

(2018) 08 RAJ CK 0101

In the Rajasthan High Court

Case No : Criminal Appeal No. 889, 758 of 2005

Vinod Kumar @APPELLANT@Hash State of Rajasthan & Ors.

Date of Decision : 20-08-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 304, 323, 326
Code of Criminal Procedure, 1973 — Section 161, 313, 437A

Citation : (2018) 08 RAJ CK 0101

Hon'ble Judges : SANGEET LODHA, J; DR. VIRENDRA KUMAR MATHUR, J

Bench : Division Bench

Advocate : Mahesh Bora, Nishant Bora, Arun Kumar, Vishnu Kachhawaha, Manoj Pareek

Final Decision : Partly Allowed

Judgement

Sangeet Lodha, J.

1. These appeals are directed against judgment and order dated 26.9.05 passed by the Additional Sessions Judge, Rajgarh (Churu) in Sessions Case

No.31/04 (7/01), whereby the appellants have been convicted and sentenced as under:

Vinod Kumar

Â Section 302 IPC

Life imprisonment with fine Rs.10,000/-; in default of payment of fine, to further undergo two monthsâ?? rigorous imprisonment.

Ramkumar, Rajesh, Smt. Chandro Devi

Â Section 302/34 IPC

Life imprisonment with fine Rs.10,000/-; in default of payment of fine, to further undergo two monthsâ?? rigorous imprisonment.

2. In nutshell the prosecution story may be summarised thus:

On 6.11.2000 around 9.45 P.M. in the village Kalri Bari, water supply began and therefore, lots of people gathered at the water supply tank to draw water. Raghuveer Singh, who was present there, informed the crowd that they need not hurry and may take out the water peacefully as he had telephonic conversation with Mangeram Mund, J.En., Water Works, who told that supply shall continue for one more hour. At that moment, Vinod Kumar told Raghuveer Singh that who is he to talk to J.En., there is no need to impose the leadership, he should go home. On this, Raghuveer Singh and Vinod Kumar entered into altercation then Rajkumar, the brother of Raghuveer Singh and his uncle Vijay Singh took away Raghuveer Singh to home. After ten minutes of Raghuveer Singh reaching home, Ramkumar, the father of Vinod Kumar came in front of his house and while shouting told Raghuveer Singh to come out of the house once, on this Raghuveer Singh went out of the house in the street outside, his brother Rajkumar and wife also followed him to the street. They saw that Ramkumar was holding right hand of Raghuveer Singh and Rajesh s/o Ramkumar, who was armed with lathi inflicted blow on elbow of left hand of Raghuveer Singh and Vinod Kumar who was armed with barchhi inflicted injury on the head of Raghuveer Singh by sharp edged side, as a result thereof, Raghuveer Singh fell on the ground and the blood started oozing out of his head and he become unconscious. Ramkumar's wife Chandro holding a stick was standing in verandah of her house and told Vinod to kill Raghuveer. Vijay Singh, Tarachand, Karan Singh, Jaiprakash and others, who were filling water also rushed to the spot. On their shouting at Vinod Kumar and Ramkumar, they fled away to their house leaving Raghuveer Singh behind. Raghuveer Singh was taken to Government Hospital, Rajgarh by Rajkumar, Vijay Singh, Karn Singh, Mor Singh and Tarachand in a jeep of villager Balwan. As soon as they reached hospital, Raghuveer Singh succumbed to the injuries, whose body was kept in hospital mortuary.

3. Narrating the incident occurred as aforesaid, P.W.1-Rajkumar submitted a written report (Ex.P/1) to the Station House Officer, Police Station, Hamirwas, at Government Hospital, Rajgarh. On the basis of the written report, the police registered the FIR (Ex.P/2) on 7.11.2000 at 2.30 A.M. and the investigation commenced.

4. During the investigation, necessary memos were drawn. After inquest

proceedings, blood stained clothes of the deceased were seized. Accused persons were arrested and at their instance, the weapon of offence were recovered. Blood stained clothes and weapons were sent for examination to the Forensic Science Laboratory (FSL) and the report was obtained.

5. After completion of the investigation, the police filed charge sheet against the appellants for offence under Section 302/34 IPC. The trial Judge

framed the charge against the accused appellant Vinod Kumar for offence under Section 302 IPC and against the accused appellants Ramkumar,

Rajesh Kumar and Chandro Devi for offence under Section 302/34 IPC. The accused appellants denied the charges and claimed trial.

6. During the trial, the prosecution got examined as many as 17 witnesses (P.W. 1 to P.W. 17) and documentary evidence was exhibited as Ex.P/1 to

P/38. After completion of the prosecution evidence, the statements of the accused appellants were recorded under Section 313 Cr.P.C. wherein they

denied their involvement in commission of the offence and expressed the desire to lead evidence in defence. The accused appellant Vinod Kumar

raised plea of alibi. In defence, the accused appellants got examined 8 witnesses D.W.-1 to D.W.-8 and documentary evidence was exhibited as

Ex.D/1 to D/21.

7. The learned trial Judge after due consideration of the rival submissions and evidence on record, convicted and sentenced the appellants as indicated

above. Hence, these appeals.

8. Mr. Mahesh Bora, Senior Advocate, appearing for the appellants submitted that the prosecution case rests on testimony of alleged eye witnesses

P.W.1-Rajkumar, P.W.2-Sumitra Devi, P.W.3-Vijay Singh, P.W.4-Karan Singh, P.W.5-Tarachand and P.W.6Mehar Singh, who had seen the

accused persons fleeing away from the spot. Learned counsel submitted that as a matter of fact, none of the witnesses projected by the prosecution

as eye witnesses, could be considered to be the eye witness of the incident. Drawing the attention of the court to the written report (Ex.P/1), learned

counsel submitted that as per the written report, only two injuries were caused to the deceased; one by accused Rajesh on the left upper arm by lathi

blow and another by accused Vinod Kumar by sharp edged side of barchhi on the head whereas, as per post mortem report (Ex.P/21), seven injuries

were found on the person of the deceased. The eye witnesses while improving

their original version as contained in the written report (Ex.P/1) and the statement under Section 161 Cr.P.C. (Ex.D/1 to D/5), in their deposition before the court, stated that the injuries were caused to the deceased by stick blow by accused Chandro as well.

