

(2013) 09 RAJ CK 0174

In the Rajasthan High Court

Case No : Criminal Appeal No. 1315 of 2003 and Criminal Revision Petition No. 155 of 2004

Yashpali @ Jaspali

APPELLANT

Vs

The State of Rajasthan
 Brahmchari Vs State of
Rajasthan and Jaswant and Others

RESPONDENT

Date of Decision : 18-09-2013

Acts Referred:

Arms Act, 1959 — Section 25, 3

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313, 437A

Penal Code, 1860 (IPC) — Section 147, 148, 149, 300, 302

Citation : (2013) 09 RAJ CK 0174

Hon'ble Judges : Nisha Gupta, J; Mohammad Rafiq, J

Bench : Division Bench

Advocate : Harendra Singh, Mr. Rajesh Choudhary in D.B. Criminal Appeal No. 1315/2003 and Mr. Anil Jain in D.B. Criminal Revision Pet. No. 155/2004, for the Appellant; Javed Choudhary, Public Prosecutor for the State and Shri Neeraj Joshi in D.B. Crl. Revision Pet. No. 155/2004, for the Respondent

Final Decision : Dismissed

Judgement

Mohammad Rafiq, J.—Above criminal appeal has been preferred by convict accused-appellant Yashpali @ Jaspali against judgment dated 28.08.2003 of learned Additional Sessions Judge No. 1 (Fast Track), Dholpur, in Sessions Case No. 69/2002, whereby he has been convicted for offence u/s 302 IPC and sentenced to undergo life imprisonment with fine of Rs. 500/-, in default of payment of fine, he was ordered to additionally undergo rigorous imprisonment for one month. Above mentioned revision petition has been preferred by the accused-party in the above appeal challenging acquittal of the members of the complainant party of the charge of murdering two of their members. As per the prosecution case, the police recorded "parcha bayan" of one Jaswant Singh (PW-13) at General Hospital, Dholpur, in connection with the incident that took place on 27.08.1999 at 7.00 am. It was stated by him that there was a dispute

between him on the one hand and Bhimsen and others on the other hand, with regard to partition of certain agriculture land. Bhimsen and Yashpali had cultivated that agriculture land despite complainant party asking them not to do so. The village Panchas tried to mediate between both the parties. The dispute was about the land of one Shripat measuring 5 bighas and 7 biswas. Both, the accused-party and the complainant party had purchased half share each of that land and both wanted to cultivate that half portion of the land, which was adjacent to the tube-well. It was in that connection that the incident took place. It was stated that the Panchas-Prem Singh, Om Prakash, Nathi, Dayaram, Ram Shanker, Ramujiya, Purushottam, Ramphool, Sahib Singh and Jagdish tried to get the dispute settled but they failed to persuade the parties to arrive at an amicable settlement. Then Bhimsen, Gangola, Yashpali etc. ploughed the field forcibly. Bhimsen, Tulsi, Gangola, Yashpali, Dauji, Veero, his brothers and Preetam Singh, Ram Prasad, Vasudeo and Padam Singh, brothers of Dauji, of the accused-party were present. Yashpali opened fire from "katta", which hit Ramdeen. When complainant Jaswant Singh tried to save him, Padam inflicted a "kulhari" blow on him, due to which he became unconscious and fell down. He regained consciousness only in Hospital. His younger brothers Vijendra Singh and Ram Laxman also sustained injuries. Ramdeen died on account of firearm injury.

