

receipt of a copy of this order. It is clarified that the parties shall not seek unnecessary adjournment before the Family Court.

(20) Registry to transmit the trial Court's record to the Family Court, Ambedkar Nagar along with a copy of this order for information and compliance forthwith.

(2024) 11 ILRA 516
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.11.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Appeal No. 413 of 2001

Mata Prasad & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:

Arun Sinha, Ashish Raman Mishra,
 Maneesh Kumar Singh, Navita Sharma

Counsel for the Respondent:

Govt. Advocate

(A) Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 207 & 313 - Indian Penal Code, 1860 - Sections 147, 148, 149, 302, 300 & 304 - Appeal – against conviction & sentence – offence of murder – FIR – allegation that, accused appellants armed with Pharsa, ballam, lathi assaulted the father-in-law of the informant - investigation – trial by session judge – conviction & sentence – Evaluation of evidence - court finds that, (i) there is no contradiction in the testimony of prosecution witnesses on any point, as such, the truthfulness of factual matrix cannot be doubt in the absence of any material evidence to the contrary – (ii) the ground of enmity, ground of interested witnesses and ground of delay in lodging FIR does not stand to appeal which is

proved beyond the reasonable doubt – (iii) antemortem injuries found on the body of deceased indicate that they were caused by the Pharsa, ballam and lathi as such the medical evidence corroborates with the ocular evidence – (iv) The surviving appellants were armed with lathi and they only wants to cause bodily injuries to the deceased and they were not having any intention to kill the deceased – held, on appreciation of peculiar facts and circumstances of the case, instead of conviction of the surviving appellants under section 302 r/w 149 IPC is concern offence would be punishable u/section 304 part 1 of the IPC – Appeal is partly allowed – impugned conviction and sentence is liable to be altered and modified – directions issued accordingly. (Para – 32, 35, 39, 45, 48, 49, 50, 51, 53, 54)

Appeal Partly Allowed. (E-11)

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard learned counsel for the appellants, learned A.G.A. for the State and perused the material on record.

2. During the course of hearing of this appeal, the appellant nos. 1 and 2 namely Mata Prasad and Bhurey @ Dinesh Kumar have died and the appeal insofar as it relates to them has been abated vide order dated 11.7.2023 and 16.8.2023 respectively. Thus, the appeal survives on behalf of these appellants namely Pappu, Puttan and Daddan(appellant nos. 3, 4 and 5) only.

(A) Prelude

3. By means of this criminal appeal, the appellants, out of whom, only appellant nos. 3, 4 and 5(hereinafter referred to as appellants) survive have challenged the judgment and order dated 26.5.2001 by which learned Sessions Judge, Bahraich in sessions trial no. 25 of 1999 arising out of

case crime no. 318 of 1998, under Sections 147, 148, 149 and 302 I.P.C., police station Ikauna, district Shrawasti has convicted them under Sections 302/149 I.P.C, and sentenced to undergo imprisonment for life with a stipulation of fine of Rs.5000/- each and further to undergo rigorous imprisonment for a period of two years in default of payment of fine. In addition, appellants namely Pappu, Puttan and Daddan were also convicted under Section 147 I.P.C. and sentenced to undergo one year's R.I. with stipulation of fine of Rs. 500/- each. In default of payment of fine a further R.I. of three months. All the sentences are directed to run concurrently.

4. The prosecution case, in nutshell, is that the complainant namely Smt. Meera Devi submitted a tahrir(exhibit ka-1) on 23.9.1998 at 10.00 p.m. in the police station alleging therein that on 23.9.1998 at 5.30 p.m. the accused appellants namely Mata Prasad armed with pharsa, Bhoorey alias Dinesh Kumar armed with ballam and rest of the accused namely Pappu, Puttan and Dadan armed with lathis were sitting near the 'Dhabli' of one Nankoo Tiwari and while her father-in-law was going to his agricultural field from his house they all started assaulting him and dragged him to the door of Chhotkau Kurmi where they again assaulted him with lathi, ballam and pharsa. The complainant on hearing the scream reached at the place of occurrence. The other persons namely Nand Kumar, Mahipal and several villagers also reached there. On being reprimanded by these persons, the accused appellants ran away from the spot. The complainant with the help of villagers brought the deceased at the door of Kailash Nath Pradhan where he succumbed to the injuries. The report of the incident was registered as case crime no. 318 of 1998, under Sections 147, 148, 149

and 302 I.P.C. at police station Ikauna, district Shrawasti and was entered in the G.D. No. 32(Exhibit ka-3).

