IN THE HIGH COURT OF JHARKHAND AT RANCHI
Criminal Appeal (D.B.) No. 141 of 1996

[Against the Judgment of conviction dated 13th June, 1996 and Order of sentence dated 14th June, 1996 passed by learned 1st Additional Sessions Judge, Giridih in Sessions Trial No.14 of 1994]

Daleshwar Gope son of Sri Ishwar Gope, resident of village Kenduadih, P.S. Nimiaghat, District-Giridih

... ... Appellant

Versus

The State of Bihar **... ... Respondent**

With

Criminal Appeal (D.B.) No. 163 of 2020

[Against the Judgment of conviction dated 22nd January, 2020 and Order of sentence dated 24th January, 2020, passed by learned District & Additional Sessions Judge-VI, Giridih in Sessions Trial No. 14-A of 1994]

Jageshwar Gope, aged about 43 years, Son of Late Babulal Ram, resident of village – Kenduadih, P.S.- Nimiaghat, P.O. – Kenduadih, District-Giridih/Jharkhand.

... ... Appellant

Versus

The State of Jharkhand **... ... Respondent**

P R E S E N T

HON'BLE MR. JUSTICE SUJIT NARAYAN PRASAD
HON'BLE MR. JUSTICE PRADEEP KUMAR SRIVASTAVA

.....

For the Appellants : Mr. Mahesh Kumar Sinha, Advocate
[In Cr. A. 141/1996]
Mr. B.M. Tripathi, Sr. Advocate
Ms. Nutan Sharma, Advocate
Mr. Naveen Kr. Jaiswal, Advocate
[In Cr. A. 163 of 2020]

For the Respondent : Mr. Bhloa Nath Ojha, Spl. P.P.

.....

C.A.V. on 12/02/2024 ***Pronounced on 05/03/2024***

Per Sujit Narayan Prasad, J.:

1. Both the appeals arise out of the common prosecution case, as such, directed to be listed together for analogous hearing as such they are being taken up together.

Prayer in Cr. Appeal (DB) No. 141 of 1996:

2. The instant appeal is directed against the judgment of conviction dated 13th June, 1996 and order of sentence dated 14th June, 1996 passed by learned 1st Additional Sessions Judge, Giridih in Sessions Trial No.14 of 1994 arising out of Nimiaghat P.S. Case No.106 of 1993 registered under Sections 147/148/341/302/452/149 of the Indian Penal Code for causing murder of Domar Gope which culminated into the judgment of conviction under Section 302/34 of the Indian Penal Code. Accordingly, the appellant has been directed to undergo rigorous imprisonment for life for the offence committed by him under Section 302 I.P.C.

Prayer in Cr. Appeal (DB) No. 163 of 2020:

3. The instant appeal is directed against the judgment of conviction dated 22nd January, 2020 and order of sentence dated 24th January, 2020, passed by learned District & Additional Sessions Judge-VI, Giridih in Sessions Trial No. 14-A of 1994 arising out of Nimiaghat P.S. Case No.106 of 1993 registered under Sections 147/148/341/302/452/149 of the Indian Penal Code for causing murder of Domar Gope which culminated into the judgment of conviction under Section 148/341/323/ 452/302/149 of the Indian Penal Code (IPC). Accordingly, the appellant has been sentenced for the offence under

Section 302/149 IPC to undergo RI for life along with fine of Rs. 25,000/- and in default payment of fine further RI for six months. For the offence under Section 148 IPC directed to undergo RI for the period of three years. For the offence under Section 341 IPC RI for one month. For the offence under Section 323 IPC directed to undergo RI for one year. For the offence u/s 452 IPC directed to undergo RI for seven years and fine of Rs. 10,000/- in default of payment of fine awarded three months RI and further for the offence u/s 504 IPC RI for two years. All the sentences were directed to run concurrently.

Common Prosecution Case:

4. Prosecution story as per fardbeyan of one Dukhi Gope, recorded by the officer-in-charge of Nimiaghat P.S. on 02.10.1993 at about 11:30 PM is that in the night of said date Domar Gope was thrashing his cot at his door for which the accused objected as such there was exchange of hot talk in between Ishwar Gope and deceased Domar Gope, who is his cousin brother and residing in front of his house. It has further been stated that there is no good relation between them. The accused Ishwar Gope started abusing in filthy language to Domar Gope and thereafter went to his home and back with his son namely Dalo Gope and Jageshwar Gope lashed with lathi, danda and sword and again started abusing in filthy

language. The accused persons Lilo Gope and Jageshwar Gope caught hold of Domar Gope and dragged him to the verandah of one Lilo Sao and they started assaulting him. They also rushed to assault the informant but he entered into his house. The sister-in-law of informant, namely, Ambia Devi went there to save her husband but she was also assaulted by Mainwa Devi, Chhutu Devi, Bhukri Devi and Puchhni Devi with fists and legs. She was also made injured by assaulting with stone. Due to assault by accused persons Domar Gope, the deceased, fell unconscious on the ground and blood was oozing out from his head. Informant further stated that he cannot explain as to who assaulted with which weapon to Domar Gope but he heard that Ishwar Gope instigated his son not to leave the Domar Gope alive.

5. The injured Domar Gope and Ambia Devi was brought to Nimiaghat Police Station where the statement was recorded at 11:30 PM thereafter injured were referred to Dumri Hospital for their treatment. The informant further stated that Domar Gope was referred to Dhanbad for the better treatment where he was died on the next day.

6. On the basis of above information, Nimiaghat P.S. Case no. 106 of 1993 dated 02.10.1993 was registered against accused persons for the offences under Sections

147/148/ 149/323/325/337/324/341/307/452/302 of the Indian Penal Code and charge of investigation was handed over to S.1., Uday Prasad Singh, who after conclusion of investigation, submitted Charge-Sheet no. 110/1993 dated 31.12.1993 against the accused persons namely Ishwar Gope, Daleshwar Gope, Jhanko Devi, Mainwa Devi, Chuto Devi, Fuchni Devi, in which Jageshwar Gope showing absconder in the charge-sheet.

7. It appears from the perusal of case record that initially there was charge-sheet against three accused persons namely Iswhwar Gope, Daleshwar Gope and Jhanwa Devi and four accused persons Jageshwar Gope, Mainwa Devi, Chutuwa Devi and Fuchni Devi were shown absconder in original charge-sheet. During that accused Mainwa Devi, and Chutuwa Devi and Fuchni Devi later on appeared in the case and faced trial in the original case record i.e., S.T No. 14 of1994.

8. The case record of Jageshwar Gope was separated showing him as an absconder in the case by order dated 02.08.1994. The accused Jageshwar Gope was arrested later on and remanded by the Court of learned District and Additional Sessions Judge-I on 06.03.2019 facing trial in this supplementary case record being S.T. No. 14A of 2020.

9. After submission of charge-sheet, learned Chief Judicial Magistrate took cognizance of the aforesaid offences and committed the case to the Court of Sessions and kept in personal file of Sessions Judge for trial and disposal.

10. Charge was framed against the accused persons, which was read over to them and explained to them in 'Hindi', to which they pleaded not guilty and claimed for trial.

11. The prosecution has altogether examined 12 witnesses in Cr. Appeal (DB) No. 141 of 1996 whereas 10 witnesses have been examined in Cr. Appeal (DB) No. 163 of 2020. In Cr. Appeal (DB) No. 141 of 1996 one defense witness has been examined whereas in Cr. Appeal (DB) No. 163 of 2020 two defense witnesses have been examined.

12. The learned trial court, on appreciation of the evidences produced on behalf of the prosecution and defence, has found the allegation proved beyond all reasonable doubt and accordingly, passed the judgment of conviction which is impugned in these appeals.

Argument on behalf of appellants in both the cases

13. Mr. Mahesh Kumar Sinha, learned counsel for the appellant in Criminal Appeal (D.B.) No. 141 of 1996 and Mr. B.M. Tripathi, learned senior counsel for the appellant

in Criminal Appeal (D.B.) No. 163 of 2020 have taken the common grounds in assailing the impugned judgment of conviction as under: -

I. That the prosecution has miserably failed to establish the charge said to be proved beyond all reasonable doubt.

II. The prosecution has miserably failed to substantiate the case said to be under Section 302 IPC since there is no evidence, as per deposition of the witnesses, with respect to pre-meditation of mind to commit murder.

III. The ground has been taken that if the testimony of informant and other witnesses will be taken into consideration it would be apparent that fight took place due to sudden heat of passion and in course thereof the deceased has sustained injuries due to which he subsequently succumbed to death.

IV. It has come in the testimony that on the issue of thrashing cot at the door of appellants by the deceased-Domar Gope, the accused-Ishwar Gope started abusing in filthy language to Domar Gope and in course thereof scuffle took place which ultimately culminated into quarrel in between both the parties. In the said quarrel even the female members of both the parties were also involved. It

has come in their testimony that the appellants along with their sons have started assaulting by lathi and danda. Therefore, submission has been made that if there would have been pre-meditation of mind then the appellants would have used sharp-cutting deadly weapon and if in such circumstances, assault would have been made then it could have been understood that there is pre-meditation of mind. But that is not the factual aspect herein.