2. The police on the basis of aforesaid "parcha bayan" registered F.I.R. No. 190/99 for offence under Sections 147, 148, 149, 323, 307, 302 of the Indian Penal Code, and commenced investigation. The police filed challan against seven accused persons, namely, Brahmchari, Daudayal, Vasudeo, Birbal @ Veero, Ramrath @ Rama, Harimohan and present appellant Yashpali (hereinafter shall be referred to as "the first party") for offence under Sections 147, 148, 149, 323, 326, 307 and 302 IPC. Accused Yashpali was also charged for offence u/s 3/25 of the Arms Act. Learned trial court framed charges against accused Yashpali for offence under Sections 148, 302, 307/149, 323/149 IPC and Section 3/25 of the Arms Act, and against other accused persons for offence under Sections 147, 302/149, 307 and 323 IPC. They denied the charges and claimed to be tried. The prosecution examined 17 witnesses and got 47 documents exhibited. The defence did not produce any witness, however, got 12 documents exhibited. On conclusion of the trial, learned trial court, vide judgment dated 28.08.2003 in Sessions Case No. 69/2002, acquitted Brahmchari, Daudayal, Vasudeo, Birbal @ Veero, Ramrath @ Rama and Harimohan of all the charges. Learned trial court, however, while acquitting accused Yashpali for offence under Sections 148, 307/149, 323/149 IPC and Section 3/25 of the Arms Act, convicted him for offence u/s 302 IPC and sentenced to undergo life imprisonment with fine of Rs. 500/-. In default of payment of fine, he was required to further undergo rigorous imprisonment for one month. Hence, the Criminal Appeal on behalf of accused Yashpali.

3. It is significant to note that in the same incident, two persons of the first party, namely, Tulsi and Bhimsen, also died and some other received injuries and on the basis of "parcha bayan" of Brahmchari, the police registered F.I.R. No.

191/1999 for offence under Sections 147, 148, 149, 33, 307 and 302 IPC, and commenced investigation. After completion of investigation, the police filed challan. Charges were framed against accused-persons, namely, Jaswant, Ramlakhan, Kalicharan, Bijendra and Biharilal, (hereinafter shall be referred to as "the second party") for offence under Sections 148, 302, 302/149, 323 and 323/149 IPC. The accused denied the charges and claimed to be tried. Accused Bijendra Singh went absconding and standing warrant was issued against him. The prosecution examined 20 witnesses and got certain documents exhibited. The accused examined Indrajeet Sharma as DW-1, in defence. On conclusion of trial, learned Additional Sessions Judge No. 1, (Fast Track) Dholpur, vide judgment dated 28.08.2003 in Sessions Case No. 0/2002, acquitted accused Jaswant, Ramlakhan, Kalicharan and Biharilal on the premise that they acted in exercise of right of private defence. Hence, the revision petition on behalf of Brahmchari of the accused-party. Brahmchari, Daudayal, Vasudeo, Birbal @ Veero, Ramrath @ Rama, Harimohan, and present accused-appellant Yashpali shall be herein referred to as "the first party". Jaswant, Ramlakhan, Kalicharan, Bijendra Singh and Biharilal shall be herein referred to as "the second party". The criminal appeal and the revision petition both have been preferred on behalf of the first party. Criminal appeal is against conviction and sentence of Yashpali, and revision petition is against acquittal of four members of second party.

4. We have heard Shri Harendra Singh, learned counsel for accused-appellant Yashpali (first party), Shri Anil Jain, learned counsel for complainant-petitioner (first party), Shri Javed Choudhary, learned Public Prosecutor for the State, and Shri Neeraj Joshi, learned counsel for accused-respondents (second party) in Revision Petition.

5. Shri Harendra Singh, learned counsel for the first party in the appeal, has argued that the trial court erred in law in convicting the accused-appellant. Findings recorded by the trial court are contrary to the material and evidence on record and the same are based on misapplication of law. The basic law in the judgment of the learned trial court was that it held the first party as aggressor. This finding is totally erroneous. The trial court failed to appreciate that in the facts of the case when two persons have lost their lives on the side of the first party, allegation of the second party that the accused were armed with "katta", does not at all inspire any confidence. The evidence on record proves that members of the second party started the incident. They attacked the first party and inflicted injuries on the bodies of two members of the first party, namely, Bhimsen, Tulsi and Brahmchari. In response, Bhimsen, in the right of private defence of his person, also opened fire from "katta", which hit Ramdeen (member of second party), as a result of which he died. Bhimsen and Tulsi of the first party sustained fatal injuries at the hands of the second party, as a result of which they died. It is in order to avenge that incident, that the second party has now falsely named members of the first party, which is contrary to the case originally set up by them. Innocent person of the first party has been wrongly convicted.