Learned counsel would submit that the entire prosecution story is concocted and false. The accused Vinod Kumar, who was at the relevant time

serving as Signalman in Unit 2 RR Battalion, c/o of 56 APO, after availing the leave for 14 days from 20.10.2000 to 2.11.2000 had rejoined duties on

7.11.2000 and during the period from 3.11.2000 to 6.11.2000 remained in 213 Transit Camp, which is apparent from bare perusal of Ex.D/8A,

Ex.D/9A, Ex.D/10 and Ex.D/10A. Learned counsel submitted that the plea of alibi taken by the accused Vinod further stands established by

deposition of D.W.1-Baru Singh who had appeared before the court for examination with the official record. Learned counsel would submit that the

factum of the accused Vinod being on duty during the relevant period had come on record yet, the Investigating Officer did not care to investigate the

matter in this regard and thus, there is no reason as to why the official record exhibited in evidence and the testimony of the official witness should be

disbelieved.

Learned counsel submitted that it is an admitted fact that the independent persons viz. Banwari, Bheem Singh, Rooparam and Dara Singh etc. were

present on the spot, however, none of them was produced by the prosecution for examination as witness. Learned counsel would submit that lapse on

the part of the Investigating Officer in not interrogating the independent persons available at the spot and not producing them for examination before

the Court, makes the investigation unfair. It is submitted that the testimony of interested eye witness being not wholly reliable on account of

contradictions and embellishment, the same cannot be made basis for conviction of the appellants.

Learned counsel submitted that from Village Kalri Badi, Hamirwas police station is only 6 miles away, but, the written report was submitted at 1.30

AM. There is no explanation regarding delay in lodging the FIR. It is submitted that before submitting the written report, the investigation had

already commenced and thus, the registration of the FIR on the basis of the written report is fatal to the prosecution case.

Learned counsel submitted that as per the written report, only two injuries were caused to the deceased and as per the post mortem report (Ex.P/21), out of the seven injuries found on the person of the deceased, only one injury was found to be grievous in nature, other injuries were bruises and abrasions and thus, the nature of the injuries caused to the deceased, in no manner indicates that the accused had intention to cause death and thus, looking at the injuries, the case against the accused Vinod Kumar cannot travel beyond provisions of Section 304 Part II IPC and as against the co-accused Rajesh under Section 323 IPC.

Learned counsel submitted that according to the prosecution, Ramkumar caught hold of right hand of the deceased, he was not having any weapon in his hands and thus, on the facts and the circumstances of the case, it is against the human conduct that the deceased who was a young person would not react and wait for other persons to attack him. According to the learned counsel, apparently, Ram Kumar and Smt. Chandro have not played any role and thus, it is a case of over implication.

Learned counsel further submitted that besides the fact that there was no previous enmity between the parties, there is absence of the motive and thus, on the facts and in the circumstances of the case, in no manner, it could be gathered that the accused persons had intention to cause death of Raghuveer Singh.

Learned counsel submitted that all the recoveries i.e. Bamboo Stick at the instance of accused Smt. Chandro and Rajesh Kumar and Barchhi at the instance of accused Vinod Kumar, were made from the same house on different dates, which by itself shows that the recoveries effected are absolutely fake. In the first instance, on the basis of the information furnished by Smt. Chandro vide Ex.P/27 on 8.11.2000 at 8.30 AM, Bamboo Stick was recovered vide Ex.P/13 wherein time of recovery was not mentioned. At the instance of accused Rajesh, a Bamboo Stick was recovered on 10.11.2000 vide Ex.P/17 and thereafter, at the instance of accused Vinod Kumar, Barchhi was recovered on 24.1.2001 vide Ex.P/15. Learned counsel submitted that when the recovery was effected at the instance of Smt. Chandro Devi on 8.11.2000, why the co-accused shall keep the weapon of offence at their own house. Learned counsel submitted that as per deposition of P.W.7-Mahendra Singh, after arrest of accused Chandro,

Ramkumar and Rajesh on 7.11.2000, the house was locked and the key was kept by the police official by them and on the next day when recovery was made, the lock was opened by the police. He further deposed that on 7.11.2000 when Smt. Chandro was arrested, the house was searched by the police and further that when Vinod Kumar was arrested on 24.1.2001 and brought to the house, nobody was there at home and the lock was opened by the police. Strangely enough, P.W.9-Bajrang, the witness of recovery at the instance of Vinod Kumar, has deposed that the lock of the house was opened by Vinod Kumar by taking out keys of the lock put thereon from his own pocket. Learned counsel submitted that the deposition of the said witnesses makes it abundantly clear that the recoveries effected were absolutely concocted and false.

Learned counsel while questioning the correctness of the FSL report (Ex.P/38), submitted that there is no possibility of determination of the group of the blood found on Barchhi recovered at the instance of accused Vinod Kumar after a lapse of about two and half months. It is submitted that the article recovered at the instance of Smt. Chandro i.e. Bamboo Stick, alleged to be blood stained was not marked and sent for FSL examination. That apart, no blood was detected on the Bamboo Stick recovered at the instance of accused Rajesh.Â

Learned counsel submitted that as per prosecution, Raghuveer was taken to the Rajgarh Hospital by P.W.1-Rajkumar, P.W.4-Karan Singh, P.W.5-

Tarachand and Jaiprakash. As per deposition of P.W.1-Rajkumar, when Raghuveer was lifted from the place of occurrence and put into jeep, their clothes got blood stained. However, their clothes were not recovered by the police to show their presence at the place of occurrence.