V. The learned trial court has convicted the four accused persons, who are ladies members of the family of the appellants under Sections 323 IPC by taking aid of Section 34 IPC thereof. The punishment under Section 323 IPC has been inflicted by trial court upon said four ladies accused by taking in to consideration that the aforesaid accused ladies were found involve in inflicting injuries upon Ambia Devi(wife of deceased) therefore in such scenario there is no ingredient of common intention so as to attract the penal offence of murder with Section 34 IPC.

VI. The ground has been taken so far as Cr. Appeal (DB) No. 163 of 2020 is concerned wherein the conviction is based upon Section 149 IPC of commission to commit murder with common object while the

appellant in Cr. Appeal (DB) No. 141 of 1996 the conviction is based upon the ingredient of Section 34 IPC to commit murder with the common intention. The argument, therefore, has been advanced that if the occurrence is of same transaction, then in one case with the aid of Section 34 IPC the judgment of conviction has been passed under Section 302 IPC so far Cr. Appeal (DB) No. 141 of 1996 is concerned. While on the same set of occurrences, the appellant of Cr. Appeal (DB) No. 163 of 2020, the conviction under Section 302 IPC is based upon taking aid of Section 149 IPC. Therefore, question has been raised that in the same set of occurrence in one case judgment of conviction under Section 302 IPC has been passed taking aid of Section 149 IPC wherein in another case judgment of conviction under Section 302 IPC has been passed taking aid of Section 34 IPC, which cannot be said to be proper reason being that the scope of Section 149 IPC is quite different to that of Section 34 IPC.

VII. Section 149 IPC speaks about common object whereas Section 34 IPC speaks about common intention.

VIII. The ground has been taken that once the co-accused, namely, Jhanko Devi, Mainwa Devi, Chuto

Devi and Fuchni Devi the female members of the family have been acquitted meaning thereby the allegation of common object so as to attract the penal provision of Section 149 will not be applicable due to the meaning of unlawful assembly as defined under the Indian Penal Code in order to prove the charge of unlawful assembly, minimum of 5 members of the assembly is said to be there in unlawful assembly.

IX. The learned trial court has also failed to appreciate the fact there was land dispute between the parties since it has come in the testimony of witnesses that the deceased has encroached upon the land of the appellants and hence there was no talking term for the last 10-20 years in between them.

X. The learned counsel for the appellants, based upon the aforesaid ground, has submitted that the impugned judgment suffers from illegality, hence not sustainable in the eyes of law.

XI. In alternative, learned counsel for the appellants based upon the aforesaid ground has submitted that even the prosecution version will be taken to be correct then it is not a case of Section 302 IPC rather it will come under the fold of Section 304 Part II

since the factual aspect is coming under exception clause.

Argument on behalf of the State

14. While on the other hand, Mr. Bhola Nath Ojha, learned A.P.P., defending the impugned judgments of conviction has raised the following arguments in response to the grounds taken by learned counsel for the appellants, as referred hereinabove:-

I. There is no error in the judgment of conviction and order of sentence since culpable homicide is there and admittedly all the witnesses have deposed about the assault was given by appellants, which ultimately resulted into death of the deceased.

II. The argument so far it relates to non-availability of pre-meditation of mind is concerned, submission has been made on behalf of learned State counsel that pre-meditation of mind is to be assessed from the factual aspect of the matter by taking into consideration the testimony of witnesses wherein reason for assault of the deceased by the appellants has all along been supported by the witnesses and hence it cannot be said that there was no premeditation of mind. Further for the reason that it has come in the testimony of witnesses that the appellants after having scuffle for a while had called

upon their son and when they came at the place of occurrence all of them started assaulting the deceased.

III. Hence, calling the son from the house and again assembling for the purpose of assaulting the deceased is very much clear evidence said to attract the penal offence under Section 302 IPC since the conduct clarifies that the appellants were having the intention to kill the deceased.

IV. Learned counsel appearing for the State based upon the aforesaid premise has submitted that the impugned judgment does not suffer from any error hence the instant appeals are fit to be dismissed.

15. We have heard learned counsel for the parties, perused the documents available on record as also the finding recorded by the learned Single Judge in the impugned judgments.

16. We have also gone through the testimonies of the witnesses as available in the Trial Court Record as also the exhibits.

17. This Court, before appreciating the argument advanced on behalf of the parties as also the legality and propriety of the impugned judgment, deems it fit and proper to refer the testimonies of the prosecution witnesses.

Testimony of witnesses in Cr. A (D.B.) No. 141/96:

18. **P.W.1, Mahadeo Yadav** has said that on the fateful day, when he was at his door and Damar Gope was thrashing his cot on the roof to free it from bedbugs. Then Ishwar Gope objected to it, whereupon Damar Gope got down from the roof and began to knock the door and also began to abuse.

19. As his statement was quite different from his earlier statement given before the police, as such he was declared hostile.

20. **P.W.2, Behari sao**, has deposed that on the alleged date of occurrence at about 10 P.M. night he was preparing to go to bed. He heard halla towards the house of Lilo Sao and he went there. He saw that Ishwar Gope and Jageshwar Gope were assaulting Damar Gope with lathi. Wife of Damar Gope attempted to save her husband but she was assaulted by Jhanwa, Mainwa, Phuchni and Chhatus Devi. Damar Gope sustained injury on head and he fell down. He has further deposed that he bandaged the head of Damar Gope with his gamchhi [towel]. Thereafter, he and others took Damar Gope on a cot to thana [police station]. From there the officer-in-charge sent them to Dumri hospital.

21. This witness in paragraph 6 of his cross-examination has stated that there is no electric light in his field. Since

this witness is next door neighbour and parties are well known to him, therefore, it was no the difficult for him to identify the injured persons and accused persons even if there be no sufficient light. He has said in paragraph 8 that as he could not see anything when he came out of his house on halla but when he went to the door of Lilo Sao, Damer Gope had fallen on the ground and his head was injured.

22. **P.W.3, Bhikhni Devi** has stated that at about 10 P.M. night she was about to go to bed and heard halla towards the house of Lilo Sao and she went there. She found Ishwar Gope, Jageshwar Gope, Dalo Gope assaulting Damar Cope. Wife of Damar Gope went to save her but she was assaulted by Mainwe, Jhanwa, Chhathu and Phuchni Devi.

23. In cross examination she said that her house and the house of Lilo Sao are intervened by only one house of Gopal. She has also said in cross-examination that Damar was thrashing his cot over the roof. This witness also says that Ambia Devi the wife of Damar Gope also sustained bleeding injury on his head. This witness has also admitted in cross-examination that she is Gotni [sister-in-law] of Ambia Devi.

24. **P.W.4, Gopal Sao** has deposed that at about 10 P.M. when he was sitting at the door of Lilo Sao after taking his

meal, Damar Gope was thrashing his cot at his door and when Ishwar Gope objected to it and there was quarrel between the two. Then Ishwar Gope went to his house and came back with his two sons, namely, Dalo and Jageshwar armed with lathis. All the three caught hold Damar Gope and dragged him to the door of Lilo Sao and all the three accused began to assault him with lathi as such he sustained head injury. Ambia Devi wife of Damar Gope rushed to save her husband but she was assaulted by four ladies accused. He further deposed that accused persons continued assaulting Damar Gope even after he fell down. In cross examination, this witness has deposed that Damar Gope was assaulted for four or five minutes and he might have been given 15-20 lathi blows. He was assaulted all over the body including his head.

25. **P.W.5, Kishun Gope** also went to the Gali [street] on hulla being raised by Damar Cope. He has also supported the occurrence. He is cousin brother of Damar Gope.

26. **P.W.6, Ambia Devi** is the wife of Damar Gope, the deceased. She has stated in her examination-in-chief that at about 10 P.M. her husband Damar Cope was thrashing the cot at his door on which Ishwar Gope began to abuse. Thereafter he went to his house and came back with his two sons Dalo Gope and Jageshwar Gope, all armed with lathis. They dragged him to the door of Lilo Sao and began

to assault him with lathi and when she went to save her husband, she was also assaulted by Fuchni, Mainwa, Thunwa and Chhathu Devi. She and others took her husband to Nimiaghat P.S. wherefrom he was taken to Dumri hospital where the doctor asked them to rush him to Dhanbad hospital.

27. She in cross examination has stated that there was land dispute with accused persons regarding a gharbani but earlier there was no quarrel or any case between the parties. This witness in paragraph 4 has said that when the accused persons came to her door the lady accused caught hold makes of her at the door of Lilo Sao.

28. P.W.8, Dr.D.P. Singh found laceration measuring 3"x 1/2"x1/2" over left parietal region of the injured Ambiya Devi. He has further opined that such injury can be causes by the hard and blunt substance. Therefore, this witness Ambiya Devi cannot be disbelieved.

29. P.W.7, Dukhi Gope is the informant. He has deposed that on the alleged date of occurrence at about 10 P.M. he was present in his house. Damar Gope was thrashing his cot at his door when Ishwar Gope came and abused him. There was hot talk from both the sides. Thereafter Ishwar Gope went to his house and he came back with his two sons. All the three having lathi in their hand dragged Damar Gope to the door of the Lilo Sao and began to

assault him and when the wife of Damer Gope came to save her husband, she was assaulted by four ladies accused. He and others took Damar Gope to Nimiaghat thana. He narrated the story to the Daroga ji [Sub-Inspector of Police] who recorded his statement and read over to him. Thereafter he put his L.T.I. Both the injured persons were taken to Dumri hospital where the doctor advised them to take injured to Dhanbad where Damar Gope died.

