Sisir Choudhury was convicted u/s 307 I.P.C. Appellants Santosh Kumar Das and Sisir Choudhury were sentenced to undergo R.I. for five years each but no sentence was awarded to Appellant Rohit Barik u/s 307 I.P.C. in view of sentence awarded to him under Sections 302 read with 34 I.P.C. Accused Ratan Kumar Agarwal, who is one of the Respondents in the Government Appeal, was convicted u/s 324 I.P.C. and was sentenced to undergo imprisonment for the period already undergone by him as an under trial prisoner. However, accused persons Tulu @ Tulasi Prasad Das and Debe @ Debendra Majhi were acquitted of all the charges.

Appellants Santosh Kumar Das, Manatu @ Dayanidhi Barik, Sisir Choudhury, Rohit Barik and Rudra Prasad Das have preferred the criminal appeals assailing their conviction and sentence whereas in G.A. No. 29 of 2001, State has assailed acquittal of Respondents Ratan Kumar Agarwal, Sisir Choudhury and Santosh Kumar Das of the charge under Sections 302 read with 149 I.P.C. and acquittal of Tulu @ Tulasi Prasad Das and Debe @ Debendra Majhji of all the charges.

3. Prosecution case is as follows:

Accused persons and deceased-Kaushik Singal belong to occurrence village Ladugaon. Occurrence took place at about 9.00 P.M. on 17.7.1996, the day of Rathayatra, i.e., Car Festival.

Prior to the Rathayatra there was difference of opinion among the villagers as regards the place at which Deities would be kept between the period from Car Festival and return Car Festival. Villagers wanted that Deities would be kept in the house of one Paban Agarwala whereas accused persons Ratan, Sisir and Santosh opposed such decision.

Occurrence started when injured Ramesh Ku. Agarwala (P.W.9) was returning from his rice mill along with informant Jaya Kiran Agarwala (P.W.1). Accused persons Sisir and Ratan approached them from opposite side. As soon as they reached near the house of one Amar Sing Agarwala, accused Sisir all of a sudden dealt tangi blow on P.W.9's chest. When accused Ratan attempted to deal blow by means of tangi on P.W.9's head, he caught hold of his hand in order to ward off the blow. In that process accused Ratan fell down on the ground. P.W.9 left the place and ran towards his house. P.W.1 snatched away the tangi which accused Ratan was holding.

Hearing hulla, the deceased, who was aged about 15 to 16 years, as well as Rakesh Sharma (P.W.2), Padmasen Agarwala (P.W.5) and some co-villagers came to the spot. Seeing them accused persons Ratan and Sisir raised alarm exhorting co-accused persons to come forward in order to commit murder of P.W.9's men by saying "RAMESH RA LOKA KU MURDER KARMA ASHA". Co-accused persons Tulasi, Rudra, Debe, Manatu, Rohit and Santosh came to the spot being armed with tangis and attacked the deceased. Accused Rudra dealt a tangi blow on deceased's head whereas accused persons Manatu and Rohit dealt tangi blows on deceased's both hands. Deceased sustained injuries, fell down and died at the spot.

P.W.5 made an attempt to come to the rescue of the deceased. However, accused persons Rohit and Santosh dealt tangi blows on his head and hands. P.W.2 also sustained injuries due to assault. However, P.W.2 snatched away the tangi which accused Deba was holding.

Occurrence was visible due to availability of electric light at the spot.

After the occurrence P.W.1 and other injured persons started for the hospital for treatment in a truck. However, accused persons being armed with tangis and

lathis blocked their way. They had to go to the house of retired pharmacist in the village for availing first aid.

P.W.1 had to take a round about way to Koksora P.S. where he lodged First Informant Report Ext.1 before the Officer-In-Charge (P.W.16) at about 11.00 P.M. P.W.16 registered the case and took up investigation.

P.W.6 visited the spot in the night of occurrence. In course of investigation, dead body of the deceased was subjected to inquest and post-mortem examination. Seizure of tangis and other articles was effected. Witnesses were examined. On 29.7.1996 the Circle Inspector of Police, Dharmagarh (P.W.17) took charge of the investigation. On completion of investigation, charge-sheet for alleged commission of offences under Sections 147, 148, 324, 307, 302/149 of the I.P.C. was submitted.