Lastly, learned counsel submitted that no common intention can be attributed to the accused persons to kill Raghuveer. Further, as a matter of fact, out

of seven injuries found on the person of the deceased, only one injury caused is found grievous which is attributed to Vinod Kumar and thus, even if

the commission of offence is found proved against him, it cannot travel beyond the provisions of Section 326 or 304 Part II IPC. The accused Chandro

Devi, who was merely standing at the place of occurrence and had played no role in commission of the crime. Similarly, the only allegation against the

accused Ramkumar is that he caught hold of right hand of the deceased. Thus, it is apparently a case of over implication. Regarding accused Rajesh

Kumar, learned counsel submitted that as per the evidence on record, accused Rajesh Kumar caused only a simple injury and thus if the commission of offence against him is found to be proved, his conviction cannot travel beyond the provisions of Section 323 IPC.

9. On the other hand, learned Public Prosecutor submitted that the prosecution has proved the guilt of the accused persons beyond reasonable doubt

on the basis of the cogent evidence on record. It is submitted that the incident occurred in front of the house of the deceased and thus, presence of

P.W.1-Rajkumar and P.W.2-Sumitra, the brother and wife of the deceased, was absolutely natural. Learned Public Prosecutor submitted that the

testimony of closely related eye witness cannot be discarded rather, must be considered as wholly reliable inasmuch as, obviously, the close relatives

shall be always interested in seeing that the actual culprit is punished. Learned Public Prosecutor submitted that some discrepancies and contradictions

here and there in the testimony of the eye witnesses do not make them wholly unreliable. Learned Public Prosecutor submitted that P.W.1Rajkumar

and P.W.2-Sumitra, the brother and wife of the deceased, have come out with the consistent version regarding the origin of the incident, the role

played by the accused persons and the entire narration as to how the incident occurred and thus, there is no reason as to why their testimony should

not be believed. It is submitted that apart from P.W.1-Rajkumar, the independent witnesses P.W.3-Vijay Singh, P.W.4-Karan Singh and P.W.5-

Tarachand have also supported the prosecution case. Drawing the attention of the court to the deposition of aforesaid witnesses, learned Public

Prosecutor submitted that Ramkumar caught hold of the deceased, which facilitated the co-accused in causing injuries and specific overt act has been

assigned to each of the accused and thus, it is not a case where the incident had occurred all of a sudden and apparently, the accused persons had

shared common intention. Learned Public Prosecutor submitted that after occurrence of the incident at 9.55 P.M., the deceased Raghuveer was

straight away taken to the hospital to save his life and therefore, some delay caused in lodging the FIR cannot be considered fatal to the prosecution

case. Learned Public Prosecutor submitted that the plea of alibi set out by the accused Vinod Kumar is absolutely baseless. It is submitted that after

availing the leave, on rejoining the attendance of the officials of the accused Vinod Kumar's rank is marked with Hawaldar Major and it is

Hawaladar Major who reports arrival of the individuals to the senior officer. Learned Public Prosecutor submitted that accused Vinod Kumar has specifically admitted that he was not put to any specific duty on 6.11.2000 which shows that he was not in transit camp. It is submitted that on the basis of the evidence on record, it is not clear that accused Vinod Kumar joined duties on 7.11.2000 or 8.11.2000 is not clear. The officers who could have been examined to prove the documents produced in defence were not examined as witnesses before the court and thus, the accused has failed to prove the plea of alibi by any cogent evidence on record. To the contrary, his involvement in commission of the crime stands proved by deposition of the eye witnesses, whose presence at the place of occurrence cannot be doubted. Accordingly, it is submitted that in the totality of the facts and circumstances of the case, where the guilt of the accused is proved on the basis of cogent evidence on record, there is no reason why the conviction of the accused persons by the learned trial Judge should be interfered with by this court in exercise of its appellate jurisdiction.

10. We have considered the rival submissions and scanned the evidence on record thoroughly.

11. P.W.13-Dr.Rajkumar Saraf conducted autopsy of the dead body of Raghuveer. As per the post mortem report (Ex.P/21), following ante mortem

injuries were found on the person of the deceased Raghuveer:-

1. Incised wound 8" x 1" x brain deep at right side forehead starting from middle of right parietal region 1/2" right to midline of skull extending to right parietal, right frontal region, on side of forehead, medial angle of right eye & right side of nose upto right nostril, margins are clear cut, widest at middle of tapping at ribs, skin, soft tissues & underlying Bones are cut. Brain matter seen through wound. Haematoma present all around soft tissue & over the skull bones.

Underlying brain membranes are cut & Brain matter (right cerebral hemisphere) is cut 3/4" in depth subdural & intra cerebral haemorrhage is present. Wound is longitudinal in direction.

2. Bruise 4" x 3/4" on upper part of left upper arm.

3. Bruise 4" x 3/4" on left lumbar region of abdomen.

4. Abrasion 2" x 1/2" on left Ant. superior iliac surface region.

5. Abrasion 1 $\frac{1}{2}$ x $\frac{1}{3}$ on dorsum of right foot.
6. Abrasion 1 $\frac{1}{2}$ x $\frac{1}{3}$ on lower $\frac{1}{3}$ of right leg.
7. Abrasion 1 $\frac{1}{2}$ x $\frac{1}{3}$ on middle $\frac{1}{3}$ of right leg.

The cause of death is opined to be shock resulting from injury to brain, which is ante mortem in nature and sufficient to cause death in due course of nature.