6. Shri Harendra Singh, learned counsel, argued that the "parcha bayan" of Jaswant Singh (PW-13) makes it clear that members of the second party were aggrieved of the fact that the first party was in possession of that part of the disputed land, which the second party wanted to take. It is at their instance that Panchas were called for settlement of the dispute. After failure of compromise talks, the Panchas told the second party to do whatever they like. It is thereupon that the second party tried to forcibly take possession of the disputed land. They had taken the law in their own hands. They were the aggressors and first opened the attack. The trial court has committed serious error of law in holding the first party as aggressors. Learned counsel argued that the prosecution/second party has utterly failed to give explanation for the death of Bhimsen and Tulsi, and for the injuries sustained by Brahmchari. Learned counsel referred to statement of Purushottam (PW-1), who was one of the Panch of the village, and submitted that this witness has specifically stated that during the course of occurrence, Ramdeen took a "ballam" and ran towards Brahmchari and caused injuries to him. He further stated that Bhimsen opened fire, which hit Ramdeen. He also admitted that Tulsi and Bhimsen were also beaten by the members of the second party and that first of all Ramdeen gave beating to Tulsi, Bhimsen and Brahmchari and thereafter Bhimsen opened fire in his defence. The trial court failed to appreciate that this witness has not been declared hostile and prosecution is bound by the statement of this witness, who has not been declared hostile.

7. Shri Harendra Singh, learned counsel, argued that the statements of Ramnaresh Yadav (PW-10) and Ramlakhan (PW-12) have also not been correctly appreciated by the trial court. In fact, Ramlakhan (PW-12) has made lot of improvements over his previous version and also his statement is full of contradictions. He has suppressed the true version of the occurrence and failed to give explanation of the injuries sustained by Bhimsen and Tulsi, resulting into their death and the injuries sustained by Brahmchari. Jaswant (PW-13) has also made lot of improvements over his original version and failed to give explanation for the injuries sustained by deceased Bhimsen and Tulsi, and injured Brahmchari. This witness himself stated that when he and Ramdeen sustained injuries, no one came forward to save them. That means the other accused were not present there and have been falsely implicated. If accused-appellant would be there, he would have sustained injuries. He has been falsely implicated. He further stated that Bhimsen also opened fire but he was not sure whether or not his fire hit Ramdeen. A reading of the statement of Bihari (PW-14) makes it clear that he is not a truthful witness. He too has made lot of improvements. He has failed to explain the injuries of the deceased and the injured of the side of the first party. Learned counsel argued that the evidence has not proved that the first party entered the land of the second party. In the circumstances therefore the second party could not be said to have acted in right of private defence killing two persons of the side of the first party and cause serious injuries to them. Learned counsel argued that prosecution witnesses-Purushottam (PW-1),

Sahab Singh (PW-2), Ramjilal (PW-3) and Ramphool (PW-4), have not supported the prosecution case. They are all Panchas. They have categorically stated that it was Bhimsen who opened fire by "katta" at Ramdeen. Even though they have been declared hostile but there is no impediment in law to rely on the testimony of hostile witnesses, if they are the witnesses of truth.