30. In cross examination he has stated that he was taking his meal when Damar Gope was thrashing the cot. He came out of his house on halla. When he came out, he saw that Ishwar, Dalo and Jageshwar Gope were assaulting Damar Gope near the door of Lilo Sao. He rushed to save his brother but the accused persons chased him to assault and came back to his door. In paragraph 5 his attention was drawn to his statement in F.I.R. He has said in the F.I.R. that accused persons came with lathi, danta and talwar. He has also said in the F.I.R he could not see as to which of the accused assaulted Damar Gope with what weapons. But he heard Ishwar Gope instigating his sons to finish him. This witness has said that when he went to save his brother he was chased by the accused persons and he went to his house.

31. P.W.10, Gouri Devi has deposed on the same line as stated in prosecution version on the point of occurrence .

32. **P.W.11, Dr. Binod Kumar** is the medical officer who conducted the postmortem examination on the dead body of Damar Gope. He found as many as seven injuries.:-

(i) Right side of head and face swollen and bruises Both eye lids of right eye also bruised.

(ii) Stitched wound 1/2" long on the hairy portion of right-side forehead 3" above right eye brow.

(iii) Lacerated wound 1/2"x4" situated medial to injury no.(ii)

(iv) Abrasion 1" x 3/4" on the top of left shoulder.

(v) Abrasion three in number 1/4" x 1/8", 1/2" x 1/4" and 1/5" seen in an area of 1/2" x 1/2", on the back of right elbow.

(vi) Abrasion 1" x 1/4" x with one stich on the inner side of right elbow.

(vii) Abrasion 2x1/2" x 1x1/2" on the lower 3rd outer and back right thigh.

On removal of scalp massive hematoma seen under scalp right side frontal parietal bones in 4"x3" area and mentioned injury no.(ii) showed multiple fracture. Covering of brain was also found lacerated. The doctor denied that injuries found on the head were more probable by brick

bate from height. However, he admitted that the injuries of head may be possible by brickbats. He further opined that injuries may be caused by hard and blunt substances like Lathi.

Testimony of witnesses in Cr. A (D.B.) No. 163 of 2020

33. **The informant PW-8, Dukhi Gope**, who is father of deceased has stated in examination-in-chief that occurrence took place at about 10:00 PM night while he was present in his house. He has further stated that when Domar Gope was thrashing his cot in his verandah the accused Ishwar Gope started abusing him. **He has further stated that there is exchange of hot talk in between Domar Gope and Ishwar Gope.** Thereafter, Ishwar Gope went to his house and came back with his two sons lashed with lathi and sword. The accused Ishwar Gope and his son Lilo Sao caught Domar Gope and dragged to the open courtyard and started assaulting to him by lathi. His wife Ambiya Devi went to save her husband but the lady accused persons assaulted to her. Domar Gope received serious injuries and fell on the ground. He has informed to the police Nimiaghat P.S and narrated whole story thereafter put his thumb impression. He has identified his thumb impression on the written report. The injured was taken to Dumri Hospital from

where the doctor referred to the injured Dhanbad where Domar Gope died.

34. In his cross-examination he has supported the prosecution version stating that accused Ishwar Gope, Jageshwar Gope along with other accused persons brutally assaulted to the Domar Gope near the door of Lilo Sao. He has further stated that the door of Lilo Sao is at a distance of only 4-5 feet away from the door of deceased. He has further stated that accused came lashed with lathi danda and talwar and gave blow to head of deceased which caused serious injuries. Ishwar Gope instigated his son to kill the deceased. He has also received injuries when went at the spot to save Domar Gope.

35. P.W.7 Ambiya Devi is the wife of deceased Domar Gope, an eye witness to the occurrence. She has stated that at the time of occurrence when her husband was cleaning the cot at his door, she was present and at that time Ishwar Gope started abusing him. She has further stated that Dalo Gope, Jageshwar Gope came lashed with lathi and dragged her husband to the door of Lilo Sao and started assaulting him with lathi then she rushed to save her husband but the accused persons Fuchni Devi, Manwa, Jhunwa and Chotu Devi assaulted to her. Her husband received serious injuries on her body. The accused persons threatened to dire consequences. She

has also received injuries on her person. She and other took her husband to Nimiaghat P.S from where he was referred to Dhanbad for better treatment where her husband died. In her cross-examination at paragraph 15 she has disclosed the name of accused Ishwar Gope, Jageshwar Gope and rest lady accused persons. She has further stated that accused petitioner caught her husband and brutally assaulted by lathi by which he received serious injury on forehead and blood was oozing out thereafter he died in Dhanbad.

36. P.W.3-Goapl Sao, PW.5-Kishun Gope and PW.6-Bhikhni Deve are the independent eye witnesses of this case and were present at the place of occurrence and saw the whole occurrence which was alleged to be committed by the accused persons. These witnesses have supported the prosecution case and involvement of the accused petitioner in the occurrence.

37. P.W-3 Gopal Sao stated in examination-in-chief that at 10:00 PM he was sitting at the door of Lilo Sao after taking meal. The accused Ishwar Sao started abusing to the Domar Gope who was thrashing his cot and there was exchange of hot talk in between both the parties. He has further deposed that accused persons lashed with lathi, danda dragged Domar Gope and started assaulting by lathi due to which Domar Gope received injury on his

forehead. The accused Dalo Sao, Jageshwar Gope arrived at the spot lashed with lathi and danda and also assaulted to the informant by which Jageshwar Gope received injury on his forehead. He has further deposed that these accused petitioners also threatening to kill the deceased. Ambiya Devi and Domar Gope tried to save but the accused persons were brutally assaulted along with lady accused persons. In cross-examination at paragraph 8 he has deposed that accused persons also threatened him for dire consequences. This witnesses further stated that accused persons Ishwar, Lilo and Jageshwar has given 15-20 lathi blow to the deceased due to which he received head injuries and subsequently died.

38. PW-5 Kishun Gope corroborated the whole story of prosecution. He has stated at paragraph 3 that accused persons assaulted Domar Gope by lathi and danda due to which he received serious injuries on forehead which resulted into his death. In cross-examination at paragraph 12 and 13 he disclosed that Ambiya Devi also received injury on her person when she rushed to save her husband.

39. PW-6 Bhikhari Das an eye witness of this case was present at the place of occurrence where he heard halla and when came outside of his house saw that Ishwar Gope, Jageshwar Gope, Dalo Gope were assaulting to

Domar Gope by lathi. At paragraph 1 he has stated that when Ambiya Devi rushed to save her husband the lady accused Mainwa, Jhanwa, Chatu and Fuchni assaulted to her. In cross-examination at paragraph 12, 13 and 18 it has been stated that he saw that deceased Domar Gope fell on the ground and blood was oozing out from his forehead.

40. PW-1 Bihari Sao has been declared hostile by the prosecution.

41. PW-2 Dr. Vinod Kumar has deposed that on 03.10.1993 he was posted as Asst. Professor, Department of Forensic Medicine of Patliputra Medical College, Dhanbad. On that day at 12:45 PM, he conducted postmortem examination of deceased Domar Yadav and opined that :-

> 1. Deceased was of wheat completion one mole on the upper part of left side neck. The deceased was average built rigor mortis present all over the body. P.M lividity developing on the back of drunk.
>
> II. The following antemortem injuries were seen on the person of the deceased.
>
> III. Right side of hand and face swollen and bruised (Both eyes lids of right side also bruised).
>
> IV. Stitched wound 1 1/2" long with 3 stitches on the haring portion of right side forehead, 3" above

the right eyebrow. On removal of stitches margins showed bruising.

V Lacerated wound 1/2" x 1/4" situated 1/2" medial to injury no. II.

VI. Abrasion 1" x 3/4" on the top of left shoulder.

VII. Abrasion 3 in number 1/4" x 1/8" x 1/2" x 1/4" and 1/5" diameter seen in and area of 1 1/2" x 1/2" on the back of right elbow.

VI. Abrasion 1" x 1/4" with on stitch on the inner side of right elbow.

VII. Abrasion 2 1/2" x 1 1/2" on the lower 1/3 of outer and back of right thigh. All the abrasions are read coloured.

On Dissection I found the following:-

Left side chamber of the heart were empty. Right side chambers contained little blood. Internal organs are normal looking. Stomach contained about 50 C.C. blackish fluid. Urinary bladder empty.

On removal of scalp, massive haematoma seen under the scalp. Right side frontal parietal bones in 4" x3" area under injury no. II. Showed multiple fractures. Linear fracture lines are extending anteriorly into the right anterior cranial fossa and orbital plate and laterally extending up

to right temporal bone. Extradural haematoma seen in 6" x4 1/2" area under injury no.

II. Meaninges were found lacerated by the broken cranial bones. Meninges and brain were congested.

Time passed since death was between 6 to 12 hours before the time of postmortem examination.

3. Opinion- In my opinion death was in coma as a result of aforementioned intra cranial haemorrhage caused by hard and blunt object.