The injuries found on the person of the deceased and cause of death, further stands confirmed by deposition of PW 13-Dr. Rajkumar Saraf, who

deposed in unequivocal terms that injury no.1 caused on the head of the deceased by sharp edged weapon was sufficient to cause death in ordinary course of nature. Thus, looking at the nature of injuries and the medical evidence on record the death of Raghuveer was concededly homicidal in nature.

12. As per prosecution, in the first instance, accused Vinod Kumar picked up quarrel with the deceased Raghuveer Singh at the village water tank,

which ended up after intervention by P.W.3Vijay Singh. Raghuveer Singh was taken to his home by P.W.1Rajkumar and P.W.3-Vijay Singh. After a

few minutes, accused Ramkumar while shouting told Raghuveer Singh to come out of the house. On this, Raghuveer Singh went out of the house in

the street outside, his brother P.W.1-Rajkumar and wife P.W.2-Sumitra followed him. Ramkumar caught hold of right hand of Raghuveer, accused

Rajesh inflicted lathi blow on his left hand and accused Vinod Kumar inflicted injury on his head by sharp edged side of Barchhi. As per the original

version of the complainant in written report (Ex.P/1) and in the statements of the witnesses recorded under Section 161 Cr.P.C., accused Smt.

Chandro while holding a stick was standing in verandah of her house, told Vinod Kumar to kill Raghuveer but, as per the deposition of the witnesses

before the court, Smt. Chandro inflicted lathi blows on the legs of Raghuveer after his felling down on the ground. As a result of the injury caused on

the head, Raghuveer fell unconscious and the blood was oozing out of his head. He was taken to the hospital where the doctor declared him brought

dead.

13. The prosecution case was founded on testimony of eye witnesses P.W.1-Rajkumar, P.W.2-Sumitra Devi, P.W.3-Vijay Singh, P.W.4-Karan Singh

and P.W.5-Tarachand as also P.W.6-Mor Singh, who had seen the appellants fleeing away from the place of occurrence.

14. Indisputably, P.W.1-Rajkumar, P.W.2-Sumitra Devi and P.W.3Vijay Singh being closely related to the deceased Raghuveer Singh were interested witness.

15. Before proceeding to consider the evidence adduced at the trial, we deem it appropriate to refer to the position of law settled on the issue whether

it is safe to convict an accused on the testimony of eye witnesses, who are alleged to be interested witnesses.

16. In *Vadivelu Thevar vs. State of Madras*, AIR 1957 SC 614, the Hon'ble Supreme Court observed:

“... It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of

uncommon occurrence where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of

witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the

discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of

the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no

legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a

single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of

witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well-established rule of

law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact, Generally

speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty to its

conclusion either way- it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony open to suspicion and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a particular in crime. But, where there are no much exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable. We have therefore, no reasons to refuse to act upon the testimony of the first witness, which is the only reliable evidence in support of the prosecution.â??(Emphasis supplied)

17. In *Masalti & Ors. vs. The State of Uttar Pradesh*, AIR 1965 SC 202, the Hon'ble Supreme Court observed:

â??... There is no doubt that when a criminal Court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence; whether or not evidence strikes the Court as genuine; whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But, it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested

witnesses. Often enough, where factions prevail in villages and murders are committed as a mechanical rejection of such evidence on the sole ground

that it is a partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated.

Judicial approach has to be cautions in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be

accepted as correct.â??(emphasis supplied)

18. InÂ â??Anil Phukan vs. State of Assamâ?, 1993 Cri.L.J.1796, the Hon'ble Supreme Court observed that a conviction can be based on the

testimony of single eye-witness and there is no rule of law of evidence which says to the contrary provided that sole witness passes the test of

reliability. However, where the single eyewitness is not found to be wholly reliable witness, in the sense that there are some circumstances which may

show that he could have any interest in the prosecution then the courts generally insist upon some independent corroboration of his testimony, in

material particulars, before recording conviction. It is only when the courts find that the single eye witness is wholly unreliable witness that his

testimony is discarded in toto.

Â In the said case, where the alleged single eye-witness being a close relative of the deceased and though alleged to be present at the place of

occurrence but did not attempt to save deceased and also his statement about the time of occurrence was contrary to the medical evidence, the court

observed that said eye witness could not be relied upon for the conviction of the accused.

19. Thus, it stands well settled that the absence of independent witness by itself may not give rise to the adverse inference against the prosecution and

credibility of the witness of the close relative of the deceased cannot be discarded solely on the ground that he is an interested witness if it otherwise

inspires confidence. However, the court must scrutinize such evidence with care and caution. Where the testimony of eye witnesses is not found to be

wholly reliable, the court must insist upon corroboration of their testimony.

20. In the backdrop of the settled position of law referred to hereinabove, now we proceed to scrutinize the evidence ofÂ P.W.1Rajkumar, P.W.2-

Sumitra Devi, P.W.3-Vijay Singh, P.W.4-Karan Singh, P.W.5-TarachandÂ and P.W.6-Mor Singh.