8. Shri Harendra Singh, learned counsel, alternatively argued that in the facts of the case it is clearly proved that despite the first party asking the second party not to plough the disputed land, deceased Ramdeen of second party, who is brother of prosecution witnesses, insisted that he would certainly go to the agriculture field and if the first party wanted to kill him, let them kill him. They have also proved the fact that Ramdeen was armed with "ballam", a pointed weapon, which could be used even from a distance to cause fatal injury. The evidence also proves that all other brothers of Ramdeen, who were armed with "lathis", followed him. Reference in this connection is made to the statement of Jaswant (PW-13). It is proved that the land in dispute was purchased by the first party twenty years ago. The second party forcibly ploughed the said land. They not only ploughed their own share in the land but also the share of the first party, which gave rise to the dispute. The second party therefore be held aggressor and not the first party. It is thus clear that second party gave provocation and the background of this provocation was failure of the settlement talks at the instance of the village Panchas. Evidence proves that both the parties went to their boring/tube-well. The accused did not enter their agriculture land. They could not be held aggressors. Considering that two persons lost their lives from the side of first party and one person received grievous injuries, action of the second party in moving towards the disputed land led by Ramdeen, who was armed with "ballam", and all his brothers armed with "lathis", posed a real and imminent threat to the first party. First party therefore only had knowledge and not the requisite intention that the injury that would be caused by firearm was likely to cause death of Ramdeen. The matter would fall within exception 4 of Section 300 of the IPC, and the offence of accused-appellant would at the most be culpable homicide not amounting to murder punishable under Part I of Section 304 IPC. The appellant is in jail for last more than ten years and six months. Thus, by altering his conviction, he may be sentenced to the period already undergone by him. It is therefore prayed that the appeal be allowed and the accused-appellant be acquitted of the charges. His conviction and sentence be set aside and the judgment of the trial court be quashed.

9. Shri Anil Jain, learned counsel appearing in the revision petition for the first party (complainant-petitioner), argued that the findings recorded by the trial court in the cross-case for acquittal of accused-respondents (second party) are based on erroneous reading and misappropriation of evidence. There was no justification for the trial court to hold that the first party was the aggressor. In fact, the incident had taken place on the land of the second party. They gave severe beating to the members of the first party, as a result of which, Bhimsen and Tulsi died and Brahmchari received grievous injuries. This fact was not

denied by the second party when they were examined u/s 313 of the Code of Criminal Procedure. The second party formed an unlawful assembly. They came in a group, all were armed with weapons, and attacked the members of the first party. The finding recorded by the trial court that since the first party started the incident by opening fire, the first party was the aggressor and therefore the second party acted in right of private defence of person, is wholly uncalled for. In this connection, learned counsel referred to statement of Vasudeo (PW-3 in trial of second party i.e. Jaswant and other) and argued that this witness stated that all members of the first party belonged to Mehandwar sect of Rajput caste, whereas members of the second party belonged to Pariya sect of same caste. Second party came to the agriculture land on tractor for cultivation. Members of the second party were the aggressors and that they started beating the members of the first party. Bhimsen opened fire only in retaliation to defend the members of first party. He did so after Tulsi fell on the ground on receiving fatal injuries at the hands of the second party. Brahmchari (PW-4 in trial of second party i.e. Jaswant and other) has also supported the statement of Vasudeo (PW-3) that it was the second party, who started the incident and gave severe beating to Tulsi and Bhimsen. Pappu, Ummeda and Mohan Singh (members of the second party) were armed with "lathis" and gave severe beating to those deceased. Learned counsel also relied on the statement of Veero (PW-6 in trial of second party i.e. Jaswant and other), who has also made similar statement. Dr. Thansingh (PW-7 in trial of second party i.e. Jaswant and others) has proved that deceased Tulsi received eight injuries, including injury no. 3 which was lacerated wound on the skull with the dimension of 3 cm x 1/2 cm x deep muscle. This witness has proved the injuries of deceased Bhimsen, who received six injuries including the injury on skull. It is therefore prayed that the revision petition be allowed and the accused-respondents (members of second party) be convicted for the charges levelled against them and be suitably punished.