4. The postmortem report has been prepared and written by me and it bears my signature mark as Ext-1.

During cross-examination he has stated that he did not obtain his signature of person in the postmortem examination who accompanied with the dead body. There is rigmortis of the all over the body.

In para 12, 13, 14 he did not mention that all the above mentioned injuries were sufficient to cause death of the deceased. He has further stated that contusion and abrasion and laceration are also possible by fall on the hard blow by taking risk of pain. He has denied that he has submitted wrong postmortem report in this case.

42. P.W.10 Dr. Devendra Prasad, has deposed that on 03.10.1993 at 1:10 AM he was posted at Medical Officer, PHC, Dumri, Giridih who conducted examination on

injured namely Ambiya Devi, W/o Domar Yadav, R/o village- Kenduwadih, P.S. Nimiaghat, District- Giridih, and found following injuries:-

1. laceration 3" x 1/2" x 1/2" on left parital region.

2. Nature with opinion -

Mark of identification- Single mole on right side cheek near outer can thus.

Age of Injury-About within 12 hours.

Nature of Injury Above injuries is simple in nature cause by hard and blunt substance.

This injury Report is prepared by me in his own hand-writing and signature, which is mark and Ext.6.

During cross-examination at paragraph 7 he has stated that patient was examined by him but not present in the court today and identification mentioned in the injury report. He has further stated that colour of injury is important factor but did not mention in the injury report. He has further state that the above injury will be possible by fall on the hard floor by taking the risk of pain.

So from evidence of Doctor, it appears that doctor opined cause of death due to coma as result of aforementioned it cranial hemorrhage's caused by hard and blunt object is also consistent with evidence of Informant and witnesses examined by the prosecution.

43. PW-4 Ram Lal Ram is the Investigating Officer of this case who conducted whole investigation and submitted charge-sheet against the accused persons. He has stated that on 02.10.1993 he was posted as ASI of Nimnighat P.S and took charge of the case on the direction of officer-in-charge, Nimiaghat P.S. He has stated that during the investigation he went to the place of occurrence and recorded the statement of the informant Dukhi Gope as well as the statement of witnesses. He has stated that place of occurrence is situated at village – Kenduadih in open area 'verandah' belonging to one Lalo Sao. The accused persons lashed with deadly weapons assaulted the deceased and Ambiya Devi. At paragraph 3 he has disclosed the description of place of occurrence. After investigation he has found case true and submitted charge-sheet. He has identified endorsement on FIR which is marked as Ext-2. He has further identified postmortem report which bears signature of D. Paswan marked as Ext-2/1. At paragraph 6 he has stated that Jageshwar Gope was not arrested and thereafter he was declared absconder in charge sheet.

44. In cross-examination at paragraph 9 and 10 he has stated that during the investigation postmortem report was received from Dhanbad and nothing was recovered from the house of the accused.

45. PW-9 Deepak Kumar is formal witness of this case who has only identified the signature on summons issued by the court regarding examination of informant which is in writing and signature of Vijay Kumar Kerketta.

46. In this case, defence has also examined witnesses as D.W.1 Lakhi Gope and DW2 Mital Sao, who have deposed that no occurrence took place on the said date. Both witnesses further stated that Domar Gope was residing in his sasural and never came to his village. Accused persons falsely implicated by the informant due to land dispute. Although witnesses admitted that Domar Gope died in Dhanbad due to the injuries.

47. At paragraph 12 of cross-examination of prosecution deposed that the occurrence took place is night but they did not come outside for the settlement between the parties

48. Learned trial court, based upon the testimonies of eye witnesses, referred hereinabove, has passed the judgment of conviction convicting the appellants under Section 302/34 and 302/149 of Indian Penal Code and directed to undergo R.I. for life.

49. This Court, in order to appreciate the submissions advanced on behalf of all the appellants with respect to the culpability of the appellants, of commission of offence under Section 302 or under Section 304 Part-I or Part-II

of the Indian Penal Code vis-à-vis the evidences adduced on behalf of the parties, deems it fit and proper to refer certain judicial pronouncements regarding applicability of the offence said to be committed under Section 302 or 304 Part-I or Part-II.

50. The Hon'ble Apex Court has dealt with the aforesaid position in the case of ***Surinder Kumar v. Union Territory, Chandigarh*** reported in ***(1989) 2 SCC 217*** wherein paragraph 6 and 7 are relevant which are being referred hereunder as :-

> ***"****6. Exception 4 to Section 300 reads as under:*
> *"Exception 4.—****Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.***
> *Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault."*
> ***7. To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner****. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but* ***what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger.*** *Of course, the offender must not have taken any undue advantage or acted in a cruel manner.* ***Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not***

acted cruelly. *In the present case, the deceased and PW 2 had entered the room occupied by Sikander Lal and his family members and had demanded vacant possession of the kitchen. When they found that the appellant was disinclined to hand over possession of the kitchen, PW 2 quarrelled and uttered filthy abuses in the presence of the appellant's sister. On the appellant asking him to desist he threatened to lock up the kitchen by removing the utensils, etc., and that led to a heated argument between the appellant on the one side and PW 2 and his deceased brother on the other. In the course of this heated argument it is the appellant's case that PW 2 took out a knife from his pant pocket. This part of the appellant's case seems to be probable having regard to the antecedents of PW 2. It is on record that PW 2 was convicted at Narnaul on two occasions under Section 411 IPC and his name was registered as a bad character at the local police station. It was presumably because of this reason that he had shifted from Narnaul to Chandigarh a couple of years back and had started to live in the premises rented by PW 4. When the appellant found that PW 2 had taken out a pen knife from his pocket he went into the adjoining kitchen and returned with a knife. From the simple injury caused to PW 2 it would appear that PW 2 was not an easy target. That is why the learned Sessions Judge rejected the case that Amrit Lal had held PW 2 to facilitate an attack on him by the appellant. It further seems that thereafter a scuffle must have ensued on Nitya Nand intervening to help his brother PW 2 in which two minor injuries were suffered by the deceased on the left arm before the fatal blow was inflicted on the left flank at the level of the fifth rib about 2" below the nipple. It may incidentally be mentioned that the trial court came to the conclusion that the injury found on the neck of PW 2 was a self-inflicted wound and had therefore acquitted the appellant of the charge under Section 307 IPC, against which no appeal was carried. We have, however, proceeded to examine this matter on the premise that PW 2 sustained the injury in the course of the incident. From the above facts, it clearly emerges that after PW 2 and his deceased brother entered the room of the appellant and uttered filthy abuses in the presence of the*

latter's sister, tempers ran high and on PW 2 taking out a pen knife the appellant picked up the knife from the kitchen, ran towards PW 2 and inflicted a simple injury on his neck. It would be reasonable to infer that the deceased must have intervened on the side of his brother PW 2 and in the course of the scuffle he received injuries, one of which proved fatal. Taking an overall view of the incident we are inclined to think that the appellant was entitled to the benefit of the exception relied upon. The High Court refused to grant him that benefit on the ground that he had acted in a cruel manner but we do not think that merely because three injuries were caused to the deceased it could be said that he had acted in a cruel and unusual manner. Under these circumstances, we think it proper to convict the accused under Section 304, Part I IPC and direct him to suffer rigorous imprisonment for 7 years."

[Emphasis supplied]

51. In the case of ***Murlidhar Shivram Patekar and Another v. State of Maharashtra*** reported in ***(2015) 1 SCC 694*** it has been held be Hon'ble Apex Court at paragraph 28 and 29 as under :-

"*28.* *The question however still remains as to the nature of* ***the offence committed by the accused and whether it falls under Exception 4 to Section 300 IPC.*** *In Surinder Kumar [Surinder Kumar v. UT, Chandigarh, (1989) 2 SCC 217] , this Court has held as under: (SCC p. 220, para 7)*

"7. To invoke this Exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a

cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this Exception provided he has not acted cruelly."

(Emphasis Supplied)

29. *Further, in Arumugam v. State [(2008) 15 SCC 590 at p. 595 : (2009) 3 SCC (Cri) 1130] , in support of the proposition of law that under what circumstances Exception 4 to Section 300 IPC can be invoked if death is caused, it has been explained as under: (SCC p. 596, para 9)*

"9. … '18. ***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 Penal Code, 1860****. 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 had worked themselves into a fury on account of the verbal altercation in the beginning.*** *A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel.* ***It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case.*** *For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage"."*

[Emphasis supplied]

52. In the case of ***Surain Singh v. State of Punjab*** reported in ***(2017) 5 SCC 796*** at paragraph 13 the Hon'ble Apex Court has held which is being referred hereunder as :-

> *"**13.** Exception 4 to Section 300 IPC applies in the absence of any premeditation. This is very clear from the wordings of the Exception itself. The Exception contemplates that the sudden fight shall start upon the heat of passion on a sudden quarrel. The Fourth Exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of provocation 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 in respect of guilt upon an 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 could in such cases 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."*

53. In the case of State of ***Andhra Pradesh v. Rayavarapu Punnayya, (1976) 4 SCC 382***, the Hon'ble Apex Court, while clarifying the distinction between section 299 and 300 of the IPC and their consequences, held as under: —

> *"12. In the scheme of the Penal Code, 'culpable homicide' is genus and 'murder' is species. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide not amounting to murder'.* ***For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is what may be called 'culpable homicide of the first degree'. This is the greatest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304****."*
>
> ***(Emphasis supplied)***

54. In ***Pulicherla Nagaraju v. State of A.P., (2006) 11 SCC 444***, wherein the Hon'ble Apex Court enumerated some of the circumstances relevant to finding out whether there was any intention to cause death on the part of the accused. The Court observed as under :-

> *"29. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters — plucking of a fruit, straying of cattle, quarrel of children, utterance of a*

rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention."