4. On consideration of materials on record, charge was framed against all the accused persons under Sections 147, 148, 324 read with 149, 307 read with 149, and 302 read with 149 of the I.P.C. In addition, charge under Sections 302 read with 34 of the I.P.C. was framed against accused persons Rudra, Rohit and Manatu @ Dayanidhi, charge under Sections 307 read with 34 of the I.P.C. was framed against accused persons Rohit and Santosh; charge u/s 307 of the I.P.C. was framed against accused Sisir; and charge u/s 324 of the I.P.C. was framed against accused Ratan.

5. Defence plea is one of complete denial.

6. In order to substantiate the charge, prosecution examined seventeen witnesses. P. Ws.1, 2, 5, 9, 16 and 17 have already been introduced. Out of them, P. Ws.1, 2, 5 and 9 are injured eye witnesses. P. Ws.3 Bajarang Agarwala and 6 Rama Abatar Agarwala are seizure witnesses. P.W.4 Dinabandhu Agarwala is a witness to inquest.. P.W.7 Dr. Baishnab Charan Sahu medically examined P.W.5. P.W.13 Dr. Sugyani Satapathy conducted post-mortem examination over the dead body of the deceased as well as medically examined P. Ws.1, 2, 9 and one Chandanlal Sharma. Other witnesses are police personnel. Of them, P.W.8 Havildar Baibasuta Naik accompanied the dead body to the hospital and was a witness to seizure of wearing apparels of the deceased. P. Ws. 10 Santosh Kumar Nayak, 11 Y. Jagannath Rao, 12 Arun Kumar Jena, 14 Ramachandra Behera and 15 Kishore Kumar Patra arrested some of the accused persons on the strength of requisitions received from Investigating Officers. P.W.14 appears to have seized a tangi on production of accused Rudra. Prosecution also relied upon documents marked exhibits. 1 to 42 and material exhibits M.O.I to XIII.

One Dr. M. Bijaya Gopal was examined on behalf of defence as D.W.1. Also, medical prescription Ext. A issued by D.W.1 was admitted into evidence.

7. In assailing the impugned judgment and order, following contentions were raised by the learned Counsel appearing for the Appellants:

(i) Occurrence took place during night time when it was dark. Prosecution

evidence regarding availability of any source of light is vague and inconsistent. There was admitted factionalism in the village. In the absence of cogent evidence indicating that place of occurrence was not dark, learned court below should not have accepted prosecution evidence ascribing specific overt acts to the accused persons towards commission of the alleged offences.

(ii) Though medical evidence available from P.W. 13 reveals that deceased had sustained six external injuries out of which only injury Nos. (i) and (ii) were on the head, only Appellant Rudra Prasad Das was stated to have dealt a blow on deceased's head by means of tangi. Injury Nos. (iii) to (vi) were on palms, right index finger and left forearm and were not fatal. Prosecution has not led evidence to indicate that any of the injuries by itself was fatal. It is evident that only injury No. (ii) i.e. incised wound on left parietal bone with absence of a portion of parietal bone exposing the membrane was serious. There is no evidence indicating the authorship of injury No. (ii). In the absence of any evidence indicating that all the accused persons harboured any common object towards commission of the alleged offences, all of them were acquitted of the charge under Sections 147, 148 and 149 I.P.C. However, the learned trial court has convicted Appellants Rudra Prasad Das, Manatu @ Dayanidhi Barik and Rohit Barik u/s 302 with aid of Section 34 I.P.C. without any evidence on record to indicate that the Appellants had common intention to commit murder of the deceased. Prosecution has failed to prove which of the accused caused fatal wound on the deceased or that all of them had common intention to commit murder. At the worst evidence on record indicates that the above three Appellants were guilty of causing injuries on the deceased without any intention to commit his murder.

(iii) There is no evidence on record to conclude that Appellants Rohit Barik and Santosh Kumar Das attempted to commit murder of any of the injured persons. Medical evidence does not indicate that there was any attempt on the life of any of the injured persons.

