

(2014) 07 DEL CK 0182
In the Delhi High Court
Case No : Crl. A. 519/1999

Siri Ram

APPELLANT

Vs

State Govt. of NCT of Delhi

RESPONDENT

Date of Decision : 18-07-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 147, 148, 149, 300, 302

Citation : (2014) 7 AD 105 : (2014) 4 CCR 59

Hon'ble Judges : Sunita Gupta, J; Kailash Gambhir, J

Bench : Division Bench

Advocate : Mohit Mathur, Shahrukh Hussain, Varun Tankha and Badar Mehmood, Advocate for the Appellant; Richa Kapoor, APP, Rohit Meena, ACP and Mahender, SI, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Kailash Gambhir, J.—Challenge in the present appeal is to the impugned judgment and order on sentence dated 24th July 1999 and 28th July 1999 respectively, whereby the learned Additional Sessions Judge had convicted each of the appellants for committing an offence punishable under Sections 302/323 read with Section 34 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and sentenced them to undergo imprisonment for life along with a fine of Rs. 1000/- each u/s 302 IPC and in default of payment of fine to undergo rigorous imprisonment for a period of three months each, and so far as the offence u/s 323 IPC is concerned, the appellants have further been sentenced to undergo rigorous imprisonment for a period of three months each.

2. The germane case of the prosecution in brief is summarized as under:

Complainant Dev Chand was a resident of B-53, Sultan Puri, New Delhi. PWs Mohan, Puran and deceased Bhagwat Parsad were his real brothers, they were also residing at B-3/53-54, Sultan Puri, New Delhi. PW Udayvir and Roop Chand were the real uncles of the complainant Dev Chand. They were also residing in

the same locality at B-3/66, Sultan Puri, New Delhi. In the same vicinity, accused Siri Ram, Dal Chand, Tikam, Netra Pal, Banwari Lal, Hargu Lal and Kamlesh were also residing. All the said 7 accused persons were residents of B-3 Sultan Puri, New Delhi. The accused persons had cordial relations with the complainant party prior to the incident. One Vir Singh, resident of the same locality had invited Udayvir to attend the marriage ceremony of his son at Ballabhgarh on 16.2.93. Accused Netra Pal was also invited and he had also participated in the marriage party at Ballabhgarh. However, at Ballabhgarh, some altercation took place between PW Udayvir Singh and accused Netra Pal Singh in the marriage party and accused Netra Pal had allegedly hit PW Udayvir Singh in that party on his private part, as a result of which, he had become unconscious. However, he had come back on the same night to his village and narrated the whole incident to his wife on the same night and had also told his wife that he could have even died in that incident. On 17.02.1993 after PW Udayvir Singh had left for his duty, his wife had gone to the house of accused Netra Pal and made a complaint to his wife about the incident which had taken place with her husband on the previous night at Ballabhgarh. Instead of offering consolation and sympathy to the wife of PW-Udayvir Singh, the wife of accused Netra Pal had retorted that "what was to be done, had been done by them and now, they were at liberty to do anything." Shocked by the said behaviour of the wife of accused Netra Pal, the wife of Udayvir narrated the whole incident to him after he came back from work. Unable to assimilate the said unbecoming behaviour of the wife of accused Netra Pal, Udayvir and his nephew Dev Chand went to the house of accused Netra Pal. All the accused persons were allegedly found present in his house. PW Dev Chand had complained to the accused persons about the incident which took place at Ballabhgarh with PW Udayvir Singh and also took exception to the arrogant behaviour of the wife of accused Netra Pal. But instead of expressing sorrow about the incident, all the accused persons with rage asked PW Udayvir Singh and Dev Chand that they should run away from the house, otherwise, they will be killed. Feeling helpless PW Udayvir Singh and Dev Chand came back from the house of Netra Pal at about 7:45/8 PM. When PW Udayvir Singh was sitting on the "takhat" lying outside his house, accused Siri Ram, Tikam and Netra Pal appeared, while accused Siri Ram was carrying iron pipe, accused Tikam was armed with "Sabbal" accused Netra Pal was carrying lathi. Accused Netra Pal had allegedly hit Udayvir Singh with lathi on his shoulder, while accused Siri Ram hit him with iron pipe; accused Tikam had hit him with "sabbal". PW Udayvir Singh had started bleeding from forehead and nose, as a result of injuries sustained by him. He had become unconscious and had fallen on the Takhat. On hearing the noise, PW Dev Chand came to save his uncle Udayvir Singh, he was also hit with iron pipe and lathi by accused Siri Ram and Netra Pal, as a result of which, he sustained injuries on his left hand, on the right side of his leg and on other part of his body. On hearing the noise of quarrel, Bhagwat Prasad, the younger brother of PW Dev Chand also reached the spot. On seeing him, accused Netra Pal had allegedly exhorted his co-accused by saying, "mar do sale ko, iska kaam tamam kar do". At this juncture, accused Siri Ram had allegedly hit him with iron

pipe, while accused Tikam had hit him with sabbal on his head, as a result of which he fell down in front of the house of Nathu. When he was lying down, he was allegedly hit by Siri Ram, Tikam and Netra Pal with their respective weapons on his head and other part of his body repeatedly as a result of which he sustained injuries on all parts of his body. PW Mohan and Puran, the other brother of PW Dev Chand also reached the spot. Accused Tikam had allegedly exhorted to his co-accused that they should also be killed. Meanwhile, PW Dev Chand had fled from the scene and hid himself in the house adjacent to the house of his uncle. When PW Puran tried to rescue his brother Bhagwat Prasad, accused Tikam had hit him with Sabbal. He sustained injuries on his right eye as well as on his right hand. PW Mohan was also allegedly attacked by the accused Hargulal and Banwari with the lathis and when his uncle Roop Chand tried to save him, accused Dal Chand and Kamlesh had allegedly hit him with lathis on his shoulder as well as on his forehead and on his left foot. Accused Dal Chand was also found under the influence of liquor. PW24 HC Rajinder Singh was posted in Police Control Room and was on duty in PCR Van on 17.02.1993 at Mangol Puri Chowk. He had received information from telephone No. 100 that at B-66, Sultan Puri, a quarrel had taken place. He had then reached at the spot at about 9:10 PM and had found that PWs Roop Chand, Dev Chand, Puran Chand and Udayvir Singh were lying in an injured condition. He had then got them admitted in DDU Hospital by Delhi Home Guard constable Bachu Singh at about 9 PM. Injured Bhagwat Prasad was rushed to Jai Pur Golden Hospital by PCR Van. PW Devchand claimed himself to be the eyewitness of the incident. Consequently his statement was recorded. On the said basis, FIR was registered. After completion of all the formalities by the police and after recording of the statements of the witnesses, a challan was completed by the police against all the accused persons and they were sent up for trial. Charges u/s 147/148/302/308/323 read with Section 149 IPC were framed against all the 7 accused persons.

3. To prove its case the prosecution mustered support from as many as 29 witnesses. After the completion of prosecution evidence, statement of the accused persons were recorded u/s 313 of Cr.P.C. wherein the entire incriminating evidence was put to them and in reply they pleaded innocence and false implication.