(Emphasis supplied)

55. Recently the Hon'ble Apex Court while considering the various decisions on the aforesaid issue has laid down the guidelines in the case of ***Anbazhagan Vs. State***

Represented by the Inspector of Police reported in ***2023 SCC OnLine SC 857*** which are being quoted as under:

> ***"66.*** *Few important principles of law discernible from the aforesaid discussion may be summed up thus:—*
>
> *(1) When the court is confronted with the question, what offence the accused could be said to have committed, the true test is to find out the intention or knowledge of the accused in doing the act. If the intention or knowledge was such as is described in Clauses (1) to (4) of Section 300 of the IPC, the act will be murder even though only a single injury was caused. ---*
>
> *(2)* ***Even when the intention or knowledge of the accused may fall within Clauses (1) to (4) of Section 300 of the IPC, the act of the accused which would otherwise be murder, will be taken out of the purview of murder, if the accused's case attracts any one of the five exceptions enumerated in that section. In the event of the case falling within any of those exceptions, the offence would be culpable homicide not amounting to murder, falling within Part 1 of Section 304 of the IPC, if the case of the accused is such as to fall within Clauses (1) to (3) of Section 300 of the IPC. It would be offence under Part II of Section 304 if the case is such as to fall within Clause (4) of Section 300 of the IPC. Again, the intention or knowledge of the accused may be such that only 2nd or 3rd part of Section 299 of the IPC, may be attracted but not any of the clauses of Section 300 of the IPC. In that situation also, the offence would be culpable homicide not amounting to murder under Section 304 of the IPC. It would be an offence under Part I of that section, if the case fall within 2nd part of Section 299, while it would be an offence under Part II of Section 304 if***

the case fall within 3rd part of Section 299 of the IPC.

(3) To put it in other words, if the act of an accused person falls within the first two clauses of cases of culpable homicide as described in Section 299 of the IPC it is punishable under the first part of Section 304. If, however, it falls within the third clause, it is punishable under the second part of Section 304. In effect, therefore, the first part of this section would apply when there is 'guilty intention,' whereas the second part would apply when there is no such intention, but there is 'guilty knowledge'.

(4) Even if single injury is inflicted, if that particular injury was intended, and objectively that injury was sufficient in the ordinary course of nature to cause death, the requirements of Clause 3rdly to Section 300 of the IPC, are fulfilled and the offence would be murder.

(5) Section 304 of the IPC will apply to the following classes of cases : (i) when the case falls under one or the other of the clauses of Section 300, but it is covered by one of the exceptions to that Section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression 'sufficient in the ordinary course of nature to cause death' but is of a lower degree of likelihood which is generally spoken of as an injury 'likely to cause death' and the case does not fall under Clause (2) of Section 300 of the IPC, (iii) when the act is done with the knowledge that death is likely to ensue but without intention to cause death or an injury likely to cause death.

To put it more succinctly, the difference between the two parts of Section 304 of the IPC is that under the first part, the crime of murder is first established and the accused is then given the benefit of one of the exceptions to Section 300 of the IPC, while under the second part, the crime of murder is never established at all. Therefore, for the purpose of holding an accused guilty of the

offence punishable under the second part of Section 304 of the IPC, the accused need not bring his case within one of the exceptions to Section 300 of the IPC.

(6) The word 'likely' means probably and it is distinguished from more 'possibly'. When chances of happening are even or greater than its not happening, we may say that the thing will 'probably happen'. In reaching the conclusion, the court has to place itself in the situation of the accused and then judge whether the accused had the knowledge that by the act he was likely to cause death.

(7) The distinction between culpable homicide (Section 299 of the IPC) and murder (Section 300 of the IPC) has always to be carefully borne in mind while dealing with a charge under Section 302 of the IPC. Under the category of unlawful homicides, both, the cases of culpable homicide amounting to murder and those not amounting to murder would fall. Culpable homicide is not murder when the case is brought within the five exceptions to Section 300 of the IPC. But, even though none of the said five exceptions are pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of Section 300 of the IPC to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any one of the four clauses of Section 300 of the IPC, namely, 1stly to 4thly, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under Section 299 of the IPC.

(8) The court must address itself to the question of mens rea. If Clause thirdly of Section 300 is to be applied, the assailant must intend the particular injury inflicted on the deceased. This ingredient could rarely be proved by direct evidence. Inevitably, it is a matter of inference to be drawn from the proved circumstances of the case. The court must necessarily have regard to the nature of the

weapon used, part of the body injured, extent of the injury, degree of force used in causing the injury, the manner of attack, the circumstances preceding and attendant on the attack.

(9) Intention to kill is not the only intention that makes a culpable homicide a murder. The intention to cause injury or injuries sufficient in the ordinary cause of nature to cause death also makes a culpable homicide a murder if death has actually been caused and intention to cause such injury or injuries is to be inferred from the act or acts resulting in the injury or injuries.

(10) When single injury inflicted by the accused results in the death of the victim, no inference, as a general principle, can be drawn that the accused did not have the intention to cause the death or that particular injury which resulted in the death of the victim. Whether an accused had the required guilty intention or not, is a question of fact which has to be determined on the facts of each case.

(11) Where the prosecution proves that the accused had the intention to cause death of any person or to cause bodily injury to him and the intended injury is sufficient in the ordinary course of nature to cause death, then, even if he inflicts a single injury which results in the death of the victim, the offence squarely falls under Clause thirdly of Section 300 of the IPC unless one of the exceptions applies.

(12) ***In determining the question, whether an accused had guilty intention or guilty knowledge in a case where only a single injury is inflicted by him and that injury is sufficient in the ordinary course of nature to cause death, the fact that the act is done without premeditation in a sudden fight or quarrel, or that the circumstances justify that the injury was accidental or unintentional, or that he only intended a simple injury, would lead to the inference of guilty knowledge, and the offence would be one under Section 304 Part II of the IPC.***

[emphasis supplied]

56. In the backdrop of the aforesaid discussion of proposition of law, this Court is to consider following issues :-

> ***(i)*** *Whether the material as has come in course of trial is sufficient to attract the ingredients of offence committed under Section 302 of the Indian Penal Code? or*
>
> ***(ii)*** *Whether the case is said to be covered under the exception to Section 300 of the Indian Penal Code? or*
>
> ***(iii)*** *Whether on the basis of factual aspect, the case will come under the purview of Part-I of Section 304 or Part-II thereof? Or*
>
> ***(iv)*** *Whether in the same transaction of occurrence, can the trial Court adopt two parameters of conviction i.e, in one case convicting the appellant under section 302 IPC read with Section 149 IPC and in another case for the same occurrence the appellant has been convicted for the offence under Section 302 IPC with aid of Section 34 IPC?*
>
> ***(v).*** *Whether the four female members, who have also been alleged of committing the similar type of offence as that of these two appellants but they have not been convicted under Section 302 IPC rather they have been convicted under section 323 IPC but without taking aid of Section 149 IPC. Therefore, the question which requires consideration that how two parameters can be adopted by the learned trial Court if the charges are similar upon all the accused persons.*
>
> ***(vi).*** *Whether the applicability of Section 149 IPC which defines the unlawful assembly consisting of five members but the moment the four ladies out of 7 accused persons have been convicted under section 323 IPC without aid of Section 149 IPC can there be conviction of the appellant of Cr. Appeal (DB) No. 163 of 2020 under Section 302 IPC by taking aid of Section 149 IPC?*

57. Since all the aforesaid issues are inextricably interlinked, the same are being decided hereinbelow by considering them together.

58. The law is well settled that for proving the charge under Section 302 of the Indian Penal Code, it is the bounden duty of the Court to consider the ingredients of culpable homicide as provided under Section 299 of the Indian Penal Code amounting to murder as provided under Section 300 IPC and not amounting to murder as provided under Exception 4 to Section 300 of the Indian Penal Code.

59. Section 299 I.P.C. speaks about culpable homicide wherein it has been stipulated that whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. Thus, Section 299 defines the offence of culpable homicide which consists in the doing of an act – (a) with the intention of causing death; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that the act is likely to cause death. “intent” and “knowledge” as the ingredients of Section 299 postulates existence of the positive mental attitude and this mental condition is the special *mens rea*

necessary for the offence. The knowledge of 3rd condition contemplates knowledge or the likelihood of the death of the person.