(iv) In the absence of evidence establishing motive on the part of the Appellants to commit the alleged offences, the learned trial court should not have believed the allegation that the Appellants were inimical towards the deceased or injured persons.

(v) Adverse inference ought to be drawn against the prosecution for suppression of material witnesses including the person stated to have sustained injuries in course of occurrence. Partisan evidence of P. Ws. 1, 2, 5 and 9 should not have been made the basis of findings recorded by the learned trial court.

(vi) The learned court below has failed to take note of contradictions in the evidence of witnesses as well as inconsistencies between ocular testimony and medical evidence.

8. Learned Counsel appearing for the State strenuously contended that evidence of material eye witnesses informant P.W.1 and injured persons P. Ws.2, 5 and 9

corroborated by contents of the F.I.R. Ext.1, medical evidence available from P. Ws.7 and 13 and post-mortem examination report and injury reports prepared by them as well as other circumstances including seizure of weapons of offence clearly establish all the charges framed against the accused persons. It was argued that Appellants Rudra Prasad Das, Manatu @ Dayanidhi and Rohit Barik have rightly been convicted under Sections 302 read with 34 I.P.C. In support of the Government Appeals it was contended that evidence on record conclusively established that all the accused persons being armed with axes and other weapons combined together to launch an attack on the deceased and injured persons causing injuries on them indiscriminately. Fatal and serious injuries were inflicted. Therefore, all the accused persons are liable to be convicted under Sections 302 read with 34 I.P.C. as well as 307 read with 34 I.P.C.

9. It is not disputed that death of the deceased was homicidal in nature. In course of post mortem examination over the dead body of the deceased by P.W. 13, the deceased was found to have sustained following injuries:

(i) Incised wound measuring 6" x 1" x 3/4" over the right parietal bone close to the vertex with involvement of bone.

(ii) Incised wound measuring 5" x 2 1/2" x 1" situated obliquely from the vertex to down words over the left parietal bone with absence of portion of parietal bone of size 2" diameter, the membrane was visible.

(iii) One incised wound measuring 2" x 1 1/2" x 1" over the dorsum of right palm obliquely situated over the first metacarpal bone with inverted clean edges.

(iv) One lacerated wound over the dorsum of right index finger measuring 1" x 1/2" x with cut off terminal phalanx.

(v) Incised wound with clean edges over the middle of left palm measuring 2" x 2" x 3/4" with cut off first, second and 3rd metacarpal bones.

(vi) One incised wound over the dorsum left forearm 1" above the wrist joint obliquely placed measuring 3" x 3/2" x 2" with clean edges, with the complete cut off shaft of radius and ulna. Only skin was intact ventral aspect.

In answer to query made by the I.O. P.W. 13 opined under report Ext.23 that all the six injuries could combinedly cause death of a person in ordinary course of nature and that injury Nos. (i), (ii), (iii) and (vi) alone could cause death of a person. The injuries were caused by sharp cutting weapon like tangi M.O. I.

10. Injured-informant P.W. 1 was found by P.W. 13 to have sustained the following injuries:

(i) One incised wound over the dorsum of first inter phalangeal joint of index finger of right hand.

(ii) Incised wound over dorsum of first inter-phalangeal joint of middle finger of right hand.

(iii) One bruise measuring 3" x 1" over the middle of right buttock.

P.W. 13 testified that injury Nos. (i) and (ii) were possible if the injured snatched the tangi like M.O. I. from hand of the assailant and the sharp portion of the tangi came in contact on that part of the body.

11. P.W. 13 also examined injured P.W. 2 and found a simple injury on the left calf which could have been caused by sharp cutting weapon.

12. On medical examination of the injured P.W. 9 by P.W. 13, a simple injury on the left side of chest caused by sharp instrument was found.

13. P.W. 13 also appears to have examined one Chandanalal Sharma who has not been examined by the prosecution and to have found a simple injury over medial line of left eyebrow which might have been caused by sharp cutting weapon.

14. Injured P.W. 5 was examined by P.W. 7 and was found to have sustained following injuries:

(i) Lacerated wound situated over the right occipito parietal region measuring 3 1/2" x 1/2" x 1/2".