4. Addressing arguments on behalf of the appellants, Mr. Mohit Mathur, Learned Counsel strongly contended that all these appellants have been falsely implicated in the present case and the learned trial court has believed the fictitious, concocted and apocryphal story of the prosecution. Counsel also submitted that the falseness in the prosecution story could be simply discerned from the fact that initially the prosecution had roped in seven accused persons, but out of them four have already been acquitted by the learned trial court, finding no credible or cogent evidence against them. Counsel also submitted that even as against these three appellants, the evidence of the prosecution is quite tottery and unreliable, and therefore, the conviction of these appellants and order on sentence passed against them by the learned trial court is liable to be set aside.

5. Counsel also submitted that it is a well settled principle of law that when the genesis and the manner of incident itself is doubtful resulting in an order of acquittal in favour of some accused persons, then even the remaining accused persons cannot be convicted and that too for an offence as serious as that of murder u/s 302 IPC. Ld. Counsel further submitted that the police got the first information with regard to some quarrel having taken place at B-66, Sultan Puri, Delhi from an unknown person and the same was registered vide DD No. 68/B which was proved on record as Ex. PW-16/A but the police had reached a different spot which was near the house of PW-2 Udayvir, i.e., House No. B-3/66, Sultan Puri, Delhi. Ld. counsel also raised a doubt that how could there be a change in the site of the spot of crime and in the absence of any evidence to this effect adduced by the prosecution, the change of the site of the crime is fatal to the case of the prosecution. Ld. Counsel also submitted that there is complete variation in the rough site plan prepared by the Investigating Officer at the spot which is exhibited as Ex. PW-29/A and the scaled site plan. In the said regard, Ld. Counsel explained that as per the rough site plan, the spot of the crime has been shown in front of the House No. B-3/66 while in the scaled site plan the spot of the crime has been shown near the door of House No. B-3/98. Counsel thus submitted that there is a serious dispute with regard to the place of the crime and benefit of this should go to the accused persons.

6. The next argument raised by the Ld. counsel was that the prosecution failed to give any explanation to the injuries sustained by the appellants. Counsel further submitted that as per the case of the prosecution and the findings recorded by the learned trial court, there is a clear evidence that all these appellants had received injuries in an open brawl which had taken place between the complainant party on one hand and these accused persons on the other and these accused persons were taken to the hospital by the police itself and their MLCs have been produced on record but shockingly the prosecution failed to come out with any explanation as to how these accused persons had received injuries. Counsel also submitted that if the entire case of the prosecution is accepted as correct then at the highest, the case against these appellants can be for culpable homicide not amounting to murder, punishable u/s 304 Part-I or Part II of IPC and not a case of culpable homicide amounting to murder punishable u/s 302 IPC. Ld. Counsel also urged that all these appellants have already undergone about seven years of sentence and their respective ages are between 37 years to 57 years, and therefore, their sentence be commuted for the period of sentence already undergone by them.

7. The next contention raised by the Ld. counsel was that the learned trial court had adopted different parameters to test the veracity of the recoveries of weapon of offence made from the accused persons during their disclosure statements. Ld. counsel further submitted that the recoveries from the other accused persons who were acquitted by the learned trial court were disbelieved due to the fact that the prosecution failed to join any public witness either at the time of their making disclosure statements or at the time of effecting recoveries of weapons of

offence, and also because the seizure memos nowhere mentioned the exact place wherefrom the recoveries were effected, but on the same parameters, the recoveries made from these accused persons have been surmised by the learned trial court. Ld. Counsel thus submitted that the learned trial court could not have adopted different criteria to test the genuineness and truthfulness of the recoveries made from the same set of accused persons. Counsel also submitted that with regard to the acquittal of the accused persons, the reasoning given by the learned trial court to disbelieve the recoveries was that they would not be so naive as to keep the lathi with which they had allegedly hit the injured persons in their houses and hand over the same to the police for creating self incriminating evidence but as regards these appellants, they were considered as naive because recoveries effected from them were believed by the learned trial court.

8. Ld. Counsel also argued that the taint in investigation conducted by the prosecution is writ large as all the accused persons were taken to the hospital by the police and their MLCs were prepared but their arrest by the police has been shown after three days, i.e., on 20.02.1993. Ld. Counsel also invited the attention of this court to the cross-examination of PW-28 (Ex. Constable Mohar Singh) who in his cross-examination deposed that all the above three accused persons namely, Dal Chand, Tikam and Siri Ram were found lying in an injured condition and they were rushed to the hospital by the police after preparing their injury sheets. Ld. Counsel thus contended that if they were the accused persons, then why they were not arrested immediately. Ld. Counsel also submitted that PW-1 and PW-13 in their testimonies also deposed that all these accused persons ran away after the incident but as per the deposition of PW-28 (Ex. Constable Mohar Singh) they were taken to the hospital in an injured condition.

9. Ld. Counsel also argued that the matter was reported to the police vide DD No. 68/B at 9.00 p.m. but the IO had sent the rukka for registration of the FIR at 12.45 a.m. on 18.2.1993 and such a wide gap of about four hours clearly shows that the police was manipulating the things to frame up these accused persons. Counsel thus submitted that the genesis of the investigation itself is doubtful and no explanation has come from the side of the Investigating Officer for the delay in the preparation of the rukka and for arresting the accused persons after four days of the incident. Counsel also invited attention of the court to the deposition of PW-29 who in his deposition stated that the accused were already in custody then there was no question of arresting them on 20.02.1993.

10. Ld. Counsel also argued that the investigation and prosecution story seems doubtful on considering the CFSL report (Ex. PX and PY). The report does not show any sign of blood on the weapons recovered by the police after the disclosure statements made by the appellants. The earth control and blood stained soil (Ex. PW-16/B) lifted outside Nathu's house, where allegedly the deceased Bhagwat Prasad was lying after being beaten by the appellants also does not show any trace of blood as per the CFSL report. Ld. Counsel further contended that the weapons that were recovered by the police were not sent for

examination by CFSL.

11. Ld. Counsel also argued that the learned trial court has failed to consider that the prosecution had not examined certain material witnesses such as Ramwati, wife of PW-2 Udayvir who met Netra Pal's wife to complain about the incident that had occurred at Ballabgarh. Further Gyan Chand who accompanied the deceased to the hospital was also not made a witness. Nathu, in front of whose house the deceased was lying after sustaining injuries was also not examined. Counsel also states that the non-examination of these material witnesses creates serious doubts regarding the veracity of the prosecution case.

12. Ld. Counsel also argued that the learned trial court has not believed the testimony of PW-1 Mohan yet his testimony has been relied upon while convicting the present accused persons. Ld. Counsel also argued that it was the complainant party who was aggressor in the free fight and this can be fortified from the fact that Udayvir was found having consumed liquor as per the findings given in the MLC report Ex. PW15/A.

13. Based on the above submissions, counsel for the appellants strongly urged for the acquittal of these accused persons or in the alternative to convert their conviction from Section 302 IPC to Section 304 Part II IPC. In support of his arguments, counsel for the appellant placed reliance on the following judgments:

1. Mathura Yadav @ Mathura Mahato and Others Vs. State of Bihar,
2. Shivilal and Another Vs. State of Chhattisgarh,
3. Anand Kumar @Beeru and Others Vs. State,
4. Vijay Kumar Vs. State of Rajasthan,
5. Arshad Hussain Vs. State of Rajasthan,

14. Per contra, Ms. Richa Kapoor, learned APP for the State, submitted that it is an open and shut case based on the testimonies of the injured eye witnesses and their testimonies being fully corroborated by the prosecution with the help of the witnesses including medical evidence. Learned APP also submitted that the learned trial court has passed a well reasoned judgment on conviction and order on sentence and this court may not find any plausible ground to interfere with the findings arrived at by the learned trial court.