10. Shri Javed Choudhary, learned Public Prosecutor for the State, argued that learned trial court has rightly held the first party as aggressor. Even if Ramdeen has stated that he wanted to enter the disputed agriculture field and was having "ballam" but the evidence does not prove that he actually entered the disputed agriculture field or otherwise came to agriculture land of the first party. Mere oral threat given by him to enter the disputed agriculture land, did not justify opening of fire by the first party. Learned Public prosecutor referred to the statement of Jaswant (PW-13 in the trial of first party) and argued that this witness himself has stated that first party was the aggressor. Learned Public prosecutor argued that only because members of the second party did not suffer injuries, does not by itself prove that they were not present at the scene of occurrence. The statement of Purushottam (PW-1 in the trial of first party), even if he has not been declared hostile, is not the solitary evidence. There are several other witnesses, who have proved that it was accused-appellant Yashpali (member of the first party), who opened fire at Ramdeen and it is thereafter that the second party in retaliation acted in exercise of right of private defence, though it is

unfortunate that the incident, that followed thereafter, led to death of two persons on the side of first party. It is argued that Purushottam (PW-1), Sahab Singh (PW-2), Ramjilal (PW-3) and Ramphool (PW-4), were all Panchas of the village but they belonged to Mehandwar sect of Rajput caste, which is also the sect of members of the first party and therefore they have not given the correct statement. They were all confronted with their previous statement given to the police. Sahab Singh (PW-2) in his statement u/s 161 Cr.P.C. (Exhibit P-1) has stated that the incident had taken place after they reached the place of occurrence and they did not see the same. Similarly, Ramjilal @ Ramujiya (PW-3) and Ramphool (PW-4) were also confronted with their statements u/s 161 Cr.P.C. (Exhibit P-2 and Exhibit P-3), in which they maintained that they had left the place of occurrence after failure of the settlement talks and they were not present when the incident took place. Testimony of these witnesses therefore can not be believed.

11. Learned Public Prosecutor submitted that it is a case where direct fire was opened by the accused-appellant (first party), resulting into death of a person, and the offence cannot fall within the purview of Part I of Section 304 IPC. The act of the accused-appellant (first party) in such a case would carry both the requisites - knowledge as well as the intention, to murder Ramdeen, who was fired at. The cited judgments are distinguishable. It is therefore prayed that the appeal be dismissed.

12. We have given our anxious consideration to rival submissions, perused the record and respectfully studied the cited case law.

13. The evidence recorded in the trial of the first party indicate that there was dispute between the parties with regard to partition of land measuring 5 bighas and 7 biswas. Half share each of that land was purchased by both-the first party and second party. The dispute arose when both of them wanted to retain that half part of the land, which was irrigable directly from the tube-well/boring, adjacent thereto. Sahab Singh (PW-2), Ramjilal (PW-3) and Ramphool (PW-4) have been declared hostile because contrary to what they stated in their statements u/s 161 Cr.P.C., while appearing in the court they claimed to be eye witnesses of the incident. They failed to give any clarification when they were confronted with their statements given to the police where they claimed that the incident had taken place much after they left the place of occurrence upon failure of the settlement talks. Purushottam (PW-1) also, even if he has not been declared hostile, cannot be believed as he too like other three, was Panch of the village and accompanied them. Ramlakhan (PW-12) has stated that Mohar Singh was brother of Shripat. Achla and Harnam had purchased the land of Mohar Singh. Bhimsen forcibly ploughed the disputed land by tractor. He was accompanied by Daudayal, Brahmchari, Ramrath, Veero, Yashpali, Harimohan, Tulsi, Gangola. They even cultivated their share of the land. While they were sitting on the tube-well, their brother Ramdeen asked them not to indulge in the fight. Even then accused-appellant (first party) opened fire at Ramdeen, resulting