5. Inquest report of the dead body was prepared by the Investigating Officer(P.W. 4) and the postmortem was conducted by P.W. 6 who noted the following antemortem injuries on the body of the deceased :-

(i) *Larger abraded contusion on right outer front of abdomen and adjacent part of back size 26 cm x 12.5 c.m.*

On opening abdominal cavity about 2 litres of blood found. Liver ruptured

(ii) *3 cm X 1.5 cm abraded contusion left side forehead just about left eyebrow.*

(iii) *1.5 cm incised wound mid-part of back of left forearm.*

(iv) *8.0 c.m. x 6.0 cm contusion dorsum of right hand, on deeper dissection, outer three metacarpals found fractured.*

(v) *7.00 cm x 5.5 cm contusion dorsum of left hand*

(vi) *Larger abraided contusion over back and sides of lower half of right upper arm and upper half of right forearm. Size 28.0 cm X 8.0 cm on deeper dissection right humerus fractured near lower end.*

(vii) *Incised wound size 1.5 cm X 0.5 cm outer side right arm lower part 7 cm above the elbow joint.*

(viii) *7.5 Incised would front of left leg 12.0 c. above the ankle joint*

(ix) *4.0 cm. incised wound front of right leg 13 cm above the ankle joint.*

(x) *3.5 cm long incised wound inner side right foot 7 cm in front of medial malleolus.*

In the opinion of the doctor deceased died due to shock and

hemorrhage as a result of antemortem injuries.

6. After lodging the F.I.R., the police started investigation in the the matter and submitted charge-sheet against all the accused persons under Sections 147, 148, 149 and 302 I.P.C. After taking cognizance on the charge-sheet, the case was committed to the court of sessions where the statements of the appellants were recorded under Section 313 Cr.P.C. The accused appellants pleaded that they are innocent and have been implicated on account of previous enmity. They claimed trial.

7. In the trial the prosecution examined the following witnesses which are as under :-

P.W. 1 Mahipal, P.W. 2 complainant Meera Devi, P.W. 3 Sri Nand Kumar, P.W. 4 the Investigating Officer Yogendra Nath Tripathi, P.W. 5 Constable C.P. 58 Subhash Chandra Yadav and P.W. 6 Dr. Vijay Gorla.

8. The witness Abdul Sattar, Advocate has been examined as D.W.-1 from the side of defence.

9. We have heard learned counsel for the appellant and learned A.G.A. for the State and carefully gone through the material available on record.

Submissions on behalf of the appellants

10. Learned counsel for the appellants has submitted that the incident is stated to have occurred on 23.9.1998 at 5.30 p.m. whereas the F.I.R. was registered after 4.30 hours of the incident i.e. at 10.00 p.m. for which the explanation offered by the

prosecution is not convincing. Learned counsel states that there is long standing enmity between the parties due to which they have been falsely implicated in this case. The injuries found on the body of the deceased do not support the prosecution case.

Submissions on behalf of the State.

11. Per contra, learned Additional Government Advocate contended that all the prosecution witnesses have supported the prosecution case. There is no material contradictions between the contents of the F.I.R. and the statements of the prosecution witnesses. The injuries found on the dead body of the deceased corroborate with the weapons which are stated to be caused by the accused appellants. He has also submitted that there is no conflict between the medical evidence and ocular evidence. Thus, the conviction of the appellants does not suffer from any infirmity and the appeal is liable to be dismissed.