60. The Hon'ble Apex Court while considering the aforesaid fact, in the case of ***Jairaj v. State of Tamil Nadu*** reported in ***AIR 1976 SC 1519*** has been pleased to held at paragraph 32 & 33 which is being quoted hereunder as :-

> ***"32.*** *For this purpose we have to go to Section 299 which defines "culpable homicide". This offence consists in the doing of an act*
> *(a) with the intention of causing death, or*
> *(b) with the intention of causing such bodily injury as is likely to cause death, or*
> *(c) with the knowledge that the act is likely to cause death.*
> ***33.*** *As was pointed out by this Court in Anda v. State of Rajasthan [AIR 1966 SC 148 : 1966 Cri LJ 171] x"intent" and "knowledge" in the ingredients of Section 299 postulate the existence of positive mental attitude and this mental condition is the special mens rea necessary for the offence. The guilty intention in the first two conditions contemplates the intended death of the person harmed or the intentional causing of an injury likely to cause his death. The knowledge in the third condition contemplates knowledge of the likelihood of the death of the person."*

61. It is, thus, evident that our legislature has used two different terminologies 'intent' and 'knowledge' and separate punishments are provided for an act committed with an intent to cause bodily injury which is likely to cause death and for an act committed with a knowledge that his act is likely to cause death without intent to

cause such bodily injury as is likely to cause death, it would be proper to hold that 'intent' and 'knowledge' cannot be equated with each other. They connote different things. Sometimes, if the consequence is so apparent, it may happen that from the knowledge, intent may be presumed. But it will not mean that 'intent' and 'knowledge' are the same. 'Knowledge' will be only one of the circumstances to be taken into consideration while determining or inferring the requisite intent.

62. Thus, while defining the offence of culpable homicide and murder, the framers of the IPC laid down that the requisite intention or knowledge must be imputed to the accused when he committed the act which caused the death in order to hold him guilty for the offence of culpable homicide or murder as the case may be.

63. The framers of the Indian Penal Code designedly used the two words 'intention' and 'knowledge', and it must be taken that the framers intended to draw a distinction between these two expressions. The knowledge of the consequences which may result in the doing of an act is not the same thing as the intention that such consequences should ensue. Except in cases where mens rea is not required in order to prove that a person had certain knowledge, he "must have been aware that certain

specified harmful consequences would or could follow." (Russell on Crime, Twelfth Edition, Volume 1 at page 40).

64. In view of Section 299 of the Indian Penal Code, the material relied upon by the prosecution for framing of charge under Section 304 Part-II must be at least *prima facie* indicate that the accused has done an act which has caused death with at least such a knowledge that such act was likely to cause death.

65. The Hon'ble Apex Court, in ***Keshub Mahindra v. State of M.P.*** reported in ***(1996) 6 SCC 129*** has been pleased to hold as under paragraph 20 which reads hereunder as :-

> ***"20.*** --- *We shall first deal with the charges framed against the accused concerned under the main provisions of Section 304 Part II IPC. A look at Section 304 Part II shows that the accused concerned can be charged under that provision for an offence of culpable homicide not amounting to murder and when being so charged if it is alleged that the act of the accused concerned is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death the charged offences would fall under Section 304 Part II. However before any charge under Section 304 Part II can be framed, the material on record must at least prima facie show that the accused is guilty of culpable homicide and the act allegedly committed by him must amount to culpable homicide. However, if the material relied upon for framing such a charge against the accused concerned falls short of even prima facie indicating that the accused appeared to be guilty of an offence of culpable homicide Section 304 Part I or Part II*

would get out of the picture. In this connection we have to keep in view Section 299 of the Penal Code, 1860 which defines culpable homicide. It lays down that:

"Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

Consequently the material relied upon by the prosecution for framing a charge under Section 304 Part II must at least prima facie indicate that the accused had done an act which had caused death with at least such a knowledge that he was by such act likely to cause death. ---"

66. Section 300 of Indian Penal Code speaks about murder under which it has been stipulated that Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or, secondly, if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or thirdly, if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or fourthly, if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for

incurring the risk of causing death or such injury as aforesaid.

67. It is, thus, evident that the punishment under Section 302 of the Indian Penal Code shall not apply if any of the conditions mentioned above, are not fulfilled. This means that if the accused has not intentionally killed someone then murder cannot be proved. Apart from this, Section 300 of the Indian Penal Code mentions certain exceptions for offence of murder which are as follows :-

(a) If a person is suddenly provoked by a third party and loses his self-control, and as a result of which causes the death of another person or the person who provoked him, it won't amount to murder subject to proviso as provided.

(b) When a person under the right of private defence causes the death of the person against whom he has exercised this right without any premeditation and intention.

(c) If a public servant, while discharging his duty and having lawful intention, causes the death of a person.

(d) If it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender' having taken

undue advantage or acted in a cruel or unusual manner.

(e) Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

68. All these exceptions mentioned above shall come under purview of Section 304 and will be termed as culpable homicide not amounting to murder.

69. It is, thus, evident the parameters which are to be followed while convicting a person of commission of crime of murder will be different if the murder comes under fold of culpable homicide amounting to murder and it will be different if with the intent to commit murder as per the outside the purview of exception carved out under Section 300 of the Indian Penal Code.

70. In the present case the pleas, *inter alia*, have been taken on behalf of appellants that during course of thrashing of cot the scuffle took place between the parties, thereby injuries caused to the deceased who succumbed to the injuries alleged to have been inflicted by appellants and hence it has been contended that it is a case not or murder rather it comes within the purview of exception 4 to Section 300 (murder) of IPC.

71. The parameters for judging the case have been dealt with by Hon'ble Apex Court in the case of ***Sayaji Hanmat Baukar v. State of Maharashtra, AIR 2011 SC 3172*** whereunder the circumstances of the case it has been held that if the act is done without premeditation in a sudden quarrel and if the offender does not take any undue advantage or act in a cruel or unusual manner, then exception 4 will be attracted.

72. Law is well settled that in order to attract Exception 4 to Section 300 of IPC, four requirements must be satisfied namely :-

(a) It should be sudden fight.

(b) There was no premeditation.

(c) The act was done in a heat of passion

(d) The assailant had not taken any undue advantage or acted in a cruel manner.

73. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offence must have taken place in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in an unusual or cruel manner. If a person in the heat of a moment on a sudden quarrel picks a weapon which is handy and thereby injuries are caused, one of which proves fatal, he would be

entitled to the benefit of this exception 4 to Section 300 of IPC provided he has not acted cruelly. Thus whenever there is a case of sudden fight and conflict, it has to be dealt with under Exception 4 to Section 300 of IPC.

74. In the aforesaid backdrop, this Court is now proceeding to examine the evidence adduced by the prosecution in course of trial in order to answer the issue as to whether it is a case under Section 302 or Section 304 Part-I or II by appreciating the evidences vis-à-vis the provisions of murder or exception 4.

In Cr. Appeal No. 141 of 1996:

75. PW-2 Behari Sao has deposed that after hearing halla he went towards the house of Lilo Sao and saw that Ishwar Gope and Jageshwar Gope were assaulting Domar Gope with lathi. Wife of Damar Gope attempted to save her husband and she was assaulted by Jhanwa, Mainwa, Phuchni and Chhatus Devi. Damar Gope sustained injury on head and he fell down. He has further deposed that he bandaged the head of Damar Gope with his gamchhi [towel]. Thereafter, he and others took Damar Gope on a cot to thana [police station]. From there the officer-in-charge sent them to Dumri hospital.

76. **P.W.3, Bhikhini Devi** has stated that when she was about to go to bed, he heard halla towards the house of Lilo sao and saw that Ishwar Gope, Jageshwar Gope, Dalo

Gope were assaulting Damar Gope. Wife of Damar Gope went to save her but she was assaulted by Kainwe, Jhanwa, Chhathu and Phuchni Devi. She has also stated in cross-examination that Damar was thrashing his cot over the roof.

77. P.W.4, Gopal Sao has deposed that when he was sitting at the door of Lilo Sao after taking his meal, Damar Gope was thrashing his cot at his door and when Ishwar Gope objected to it and there was quarrel between the two. Then Ishwar Gope went to his house and came back with his two sons, namely, Dalo and Jageshwar armed with lathis. All the three caught hold Damar Gope and dragged him to the door of Lilo Sao and all the three accused began to assault him with lathi as such he sustained head injury. Ambia Devi wife of Damar Gope rushed to save her husband but she was assaulted by four lady accused. He has further deposed that accused persons continued assaulting Damar Gope even after he fell down. In cross-examination, this witness has deposed that Domar Gope was assaulted for four or five minutes and he might have been given 15-20 lathi blows. He was assaulted all over the body including his head.

78. P.W.5, Kishun Gope also went to the Gali [street] on halla being raised by Damar Cope. He has also supported the occurrence.

79. P.W.6, Ambia Devi is the wife of Damar Gope, the deceased. She has stated in her examination-in-chief that her husband Damar Gope was thrashing the cot at his door upon which Ishwar Gope began to abuse. Thereafter he went to his house and came back with his two sons Dalo Gope and Jageshwar Gope, all armed with lathis. They dragged him to the door of Lilo Sao and began to assault him with lathi and when she went to save her husband she was also assaulted by Fuchni, Mainwa, Thunwa and Chhathu Devi. She and others took her husband to Nimiaghat P.S. wherefrom he was taken to Dumri hospital where the doctor asked them to rush him to Dhanbad hospital. She in cross examination has stated that there was land dispute with accused persons regarding a gharbani but earlier there was no quarrel or any case between the parties. This witness at paragraph 4 has said that when the accused persons came to her door the lady accused caught hold makes of her at the door of Lilo Sao.