into his death. In cross-examination, he has denied the suggestion that fire was opened by Bhimsen by "katta". He was arrested by the police and Jaswant (PW-13) was also arrested. Jaswant (PW-13) gave written-report ("parcha-bayan") to the police in the hospital. Tulsi and Bhimsen died in the incident. He too received injuries - one on the head and another at the back, caused by Harimohan and Veero of the first party. Jaswant (PW-13) has stated that while their brother Ramdeen was in the agriculture field, Yashpali opened the fire from "katta", as a result of which he died. When he reached to his brother, Vasudeo inflicted a "kulhari" blow at his back and thereafter he gave "lathi" blow. He has stated that it would have been better if the accused had cultivated the field after partition. The Sarpanch of the Gram Panchayat came to their agriculture field in the morning and village Panchas tried to settle the dispute between the parties, but the first party did not agree for the partition. The land was purchased by them (second party) twenty years ago and since then they are in cultivator possession. The second party started opposing the cultivation by first party. Despite the second party asking them not to do so, the first party continued to insist on cultivating the disputed land and also abused them. His brother Ramdeen went to the first party. They did not relent. In cross-examination this witness, when confronted with previous statement given to the police u/s 161 Cr.P.C. (Exhibit D-6), denied having given statement to the police that second party purchased part of the disputed land twenty years ago from Shripat and that Daudayal, Gangola and Bhima of the first party also purchased the remaining part of the land in the same year. Bhima of the first party wanted to take the same part of land which the second wanted to take. In cross-examination, this witness further stated that when the efforts for settlement failed, the village Panchas left the place stating that they should do whatever they want. His brother Ramdeen stated that they would go to the disputed agriculture land and the first party, if they wanted, could kill them. Thereafter, Ramdeen reached near boring of the first party. He was having "ballam" in his hand. Ramdeen was followed by this witness, Ramlakhan, Kalicharan, Bijendra and Bihari. They all were armed with "lathis. This witness has also admitted that Bhimsen opened fire but he cannot say whether this fire hit Ramdeen.

14. Evidence thus clearly suggests that atmosphere was fully charged and there was heightened tension between the parties. Upon failure of settlement talks through mediation of village Panchas, atmosphere was full of strain. Both of them returned to their boring/tube-well situated in their respective lands. Deceased Ramdeen of the second party, who was armed with "ballam", openly declared that they would go to the disputed agriculture land, come what may. As admitted by Jaswant (PW-13), he in fact reached the boring of Gangola of the second party. This witness (Jaswant) along-with Ramlakhan, Kalicharan, Bijendra and Bihari followed him. They were all armed with "lathis". This single move by Ramdeen after giving open challenge to the first party that they could do whatever they like and that the second party would definitely go to the disputed agriculture land, in the facts of the case, when already tension was heightened

since morning, if not grave, amounted to sudden provocation, which gave rise to sudden fight. The situation was so tense that apprehension of the first party proved real when the second party, who were armed with "ballam" and "lathis" attacked the first party and put two of the members of their side to death. The first party felt imminent danger of the second party taking possession of the disputed land as they were all armed with "ballam" and also "lathis", even as per own admission of Jaswant (PW-13). In such a situation, if one of the member of the first party, namely, accused-appellant Yashpali in the heat of passion by such provocation opened fire, the purpose of opening fire was to deter the second party from moving towards the disputed land and protect such land being taken possession of by them. The evidence though proves that it was accused-appellant Yashpali (first party) who opened fire but this act of his would attract Exception 4 of Section 300 of the IPC.

15. In Lachman Singh Vs. State of Haryana, the dispute between the parties was with regard to flow of rain water. Accused Dev Singh was challenging that they would pass the rainy water from a particular way which was objected to by the complainant. Accused Dev Singh got infuriated and all of a sudden asked his son Lachman Singh to bring revolver from inside as the other side members were always harassing them. It was alleged that thereupon accused Lachman Singh brought a revolver from inside and thereafter, accused Dev Singh stated "shoot them", whereupon accused Lachman Singh fired and the shot hit the deceased, and on receipt of the said shot deceased fell down. In those facts, the Supreme Court, in para 11 of the report, held as under:-

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 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 on 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.