15. Learned APP also contended that it is an admitted case of the prosecution that both the parties were residing in the same vicinity with no history of enmity between them prior to the incident which had occurred between PW-2 Udayvir and accused Netra Pal where Netra Pal had hit Udayvir at his private part. Learned APP also submitted that the testimonies of all the eye witnesses comprising of PW-1, PW-2, PW-7, PW-11 and PW-13 remained clear, consistent and coherent with regard to complicity of these three accused persons and defence failed to succeed to impinge upon their testimonies despite their lengthy cross-examination. Learned APP also argued that so far as the accused persons

are concerned, they have given different versions about the alleged free fight having occurred at different places and therefore, they cut across each other's defence. In this regard learned APP invited the attention of this court to para 11 of the impugned judgment where learned trial court has referred to three different stands taken by the accused persons to explain the incident of crime.

16. Learned APP also argued that no separate complaint was lodged by the accused persons against the members of the complainant party with regard to the alleged injuries suffered by them and therefore, it was quite apparent that these accused persons sustained injuries in process of the fight that took place between them. Learned APP also submitted that PW-24 HC Rajinder Singh in his deposition clearly stated that he had received an information from telephone No. 100 that at B-66, Sultan Puri, Delhi a quarrel had taken place and he had made entry in his call book register wherein this address has been disclosed. Learned APP also submitted that this court may peruse the inner case diary of the police in this regard in order to testify the veracity of the facts.

17. On the aspect of the recovery made from the accused persons, learned APP submitted that there is no reason to disbelieve the recoveries which were effected by the police from these accused persons as a consequence of their disclosure statements as all the eye witnesses were consistent in their respective depositions in pointing out as to which accused person was armed with which weapon unlike their statements with regard to the recoveries effected from other accused persons who were acquitted by the learned trial court. Learned APP further submitted that there was not a single factor which led the learned trial court to disbelieve the recoveries so far as the acquitted accused persons are concerned and in totality of the circumstances which led the learned trial court to believe that the prosecution witnesses had tried to use exaggerated versions with a view to rope in all the accused persons in their anxiety to seek revenge from the family of the accused persons. Learned APP thus submitted that there is stark difference between circumstances which led to disbelieve the recoveries effected from the acquitted accused persons and the recoveries which were effected from these accused persons. Learned APP thus submitted that the contention raised by the learned counsel for the appellants to challenge the said recoveries effected from the accused persons does not carry any force.

18. Learned APP also argued that in the scaled site plan proved on record as Ex. PW-9/A, the place of incident has been marked as "B" and the place where the scuffle had started has been marked as "A" and Takht on which Udayvir was sitting has been marked as "D" being in front of his house B-3/66, Sultan Puri, Delhi. Learned APP also argued that the said scaled site plan was not challenged by the defence and therefore, defence cannot be allowed to raise any plea to challenge the correctness of the scaled site plan prepared by PW-9. Learned APP further submitted that all these accused persons had mercilessly beaten the deceased by inflicting as many as 17 injuries on his person. Learned APP also submitted that as per his post mortem report, he was repeatedly hit on his

shoulder as well as on his occipital parietal region due to which he had sustained fracture in the said region. Learned APP also argued that the said injuries caused to the deceased on his head were found sufficient to cause his death in the ordinary course of nature. Learned APP also argued that these accused persons kept on hitting him even after he had fallen down and therefore, the conduct of these accused persons clearly demonstrate a common intention that evolved to carry out his murder. Learned APP thus submitted that the injuries were caused by the appellants on the vital part, i.e., on the scalp of the deceased which ultimately proved fatal resulting in his instant death.

19. Learned APP further submitted that before attacking the deceased accused Netra Pal had exhorted to the other accused persons by saying "mar do sale ko, iska kam tamam kar do". Learned APP thus submitted that there cannot be any reason to doubt the intention of these accused persons who were hell bent to kill the deceased person. Learned APP also argued that all the members of the complainant party were unarmed and on the other hand all the three accused persons were armed with iron pipe, sabbal and lathi respectively. Learned APP thus submitted that it was not a case of free fight but an intentional murder where the deceased was mercilessly beaten to death. Learned APP thus submitted that the appellants have been rightly convicted u/s 302 IPC and sentenced for life imprisonment and there is no ground to convert the offence from Section 302 IPC to Section 304 IPC.

20. We have heard learned counsel for the parties at a considerable length and given our thoughtful consideration to the arguments advanced by them. We have also perused the trial court record.

21. All these appellants have been convicted for an offence punishable u/s 302 IPC and they were sentenced for life imprisonment. The appellants were also convicted for the offence punishable u/s 323 of IPC for which a separate sentence of three months has been awarded to each of them.

22. Complainant party and the accused persons were residing in the same locality bearing No. B-3, Sultanpuri, Delhi. There was no enmity between both the parties but a small altercation that arose between PW-2 -Udayvir and the accused Netra Pal Singh on the evening of 16th February 1993, resulted in an ugly facade on the next evening of 17th February 1993. On 16th February 1993 Udayvir and Netrapal Singh had gone from Delhi to Ballabhgarh. On some trivial issue accused - Netra Pal had hit PW-2 Udayvir on his private part due to which he became unconscious. After regaining consciousness he returned back to Delhi and explained everything to his wife on the same night. Udayvir told his wife that due to the said incident he could have even died. On the next morning, after Udayvir had left his house, his wife went to lodge a protest to the wife of Netrapal, but wife of Netrapal instead of being remorseful over the conduct of her husband behaved in the most boorish manner by retorting that what was to be done had been done by them and now if they want to do anything they were at liberty to do so. In the evening, Udayvir was told by his wife about the very

incident and it was thereafter an altercation between the males of the two families resulted into a gruesome murder of Bhagwat Prasad. As per the case of the prosecution, Udayvir had gone to the house of accused Netrapal with his nephew - Dev Chand where all the accused persons were found present. He requested all of them to at least keep up the decency of being neighbours, but the accused persons shouted at them and asked them to leave the spot right away, else they would be trodden. Out of fear, Udayvir and Devchand came back from the house of Netrapal and at about 8 pm, when Udayvir was sitting on a Takht in front of his house, these accused persons armed with iron pipe, sambhal and lathi started hitting Udayvir, then Dev Chand and thereafter, the main victim - Bhagwat Prasad. As per the defence, the Complainant party was aggressive but had no lathies to attack the accused persons. The accused persons had also received injuries and their MLCs are also on record. Learned trial court is correct in holding in the impugned judgment that the incident which had taken place on 17th February 1993 at about 8 pm in the same locality where both the parties were residing has not been disputed by the defence except the defence had come out with its own version about the facts leading to the crime. As per the defence the Complainant party were beaten by some unidentified public persons, due to that the members of the Complainant party had received injuries and the injuries caused to Mr. Bhagwat Prasad proved fatal.