(ii) Lacerated wound situated just in front of injury No. (i) measuring 1" x 1/2" x 1/2".

(iii) Incised wound eleptical in shape clean cut margin over the temporo parietal region of the skull on the left side measuring 2" x 1/2" x 1/2".

(iv) Incised wound clean cut margin on the left side of the zygomatic bone measuring 2" x 1/2" x 1/2".

(v) Deep incised wound over right forearm 2" above the wrist cutting muscle, fascia, skin and ulna bone with fracture of radius, causing deformity and loss of function.

(vi) Multiple incised wounds out of which two were situated over the right outer aspect of little finger measuring 1/4" x 1/2" x 1/2".

(vii) Bruises on the left side of forehead and eye brow measuring 2" x 1/2" x 1/2".

According to P.W. 7 injury Nos. (iii), (iv), (v), and (vi) might have been caused by sharp cutting weapon like tangi and other injuries might have been caused by hard and blunt weapon like lathi or torch light. It does not appear from the evidence of P.W. 7 that any of the injuries except injury No. (v) was grievous in nature. However, in course of cross-examination P.W. 7 testified that all the injuries on the head were simple in nature excepting injury No. (v) on the forearm and that he had given his opinion that injury No. (v) was simple one.

15. Admittedly, P. Ws. 1, 2, 5 and 9 are the four material witnesses examined by the prosecution. Informant P.W.1 testified that there was difference of opinion

among the villagers regarding place in which Deities were to be kept during the period from Car Festival to return Car Festival. He deposed that villagers wanted the Deities to be kept in the house of one Paban Agrawala instead of the place in which the Deities were kept earlier. However, Appellants Ratan, Santosh and Sisir objected to such decision in the meeting held on 16.7.1996.

P.W.1 alleged that occurrence took place at about 9.00 P.M. on 17.7.1996 when he alongwith P.W.9 were returning home from P.W.9's mill. When they reached in front of house of one Amarsingh Agrawala they found accused persons Sisir and Ratan proceeding from the opposite direction. All of a sudden, Appellant Sisir dealt tangi blow on P.W.9's left side chest causing severe bleeding injury. Accused Ratan raised his tangi in order to assault P.W.9 on his head and P.W.9 caught hold of Ratan's hands to ward off blow as a result of which Ratan fell down on the ground. It was asserted by P.W.1 that he snatched away the tangi M.O.I from accused Ratan's hands in course of which he sustained injuries on his fingers of right hand and buttock.

Hearing hulla deceased arrived there being followed by P.W.2 and P.W.5 and others. At that time accused Ratan and Appellant Sisir loudly asked to join them to kill the persons belonging to P.W.9's group (Aso Ramesh Ro Lokaki Murder Karma). At that time Appellants Rudra, Manatu, Rohit and Santosh as well as co-accused Tulu @ Tulasi and Debe @ Debendra arrived there. After their arrival at the spot Appellant Rudra attacked the deceased by means of tangi and gave a blow on deceased's head. Appellants Rohit and Manatu also dealt tangi blows on both the hands of the deceased. When P.W.5 intervened in order to rescue the deceased, he was assaulted by Appellant Rohit on his head by means of the handle of a tangi and by Appellant Santosh on his head by means of a tangi. A tangi blow was also dealt on P.W.2's leg.

P.W.1 asserted that seeing the blood and when people started coming to the spot, he returned home with the tangi M.O.I.

It was further asserted by P.W.1 that at the time of occurrence the light of nearby houses were burning for which he was able to see the occurrence clearly.

He proceeded on a motorcycle to Koksara police station on another route and not on the usual way which was blocked by the accused persons, scribed F.I.R. Ext.1 and handed it over to P.W.16. P.W.16 examined him and proceeded to the spot. Next morning P.W.1 produced tangi M.O.I before P.W.16 upon which it was seized under seizure list Ext.2.

Evidence of P.W.1 has not been discredited in any manner in course of cross-examination. It appears that in his cross-examination P.W.1 deposed that the deceased was aged about 14 to 15 years by the time of his death and that he was not concerned with the dispute regarding the place in which Deities were to be kept.