12. Having considered the rival contentions and having perused the evidence on record, it is necessary to briefly discuss the prosecution evidence adduced during trial.

Gist of Prosecution Witnesses

13. P.W. 1 Mahipal in his examination-in-chief has stated that on 23.9.1998 at 5.30 p.m. while he was returning from the flour mill he heard the noise of the daughter-in-law(P.W. 2) of the deceased and therefore he ran towards her. P.W. 3 Nand Kumar also came there. He saw that all the five accused were assaulting the deceased Baijnath in the galiyara existing in between the house of Koiley Pasi and Chhotkau Kurmi. Accused

appellant Mata Prasad was assaulting the deceased with pharsa, Bhorey @ Dinesh Kumar was assaulting with ballam and other three accused were assaulting with lathi. On alarm being raised by the said witnesses, the accused ran away to the east towards their house. They lifted the deceased and brought him near the pakaria tree and got him laid down. This pakaria tree exists in front of the houses of Mohan and Pradhan. The deceased died after some time. The complainant Meera Devi i.e. P.W. 2 got a tahrir scribed through one Indrajit and went to police station along-with Hansram, brother of Chaukidar. The police came at night and recorded their statements and in the next morning, the police inspected the spot and prepared the site-plan. Blood had fallen at the place where the deceased was assaulted.

14. In his cross examination, P.W. 1 has stated that on the date of incident while he was returning from the flour mill of Bhabhuti Lal, on the way, he having heard the noise of the appellant rushed to the spot where he saw that the the complainant Meera Devi, P.W. 2 was standing in the galiyara existing in between the house of Koiley Pasi and Chhotkau Kurmi and she was crying and when she ran towards the galiyara, he also rushed towards the house of Chhotkau Kurmi where he saw that the accused appellant Bhurey @ Dinesh Kumar armed with ballam and accused Mata Prasad armed with Pharsa were assaulting the deceased. P.W.1 with the help of P.W. 3 and the other villagers brought the deceased below the Pakariya tree. On being asked by the P.W. 2, the deceased was brought at the door of Kailash for the treatment as there was no member in the house of the deceased. He also stated that when he lifted the body of the deceased blood was oozing from the body and near

the Pakaria tree where the deceased had been laid down some blood had also fallen.

15. P.W. 2 in his examination-in-chief has stated that on 28.10.1999 at 5.30 pm. her father-in-law was going from his house to see the paddy crop. Having heard the scream of the deceased near the Dhabli of Nankoo crying, she rushed towards the spot and saw that all the five accused appellants were assaulting the deceased and catching hold of his hand were dragging him towards east. The accused appellants assaulting and dragging brought her deceased father-in-law in the galiyara existing between the house of Chhotkau Kurmi and Koiley Pasi. Accused Matha Prasad armed with pharsa, Bhurey @ Dinesh Kumar armed with ballam and rest of the three persons were assaulting the deceased. She has stated that the P.W. 1 and P.W. 3 also reached at the place of occurrence. On being admonished by these witnesses, the accused ran away towards east. The deceased was standing while he was being assaulted and later on he fell down and the accused appellants again assaulted the deceased. Accused Bhurey @ Dinesh Kumar was the son of accused Matha Prasad and rest of the accused are sons of Bhurey @ Dinesh Kumar. The deceased was alive for some time. The accused appellants brought the deceased in the galiyara existing between Chhotkau Kurmi and Koiley Pasi. She got the tahrir of the occurrence scribed by Indrajit and went to the police along-with Hansram brother of Chaukidar and submitted the tahrir. The Investigating Officer recorded the statement of the witnesses in the night and on the next date he inspected the spot and collected blood stained soil also. P.W. 2 has stated that for the last about 15 years, civil litigation was going on between the deceased and the accused.