23. The case of the prosecution is primarily based on the testimonies of PW-1, PW-2 and PW-7 whose testimonies found due corroboration from the medical and scientific evidence and the evidence of recoveries effected from the accused persons during the course of their disclosure statements. The learned trial court found that the testimony of PW- 2 Udayvir and Dev Chand (PW-7) were clear and consistent on material facts of the case and there was no reason to disbelieve their testimonies. Both these witnesses had clearly named Siri Ram, Tikam and Netrapal who were armed with iron pipe, sabbal and lathi respectively and had first inflicted injuries on the person of Udayvir Singh then PW-7 Dev Chand and ultimately deceased Bhagwat Prasad. Udayvir and Dev Chand were admitted in DDU hospital after receiving injuries at the hands of the accused persons. The accused Siri Ram and Tikam Ram were also injured in the incident and were removed to the hospital by the police and this fact shows the presence of these accused persons at the spot. As per the prosecution, accused Siri Ram and Tikam were arrested on 20th February 1993 and accused - Netrapal was arrested on 4th March 1993. The weapons of offence which were used by these accused persons were got recovered by them from different spots as disclosed by them during their disclosure statements. All the said weapons, which were recovered by the police at the instance of these accused persons were found to be blood stained. Learned trial court has believed these recoveries as nobody else could know the place of recovery of these weapons which were within the exclusive knowledge of the accused persons. The court also found that no suggestion was given by the defence to these accused persons to attribute any motive on the investigating agency to plant the said weapons on the accused persons.

24. In the background of aforesaid facts, let us now deal with the contentions raised by counsel for the appellants to assail the findings of the learned trial court. The first contention raised by learned counsel for the appellants was that if the genesis and the manner of incident is doubtful resulting in an order of acquittal in favour of some of the accused persons then even the remaining accused persons cannot be convicted based on the same facts. This argument raised by learned counsel for the appellants appears to us as a self defeating argument. The criminal jurisprudence proceeds on the cardinal principal of law that there should not be conviction of the innocent persons but at the same time there should not be any unjust acquittals of those who are guilty of the crime. By acquitting some of the accused persons, the learned trial court has not believed the prosecution story in its entirety but the same has been scrutinized on the basic facts which have been proved on record by the defence. The incident had resulted in causing one death and injuries to three members of the Complainant; however the injuries were even caused to the accused persons. In the background of these facts, how the defence can even raise a plea to doubt the genesis of the crime.

25. The learned trial court has very aptly observed that in the anxiety to seek revenge from the family of accused persons for causing death of their kith and kins, the prosecution witnesses had tried to give some embroidered versions with a view to involve the other accused persons. The said argument of the learned counsel for the appellant therefore will not cut much ice in view of the credible evidence put forth by the prosecution on record to prove the guilt of these accused persons.

26. Learned counsel for the appellant laid much stress on his argument that where sites of the incident itself is in dispute, then the case of the prosecution loses its credibility. The answer to this argument has also been variably given by the learned trial court. Learned trial court is correct in observing that house No. B-3/23, was situated near the house of Netra Pal where Udayvir and Dev Chand had visited in the evening to lodge their protest and they were threatened to leave the place by the accused persons, present at the house of Netrapal and this initial quarrel was reported to the police and that is how house No. B-66, Sultanpuri, Delhi was found mentioned in DD entry No. 68B. So far as the change of sites of the incident is concerned, we cannot lose sight of the fact that the incident had taken place not far away from the house No. B-3/23 and once the matter was reported to the police there could arise no difficulty for the police to reach at the place where the actual incident had taken place. The testimonies of the injured eye witnesses and the lifting of earth control and blood samples from near the house of PW-2 Udayvir, leave no room for any doubt about the site of the crime. The contention raised by learned counsel for the appellants is thus devoid of any force.

27. So far the contention raised by learned counsel for the appellant with regard to the variation in the rough site plan prepared by the investigating officer at the

spot and the scaled site plan, we find from the record that no suggestion was given by the defence to dispute the correctness of the rough site plan Ex. PW- 29/ A and scaled site plan (Ex. PW-9/A). PW-9 -SI Manohar Lal, Draftsman, who prepared the scaled site plan Ex. PW-9/A was the best person to answer the alleged variation in the scaled site plan with regard to the exact place of the incident. Even otherwise, point "D" shown in the scaled site plan has been referred as the place where accused persons had attacked on Bhagwat Prasad while in the rough site plan Ex. PW-29/A marked "A" has been shown to be the place near B-3/66 where Bhagwat Prasad was given beatings. Both these places are almost opposite to each other and it is the case of the prosecution that the initial fight started from a Takhat in front of house of B-3/66 and therefore, it appears that the sites of the incident remained around the premises No. B-3/66 and front of House No. B-3/98. The alleged variation therefore, pointed out by the Id. counsel for the appellant is hardly of any significance, particularly in the background that both the said witnesses were not put to cross-examination on this aspect by the defence.

28. Dealing with the next contention raised by Id. counsel for the appellant that the prosecution failed to give any explanation to the injuries sustained by the accused persons. Submission of learned counsel for the appellant was that all these accused persons were admitted in the hospital by the police itself and their MLCs were produced on record but yet the prosecution failed to come out with any explanation as to how these accused persons had received injuries. There can be no doubt that non explanation of the injuries sustained by the accused persons at the time of occurrence is an important circumstance to be explained by the prosecution but it is equally correct that mere non explanation of the injuries by the prosecution may not affect the case of the prosecution which is otherwise comprehensible, cogent and creditworthy and the court can easily distinguish the truth from falsehood to reach its final conclusion. It would be useful here to refer the judgment of the Hon"ble Apex Court in the case of Lakshmi Singh and Others Vs. State of Bihar , wherein it was held as under:-

It is observed that any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case. But such non-explanation may assume greater importance where the evidence consisted of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and credit-worthy and where the Court can distinguish the truth from the falsehood, the mere fact that the injuries are not explained by the prosecution, cannot itself be a sole basis to reject such evidence and consequently the whole case.

29. In Rizan and Another Vs. State of Chhatisgarh, through The Chief Secretary, Govt. of Chhatisgarh, Raipur, Chhatisgarh, , the Hon"ble Apex Court in similar circumstances on non explanation of injuries sustained by the accused, held as under:-

The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise on the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilities the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries.

30. In the present case also, these accused persons had suffered simple injuries and they were not attacked by any dangerous weapons and even no complaint was lodged by these accused persons mourning that they were attacked by the Complainant party and therefore, in the background of these facts, non explanation by the prosecution with regard to the injuries suffered by the accused persons would not dislodge the case of the prosecution, which has been established by clear, forceful and clinching evidence to believe the prosecution case.

31. The next contention urged by learned counsel for the appellant was that the learned trial court has adopted different parameters to test the veracity of recovery of weapons of offence made from the accused persons during their disclosure statements. It is a settled legal position that mere recovery of weapon of offence during the disclosure statement of an accused person cannot by itself be sufficient to prove the guilt on the part of the accused. Likewise, non recovery of the weapon of offence for any reason whatsoever cannot establish innocence of an accused person.