16. It appears from the F.I.R. Ext.1 and also it is in the evidence of P.W.16 that

F.I.R. was received and registered at 11.00 P.M. on the date of occurrence. It is alleged in the F.I.R. that though Deities were kept in earlier years in the house of one Mura Dandasena, villagers decided during the year of occurrence that Deities would be kept in the house of one Paban Agrawala during the period from Car Festival to return Car Festival. However, decision of the villagers was opposed by Appellants Ratan, Sisir and Santosh. P.W.9 happens to be one of the prominent gentlemen of the village. After the Car Festival when P. Ws. 1 and 9 were returning from the side of P.W.9's mill, Appellant Sisir and accused Ratan attacked in order to kill P.W.9. Appellant Sisir dealt tangi blow on P.W.9's chest whereas accused Ratan raised tangi in order to assault on P.W.9's head. However, P.W.9 caught hold of Ratan's hand. In the process Ratan fell down P.W.9 ran towards his house. P.W.1 snatched away the tangi which accused Ratan was holding. Hearing noise deceased as well as P.W.2, P.W.5, Lalit Sharma, Chandan Sharma, Amarsingh Agrawala and Durga Prasad Agrawala arrived at the spot. At that time Ratan and Sisir shouted others to come in order to kill the persons belonging to P.W.9's group upon which Appellants Rudra, Manatu, Rohit and Santosh as well as co-accused Tulasi and Debe came to the spot with tangis and launched an attack. Appellant Rudra dealt tangi blow on deceased's head whereas Appellants Manatu and Rohit dealt tangi blows on deceased's hands as a result of which deceased sustained injuries and died at the spot. When P.W.5 made an attempt to intervene in order to rescue the deceased, Appellants Rohit and Santosh assaulted him by means of tangis on his head and hands causing serious injuries. P.W.2 also sustained injuries when he tried to rescue the deceased. It has also been stated in the F.I.R. that the informant could see the entire occurrence as there was electric light. Thus, evidence of P.W.1 is materially corroborated by the contents of F.I.R. lodged soon after the occurrence. Medical evidence available from the evidence of P.W.13 adverted to above is also consistent with the evidence of P.W.1.

17. Injured P.W.9 also deposed regarding objection by Appellants Ratan, Sisir and Santosh to the decision of the villagers to keep the Deities in the house of Paban Agrawala. He testified that the occurrence took place on the road when he alongwith P.W.1 was returning to their respective houses from his rice mill at about 9.00 P.M. When they reached near the house of Amar Agrawala P.W. 9 found Appellant Sisir and accused Ratan coming from the opposite direction. All on a sudden, Appellant Sisir dealt tangi blow on his left side chest as a result of which he sustained bleeding injury. In the said process accused Ratan was trying to deal a tangi blow on his head but he caught hold of Ratan's right hand in order to ward off the blow. Accused Ratan fell down on the ground. P.W.9 stated to have gone to his house out of fear. Thus, evidence of P.W.9 is limited to that part of the occurrence which took place prior to arrival of deceased and other co-villagers as well as other accused persons. There is nothing in the cross-examination of P.W.9 to find any infirmity in his allegations relating to part played by Appellant Sisir in inflicting injury on his chest. As has been stated earlier, in course of medical examination, P.W.9 was found to have sustained simple injury

on his left side chest caused by sharp instrument. P.W.9 denied the suggestion made in course of cross-examination that he used to vehemently insist that Deities would be kept in the house of Paban Agrawala.