16. The Supreme Court in *Jai Prakash Vs. State (Delhi Administration)*, held that the "Knowledge" as contrasted with "intention" signify a state of mental realization with the bare state of conscious awareness of certain facts in which human mind remains supine or inactive. Intention need not necessarily involve premeditation. Whether there is such an intention or not is a question of fact. Merely because the injury caused is sufficient in the ordinary course of nature to cause death, does not necessarily follow that the offender intended to cause the injury of that nature. However, the presumption arises that he intended to cause death. In such a situation the Court has to ascertain whether the facts and circumstances in the case are such as to rebut the presumption and such facts and circumstances cannot be laid down in an abstract rule and they will vary from case to case, as enumerated in *Virsa Singh Vs. The State of Punjab*, It was reiterated by their Lordships therein that weapon used, the degree of force released in wielding it, the antecedent relation of the parties, the manner in which the attack was made that is to say sudden or premeditated, whether the injury was inflicted during a struggle or grappling, the number of injuries inflicted and their nature and the part of the body where the injury was inflicted are some of the relevant factors. Their Lordships held that in some cases there may be other explanation as well, where for different considerations may apply requiring the court to decide whether the accused is entitled to benefit of Exceptions to Section 300 I.P.C.

17. The Supreme Court in *Vijay Ramkrishan Gaikwad Vs. State of Maharashtra and Another*, held that even a single injury in a given case constitute murder having regard to the weapon used and part of body chose for inflicting injury. But this by itself is not conclusive either way. Holding this, the Supreme Court, in the facts of the case, held as under:-

6. The first and foremost of the circumstances is that the incident in question was not premeditated. The evidence on record establishes that the appellant was provoked by certain accusations made against him by the deceased. It is common ground that the appellant as also family of the deceased were engaged in the business of breeding pigs. The deceased it appears had accused the appellant of being a thief stealing pigs. That being the genesis of the incident all

that the appellant perhaps intended when he came in front of his house was to question him about the accusations made by him. It is also evident from the depositions of Kamalabai (PW 6) and Gaurav (PW8) that on account of the abuses hurled by the two groups a scuffle had started between the deceased and his brother on the one hand and the appellant and his companions on the other. It is further seen from the evidence on record that Kamalabai (PW 6) and her brother, Bhura Natthu Vadar (PW7) came out of the house with a view to separate the two groups, and that it was in the course of the scuffle that the appellant inflicted a knife-blow to the deceased. Apart from one injury on the body of the deceased sustained in the course of the scuffle, even the appellant received an injury on his three fingers is a fact duly certified by Dr. Sushant Mahale (PW2).

18. The Supreme Court in Rampal Singh Vs. State of U.P., while dealing with the case where both-the accused-appellant and deceased, related to each other. There was no animosity between them. The incident occurred due to the dispute between the accused and deceased with regard to construction of ladauri by the deceased to prevent garbage from being thrown on his open land. The accused had broken the ladauri and thrown garbage on the vacant land of the deceased. There was hated exchange of words between the deceased and the accused. The deceased had thrown the accused on the ground. They were separated by two persons. It was in that state of anger that the accused went to his house, took out the rifle and from a distance shot at the deceased. But before shooting, he expressed his intention to shoot by warning his brother to keep away. He actually fired in response to the challenge that was thrown at him by the deceased. In those facts, which are somehow similar to the facts of the present case, their Lordships of the Supreme Court, in Para 13 of the report, observed as under:-