32. The contention raised by learned counsel for the appellant about the different parameters adopted by learned trial court with regard to the recoveries effected from these accused persons vis-a-vis acquitted accused persons has to be examined in the entirety of the facts proved on record by the prosecution vis-a-vis the two set of accused persons and the credibility of the evidence so placed on record. As already discussed above, the learned trial court did not believe the prosecution story as against the acquitted accused persons and view taken was that the prosecution witnesses had introduced the other accused persons just with a view to take revenge due to the death of their family member- Bhagwat Prasad. Learned trial court also found that the prosecution evidence regarding role of the acquitted accused persons in causing injuries on the person of Mohan and Roop Chand did not appear to be convincing. Learned trial court also took a view that the three lathies recovered from the acquitted accused persons were

not sent to CFSL for the best reasons known to the police officials. It is the totality of these circumstances and certainly one of them being non-joining of the independent witnesses to the said recoveries convinced the learned trial court to disbelieve the recoveries made from the acquitted accused persons. So far as the present accused persons are concerned, PW-2 and PW-7 were clear and consistent in their testimonies that accused -Sri Ram was armed with iron pipe, accused - Tikam with sabbal and accused - Netrapal with lathi and these eye witnesses account find support from the recoveries effected from these accused persons during their disclosure statements. In the given circumstances, we do not find that on the same parameters the learned trial court has believed the recoveries from these accused persons however on the other hand on similar notions has disbelieved the recoveries from the other set of accused persons, who were later acquitted.

33. One of the arguments raised by the counsel for the appellant was that taint in the investigation conducted by the prosecution is well amplified from the fact that the accused persons were taken to the hospital by the police and their MLCs were collected by the police but yet their arrest was shown after three days, i.e., on 20.02.1993. The incident in question had happened on the evening of 17.02.1993. As per DD No. 68B proved on record as Ex. PW-16/A, the matter concerning the incident was reported to the police by some unknown persons at 9.00 p.m. on 17.02.1993. Copy of the said DD was handed over to PW-16 Head Constable Prakash Chand who along with Constable Mohar Singh immediately reached at the spot. PW-29 Ram Gopal Sharma, SHO was also informed about the incident at about 9.10 p.m. and he also reached at the spot where he found the presence of other police officials. PW-29 Ram Gopal Sharma was informed by the police official that the injured were already removed to Jaipur Golden Hospital and DDU Hospital. After instructing the police staff to guard the spot of the crime, he himself left for Jaipur Golden Hospital along with PW-21 SI Lekh Ram. At Jaipur Golden Hospital, he had collected the MLC of the deceased Bhagwat Prasad marked as Ex. PW-25/A and on his MLC, doctor had already mentioned about Bhagwat Prasad (deceased) being brought dead. PW-29 Ram Gopal Sharma then left for DDU Hospital along with PW-21 SI Lekh Ram where PW-28 Constable Mohar Singh met him. PW-29 Ram Gopal Sharma had collected the MLCs of the injured persons who were admitted in DDU Hospital and one amongst them was PW-7 Dev Chand who disclosed to the officer that he was an eye witness of the crime. PW-29 Ram Gopal Sharma had recorded the statement and on his statement made his endorsement and then sent the rukka for registration of the FIR through Constable Mohar Singh. PW-29 Ram Gopal Sharma in his cross-examination in chief clearly stated that he was told by PW-28 Constable Mohar Singh that accused persons namely, Siri Ram, Dal Chand and Tikam also came for their medical examination in DDU Hospital and PW-29 made efforts to search for them but none of these accused persons were found available in the hospital. It is thereafter, PW-29 Ram Gopal Sharma had reached at the spot of the crime so as to carry on further investigation into the said crime.

34. PW-21 SI Lekh Ram in his cross examination also deposed that SHO had collected the MLC of the injured person but he could not come across the accused persons whose MLC's were procured by him although this fact was not stated by PW-21 SI Lekh Ram in his statement u/s 161 Cr.P.C. as during his cross examination he was confronted with his statement u/s 161 Cr.P.C. where this fact of SHO having not come across the accused person was not found to be recorded. Nevertheless, non-disclosure of this fact in his statement u/s 161 Cr.P.C. cannot discredit his statement made before the court in response to the question raised by the defence counsel during his cross examination. It cannot be expected of any witness being a private witness or public witness to give a detailed account of each and every fact concerning the crime. What is important for the court is to see whether the testimony of the witness is inspiring enough and once the court finds the witness is a truthful witness then the other facts disclosed by him during his examination in chief or cross examination which appears to be convincing and logical could be taken to be correct, however, it is made clear that this reasoning cannot be applied so far as the material and vital facts concerning any incident are concerned. It would be therefore, quite evident that these accused persons were taken to the DDU Hospital by the police and in the hospital, they were medically examined and their MLCs were collected by PW-29 Ram Gopal Sharma but later when PW-29 Ram Gopal Sharma went in search for them after having recorded the statement of PW-7 Dev Chand, they were not found in the hospital. Two accused persons were arrested on 20.02.1993 and third accused Netra Pal was arrested on 04.03.1993.

35. In the background of these facts it cannot be said that these accused persons were in the illegal custody of the police and their arrest was only shown on 20.02.1993 or the police deliberately did not show their arrest despite the fact that they were available in DDU hospital getting their medical treatment. We thus find no force in the contention raised by the counsel for the appellants regarding the delay in the arrest of these accused persons. Another contention raised by the counsel for the appellants was that the matter was reported to the police vide DD No. 68B at 9.00 p.m. but the IO had sent rukka for registration of FIR at 12.45 a.m. which resulted in a gap of 4 hours and gave police sometime to manipulate the things and frame up these accused persons as the perpetrator of the said crime.

36. As can be seen from the facts of the case, after receiving the information of the said crime at 9.00 p.m., the IO of the case had rushed to the spot of the crime and from there he had first gone to Jaipur Golden Hospital where the main victim Bhagwat Prasad was admitted and when he found Bhagwat Prasad had already died and his body was sent to the mortuary then he reached at DDU hospital so as to know the fate of the other injured persons. At DDU hospital, he came across one of the injured persons PW-7 Dev Chand and after recording his statement he had sent the rukka for registration of FIR after endorsing the statement given by him. In this entire process use of 3-4 hours can be said to be quite normal and not unusual or unrealistic. Thus the contention raised by the

counsel for the appellant is misconceived and stand rejected.

37. Counsel for the appellant had also raised a contention that the prosecution had failed to examine two material witnesses, the same being Ramwati and Gyan Chand, and therefore, non-examination of these material witnesses casts a serious doubt on the case of the prosecution. Non-examination of these witnesses have been convincingly, dealt with by the learned trial court in the impugned judgment and we find ourselves in complete agreement with the reasoning given by the learned trial court. The learned trial court held that non-examination of Ramwati as a witness cannot be held fatal to the case of the prosecution particularly in the background when all the material facts of the prosecution case were not much in dispute. With regard to the non-examination of Gyan Chand, the learned trial court clearly held that no person by the name of Gyan Chand was found residing at the address disclosed by him in the MLC, as per the deposition of prosecution witnesses.

38. Counsel for the appellants also raised a contention that the investigation and the prosecution story are shrouded with suspicion if the CFSL report proved on record as Ex. PW-X and PW-Y are taken into consideration. The contention raised by the counsel for the appellants was that the report does not show any sign of blood on the weapon recovered by the police during the course of disclosure statement made by these appellants. Counsel for the appellant also submitted that earth control and soil samples lifted from the spot in front of Nathu's house do not show any trace of blood as per the CFSL report. This contention raised by the counsel for the appellant is also fallacious and is devoid of any merit. The prosecution has convincingly proved the fact that all the accused persons were armed with weapons which were recovered at their instance during the disclosure statements made by them and once these facts have been established the non-trace of blood on these weapons by the CFSL is hardly of any consequence. Nevertheless, it is not correct on the part of the counsel for the appellants to contend that no trace of blood was found on these weapons at the time of recovery of these weapons, rather all of them were blood stained and not even a bald suggestion given by the defence to the witnesses for recovery that these weapons were planted by them on the accused persons and secondly as per the CFSL report blood was detected on Ex. 2 which was a lathi, Ex. 3 which was an iron rod and Ex. 4 which was an iron pipe. Even on Ex. 5 which was a small piece of cemented floor and described as earth control presence of blood was found as well. We are not convinced with this contention raised by the counsel for the appellant.