16. In his cross examination, P.W. 2 has also stated that some others persons had also gathered at the time of assault along-with the P.W. 1 and P.W. 3 and saw the occurrence. The accused appellant Bhurey @ Dinesh Kumar from one hand was dragging the deceased and from the other hand he was assaulting him and rest of the accused appellants were also assaulting the deceased. The accused Bhrey @ Dinesh Kumar armed with ballam, accused appelant Mata Prasad armed with Pharsa. P.W. 2 has not specified the weapon ballam but has stated that size of iron part in ballam was about one hand. Accused Bhurey @ Dinesh Kumar dragging him brought in the galiyara existing between the house of Koiley Pasi and Chhotkau Kurmi. All accused were assaulting the deceased.

17. P.W. 3 in his examination-in- chief has stated that on the date of incident i.e. 23.9.1998 at about 5.30 p.m. having heard the noise of the deceased Baijnath and his daughter-in law he rushed to the spot. The complainant P.W. 2 was present on the spot. He reached behind her and P.W. 1 also reached there. He saw that the accused namely Mata Prasad armed with pharsa, accused Bhurey @ Dinesh Kumar armed with ballam and rest of the accused armed with lathi were assaulting the deceased. On being confronted by the witnesses, the accused ran away. The deceased had sustained several injuries. The deceased was standing but accused hushed him down the ground and kept on assaulting. They were assaulting in the midst of the galiyara existing in between the houses of Chhotkau Kurmi and Koiley Pasi. The deceased was lifted from there and brought in front of the house of the Mohan Thekedar and Kailash Pradhan under the Pakaria tree and he was got laid down there. The deceased was alive for 5-10 minutes and thereafter he

died. The P.W. 2 got the tahrir written through Indrajeet and went to the police station with Hansram brother of Chaukidar.

18. In his cross-examination, the P.W. 3 has stated his house is situated 15 paces away from the house of the deceased. P.W. 1 and 3 were present there and other villagers arrived after the incident. The appellant Bhurey @ Dinesh Kumar was assaulting the deceased with the ballam from the wooden side and he was not piercing. The appellant Mata Prasad was assaulting with pharsa from the side of edges. There was civil litigation between father of this witness and other villagers. He expressed his unawareness as to whether the appellant Mata Prasad was a witness in the criminal case initiated against his father or not.

19. P.W. 4 in his examination-in-chief has stated that on 23.9.1998 he was posted as S.O. Ikauna. One Onkar Nath Pathak was Head moharrir posted there. The F.I.R. was written by him and the case was entered in the G.D. at report no. 32 at 10.00 p.m. in the night. He proved the chik report and tahrir as Ext. ka-1 and Ext ka-2. He assumed the investigation of this case. On 23.9.1998, he entered the copy of chik and G.D. in his case diary and recorded the statement of the head moharrir Onkar Nath Pathak. Thereafter, he reached the village of the deceased with his subordinates namely Constable Dinesh Tiwari and Subhash Chandra Yadav(P.W. 5) who were on patrol duty and were summoned. The dead body of the deceased was lying in front of the house of Mohan Verma. He recorded the statement of the complainant and other witnesses in the night. In the morning on the pointing out of the complainant P.W. 4 inspected the spot and prepared the site plan. He proved the site

plan as exhibit Ka -4. He took the blood stained soil and simple soil from the place where the deceased had been assaulted and sustained injuries. He prepared the memo of blood stained and simple soil. He proved the paper as exhibit Ka-5 and Ka-6. Thereafter, he prepared the inquest report on the deceased body of the deceased and proved it as exhibit Ka-7. He prepared the photo lash, challan-lash and letter for postmortem and proved these papers as Exhibits ka-8, ka-9 and ka-10. He prepared the sample seal and proved it as Exhibit Ka-11. He proved the letter to R.I. as Exhibit ka-12. He entered the inquest report and statement of witnesses in the case diary. On 26.9. 1998, postmortem report was received. He entered it in the case diary. On 9.10.1998, he recorded the statement of the accused and submitted the charge-sheet. He proved the charge-sheet as Exhibit ka-13.

20. In cross examination, the P.W. 4 has stated that the blood had fallen there but he did not take blood in his possession.