80. P.W.7, Dukhi Gope is the informant. He has deposed that on the alleged date of occurrence he was present in his house. Damar Gope was thrashing his cot at his door when Ishwar Gope came and abused him. There was hot talk from both sides. Thereafter Ishwar Gope went to his house and he came back with his two sons. All the three

having lathi dragged Damar Gope to the door of the Lilo Sao and began to assault him and when the wife of Damar Gope came to save her husband she was assaulted by four lady accused. In cross examination he has stated that he was taking his meal when Damar Gope was thrashing the cot. He came out of his house on halla. When he came out he saw Ishwar, Dalo and Jageshwar Gope assaulted Damar Gope near the door of Lilo Sao. He has also said in the F.I.R he could not see as to which of the accused assaulted Damar Gope with what weapons. But he heard Ishwar Gope instigating his sons to finish him.

Testimony of witnesses in Cr. A (D.B.) No. 163 of 2020

81. The informant PW-8, Dukhi Gope, who is father of deceased has stated in examination-in-chief that when the occurrence took place he was present in his house. He has further stated that when Domar Gope was thrashing his cot in his verandah the accused Ishwar Gope started abusing him. He has further stated that there is exchange of hot talk in between Domar Gope and Ishwar Gope. Thereafter, Ishwar Gope went to his house and came back with his two sons lashed with lathi and sword. The accused Ishwar Gope and his son Lilo Sao caught Domar Gope and dragged to the open courtyard and started assaulting to him by lathi. His wife Ambiya Devi went to

save her husband but the lady accused persons assaulted to her. Domar Gope received serious injuries and fell on the ground and was taken to Dumri Hospital from where the doctor referred to the injured Dhanbad where Domar Gope died.

82. P.W.7 Ambiya Devi is the wife of deceased Domar Gope, an eye witness to the occurrence. She has stated that at the time of occurrence when her husband was cleaning the cot at his door, she was present and at that time Ishwar Gope started abusing him. She has further stated that Lalo Gope, Jageshwar Gope came lashed with lathi and dragged her husband to the door of Lilo Sao and started assaulting him with lathi then she rushed to save her husband but the accused persons Fuchni Devi, Manwa, Jhunwa and Chotu Devi assaulted to her. Her husband received serious injuries on her body. The accused persons threatened to dire consequences. She has also received injuries on person. She and other took her husband to Nimiaghat P.S from where he was referred to Dhanbad for better treatment where her husband died.

83. P.W.3-Goapl Sao, PW.5-Kishun Gope and PW.6-Bhikhni Deve are the independent eye witnesses of this case who also supported the prosecution case and involvement of the accused petitioner in the occurrence.

84. PW-2 Dr. Vinod Kumar has opined the cause of death was in coma as a result of aforementioned intra cranial haemorrhage caused by hard and blunt object.

85. P.W.10 Dr. Devendra Prasad, has deposed that on 03.10.1993 he was posted at Medical Officer, PHC, Dumri, Giridih who examined injured namely Ambiya Devi, W/o Domar Yadav,

86. PW-4 Ram Lal Ram is the Investigating Officer of this case who conducted the whole investigation and submitted charge-sheet against the accused persons.

87. This Court, on the basis of discussion made hereinabove, has found that the learned trial Court has considered the testimony of witnesses in particular, the testimony of PW3, PW5.PW 6, PW 7. PW8 (informant) of the case wherein they categorically deposed in their evidence that the occurrence took place at 10:00 night when deceased was cleaning his cot and accused Iswhar Gope started abusing to him. It is also clear from the evidence as discussed above that accused Ishwar Gope along with Jageshwar Gope, Dalo Gope lady accused Mainwa Devi, Choti Devi, Fuchini Devi, Jhanwa Devi arrived at the spot lashed with lathi and danda assaulted to deceased Domar Gope. It is also evident that Domar Gope was caught by the Ishwar Gope, Dalehswar Gope, and Jageshwar Gope dragged at the door of Lilo Sao and

gave blow by lathi on his body and forehead by which received injury on forehead as well as on the body and fell unconscious on the ground and he was referred to Dhanbad for better treatment where Domar Gope died. Therefore, I find that independent witnesses PW3, PW5, PW6 fully supported and corroborated the evidence of the informant PW-8 as well as injured PW-7 and also corroborated the FIR in favour of the prosecution. These witnesses, PW 8 informant and PW7 (wife of deceased Domar Gope), also an injured, disclosed the name of the accused persons including Jageshwar Gope who facing trial in this supplementary case record. Further the independent witness also disclosed and led evidence regarding involvement of accused Jageshwar Gope alongwith Ishwar Gope, Dalsehwar Gope.

88. Whereas on the other hand, learned counsel for the appellants in alternate has taken the ground that there was no premeditation of mind to commit murder rather it was sudden fight and the act was done in a heat of passion.

89. In the light of the aforesaid fact, now it is to be appreciated as to whether the case is coming under Exception 4 to Section 300 of the Indian Penal Code.

90. Admittedly, in order to invoke this exception, four ingredients must be satisfied, i.e., - (i) it was a sudden

fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion ; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner.

91. In ***Dhirajbhai Gorakhbhai Nayak vs. State of Gujarat [(2003) 9 SCC 322***, it has been observed by the Hon'ble Apex Court 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 in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to*

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

92. This Court, on the basis of the factual aspect as discussed hereinabove as also after taking into consideration the law laid down by Hon'ble Apex Court in the case of ***Surinder Kumar v. Union Territory, Chandigarh*** (Supra), ***Nankaunoo v. State of Uttar Pradesh*** (Supra), ***Murlidhar Shivram Patekar and Another v. State of Maharashtra*** (Supra) and ***Surain Singh v. State of Punjab*** (Supra) and other aforesaid judicial pronouncements wherein the difference has been

carved out in between the culpable homicide amounting to murder and culpable homicide not amounting to murder, rebutting back to the facts of the given case, is proceeding to examine the fact of the given case.

93. In the instant case, all the witnesses have deposed that there was exchange of hot talk between Domar Gope [deceased] Ishwar Gope. Further, there is unanimity in their deposition with regard to participation of all the ladies of both the family in the quarrel between the parties. The informant side also sustained injury.

94. Informant [Dukhi Gope] in unequivocal term has deposed that there was exchange of hot talk between the parties and thereafter the accused-Ishwar Gope went to his house and called upon his two sons who came with lathi and sword but as per prosecution version no witness has deposed that sword was used in commission of crime neither injury report suggests so.

95. In the instant case from perusal of the testimonies of the witnesses it is noticed that the witnesses examined by the prosecution have admitted that the dispute was going on between the parties with respect to thrashing of cot at the door of Lilo Sao. It is explicit from the testimony of the witnesses that the occurrence took place over the trivial matter of thrashing of cot. In such scenario it

cannot be ruled out that there was free fight between the parties.

96. No doubt the injuries sustained by prosecution witnesses were more and there was loss of life of deceased on the side of the informant. In this context, it is pertinent to refer to the decision rendered in the case of ***State of U.P. Vs. Munni Ram & Ors., reported in 2011 (1)East Cr.C.86 (SC)*** wherein the Hon'ble Supreme Court in para-17, has observed that the defence version cannot be discarded only on the basis of lesser number of injuries having been suffered by them.

97. In the obtaining evidence, it cannot be possible to say with certainty that the accused/ appellants party were the aggressors. It is evident that origin and genesis of the occurrence appears to have been withheld by both the parties.

98. At this stage, it is necessary to reiterate the well settled principle that guilt of the accused is to be judged on the basis of the facts and circumstances of the particular case. The injuries found on the person of the accused assume importance in respect of genesis and manner of occurrence.

99. Thus considering the entire gamut of the case and on meticulous examination of the material evidence on record we have no hesitation in holding that there was

free fight between both the parties over the matter of thrashing of cot and in the said fight the deceased died and other witnesses sustained injuries.

100. From the discussion made hereinabove, it is apparent that in case of a free fight an offender can be made liable for his own act and not vicariously liable for the acts of others. In the case at hand there is no material to indicate that appellants/accused shared the common intention of committing death of deceased.

101. Before delving into the evidence on record on point of common intention and addressing the rival contentions in this regard as made by the parties, we wish to reiterate the precise nature, purpose and scope of Section 34 Indian Penal Code.

102. To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established: (*i*) common intention and (*ii*) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked.

103. In every case, it is not possible to have direct evidence of a common intention. The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the parties. Reference in this regard may be taken from judgment as rendered by the Hon'ble Apex Court in the case of ***Bengai Mandal v. State of Bihar*****, reported in (2010) 2 SCC 91 wherein at paragraph 13 it has been held as under:-**

> *"**13.** Thus, the position with regard to Section 34 IPC is crystal clear. The existence of common intention is a question of fact. Since intention is a state of mind, it is therefore very difficult, if not impossible, to get or procure direct proof of common intention. Therefore, courts, in most cases, have to infer the intention from the act(s) or conduct of the accused or other relevant circumstances of the case. However, an inference as to the common intention shall not be readily drawn; the criminal liability can arise only when such inference can be drawn with a certain degree of assurance."*

104. Further the Hon'ble Apex Court in the case of ***Girija Shankar* v. *State of U.P.*** **(2004) 3 SCC 793**], while bringing out the purpose and nature of Section 34 IPC observed in para 9, as follows:-

> *"9. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in*

> *furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true concept of the section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in Ashok Kumar v. State of Punjab [(1977) 1 SCC 746] the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.*

105. Thus it is evident that the inference regarding applicability of Section 34 of the IPC to be drawn from the manner of the origin of the occurrence, the manner in which the accused arrived at the scene and the concert with which attack was made and from the injuries caused by one or some of them. The criminal act actually committed would certainly be one of the important factors to be taken into consideration but should not be taken to be the sole factor.