39. Dealing with the last contention raised by learned counsel for the appellants which is a plea that has been taken in the alternative that the conviction of the accused persons may be converted from Section 302 to Section 304 Part II IPC. This argument of learned counsel for the appellant is premised on the reasoning that it was a free fight between the two set of groups and in a free fight both parties have received injuries. Another ground taken by learned counsel for the

appellant was that there was no motive or pre-meditation on the part of these appellants to have carried out the murder of Bhagwat Prasad who even as per the prosecution case has entered the scene later to rescue PW-7 - Dev Chand. Learned counsel for the appellant also took a stand that most of the injuries received by the deceased were mere abrasions and there was only one injury which was inflicted on the head of the deceased which was held sufficient in the ordinary course of nature to cause his death. The contention raised by learned counsel for the appellants was that the conduct of the accused persons was neither cruel nor any undue advantage was taken to cause any fatal blows on the person of the deceased with intention to carry out his murder.

40. As per the evidence of PW-1, PW-2 and PW-7, as soon as all the three accused persons namely, Netra Pal, Siri Ram and Tikam appeared on the scene they had first attacked on PW-2 Udayvir who was sitting on a Takht in front of his house and to rescue his uncle Udayvir, PW-7 Dev Chand entered the scene and he was also hit by Siri Ram on his head with iron pipe and by accused Netra Pal with lathi and when he fell down on the ground again Siri Ram and Netra Pal had hit him on his left hand as well as on the right side of his leg besides the other part of his body. At this juncture, on hearing the noise of quarrel the main victim Bhagwat Prasad (deceased) entered the spot and on seeing him accused Netra Pal exhorted to his co-accused "mar do sale ko iska kam tamam kar do". Provoked by this exhortation, accused Siri Ram hit Bhagwat Prasad with iron pipe while accused Tikam hit him with Sambhal. Both these persons have hit him on his head, as a result of which he fell down in front of the house of Nathu. While he was lying down, accused Netra Pal, accused Tikam and accused Siri Ram continued to hit him with their respective weapon on his head and other parts of the body repeatedly. Thereafter, his brother Puran tried to rescue Bhagwat Prasad but then he was also hit by the accused persons. Bhagwat Prasad was rushed to Jaipur Golden Hospital in the PCR van and as per the post mortem report Ex. PW 19/A, the victim was brought dead to the hospital.

41. If we dispassionately and closely examine the facts of the prosecution case, we find the initial quarrel had taken place between PW2 Udayvir and accused Netra Pal on the evening of 16.02.1993 when Netra Pal had hit him on his private part. On the next morning, i.e., on 17.02.1993 it was the wife of PW-2 Udayvir who went to the residence of Netra Pal and was humiliated by the wife of Netra Pal. In the evening of 17.02.1993 it was PW-2 Udayvir and his nephew PW-7 Dev Chand who had gone to the house of Netra Pal to lodge their protest, who found the presence of all the accused persons at the residence of Netra Pal and were threatened by the accused persons to be killed. Deceased Bhagwat Prasad was nowhere in the picture as he had entered the scene of crime only at the stage when these accused persons had attacked PW-7 Dev Chand. PW-2 Udayvir was admitted in Deen Dayal Upadhyay hospital and as per his MLC report he was quite conscious and oriented at the time of his medical examination and there were abrasions over his jaw and on his left shoulder and ear bleeding. Doctor examining him also found smell of alcohol emanating from him. In his court

deposition PW-2 Udayvir deposed that he had sustained injuries on his forehead, mouth and nose. He also deposed that he started bleeding from his nose and became unconscious after sustaining the injuries. PW-2 Udayvir was soon discharged from the hospital after he was given treatment for simple injuries and came back to the spot at about 3.00-4.00 a.m. As per his MLC report, neither he received injuries on his forehead nor was he unconscious at the time of his admission in the hospital.

42. PW-7 Dev Chand was also admitted in Deen Dayal Upadhyay hospital and as per his MLC report proved on record as Ex. PW-15/C, he was conscious and oriented with no vomiting and ENT bleeding and the injuries sustained by him on his fore-head and on lateral aspect of the left hand over the toe of his right foot were opined to be of simple nature. PW-7 Dev Chand was also discharged by the hospital after he was given the treatment and as per his deposition he also came at the spot after his discharge from the hospital.

43. It can thus be seen that the accused persons who were carrying iron pipe, Sabbal and lathi did not inflict so serious injuries on the person of PW-2 and PW-7 and the injuries sustained by them were simple in nature and they were immediately discharged by the hospital after giving them the required treatment. These accused persons thus did not target these two persons with whom they could have some grudge because both of them had gone to the residence of Netra Pal to lodge their protest and the threat was extended by the accused persons to these two members of the complainant party to be killed at their hands. The prosecution did not come out with any angle due to which the accused persons would have targeted to kill Bhagwat Prasad. The entry of Bhagwat Prasad at the scene of crime was sudden and was not known to the accused persons prior in hand. The murder of Bhagwat Prasad in our view thus was not because of any premeditated plan or was designed by the accused persons but the same was as a result of a quarrel which took place between the two groups. We cannot be oblivious of the fact that three accused persons had also sustained injuries and they were also medically examined at Deen Dayal Upadhyay hospital and their MLCs were also proved on record. The injuries suffered by the accused persons at least clearly goes to suggest that a quarrel had taken place between two groups otherwise it could be difficult to believe that the accused persons had received injuries during the course of their attack on the other party. The learned trial court in the impugned judgment has also observed that it was possible that some altercation might have taken place between PW-2 Udayvir and PW-7 Dev Chand on one side and the accused persons on the other side at the time when PW-2 Udayvir and PW-7 Dev Chand had gone to the house of Netra Pal to lodge their protest. The court further observed that it was also possible that while exchanging scorching words both the complainant party and accused party might have grappled with each other and in that process both the parties might have sustained injuries. The court also took a view that thus a quarrel which had taken place at the house of Netra Pal also led to lodging of DD No. 68B.

44. To satisfy ourselves further as to whether the case of the appellants falls under Exception 4 to Section 300 IPC, it would be relevant to reproduce the following four pre-requisite for an offence to fall under the said Exception and the same are as under:-

- a. It was a sudden fight.
- b. There was no pre-meditation.
- c. The act was done in a heat of passion.
- d. The offender not having taken undue advantage or acted in a cruel or unusual manner.

45. For the application of exception 4 to section 300 IPC, all the aforesaid pre-requisites must be tested in all probabilities and in the absence of any of the four pre-requisites, exception 4 to section 300 IPC will have no application. It is thus not sufficient to show that there was a sudden quarrel and there was no pre-meditation but it must be further shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage". Dealing with the said exception 4 to section 300 IPC the Hon'ble Apex Court in Ghapoo Yadav and Others Vs. State of M.P., has held 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. Indian Penal Code is not defined in the Indian Penal Code. 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".