18. P.W.2 deposed to have reached the spot alongwith Chandan Sharma after hearing hulla from the side of the house of Amarsingh Agrawala. He categorically testified that at that time there was electricity in the village and the light from the nearby houses was burning for which there was light on the road. He found P.W.1 standing near the house of Amarsingh, accused Ratan assaulting the deceased by means of fist blows whereas other accused persons attacking the deceased by raising tangis which they were holding. It was specifically alleged by him that Appellant Rudra dealt a tangi blow on the deceased's head whereas Appellants Rohit and Manatu dealt tangi blows on deceased's hands. He vaguely alleged that accused Ratan was assaulting the deceased by fist blows which assertion does not find support from any other witness. After receiving the blows deceased fell down on the ground. When P.W.5 tried to physically intervene in order to rescue the deceased, Appellant Rohit raised tangi in order to assault on his head. However, P.W.5 in order to ward off the blow raised both his hands with the torch light which he was holding. The tangi blow fell on the torch light and the wooden handle of the axe came in contact with P.W.5's head. Appellant Santosh dealt a tangi blow on P.W.5's right hand. P.W.5 went to the house of Amarsingh Agrawala and fell down there. P.W.2 testified to have watched the occurrence from a distance of about 5 to 6 cubits from the place of occurrence. P.W.2 further deposed that apprehending that P.W. 5 would be further assaulted by the accused persons he went near them. One of the accused persons dealt a tangi blow on his left leg from behind causing bleeding injury. It was further deposed by him that when one Chandan Sharma came close to him in order to prevent further assault, Appellant Sisir dealt tangi blow on his left side forehead causing bleeding injury. P.W.2 snatched away the tangi M.O.II from Appellant Debe. Thereafter he and Chandan Sharma entered into the house of Amarsingh. P.W.2 deposed to have seen that some other villagers were standing on the verandah of the house of Amarsingh. At about 10.30 P.M., P.W.5 and Chandan Sharma boarded a truck in order to go to hospital for treatment. Accused persons being armed with tangis blocked the road. They had to return home. On his production tangi M.O.II was seized by police next day under seizure list Ext.3. Evidence of P.W.2 to have sustained injuries on left calf caused by sharp cutting weapon is corroborated by evidence of P.W.13. Material part of evidence of P.W.2 also appears to be without any embellishment.

19. Injured P.W.5 stated that at about 9.00 P.M. on the date of occurrence he was standing with the deceased on the road in front of his house. At that time P. Ws.1 and 9 were returning from the side of rice mill. When they reached near the house of Amarsingh Agrawala accused Ratan and Appellant Sisir attacked P.W.9. On hearing hulla he and deceased went to the spot. At that time Ratan and Sisir called their friends hearing which other accused persons being armed with tangis came to the spot in a group. Out of fear deceased started to run

away. However, all the accused persons being armed with tangis started attacking the deceased. It was testified by P.W.5 that except accused Ratan all other accused persons were armed with tangis. Appellant Rudra dealt tangi blow on deceased's head whereas Appellants Rohit and Manatu dealt tangi blows on deceased's hands. Deceased sustained bleeding injuries and fell down on the ground. When P.W.5 followed the deceased in order to save him from the attack, accused persons combinedly attacked him. Appellant Rohit dealt a tangi blow on his head and Appellant Santosh dealt a tangi blow on his right forearm. P.W.5 fell down on the ground. When P.W.2 and Chandan came in order to rescue him they were also assaulted by the accused persons by means of tangis. P.W.5 got up and went to the old house of P.W.9. After sometime P.W.5 as well as P.W.2 and Chandan were taken in a truck in order to go to Koksara hospital but on the way the accused persons in a group damaged the truck. They could not go to the hospital. They received treatment from a Pharmacist in the village. He deposed to have received treatment subsequently in District Headquarters Hospital, Bhawanipatna as well as in Seven Hills Hospital at Bisakhapatnam. Medical evidence of P.W. 7 referred to above corroborates evidence of P.W.5 to have sustained incised and lacerated wounds as well as bruises. There is nothing in the cross-examination of P.W.5 to disbelieve his testimony.

20. In the very F.I.R. itself, at the earliest, it was pointed out that the informant could see the entire occurrence as there was electric light. In his deposition also informant P.W.1 reiterated that he could be able to clearly see the occurrence due to availability of light from the nearby houses. Evidence of P.W.2 reveals that he watched the occurrence from a very close distance and there was availability of light at the spot from nearby houses. Witnesses and co-accused persons are co-villagers and closely known to each other. There being nothing on record to support the contention regarding want of sufficient light so as to make identification of the assailants improbable, contention raised on behalf of the Appellants in this regard is without merit.