21. P.W.1-Rajkumar, the brother of the deceased, deposed that on 6.11.2000 around 9.45 P.M. lots of people gathered at the water tank to draw water, which is just nearby their house. Raghuveer Singh, his elder brother, tried to convince the persons present that they can take water comfortably inasmuch as, as per his telephonic conversation with Mangeram, J.En., Water Works, the water supply shall continue for an hour. At that moment, accused Vinod Kumar, a defence personnel, who had come to the village on leave, present there, told Raghuveer Singh that he need not impose his leadership and should go home. On this Raghuveer Singh and accused Vinod Kumar entered into altercations then, he and his uncle Vijay Singh took away Raghuveer Singh to their home. Vijay Singh returned to the water tank, however, they both the brothers stayed back at home. After ten minutes, Ramkumar, the father of the accused Vinod Kumar, told Raghuveer Singh to once come out of the house. Raghuveer Singh went out of the house, he and his sister-in-law Sumitra (the wife of deceased Raghuveer Singh) followed him and came out of the house. They saw that accused Ramkumar caught hold of right hand of Raghuveer and accused Rajesh Kumar who was having stick in his hand, inflicted blow on the upper arm of Raghuveer and accused Vinod Kumar, who was armed with Barchhi, inflicted injury on the head of Raghuveer Singh by sharp edged side of Barchhi, Raghuveer Singh fell down, blood started oozing out from his head and he fell unconscious. Then Ramkumar's wife Chandro, who was having stick in her hand announced that Raghuveer should be killed. He and Sumitra raised alarm then, Vijay Singh, Tarachand, Karan Singh, Jaiprakash rushed to the spot. They challenged accused persons, who while leaving Raghuveer Singh, fled away to their house. Thereafter, Raghuveer Singh was taken care of, he was taken to the Rajgarh Hospital by him, Tarachand, Vijay Singh, Karan Singh and Mor Singh. The doctor announced that Raghuveer Singh has died.

In cross examination, he deposed that Chandro inflicted one or two stick blows on Raghuveer Singh's legs after he fell down, which caused swelling and abrasion on his legs. He deposed that in the written report (Ex.P/1) he had mentioned about Chandro inflicting stick blows on the legs of Raghuveer and he does not know why it is not mentioned therein. Vinod Kumar had inflicted only one injury by Barchhi on the head of Raghuveer.

The injuries were caused by all the three accused persons within a span of 3-4 minutes. He deposed that the water tank is situated 100 ft. away from their house. The injuries on the person of Raghuveer Singh were inflicted by the accused persons after all the persons reached on the spot from the water tank. He stated that while putting Raghuveer Singh in the jeep, their clothes got blood stained which were not handed over by them to the police. He denied the knowledge about Vinod Kumar being posted at Srinagar in the army and categorically deposed that on 6.11.2000, accused Vinod Kumar was not on duty rather, he was in village Kalri Badi.

22. The deposition of P.W.2-Sumitra Devi is consistent with the deposition of P.W.1-Rajkumar, with the only variation that according to her, the injuries were caused within the span of 1-2 minutes. Further, she deposed that the factum of Chandro causing injuries to her husband by stick was revealed by her to the police but she does not know as to why it is not recorded in her police statement (Ex.D/2). She deposed that her husband had suffered 6-7 injuries. Chandro inflicted injuries on knee joint and blood was oozing out of it. Rajesh had inflicted two lathi blows; one near the shoulder and another a little below it. Chandro had inflicted injuries after her husband fell down on the ground.

23. P.W.3-Vijay Singh while narrating the first part of the incident as narrated by P.W.1-Rajkumar and P.W.2-Sumitra Devi, further deposed that while leaving Raghuveer and Rajkumar at home, he returned to the water tank and after 5-7 minutes he heard the voice of Ramkumar calling Raghuveer to come out of the house. When he reached on the spot, Ramkumar was holding right hand of Raghuveer Singh and accused Rajesh inflicted lathi blow on left hand of Raghuveer, Vinod Kumar inflicted injury on the head of Raghuveer while standing in front of him, by sharp edged side of the Barchhi. As soon as Barchhi blow was given, Raghuveer fell down on the ground, Rajkumar and Raghuveer's wife Sumitra were present on the spot. He, Tarachand, Jaiprakash and Karni Singh had reached spot when accused persons were belabouring Raghuveer. Ramkumar's wife Chandro, inflicted lathi blows on the legs of Raghuveer after his felling down on the ground. On their challenging, accused persons fled away and while carrying the arms with them, went inside their house. Raghuveer was taken to the hospital by him, Mor Singh, Rajkumar

and Dayanand. On reaching hospital, the doctor declared Raghuveer brought dead.

In cross examination, he stated that the factum of Chandro being armed with stick and she inflicting injuries on the legs of Raghuveer after his felling

down on the ground was revealed by him to the police and he does not know as to why it is not recorded in Ex.D/3. He deposed that Rajesh had

inflicted only one lathi blow. Bheem Singh, Banwari, Hetram and Rooparam, who were standing at their gates, did not come to the spot.

24. The deposition of P.W.4-Karan Singh is consistent with the deposition of P.W.3-Vijay Singh, however, he deposed that at the time of incident,

Santro Devi and Rajkumar also came to the spot.

In cross examination, he deposed that he had not heard the voice of Raghuveer rather, he heard the call of Rajkumar and Raghuveer's wife for

rescue. He deposed that he had revealed the factum of Chandro being armed with stick and she causing injuries on the legs of Raghuveer, however,

he does not know as to why the same is not mentioned in Ex.D/4. He deposed that accused persons were not seen on the next day and accused

Vinod had absconded.

25. P.W.5-Tarachand deposed that on the fateful day, the watersupply at the water tank began around 9.30 P.M. At that time, he, Vijay Singh, Karan

Singh, Jaiprakash, Rajesh and Vinod were there. The women and children of the village were drawing water from the tank. The children indulged in

altercations, at that time, Raghuveer came to the tank from his house and said not to make noise and informed that he had telephonic conversation

with the A.En., the water supply shall continue for an hour. Thereupon, Vinod told Raghuveer that he is not the leader (choudhary), what is his

authority to contact the A.En. on phone. Raghuveer was taken home by Rajkumar and Vijay. After 10-15 minutes there was hue and cry, there was a

call for rescue. He, Vijay Singh, Jaiprakash and Karan Singh rushed to the spot and saw that Ramkumar was holding right hand of Raghuveer, Vinod

was armed with Barchhi, who inflicted blow on the head of Raghuveer, Rajesh gave stick blow on the left hand of Raghuveer and after his felling

down, Chandro inflicted stick blows on the legs of Raghuveer. On their raising alarm, the accused persons fled away to their houses. When

Raghuveer was being beaten, Rajkumar and Raghuveer's wife were the

persons rescuing him. Raghuveer fell unconscious. Thereafter, Raghuveer was taken to the hospital at Rajgarh in a jeep by him, Vijay, Jaiprakash and Karan Singh. Raghuveer died on account of the injury caused by Barchhi.