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...After the injuries were inflicted the injured has fallen down, but there is no material to show that thereafter any injury was inflicted when he was in a helpless condition. The assaults were made at random. Even the previous altercations were verbal and not physical. It is not the case of the prosecution

that the accused Appellants had come prepared and armed for attacking the deceased....This goes to show that in the heat of passion upon a sudden quarrel followed by a fight the accused persons had caused injuries on the deceased, but had not acted in cruel or unusual manner. That being so, Exception 4 to Section 300 Indian Penal Code is clearly applicable...

46. In the case of A. Maharaja Vs. State of Tamil Nadu, , the Hon''ble Apex court held:

8. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men''s sober reason and urges them to do deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. 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 IPC. 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."

47. In the background of the aforesaid legal position, let us now examine whether the facts of the case at hand satisfy the aforesaid parameters of Exception 4 to Section 300 IPC. It is a fact admitted on record that there was no previous enmity or hostility prior to the incident between both the parties and both the parties were residents of the same locality, i.e., B-3 Block Sultan Puri, Delhi. A small altercation between PW-2 Udayvir and accused Netra Pal on the evening of 16.02.1993 took an ugly tang on the evening of 17.02.1993. If there was any grudge amongst the accused persons, the same could be only against Udayvir or at the most against Dev Chand. These two persons had received simple injuries and they were not severely beaten by the three accused persons who were carrying with them iron pipe, Sabbal and lathi. The injuries sustained by deceased Bhagwat Prasad were fatal as injuries with iron rod were inflicted on his head. It is not the case of the prosecution that these accused persons were looking for Bhagwat Prasad to carry out his murder and in fact entry of Bhagwat Prasad was sudden when he went to save PW-7 Dev Chand. It is thus quite manifest that there was no premeditation on the part of the accused persons to carry out the murder of the deceased and the deceased had sustained injuries during the course of sudden fight between the two parties and in a heat of passion, he became the main victim.

48. Now, the question whether the accused persons had not taken undue advantage or acted in a cruel or unusual manner in their attack on the deceased so as to satisfy the fourth pre-requisite of Exception 4 to Section 300 IPC, needs deeper examination. As per the learned APP for the State the accused persons had acted in a most cruel and bizarre manner as even after throwing him on the floor, the three accused persons kept on hitting him from head to toe as a result of which he had sustained 17 injuries.

49. On the other hand, the argument raised by the learned counsel for the appellants was that the accused persons could not be cruel towards Bhagwat Prasad when they were not cruel or unusual against PW-2 Udayvir and PW-7 Dev Chand. PW-2 Udayvir was not a witness to the attack on deceased Bhagwat Prasad as he became unconscious after sustaining injuries by him. PW-7 Dev Chand is a prime witness as to save him from the accused persons, Bhagwat Prasad entered the scene of crime. As per his court deposition, he deposed that on hearing the noise of quarrel his younger brother Bhagwat Prasad came at the spot and on seeing him accused Netra Pal encouraged his co-accused "mar do sale ko iska kam tamam kar do". He further deposed that at this point, accused Siri Ram hit with iron pipe while accused Tikam hit him with "sabbal", on which he fell down in front of the house of Natthu. He further deposed that while he was lying down, all the three accused persons again hit him at his head and another parts of body repeatedly with weapon of offence which they were carrying with them. PW-7 Dev Chand in his first statement proved on record as

Ex. PW7/A described the incident with regard to injuries sustained by Bhagwat Prasad in a little different manner. He stated that when his brother Bhagwat Prasad came at the spot after he had heard the noise of quarrel, and accused Netra Pal exhorted "mar do sale ko, iska kam tamam kar do" at which accused Siri Ram and accused Tikam had hit him on his head with iron pipe, Sambhal respectively due to which he fell down in front of house of Nathu and thereafter, accused Netra Pal had hit him with lathi on various parts of his body. The said portion of the statement was confronted to PW-7 Dev Chand by the defence counsel where he did not state that all the accused persons had hit Bhagwat Prasad while he was lying on the ground. It is therefore evident that PW-7 Dev Chand made a material improvement in his court deposition to give a picture as if all the three accused persons kept on hitting the deceased after he had fallen down in front of house of Nathu. This material improvement made by PW-7 in his court deposition cannot inspire our confidence and thus, the same must be discarded.

50. Taking a cumulative view of the facts of the case and the legal position discussed in the foregoing paras, we are of the considered view that all the four ingredients as envisaged in Exception 4 to Section 300 IPC are fully satisfied in the facts of this case and therefore, case in hand clearly attracts Exception 4 to Section 300 IPC.

51. The next question is whether the case falls u/s 304 of Part I or Part II of IPC. Before we deal with this contention raised by learned counsel for the appellant, let us first refer to the nature of injuries sustained by the deceased and opinion thereon given by the post mortem doctor. As per the post mortem report, the deceased had sustained the following external and internal injuries:-

External Injuries:

- :Abrasion 1/4" x 1/4" over lateral end of (L) clavicle.
- :Abrasion 1" x 1/4" vertically over fm of lateral 2/3rd medial 1/3rd (I) clavicle.
- : Abrasion 3/4" x 1/4" over medial end of (L) clavicle.
- :Abrasion over (R) shoulder antaspect 3/4" x 1/4".
- :Abrasion over (L) shoulder, sub-aspect 1/2" X 1/4", 3/4"X1/4".
- : Abrasion 1" X 1/4" over (L) parasternal region.
- : Bruise 2" x 1" below (L) nostril extending upwards towards (L) malar region.
- : Abrasion 1/2"x1/4" over (L) alae nasae.
- : Abrasion 1/2"X1/4" over medial (L) side of nose.
- : There is # maxilla (L) side.
- : Abrasion 1/4" X 1/4" over.....(R) wrist joint.

: Abrasion 1/2" X 1/4" over.....(R) middle finger, middle phalanx, there is # middle phalanx (R) middle finger.

: Abrasion surrounded by bruising of sizes 1" X 1/2" to 2" X 3/4" over (L) scapula, neck of (L) scapula, medial border of (L) scapula, (L) Shoulder post-sub region

:c/w 3/4" X 1/4" upper lip (L) side going across mustache, much deep.

: Hematoma 2" X 2" over (R) Parietal region.

:c/w 1" X 1/3"x bone deep, surrounded by Hematoma ace (L) occipital region.

: c/w 1/2" X 1/2"x bone deep over occipital region (R) side.

:Bruise 3" X 1/2" over (L) side of neck extending from post hairline going towards sternocleidomastoid muscle middle posterior.

"Internal injuries:

Head:

Blood clot 2"X2" underscalp tissue over (L) occipital to parietal region.

There is comminuted # involving (L) occipital, parietal and temporal bone; fractured parts depressed in few bony pieces tearing manyinge and entering into brain substance. Brain matter is exposed over (L) parietal region. There is massive extradural, subdural clot all over. Blood clot also seen on undersurface lateal surface temporal lobe on (L) side, 8 all over the cerebellum which is bruised.

: There is fissured # involving middle posterior and anterior cranial tissue.

Neck

:On giving incision over bruise on (L) side of neck, blood clot and bruising of sternocleidomastoid muscle (L) upper and middle portion can be seen.

:There is bruising of underlying tissues corresponding to bruise and abrasions over (L) clavicular region.