21. P.W. 5 in his examination-in-chief has deposed that on 24.9.1998 he was posted as Constable in police station Ikauna. In the intervening night of 23/24.9.1998. He along with the constable Dinesh Tiwari who was on patrol duty was summoned by the P.W. 4. and they had gone to village of the deceased with the P.W. 4. On 24.9.1998, after preparation of inquest report the dead body in a sealed cover was handed over to this witness and other constables and they took the dead body to mortuary. The doctor got the identification of the dead body from this witness and Dinesh Tiwari- other Constable at the time of post mortem examination.

22. P.W. 6 in his examination-in-chief has stated that on 24.9.1998 he was posted on

the post of Surgeon. He conducted the postmortem on the dead body of the deceased at 4.45 p.m. in the evening who was brought by Constable CP 58 Subhash Chandra Yadav and CP 116 Dinesh Tiwari in sealed condition with all the papers and identified the dead body of the deceased. He proved the antemortem injuries of the deceased described in the post-mortem report. He opined that the cause of death was shock and hemorrhage as a result of antemortem injuries which were sufficient to cause death. Deceased had died a day before. He proved the postmortem report as Exhibit Ka-14. He noted the following observations :-

Injury No. 3 and 7 were possible from the edges side of ballam.

Injuries No. 8, 9 and 10 were possible from the edges side of Pharsa.

Injuries no. 1, 2, 4 5, and 6 were possible by blunt weapon for example lathi. Injury no. 1 and 6 were possible by several blows.

23. In cross examination, P.W. 6 has deposed that there may be variation of 4-6 hours in the time of death. Injury no. 3, 7, 8, 9 and 10 are on non-vital parts. Injury nos. 1 and 6 were possible by a blunt weapon for example some heavy stone or heavy iron. Injury no. 1 and 6 are single injury in itself. Injury nos. 3, 7, 8, 9 and 10 are simple in nature. Ballam is a pointed weapon. Except the fracture of bone on upper arm and metacarpal in injury no. 4 and 6, there was no other bone fracture. Liver had ruptured due to injury no. 1 and except this injury fracture of bone was found in injury nos. 4 and 6. For causing death, injury no. 1 was primarily responsible. Pharsa is a heavy weapon and it is wrong to say that injury nos. 8, 9 and 10 were not possible through heavy weapon like pharsa.

Analysis

24. Upon hearing the arguments advanced by the learned counsel for the appellants and learned A.G.A. at length, we find that following points are involved for consideration in this appeal against the impugned judgment and order of conviction and sentence of the appellants.

Point No. I

(I) Whether all the prosecution witnesses have supported the prosecution case.

25. P.W. 2 who is daughter-in-law of the deceased has supported the prosecution case by stating that P.W. 1 and P.W. 3 who are independent witnesses in this case also reached at the place of occurrence. The statement of the P.W. 2 that the accused appellant Mata Prasad armed with ballam, appellant Bhurey @ Dinesh Kumar armed with pharsa and the appellants namely Pappu, Puttan and Daddan armed with lathi is corroborated with the statements of the P.W. 1 and P.W. 3.

26. P.W. 2 i.e. daughter-in-law of the deceased has stated that the deceased was assaulted by the accused appellants in the galiyara existing in between the house of Koiley Pasi and Chhotkau Kurma and the deceased was alive for some time after being assaulted by the accused appellants. This fact has also been reiterated by the P.W. 1 and P.W. 3 in the cross-examination. P.W. 2 has stated that the dead body of the deceased was brought by the P.W. 1 and 3 under the pakaria tree and was laid down and this pakaria tree exists in front of the houses of Mohan and Pradhan which is supported by the P.W. 1 and 3 in the statements. The fact that the P.W. 1 got a tahrir scribed through

one Indrajit and went police station along-with Hansram brother of Chaukidar is also supported by the P.W. 1 and 3 in their statements.