106. The essence of liability under Section 34 IPC is simultaneous conscious mind of persons participating in the criminal action to bring about a particular result. Minds regarding the sharing of common intention gets satisfied when an overt act is established qua each of the accused. Common intention implies pre-arranged plan and acting in concert pursuant to the pre-arranged plan. Common intention is an intention to commit the crime actually committed and each accused person can be convicted of that crime, only if he has participated in that common intention.

107. In ***Jarnail Singh vs. State of Punjab; AIR 1982 SC 70***, the Apex Court held that since there was no pre-concert between the accused persons nor a meeting of minds between them before the offence took place, the conviction of the accused under Section 302/34 IPC was bad and since the accused merely gave a token blow on the ear and caused simple injuries, the conviction was altered to one under Section 324 Indian Penal Code.

108. Furthermore, submission has been made, in the same set of occurrences in one case judgment of conviction under Section 302 IPC has been passed taking aid of Section 149 IPC wherein in another case judgment of conviction under Section 302 IPC has been passed taking aid of Section 34 IPC, which cannot be said to be

proper reason being that the scope of Section 149 IPC is quite different to that of Section 34 IPC.

109. It is settled position of law that Section 149 IPC speaks about common object whereas Section 34 IPC speaks about common intention.

110. In the case at hand the out of seven accused persons, four co-accused, namely, Jhanko Devi, Mainwa Devi, Chuto Devi and Fuchni Devi the female members of the family have been acquitted meaning thereby the allegation of common object so as to attract the penal provision of Section 149 will not be applicable due to the meaning of unlawful assembly as defined under the Indian Penal Code in order to prove the charge of unlawful assembly, minimum of 5 members of the assembly is said to be there in unlawful assembly.

111. The important ingredients of an unlawful assembly are the number of persons forming it i.e. five; and their common object, as has been held by Hon'ble Apex Court in the judgment rendered in ***Manjit Singh* v. *State of Punjab*, (2019) 8 SCC 529**.

112. It is further settled proposition of law that in absence of evidence of any common object being established, accused are liable for their individual acts only. Moreover, mere presence does not make a person member of unlawful assembly unless he actively

participates in rioting or does some overt act with necessary criminal intention or shares common object of unlawful assembly as has been held by Hon'ble Apex Court in ***Vijay Pandurang Thakre* v. *State of Maharashtra*, (2017) 4 SCC 377**.

113. In the backdrop the aforesaid discussion and the judicial pronouncements and the evidence of prosecution witnesses and also taken into consideration the facts and circumstances of the instant case, we are of the view that the attack was not a premeditated one nor was there a prior concert rather it occurred due to sudden quarrel over the matter of thrashing of cot to get rid of bedbug.

114. The totality of the circumstances must be taken into consideration in order to arrive at a truthful conclusion that the appellants had a common intention to commit the offence under which they were convicted. The appellants were not armed with any deadly weapon like Fire Arms. In the present case, the way the occurrence took place as depicted by the prosecution, there could not have been common intention between the accused/appellants.

115. Thus, in these circumstances it cannot be said that the appellants have acted in furtherance of common

intention to attract even constructive liability under Section 34 or 149 of the Indian Penal Code.

116. Further it is settled connotation of law that it is necessary to establish common object before a person can be convicted with aid of Section, 149 as has been held by Hon'ble Apex Court in the case of ***Dauwalal* v. *State of M.P.*, (2019) 4 SCC 538.**

117. The facts and circumstances, in our view, do not give rise to an inference of preconcert. We have not found any material from the side of the prosecution to show that the present appellants had any common intention to eliminate the deceased.

118. In the absence of common intention, we are of the view that convicting the appellant with the aid of Section 34 of IPC cannot be sustained.

119. It is also settled proposition of law that for conviction of an offence read with Section 34 IPC, it is necessary that there should be a finding as to the common intention of the participants. Although the learned trial court has convicted the appellant under Section 302 read with Section 34 IPC, the trial court has not recorded any finding as to how the appellants shared the common intention to establish their constructive liability to sustain the conviction under Section 302 read with Section 34 Indian Penal Code.

120. Further it is pertinent to mention here that the appellant of Criminal Appeal (DB) No. 141 of 1996 was convicted by the trial court under section 302 by taking aid of section 34 of the IPC and other four ladies accused were convicted under section 323 read with section 34 of the IPC, therefore, in such situation convicting the appellant of Criminal Appeal (DB) No. 163 of 2020 under section 302 with aid of section 149 is very much questionable and as held in preceding paragraph that minimum requirement to attract the ingredients of section 149 is of the 05 (five) persons and this ingredient was not available to the trial court while rendering the order of conviction by the taking aid of 149 IPC. The aforesaid facts itself indicates the anomaly while rendering the judgment of conviction.

121. This court is of view that in the instant case there were random individual acts done without meeting of minds and it appears that that the instant case is case of free fight and the appellants can be held liable only for their individual acts. No such pre-arranged plan has been proved. It has also not been proved that any criminal act has been done in concert pursuant to the pre-arranged plan.

122. Several persons can simultaneously attack a man and each can have the same intention, namely, the

intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by Section 34 of the Penal Code, 1860 because there was no prior meeting of minds to form a pre-arranged plan. However, the prior meeting of mind is not an essential requisite in such case and the meeting of the mind can be formed at the spur of moment but in the fact of the instant case it does not appear that there was any intention to kill the deceased rather it appears that there was free fight. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others. Considering the totality of the circumstances, conviction of the appellant under Section 302 read with Section 34 IPC cannot be sustained.

123. The learned trial court however, has come to the finding by considering the case to be a case of commission of murder and hence has convicted the appellants under Section 302 of the Indian Penal Code but, while doing so, learned trial court has not appreciated the fact about the applicability of the exception as under Exception 4 of Section 300 of I.P.C.

124. This Court is of the view, based upon the judicial pronouncements as referred hereinabove, that the same on the basis of the discussion made hereinabove appears

to be a sudden free fight with no premeditation and the act was done in a heat of passion and it has also not come that the assailant has acted in a cruel manner. It further appears that for the purpose of attracting the requirement to invoke Exception 4 to Section 300 I.P.C., the number of wounds caused during the occurrence is not decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in the heat of passion.

125. This Court, therefore, is of the view that the learned trial court while convicting the appellants for commission of offence under Section 302 of the Indian Penal Code, has committed serious irregularities by ignoring all these facts as recorded in the preceding paragraphs.

126. Accordingly, we are of the view that the judgment impugned convicting the appellants in both the appeal needs to be interfered with by modifying it to that of conviction of the appellants under Section 304 Part-II and other Sections of the Indian Penal Code.

127. Thus, on evaluation of the testimony of the witnesses and the material available on record, we hold the appellant- Daleshwar Gope (appellant in *Criminal Appeal (D.B.) 141 of 1996*) guilty for the offence under Section 304 Part II of the I.P.C. only.

128. So far appellant-Jageshwar Gope (appellant in Cr. Appeal (DB) No. 163 of 2020) is concerned, on the basis of discussions made hereinabove, we found him guilty for the offence under Section 304 Part II of the I.P.C. instead of 302/149 IPC.

129. However, the appellant-Jageshwar Gope has also been sentenced and convicted under Sections 148, 341, 323, 452 and 504 IPC but from perusal of the records and the discussions made hereinabove, this Court does not find any ingredient for the offence punishable under section 452 IPC. However, rest of the sentences requires no interference.

Conclusion:

130. Consequently, **the judgment passed by the learned trial court is modified and the appellant- Daleshwar Gope (appellant in *Criminal Appeal (D.B.) 141 of 1996*) as also appellant-Jageshwar Gope (appellant in Cr. Appeal (DB) No. 163 of 2020) is held guilty for the offence under Section 304 Part II I.P.C. and sentenced them for the period already undergone by them and directed to be released forthwith from the jail custody if not wanted in any other case.**

131. Since the appellants are on bail, they are discharged from liabilities of bail bonds.

132. **The Criminal Appeal (DB) No. 141 of 1996 and Criminal Appeal (DB) No. 163 of 2020 are hereby dismissed with the modification of the judgment of conviction and order of sentence to the extent as indicated above.**

133. Both the criminal appeals are hereby disposed of as above.

134. Let the Lower Court Records be sent back to the Court concerned forthwith, along with a copy of this Judgment.

135. Pending Interlocutory Application(s), if any, stands disposed of.

I Agree **(Sujit Narayan Prasad, J.)**

(Pradeep Kumar Srivastava, J.) **(Pradeep Kumar Srivastava, J.)**

Jharkhand High Court, Ranchi
Dated, the 05 .03.2024.
Alankar /**A.F.R.**