30. Another very important aspect is that it is not a case of previous animosity. There is nothing on record to show that the relation between the families of the deceased and the appellant was not cordial. On the contrary, there is evidence that the relations between them were cordial, as deposed by PW 1. The dispute between the parties arose with a specific reference to the ladauri. It is clear that the appellant had not committed the crime with any pre-meditation. There was no intention on his part to kill. The entire incident happened within a very short span of time. The deceased and the appellant had had an altercation and the appellant was thrown on the ground by the deceased, his own relation. It was in that state of anger that the appellant went to his house, took out the rifle and from a distance, i.e., from the roof of Muneshwar, he shot at the deceased. But before shooting, he expressed his intention to shoot by warning his brother to keep away. He actually fired in response to the challenge that was thrown at him by the deceased. It is true that there was knowledge on the part of the appellant that if he used the rifle and shot at the deceased, the possibility of the deceased being killed could not be ruled out. He was a person from the armed forces and was fully aware of consequences of use of fire arms. But this is not necessarily conclusive of the fact that there was intention on the part of the appellant to kill

his brother, the deceased. The intention probably was to merely cause bodily injury. However, the Court cannot overlook the fact that the appellant had the knowledge that such injury could result in death of the deceased. He only fired one shot at the deceased and ran away. That shot was aimed at the lower part of the body i.e. the stomach of the deceased. As per the statement of PW 2, Dr. A.K. Rastogi, there was a stitched wound obliquely placed on the right iliac fossa which shows the part of the body the appellant aimed at.

19. In order to consider therefore even though the first party (accused-appellant) opened the fire and thereafter caused death of deceased Ramdeen of the second party, but in view of the attending circumstances, especially failure of settlement parleys and the imminent apprehension of the second party taking possession of the disputed agriculture land and in fact the Ramdeen of the second party reached the boring of the first party armed with "ballam" accompanied by five others, namely, Jaswant, Ramlakhan, Kalicharan, Bijendra and Bihari of the second party, who all were armed with "lathis", and in view of the ongoing heated exchange of words between the parties, accused Yashpali of the first party acted in sudden fight in the heat of passion upon sudden quarrel and therefore opened the fire, he cannot be said to have taken advantage or acted in cruel manner because he did not repeat the fire. And that perhaps was not possible for him either because he was overtaken by the sudden attack made by the second party leading into death of two members of the first party. In fact both the parties cannot be said to have acted with premeditation. Accused-appellant Yashpali therefore cannot be held to have acted with an intention to cause death of Ramdeen.

20. Coming now to the revision petition filed by first party against acquittal of second party in revision petition, we, on careful perusal of the impugned judgment, find that learned trial court was fully justified in recording the finding that initially the fire was opened by the first party in that case, which is what has given cause to the first party therein to react in retaliation in exercise of their right of private defence as one of their man had actually been murdered. Members of the second party were not armed with deadly weapons. Except Ramdeen, all of them had "lathis". Deceased Tulsi suffered only eight injuries and deceased Bhimsen suffered only six injuries, all by blunt weapons. The first party was therefore in the revision petition rightly held as aggressor. The acquittal of the accused-respondents (second party) therefore cannot be faulted. The revision petition is therefore liable to be dismissed.

21. In the result, we partly accept this appeal and alter the conviction of the accused-appellant u/s 302 of the Indian Penal Code, to the one u/s 304 Part I of the IPC. Having held that the accused-appellant is guilty of offence u/s 304 Part I, we award him sentence of ten years' rigorous imprisonment and a fine of Rs. 500/-. In default of payment of fine, he has to undergo simple imprisonment for one month. The appellant is in jail. He has served out total sentence of ten years five months twenty days. He has thus served out the period more than the

sentence so awarded. He be set at liberty forthwith if not needed in any other case. The judgment impugned in the appeal is modified in the above terms. The appeal is accordingly allowed in part. The revision petition is however dismissed. Keeping, however, in view the provisions of Section 437-A of the Code of Criminal Procedure, appellant Yashpali is directed to forthwith furnish a personal bond in the sum of Rs. 20,000/-, and a surety bond in the like amount, before the Deputy Registrar (Judicial) of this Court, which shall be effective for a period of six months, undertaking that in the event of filing of SLP against this judgment or on grant of leave, the appellant, on receipt of notice there of, shall appear before the Supreme Court.