27. P.W. 4 who is Investigating Officer in this case, in his examination-in-chief, has also supported the prosecution case by proving the chik report and tahrir as Ext. ka-1 and Ext ka-2 which were entered in his case diary. P.W. 4 has stated that on the date of incident he went to the village of the deceased with his subordinates namely Constable Dinesh Tiwari and Subhash Chandra Yadav(P.W. 5) who were on patrol duty and were summoned. P.W. 5 namely Subhash Chandra Yadav has also supported the version of P.W. 4 by stating that the on the date of incident he and the Constable Dinesh Tiwari were summoned to go to the village of the deceased Babhaniwan with the Investigating Officer i.e. P.W. 4. The statement of the P.W. 4 that the dead body of the deceased was lying in front of the house of Mohan Verma and that the statements of the complainant and other witnesses were recorded in the night and in the next morning on the pointing out of the complainant he inspected the spot and prepared the site plan was well supported by the P.W. 5.

28. P.W. 6 who conducted postmortem on the dead body of the deceased has stated that the dead body of the deceased was brought by the P.W. 5 i.e. Constable CP 58 Subhash Chandra Yadav and CP 116 Dinesh Tiwari in a sealed condition with all the papers and they had identified the dead body of the deceased. This statement also goes in line with the statement of the P.W. 5.

29. The presence of P.W. 2 along-with P.W. 1 and 2 at the spot at the time of

occurrence is proved beyond reasonable doubt from their statements recorded during examination-in-chief and cross examination as the statements of the said witnesses are well corroborated and there is no contradiction on any single point. As such, on the basis of factual aspect, it is proved that the P.W. 2 along-with P.W. 1 and P.W. 3 was present at the spot and they had seen the accused appellants assaulting the deceased. The statements of P.W. 4, 5 and 6 are also corroborated and they support the prosecution case. Statements of all the prosecution witness supports each other and there is no contradiction on any point, as such, the truthfulness of factual matrix cannot be doubted in the absence of any material evidence to the contrary.

30. Point No. I is decided accordingly.

Point No. II

(II) Whether the previous enmity is strong motive to falsely implicate the appellants.

31. The ground of previous enmity between the family of the accused and the deceased is also vehemently raised by learned counsel for the appellants.

32. P.W. 2 in the F.I.R. has alleged that prior to this incident a clash had taken place in which family members of the appellant were detained in jail and in vengeance thereof they assaulted the deceased on 23.9.1998 at about 5.30 p.m. The enmity between the appellants and family members of the deceased could not be refuted particularly in presence of two independent witnesses i.e. P.W. 1 and P.W. 3 who have supported the prosecution case and reiterated the same version as was stated by the P.W. 1.

33. As such, the ground of enmity which is proved beyond reasonable doubt, is a strong motive for the appellants to commit the offence.

34. Point No. II is decided accordingly.

Point No. III

(III) Whether the P.W. 1 and P.W. 3 are interested witnesses and their testimonies are reliable and trustworthy.

35. P.W. 2 is daughter-in-law of the deceased. P.W. 1 and P.W. 3 are stated to be present at the place of occurrence while the deceased was being assaulted by the accused appellants. The presence of the P.W. 1 and 2 at the spot at the time of occurrence is proved beyond reasonable doubt. The ground taken by the appellants is that the P.W. 1 and P.W. 3 are the interested witnesses of the incident. P.W. 1 in his cross-examination has stated that there is land dispute between the father of the P.W. 3 namely Nand Kumar and other villagers. In one criminal case instituted by a villager against the father of the P.W. 3, the accused Mata Prasad was the witness or not is not known to the P.W. 1. P.W. 3 has reiterated the same version in his statement. P.W. 1 has also admitted that there is previous enmity with the deceased and the appellants due to which the said incident occurred. There is no evidence on record on the basis of which it can be said that the P.W. 1 and P.W. 3 have previous enmity with the accused appellants. Thus, the ground of the P.W. 1 and P.W. 3 being interested witnesses does not stand to appeal.

36. Point No. III is decided accordingly.

Point No. IV**(IV) Whether the F.I.R. was lodged with delay.**

37. Learned counsel for the appellants has further argued that the distance from the place of incident to the police station is only 12 k.m. but the F.I.R. was lodged after the delay of 4.30 hours.