In cross examination, he deposed that handle of the Barchhi was made of bamboo stick. At the first instance, Vinod inflicted stick blow on the arm of Raghuveer. He deposed that the factum of Chandro inflicted stick blows on the legs of Raghuveer was disclosed by him to the police, why it is written in Ex.D/5, he does not know.

26. P.W.6-Mor Singh deposed that around 10 P.M. there was a hue and cry in the chowk, Ramkumar, Vinod, Rajesh and Chandro were running towards their house. Raghuveer was lying in the chowk and Rajkumar, Tarachand, Vijay Singh and Jaiprakash were standing nearby, they apprised him that Ramkumar, Chandro, Rajesh and Vinod have fled away after belabouring Raghuveer. He saw that amongst the accused persons fleeing away, Vinod was armed with Barchhi; Rajesh, Rajkumar and Chandro with sticks.

27. It is noticed that the incident had occurred in front of house of the deceased Raghuveer. P.W.1-Rajkumar and P.W.2-Sumitra being brother and wife of the deceased, their presence at the time of occurrence was natural and cannot be doubted. As per the evidence on record, the incident of accused persons belabouring Raghuveer was preceded by the incident of altercation between Raghuveer and accused Vinod at the water tank. Merely because they happen to be close relative of the deceased, their testimony cannot be discarded.

28. A perusal of the deposition of P.W.1-Rajkumar, the brother of the deceased and P.W.2-Sumitra is consistent with regard to the manner in which the incident occurred and the role played by the each of the accused individually in belabouring and causing death of Raghuveer Singh. As per the deposition of the said eye witnesses, the injury found fatal was caused by the accused Vinod Kumar. It is true that there is improvement made by these witnesses from their original versions as contained in written report (Ex.P/1) and their statement recorded under Section 161 Cr.P.C. by the police (Ex.D/1 & Ex.D/2) regarding the injuries caused to the deceased assigned to the accused Chandro Devi and thus, the possibility of over implication cannot be ruled out. However, the deposition of the said witnesses

regarding genesis of the incident, the role played by the accused persons Vinod, Rajesh and Ramkumar in belabouring deceased Raghuveer remained consistent and unshakened. Their credibility and the value of the evidence are not impeached in any manner in the cross examination. Obviously, the wife and brother of the deceased will not substitute the assailant of their husband/brother in place of real assailant. In this view of the matter, we do not find any reason not to believe the testimony of the said eye witnesses as truthful and reliable.

29. There is consistency in the evidence of the witnesses that P.W.3-Vijay Singh, P.W.4-Karan Singh, P.W.5-Tarachand and P.W.6Mor Singh were available at the place nearby the house of the deceased where the villagers were drawing water from water tank. As per the site plan (Ex.P/3), the house of the deceased Raghuveer Singh is just nearby the water tank and one of the door of his house opens in the street where water tank is constructed. However, from water tank one could have reached to the place of occurrence after taking a turn by the side of the house of the deceased. As per P.W.2-Sumitra, the water tank is situated 30 steps away from their house. P.W.1-Rajkumar deposed that water is situated 100 ft. away from their house. Likewise, P.W.4-Karan Singh has deposed that the water tank is situated 100 ft. away from northern gate of the house of the deceased Raghuveer. As per P.W.15-Tarachand, the Investigating Officer, the water tank situated at 100-125 ft. away, was visible from the place of occurrence. Thus, taking into consideration the location of the water tank vis-a-vis the place of the occurrence, in the considered opinion of this court, the deposition of the said witnesses that on hearing the hue and cry, from water tank they rushed to the place of occurrence and saw the incident occurred, cannot be doubted. As per the eye witnesses P.W.1-Rajkumar and P.W.2-Sumitra, the injuries were caused to the deceased within a span of a few minutes and thus, it is possible that before P.W.3Vijay Singh, P.W.4-Karan Singh, P.W.5-Tarachand reached the place of occurrence, the accused persons might have already started belabouring the deceased and they might not have seen each of the accused persons causing injuries to the deceased Raghuveer Singh. But then, their deposition to the extent that on their reaching the place of occurrence and challenging the accused persons, they fled away with the arms in their hands to their house nearby,

cannot be disbelieved.

30. As per the post mortem report (Ex.P/21), out of seven injuries found on the person of the deceased, one was brain deep incised wound at the right side of forehead. That apart, there were two bruises and four abrasions; one bruise was found on left upper arm and another on left lumbar region of abdomen whereas, the abrasions were found on the legs. Thus, the ocular evidence is corroborated by the medical evidence to a great extent. On the facts and in the circumstances of the case, where number of persons were involved in belabouring the deceased Raghuveer Singh and injuries were caused within a few minutes, merely because, the eye witnesses have not given the complete account of the injuries caused to the deceased by each of the accused, their testimony cannot be disbelieved.

31. Coming to the recoveries, it is true that the recoveries at the instance of the accused persons were effected by the police from the different places within the precincts of their house on different dates. At the instance of Chandro Devi, a blood stained bamboo stick was recovered on 8.11.2000, thereafter, at the instance of Rajesh Kumar, bamboo stick was recovered on 10.11.2000 and lastly, at the instance of Vinod Kumar, Barchhi was recovered on 24.1.2001.