: cricoid thyroid cartilage are intact, hyoid bone intact, trachea linings are intact, trachea containing blood.

: Cervical spine is intact.

Chest:

:There is # clavicle at FM of medial 2/3rd and lateal 1/3rd.

: Apex of (L) lung is bruised, (R) lung and heart is NAD.

Abdomen & Pelvis:

: Liver and kidneys -NAD.

: Spleen is enlarged 450 gms, but intact, no tear/laceration.

: Stomach is empty mucosa pale, no smell of alcohol.

: Bladder is half fill, rechen is half fill.

: Pelvis is intact.

Clothes: Cloth and blood preserved, sealed and handed over to the police.

Opinion: All injuries are anti-mortem in nature, caused by application of blunt objects as history alleged.

: Injury to the head is sufficient to cause death in ordinary course of nature.

: Times since death is about 40 hours.

52. As per the opinion of the doctor who conducted the post mortem, all the injuries were opined to be ante mortem in nature caused by application of blunt object possible as history alleged. Doctor further opined that the injury to the head was sufficient to cause his death in ordinary course of nature, and the time since death was caused was about 40 hours. It will also be useful here to refer to the judgment of the Apex Court in the case of Pulicherla Nagaraju @ Nagaraja Reddy Vs. State of Andhra Pradesh, , wherein the Court has observed that:

18.... the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls u/s 302 or 304 Part I or 304 Part II. Many petty or insignificant matters-plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre-meditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable u/s 302, are not converted into offences punishable u/s 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable u/s 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel

and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.

53. In *Jagriti Devi Vs. State of H.P.*, it was held that the expressions "intention" and "knowledge" postulate the existence of a positive mental attitude. It was further held that when and if there is intent and knowledge, then the same would be a case under first part of Section 304 of IPC and if it is only a case of knowledge and not intention to cause murder by bodily injury, then the same would be a case of second part of Section 304 IPC. To quote:

28. Section 300 Indian Penal Code further provides for the exceptions which will constitute culpable homicide not amounting to murder and punishable u/s 304. When and if there is intent and knowledge, then the same would be a case of Section 304 I and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304 II. The aforesaid distinction between an act amounting to murder and an act not amounting to murder has been brought out in the numerous decisions of this Court.

(m) The conduct and behaviour of the accused after the incident. Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment?

These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused.

54. In *State of Himachal Pradesh Vs. Wazir Chand and Others*, dealing with the sudden fight between two groups wherein one person in such fight was vitally wounded by the appellant by knife, the Hon'ble Apex Court took a view that this case falls in exception 4 of Section 300 and u/s 304 Part 1. Relevant paras of the said judgment are as under:-

Therefore, when Parshottam Lal appeared there was a sudden fight upon a sudden quarrel flowing from the earlier incident and in this both sides attacked each other. All the ingredients to attract Exception 4 to Section 300, I.P.C. are established. There is no premeditation. Parshottam Lal left the theatre and came over there. There was a fight that ensued in a sudden quarrel. The previous incident between Om Parkash alias Pashi and accused No. 3 Joginder was the cause and in that heat of passion and sudden quarrel parties grappled and attacked each other and it cannot be said in the circumstances that any undue advantage was taken. It may be recalled here that Parshottam Lal was a hefty well built fellow and if accused No. 1 alone was to attack him he could not have escaped with few abrasions. Therefore, all the ingredients to attract Exception 4 of Section 300, I.P.C. are fully established.

26. As injury No. 1 was fatal in the ordinary course of nature and accused No. 1

had wielded a dangerous weapon and caused an injury on the vital part of the body and the blows were repeated inasmuch as four injuries were caused the offence but for the application of Exception 4 would be one u/s 302, I.P.C. but as Exception 4 is attracted, it would be reduced to Section 304, Part I, I.P.C. and the conviction of accused No. 1 would be modified to one u/s 304, Part I, I.P.C. maintaining the sentence as awarded by the High Court as in our opinion that is adequate.

55. In the matter of Krishna Tiwary and Another Vs. State of Bihar, , where the accused had inflicted knife blows in the heat of passion without any premeditation and without any intention that he would cause that injury, the Hon"ble Apex Court held that the case was covered by Exception 4 to Section 300 of the IPC; the accused was convicted u/s 304-I of the IPC. Relevant paragraph of the said judgment is reproduced as under:-

the accused had inflicted knife blows in the heat of passion without any premeditation and without any intention that he would cause that injury, his case was covered within Exception 4 to Section 300 of the IPC; he had been convicted u/s 304-I of the IPC. 21 Applying the test laid down in this case, there is no reason as to why the appellants should also not be accorded the benefit of Explanation 4 of Section 300 of the IPC. The conviction of the appellants for the offence of murder is accordingly modified for the offence of culpable homicide not amounting to murder. They are all accordingly convicted u/s 304-I of the IPC.

56. In Baban Bandu Patil Vs. State of Maharashtra, , it was held that where a petty quarrel culminated into a single blow being given on the head of the deceased with axe by the appellant-accused, while other co-accused alleged to have assaulted him with sticks in the circumstances, appropriate conviction would be u/s 304, Part I.

57. In a similar case, Baij Nath Vs. State of Uttar Pradesh, , it was held that where a lathi blow was given on the head of the deceased resulting in fractures of both parietal and frontal bones and doctor opined that the cause of death was due to coma as a result of the head injury, considering the nature of injury and weapon used, the accused was rightly convicted u/s 304, Part I.

58. In the facts of the present case, these three accused persons had caused 17 injuries on the person of the deceased. Out of 17 injuries, 13 injuries were abrasions on different parts of his body and two lacerated wounds and one bruise injury on the left side of his right neck extending from post hairline going towards sternocleidomastoid muscle middle posterior. As per the post mortem report, the injury inflicted on the head of the victim was sufficient to cause death in the ordinary course of nature. The impact of the head injury was so severe as is evident from the post mortem report that the same resulted into his instant death. The prosecution has convincingly proved that accused Siri Ram was armed with iron rod, accused Tikam was armed with sabbal and accused Netra Pal was armed with lathi and with great vengeance, ferociously attacked on

Bhagwat Prasad, in fact anybody who was coming in their way was bashed and as a result 4 person including PW-2 and PW-7 had also received injuries.

59. Looking into the aggression on the part of these accused persons, nature of weapon of offences used by them and the injuries caused by them on the vital part of the body of the deceased and number of other injuries inflicted on his body, it is a clear case of the accused persons causing bodily injuries with the intention to cause his death. The case of the accused persons clearly attracts Section 304 Part-I of IPC.

60. The contentions which have been raised by counsel for the appellants to assail the findings of the learned trial court have already been dealt with by the learned trial court with all objective analysis and proper reasoning and we find no ground to disagree with the reasoning given by the learned trial court.

61. In the view of the aforesaid, the judgment and the order of the learned Additional Sessions Judge dated 24th July 1999 and 28th July 1999, respectively convicting the appellants for the offence punishable u/s 302 IPC is modified to the extent that the appellants are convicted u/s 304 Part I IPC and the sentence of life imprisonment is reduced to the sentence for a period of ten years.

62. The appellants are on bail. Their bail bonds and sureties are forfeited. They are ordered to be taken into custody forthwith.

63. Copy of this judgment to be sent to the Jail Superintendent for information and further compliance.

64. The appeal stands disposed of in the aforesaid terms.