38. P.W. 2 in his examination-in-chief has attempted to justify the delay by stating that the male members were detained in jail and there was no male member in his family due to which the delay in lodging the F.I.R. occurred. The P.W. 2 in her examination-in-chief has also stated that she got a tahrir scribed through one Indrajit and took it to police station with Hansram brother of Chaukidar. P.W. 1 and 3 have also stated that after getting the tahrir scribed through Indrajit and the P.W. 2 he had gone police station with Hansram brother of Chaukidar.

39. Keeping the aforesaid statement in view, the ground of delay in lodging the F.I.R. loses its strength and turned down.

40. Point No. IV is decided accordingly.

Point No. V**(V) Whether the medical evidence corroborated with the ocular evidence.**

41. Now, analyzing the medical evidence, we find that the P.W. 6 conducted postmortem on the body of the deceased and opined that the cause of death was shock and hemorrhage as a result of antemortem injuries which were

sufficient to cause death. He proved the postmortem report as Exhibit ka-14.

42. P.W. 6 has opined that injury No. 3 and 7 were possible from the edges side of ballam. Injuries No. 8, 9 and 10 were possible from the edges side of Pharsa. Injuries no. 1, 2, 4, 5, and 6 were possible by blunt weapon for example lathi. Injury no. 1 and 6 were possible by several assault.

43. In cross examination, P.W. 6 has deposed that the injury no. 3, 7, 8, 9 and 10 are on hand and leg which are non-vital parts. Injury nos. 1 and 6 were possible by a blunt weapon like some heavy stone or heavy iron. Injury no. 1 and 6 are single injury in itself. Injury nos. 3, 7, 8, 9 and 10 are simple in nature. Ballam is a pointed weapon. Except the fracture of bone on upper arm and metacarpal in injury no. 4 and 6, there was no other bone fracture. Liver had ruptured due to injury no. 1 and except this injury fracture of bone was found in injury nos. 4 and 6. For causing death, injury no. 1 was primarily responsible. Pharsa is a heavy weapon and it is wrong to say that injury nos. 8, 9 and 10 were not possible through heavy weapon like pharsa.

44. P.W. 1, 2 and 3 have stated that the accused appellant Bhurey @ Dinesh Kumar was armed with ballam and P.W. 3 in his cross examination has stated that appellant Bhurey @ Dinesh Kumar was assaulting the deceased with ballam. P.W. 1, 2 and 3 all have stated the accused appellant Mata Prasad to be armed with pharsa. P.W. 1, 2 and 3 all have stated the accused appellants namely Pappu, Puttan and Daddan to be armed with lathi.

45. Antemortem injuries found on the dead body of the deceased indicate that they were caused by the pharsa, ballam and lathi. As such, the medical evidence corroborates with the ocular evidence.

46. Point No V is decided accordingly.

Point No. VI

(VI) Whether the death of the deceased is culpable homicide not amounting to murder in view of provisions of exceptions if any to Section 300 I.P.C. and is punishable under Section 304 read-with Section 149 I.P.C.

47. The deceased sustained total ten injuries as per the postmortem report. In the medical opinion of the doctor who conducted the postmortem stated that the cause of death of the deceased was antemortem injuries caused by due to shock and hemorrhage.

48. P.W. 6 in examination-in-chief has stated that the injury no. 1 is the main cause of death. The injury no. 1 has been caused with blunt object like lathi by severe assault. P.W. 6 in his cross examination has stated that the injury no. 1 has been caused with heavy stone or heavy iron rod and the said injury is single in itself. It is not clear from the statement of the P.W. 6 that whether the injury no. 1 is itself a single injury or was caused by several blows. The appellants Mata Prasad and Bhurey @ Dinesh Kumar who were armed with pharsa and ballam have died during pendency of this appeal. The remaining appellants were assigned the role of lathi. It is to be noted that the weapons used by the present appellants in committing the crime were not deadly weapons. It will also be necessary to take into consideration the background in which the