As per the deposition of P.W.7-Mahendra Singh, who was the witness of arrest of the accused Chandro Devi as also of recovery effected at her instance deposed that after the arrest of accused Chandro, the house was locked and key was kept by the police officials and on the next day, when the recovery was made, lock was opened by the police. He also deposed that on 7.11.2000 when Chandro was arrested, the police had searched the house. To the contrary, PW-8 Antar Singh in his examination-in-chief deposed that when accused Chandro was arrested, at the same time, a Bamboo Stick was recovered at her instance from a room facing north i.e. on 7.11.2000. However, in cross-examination, he deposed that on the next day, accused Chandro was brought to her house, she opened the door of the house and at her instance, a stick was recovered at around 9.00-9.30 AM. PW-7- Mahendra Singh was the witness of the recovery effected at the instance of Vinod Kumar as well. He deposed that when Vinod Kumar was arrested and brought to the house on 24.1.2001, nobody was there at home and the lock was opened by the police.

The weapon of offence a blood stained Barchhi, concealed in the back of begs of the grams lying in a room, was recovered at the instance of accused Vinod Kumar. Further, as per P.W.9-Bajrang, yet another witness of recovery, at the time of recovery, the house was opened by Vinod Kumar by taking out keys of the lock from his own pocket. However, as per P.W.15Tarachand, the Investigating Officer, after arresting Smt. Chandro, he neither handed over the house to anybody nor put a lock thereon. He deposed that at the time of recovery being effected, at the instance of Chandro and Rajesh, the wife of brother of Ramkumar was present in the house. He further deposed that at the time when the recovery was effected at the instance of Vinod Kumar, his mother Smt. Chandro was present and she was not in judicial custody. Thus, on the facts and in the circumstances of the case, in our considered opinion, the variations/discrepancies in deposition of the witnesses regarding the recovery effected, makes the recovery doubtful.

32. So far as delay in lodging the FIR is concerned, the incident had occurred on 6.11.2000 at 9.45 P.M. The deceased Raghuveer Singh had suffered grievous head injury and thus, to save his life, he was required to be taken to the hospital at Rajgarh immediately. The police was called by the doctor in the hospital. The written report (Ex.P/1) was submitted by P.W.1-Rajkumar to the police at the Government Hospital, Rajgarh on 7.11.2000 at 1.30 A.M.Â Thus, on the facts and in the circumstances of the case, the delay of a few hours in lodging the FIR cannot be considered to be fatal to the prosecution case.

33. Coming to the plea of alibi taken by the accused Vinod Kumar, it is noticed that all the eye witnesses have categorically deposed that on the fateful day, in the first instance, accused Vinod Kumar picked up quarrel with the deceased Raghuveer Singh at the water tank, PW-1 Rajkumar and PW-3 Vijay Singh intervened and the deceased Raghuveer Singh was taken by them to his house. As noticed above, there is consistency in the deposition of eye witnesses that after 10-15 minutes, the accused persons gathered in front of the house of the deceased Raghuveer Singh and belaboured him. The categorical deposition of the witnesses regarding the accused Vinod Kumar causing fatal blow by Barchhi on the head of the deceased remains unshakened in the cross-examination.

34. The plea of alibi was taken by the accused Vinod Kumar in terms that he is employed in 2RR Battalion of Indian Army and was on annual leave

for the period from 20.10.2000 to 2.11.2000 and after availing the leave on 2.11.2000 by a private bus via Harpalu, he reached Sadulpur and from

where at 2.00 PM by a roadways bus reached Rewadi at 5.30 PM and on the same day, by Jammu-Tavi Express via Jaipur-Delhi, reached Jammu on

3.11.2000 and gave his attendance at transit camp. Later, on 6.11.2000 at 4.00 AM by army vehicle, he reached Srinagar at 8.00 PM and produced

leave certificate at 216 transit camp on 7.11.2000 at 9.00 AM and reached unit RR Battalion on the same day. According to him, he came to know

about the incident on 9.11.2000 when he contacted his relative on telephone who revealed that the police is searching him also.

In support of the plea, accused Vinod Kumar produced the documents Ex.D/6 to Ex.D/17. According to the accused Vinod Kumar, he had physically

reported to the unit 2RR Battalion on 8.11.2000 and before that from 3.11.2000 to 6.11.2000 he was at 213 Transit Camp. In this regard, he has

produced Ex.D/10, an attested copy of the document containing details of his stay at the Transit Camp from 3.11.2000 to 6.11.2000. The original

record maintained by the army regarding the entry of the defense personnel in the Transit Camp and the record of their attendance was not produced

before the Court on the ground that all the documents in this regard have been destroyed and for this purpose, destruction certificate issued by the

Lieutenant Colonel Mr. P.B. Thapa, Presiding Officer of 213 Transit Camp was placed on record, which is exhibited in evidence as Ex.D/13. It is

pertinent to note that as per the instructions issued by the Board of Officers of 213 Transit Camp placed on record as Ex.D/16, files/documents more

than three years old were recommended for destruction provided their security classification is confidential and below.

Accused Vinod Kumar, who appeared before the trial court for examination as witness DW-2, categorically admitted that the presence of the person

who joins the unit after availing holidays, is marked with Hawaldar Major, who in his turn, reports the arrivals of the individual to Senior Officer and he

had never worked under the Lieutenant, however, to prove the factum of accused reporting on duty as alleged, Hawaldar Major to whom he reported

after availing the holidays, was not got summoned by him for examination before the Court.

He further deposed that on 6.11.2000, during duty, he did not append his signature anywhere which could show that he was present at 213 Transit

Camp. As per Ex.D/9-A, a letter dated 7.6.2001 issued by Major Mr. S.B.Rana, of 2RR Battalion, only shows that the accused physically reported to

the unit on 8.11.2000. Apart from the fact that original of Ex.D/10 was not produced, it has also not been proved that who has issued the said

document in favour of the accused Vinod Kumar. No document was placed on record by the accused Vinod Kumar to show that besides the period

of leave how much journey period was granted to him by the unit. No proof of the travel as alleged was placed on record either.