21. Though, admittedly, other villagers who witnessed the occurrence were also present near the scene of occurrence and one Chandanalal Sharma also sustained injuries in course of occurrence, non-examination of Chandanalal Sharma or any other witness has no serious impact on the prosecution case which has been unfolded by injured eye-witnesses P. Ws. 1, 2, 5 and 9. Prosecution is required to examine all material witnesses whose evidence is necessary for unfolding of the narration on which prosecution is based. Narration of the entire prosecution case having been unfolded by P. Ws.1,2, 5 and 9, prosecution cannot be held to be guilty of suppression of any material witnesses. In appreciating the evidence of P. Ws.1, 2, 5 and 9 it has to be borne in mind that they are injured witnesses.

22. Evidence on record does not conclusively establish that the eight accused persons who faced trial combinedly committed the alleged offences. No specific overt act was ascribed to some of them in assaulting the deceased or any of the injured persons. Though accused persons Tulu @ Tulasi Prasad Das and Debe @

Debendra Majhi were also alleged to have come to the spot of occurrence holding tangis on being exhorted by accused Ratan and Appellant Sisir, it is also in the evidence that not only other co-accused persons but also many villagers including the deceased assembled at the spot hearing commotion which took place when P.W.9 was assaulted by Ratan and Sisir. Also, accused persons Tulu @Tulasi and Debe @ Debendra are not alleged to have assaulted either the deceased or any of the injured persons. P.W.5 simply testified that accused Ratan and Appellant Sisir called their friends upon which other accused persons came to the spot. He did not depose that Appellants Ratan and Sisir exhorted co-accused persons to come to the spot in order to kill persons belonging to P.W.9's group. P. Ws. 2 and 9 did not testify that other accused persons were called by accused Ratan and Appellant Sisir.

23. So far as the first part of the occurrence regarding assault on P.W.9 is concerned, admittedly no other accused person except Ratan and Sisir were alleged to be present at the spot. No other accused person except accused persons Rudra, Rohit and Manatu were alleged to have assaulted the deceased by means of tangis. Evidence on record does not indicate that all the accused persons or even any five of them were laying in wait being armed with lethal weapons with any of the common objects enumerated u/s 141 I.P.C. In such circumstances, there appears no infirmity in the impugned judgment acquitting the accused persons of the charges under Sections 147 and 148 of I.P.C. or not convicting the accused persons with the aid of Section 149 I.P.C..

24. It is in the evidence that P.W.1 sustained injuries on his palm while snatching away tangi M.O.I from accused Ratan who was making an attempt to deal a blow on P.W.9. Evidence of injured P.W.1 is corroborated by medical evidence. Therefore, there is also no infirmity in holding accused Ratan guilty of commission of offence u/s 324 I.P.C..

25. Injured P.W.5 himself deposed that Appellants Rohit and Santosh assaulted him causing severe injuries. Such evidence finds support not only from the evidence of P. Ws. 1 and 2 but also from medical evidence from which it is gathered that P.W.5 sustained grievous injuries including injuries on head. There was deep incised wound over right forearm 2" above the wrist cutting muscle and bone and fracture of bone resulting in deformity and loss of function. Therefore, it has been rightly held that the prosecution has established charge under Sections 307 read with 34 I.P.C. against Appellants Rohit and Santosh beyond reasonable doubt.

26. So far as Appellant Sisir is concerned, the only specific overt act alleged against him was that he dealt a tangi blow on P.W.9's left side chest. Medical evidence of P.W.13 indicates that P.W.9 was found to have sustained a simple skin deep injury. There is no allegation that Appellant Sisir attempted to deal any other blow on P.W.9. Therefore, in absence of any material on record, there is no basis to sustain the finding that Appellant Sisir attempted to commit P.W.9's murder and is guilty of commission offence u/s 307 I.P.C. However, in view of the

overt act of assault on P.W.9, he cannot escape the liability of commission of offence u/s 324 I.P.C.