offence took place. There was an old enmity between the deceased and the appellants. If there was any mens rea of killing the deceased the accused appellants Mata Prasad and Bhurey @ Dinesh Kumar were armed with pharsa and ballam and they may cause death of the deceased by piercing the said arms in the body of the deceased. The P.W. 3 in his cross-examination has stated that the appellant Bhurey @ Dinesh Kumar was assaulting the deceased with the wooden side of ballam. The surviving appellants were armed with lathi and the intention of the appellants was not to cause death of the deceased. The deceased died due to shock and hemorrhage and injuries on liver which must be caused by pharsa or ballam. The present appellants were having lathi as a weapon. Accused Mata Prasad and Bhurey @ Dinesh Kumar were having such deadly weapons which shows their intention to kill the deceased and not the present appellants. The presents appellants only wanted to cause bodily injuries to the deceased and they were not having any intention to kill the deceased. The injury no. 1 was main responsible to cause death of the deceased and the said injury was sustained on the abdominal part of the deceased and this injury may only be caused by a single assault. Injury nos. 3, 7, 8, 9 and 10 are also stated to be caused on non-vital parts. The said injuries also indicate that the appellants caused injuries to the deceased without intention to kill him. Moreover, the accused appellants belong to same family and accused Mata Prasad and his son Bhurey @ Dinesh Kumar who were armed with pharsa and ballam have died during pendency of the appeal and the appeal in respect of them has abated and now the appeal survives on behalf of the appellants who are stated to be armed with lathi.

49. Considering the evidence of the witnesses and also considering the medical

evidence including postmortem report, there is no doubt left in our mind about the guilt of the appellants. However, the question which falls for our consideration is whether, on appreciation of the peculiar facts and circumstances of the case, the conviction of the appellant deserves to be converted under Section 304 Part I or part II of the I.P.C.

50. The academic distinction between 'murder' and culpable homicide not amounting to murder has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the term used by the legislature in these Sections, allow themselves to be drawn into minute abstractions.

51. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and the principle laid down by the Apex Court in the catena of judgments, we are of the considered opinion that offence would be punishable under Section 304 Part I of the I.P.C.

52. Point No. VI is decided accordingly.

53. In view of the discussions made above, we are of the considered view that the impugned judgment and order is liable to be confirmed insofar as conviction and sentence under Section 147 I.P.C. is concerned. However, insofar as the conviction and sentence under Section 302 read-with Section 149 I.P.C. is concerned instead of holding accused appellants guilty of offence punishable under Section 302 read-with Section 149 I.P.C., they are held guilty of offence under Section 304 Part I read with Section 149 I.P.C. The conviction

is liable to be altered and modified and the appeal is liable to be allowed partly.

54. Accordingly, the appeal filed by the appellants is **partly allowed**. The conviction and sentence of appellants under Section 147 is affirmed and their conviction under Section 302 read-with Section 149 I.P.C. is modified as above and the accused appellants are convicted for offence punishable under Section 304 part I I.P.C. read-with Section 149 I.P.C. Therefore while modifying the sentence of life imprisonment under Section 302/149 I.P.C., both the appellants are sentenced to 10 years rigorous imprisonment and Rs. 5000/- fine and in case of default of payment of fine within two months to undergo simple imprisonment for an additional period of two months. All the sentences shall run concurrently. The period of sentence already undergone by them shall be adjusted in the sentence awarded by this Court.

55. During the course of trial, the appellants are on bail. Their personal bonds and surety bonds are cancelled and sureties discharged. The accused appellants namely Pappu, Puttan and Daddan are directed to surrender before the trial court forthwith to serve out the remaining term of sentence and deposit the fine imposed. If they fail to surrender as directed, the trial court shall take necessary action against the appellants for ascertaining compliance of the order of conviction and sentence.

56. Let the trial court record be transmitted to the trial court forthwith along-with a copy of judgment, with a direction that it shall take immediate steps for arrest of appellants for serving the remaining term of sentence.