The accused Vinod Kumar was well aware about the pendency of the trial against him, but he did not make any efforts for preservation of the

relevant record maintained by the concerned unit regarding his attendance during the period from 3.11.2000 to 7.11.2000. The accused even did not

make a prayer to the Court to summon the relevant record at the appropriate stage. As a matter of fact, as per the instructions as contained in

Ex.D/16 issued on 11.5.2002, files and documents more than three years old were recommended for destruction provided their security clarification

was confidential and below. Thus, apparently, even if the relevant record was falling within the category specified taking into consideration the

relevant period, could not have been destructed prior to November, 2003, whereas, the accused Vinod Kumar was examined before the Court on

8.4.2003.

Thus, on the facts and in the circumstances of the case, we are in agreement with the findings arrived at by the learned trial Judge that the accused

Vinod Kumar has failed to establish the plea of alibi.

35. In view of the discussion above, in our considered opinion, on the basis of the deposition of the eye witnesses P.W.1Rajkumar, P.W.2-Sumitra and

other witnesses P.W.3-Vijay Singh, P.W.4-Karan Singh, P.W.5-Tarachand and P.W.6-Mor Singh, it stands established that the accused Ramkumar

caught hold of right hand of the deceased and in furtherance of the common intention, the deceased Raghuveer Singh was belaboured by accused

Rajesh and Vinod Kumar. Rajesh inflicted stick blow and Vinod Kumar inflicted injury on the head of the deceased by sharp edged side of Barchhi,

which was found fatal. So far as accused Chandro Devi is concerned, as noticed

above, the original version of the witnesses as contained in written report (Ex.P/1) and their statement recorded under Section 161 Cr.P.C., is improved by them in their deposition before the court and the possibility of accused Chandro Devi being involved in the commission of crime by over implication cannot be ruled out and therefore, she deserves to be acquitted of the charges giving benefit of doubt.

36. This takes us to consider whether there was premeditation and common intention on the part of the accused appellants Vinod Kumar, Ramkumar and Rajesh Kumar to commit murder of deceased Raghuveer Singh.

37. There is no evidence on record suggesting that the accused appellants had any enmity with the deceased Raghuveer Singh. The incident of

accused persons belabouring Raghuveer Singh and causing inter alia a grievous injury was preceded by the incident of altercations between accused

Vinod Kumar and Raghuveer Singh over a trivial issue at the place where the villagers were drawing water from the water tank. On the basis of the

evidence on record, it cannot be inferred that the accused persons assaulted Raghuveer Singh with premeditation to cause his death. It is pertinent to

note that only one injury caused on the head of the deceased Raghuveer Singh by sharp edged side of Barchhi, is found fatal, which is attributed to the

accused Vinod Kumar. Had there been a common intention of the accused persons to cause death then obviously, other accused would have also

inflicted injuries on the vital part of the body of the deceased. But as per the post mortem report, it is manifestly clear that except the head injury

attributed to the accused Vinod Kumar, other injuries caused on non vital part of the body of the deceased, were not grievous in nature. Thus, it

appears that the accused persons who were armed with Barchhi and stick, had common intention to beat up and assault the deceased though not to

kill him or cause such bodily injury as is likely to cause death. But they must be knowing that co-accused Vinod Kumar was carrying sharp edged

Barchhi and thus, out of animosity generated on account of previous incident, may cause grievous injury and thus, the conviction of the co-accused

Ramkumar and Rajesh under Section 302/34 IPC deserves to be altered to Section 326/34 IPC.

38. As regards the accused Vinod Kumar, it stands proved that he caused injury on the head of the deceased by sharp edged Barchhi, which proved

fatal. Though, there was no intention to kill, looking at the nature of the head injury caused to the deceased by accused Vinod Kumar by sharp edged

side of Barchhi, as reflected in post mortem report (Ex.P/21), it can be safely inferred that he had intention to cause such bodily injury as is likely to

cause death and thus, the conviction of the accused appellant Vinod Kumar under Section 302/34 deserves to be altered to 304 Part I IPC.

39. In the result, the appeal preferred on behalf of the accused appellant Chandro Devi is allowed; the judgment and order under appeal convicting and

sentencing her for offence under Section 302/34 IPC is set aside. She is acquitted of the charge for offence under Section 302 IPC.

The appeal preferred on behalf of the accused appellant Vinod Kumar is partly allowed. The conviction of the appellant Vinod Kumar under Section

302 IPC is altered to Section 304 Part I IPC. He is sentenced to suffer rigorous imprisonment for a period of ten years with fine Rs.10,000/-; in

default of payment of fine to further undergo the rigorous imprisonment for a period of six months.Â If the accused Vinod Kumar has already

undergone the punishment awarded, he shall be released forthwith, if not required in any other case, else, he will serve out the remaining term of

sentence.

The appeal preferred on behalf of the accused appellant Ramkumar and Rajesh Kumar is partly allowed; their conviction under Section 302/34 IPC is

set aside. They are convicted for the offence under Section 326/34 IPC and sentenced to suffer rigorous imprisonment for a period of one year with

fine Rs.20,000/- each; in default to further undergo three months simple imprisonment. They are on bail. If they have not already undergone the

sentence awarded, they will surrender forthwith and/or shall be taken into custody, to serve out the remaining period of sentence.

The accused appellants Vinod Kumar, Ramkumar and Rajesh Kumar on being released, shall furnish a personal bond in sum of Rs.25,000/- each to

the satisfaction of the trial Judge in conformity with the provisions of Section 437A Cr.P.C.