27. So far as offence u/s 302 I.P.C. is concerned, no other accused except Appellants Rudra, Rohit and Manatu was alleged to have assaulted the deceased. P. Ws. 1,2 and 5 alleged that Appellant Rudra dealt blow by means of tangi on deceased's head whereas Appellant Rohit and Manatu dealt tangi blows on the hands of the deceased. In course of post-mortem examination by P.W.13 deceased was found to have sustained two incised wounds on the head as narrated above. Though injury No. (i) indicated involvement of bone, obviously injury No. (ii) involving absence of portion of parietal bone was more serious. Though P.W.13 opined that all the six injuries could combinably cause death and that injury No. s (i), (ii), (iii) and (vi) alone could cause death of a person, prosecution could have done well to seek opinion from P.W.13 as to whether any of the injuries could individually cause death of the deceased. Injury No. (iii) was on the right palm and injury No. (vi) was on the left forearm. Thus, there is no clinching evidence to indicate that Appellant Rudra was the author of injury No. (ii). Lack of evidence regarding second blow on deceased's head indicates that blows were dealt on the deceased in quick succession. In such circumstances, it is not safe to conclude that any of the Appellants Rudra, Rohit and Manatu assaulted the deceased with intention or knowledge required to constitute offence of murder u/s 302 I.P.C. However, it is amply established that Appellant Rudra dealt tangi blow on the deceased's head with intention of causing such bodily injury which was likely to cause death and thereafter Appellants Rohit and Manatu also indiscriminately dealt tangi blows on the deceased. In such circumstances, Appellants Rudra, Rohit and Manatu are liable to be convicted for commission of offence under Sections 304 Part-I read with 34 I.P.C. instead of offence under Sections 302 read with 34 I.P.C.

28. Save and except alleging that accused persons Tulu @ Tulasi and Debe @ Debendra also came to the spot being armed with tangis, no overt act of assault has been attributed to either of them. Admittedly, many villagers also gathered at the spot hearing noise after assault on P.W.9. Prosecution is found to have failed to establish that accused persons had any common object to commit the alleged offences. In such circumstances, there is no scope to infer that presence of accused persons Debe and Tulu by itself was culpable. There is no infirmity in the finding of the learned trial court that prosecution has not been able to establish any of the charges against said accused persons.

29. Thus, on analysis and reappraisal of the evidence on record it is found that there is no infirmity in the impugned judgment acquitting Tulu @ Tulasi and Debe @ Debendra of the charges and acquitting all the accused persons of the charge under Sections 147, 148 and 149 I.P.C. Also, there is no scope to interfere with conviction of accused Ratan u/s 324 I.P.C. and Appellants Rohit and Santosh under Sections 307 read with 34 I.P.C. However, Appellant Sisir is liable to be convicted u/s 324 I.P.C. instead of Section 307 I.P.C. and Appellants Rudra, Rohit

and Manatu are liable to be convicted for commission of offence under Sections 304-I read with 34 I.P.C. instead of 302 read with 34 I.P.C.

30. In view of the above, while setting aside conviction of Appellants Rudra, Rohit and Manatu for commission of offence u/s 302 I.P.C. and convicting them under Sections 304-I read with 34 I.P.C. they are sentenced to undergo R.I. for ten years each thereunder. Also, while setting aside conviction of Appellant Sisir for commission of offence under Sections 307 read with 34 I.P.C. and convicting him u/s 324 I.P.C. he is sentenced to undergo R.I. for one year thereunder. However, order of the learned trial court sentencing Appellants Rohit and Santosh to undergo R.I. for five years for commission of offence under Sections 307 read with 34 I.P.C. is confirmed. Learned trial court has sentenced accused Ratan to undergo R.I. for the period already undergone as an under trial prisoner for commission of offence u/s 324 I.P.C. in view of defence evidence to the effect that he is a mentally challenged person. We find no reason to interfere with the sentence awarded to accused Ratan. The impugned judgment and order are modified accordingly.

31. In the result, Government Appeal filed by the State is dismissed and Criminal Appeals filed by Appellants Rudra, Manatu, Rohit and Sisir are allowed in part to the extent indicated above. Criminal Appeal filed by Appellant Santosh is dismissed.

Pradip Mohanty, J.

I agree.