

HIGH COURT OF MADHYA PRADESH: JABALPUR

(Division Bench)

Criminal Appeal No.2562/2008

1. Maruti @ Nago S/o Keshavram Damahe
2. Rooplal @ Roopchand Lilhare S/o Subelal Lodhi
3. Tameshwar Damahe S/o Chainlal DamaheAppellants/accused

Versus

State of Madhya Pradesh

.....Respondent

Criminal Appeal No.2578/2008

1. Dilip Damahe S/o Kao @ Rajaram Lodhi
2. Rajaram S/o Keshawram Damahe
3. Deleted
4. Sukhwanti Bai W/o Kao @ Rajaram Lodhi
5. Jaglal @ Tota S/o Lotan Lodhi
6. Raju @ Ranglal S/o Lotan Lodhi
7. Shishupal S/o lotan Lodhi
8. Deleted
9. DeletedAppellants/accused

Versus

State of Madhya Pradesh

.....Respondent

CORAM:

Hon'ble Shri Justice Huluvadi G. Ramesh

Hon'ble Shri Justice B.K.Shrivastava

APPEARANCE:

Shri Alok Vagrecha, Advocate as Amicus Curiae for the Appellants.

Shri Vikalp Soni , Advocate for the Respondent/State.

Whether Approved for Reporting: Yes

Law Laid Down:

As per prosecution case, incident occurred at 10.30 o'clock in the night on 3.5.2008. The trial Court convicted all the accused persons under Sections 147, 148,

302/149 and 323/149 of the IPC. The main overt act is specifically alleged against appellant Dilip who caused fatal injuries whereas other appellants assaulted with lathis. Though recovery of Gupti at the instance of appellant Dilip and lathis at the instance of other appellants has not been proved by the seizure witnesses, but the fact remains that from the version of eye witness P.W.1 Tejwanti Bai, there were four accused persons and as per evidence of P.W.2 Rakesh, who is also eye witness to the incident, he named seven accused persons. Though there is delay in lodging the FIR, omnibus statement and exaggerations in the evidence of the eye witnesses before the Court as to identification of the accused persons in the absence of light in the place of incident but to some extent, the evidence of the eye witnesses is found to be credible and trustworthy and cannot be disbelieved in toto. [relied on (2018) 9 SCC 429 (*Motiram Padu Joshi and others Vs. State of Maharashtra* and (2009) SCC 454-*Motilal and another Vs. State of Rajasthan*)

The evidence shows that the deceased himself went to the house of appellant Dilip where his family members and other villagers were residing and there free and sudden fight took place, as such there is no question of riot and forming of an unlawful assembly. The prosecution is not able to prove its case for offences under Sections 147, 148 read with 149 of the IPC and they are entitled to be acquitted for the said offences. (relied on *Ishwar Singh Vs. State of U.P. reported as (1976) 4 SCC 355*)

On perusal of overall evidence, it is evident that the deceased himself came to the house of the appellants and all of sudden, free fight took place and appellant Dilip assaulted with Gupti and other appellants by lathis and fisticuffs without premeditation, motive or mens rea. But the facts remains that all of sudden fight took place in the night and the appellant Dilip without premeditation or intention to commit his murder caused injuries to deceased with Gupti, but he had knowledge and intention that the injuries so inflicted in the ordinary course of nature would be sufficient to cause death of the deceased. At the most the offence would fall under Exception part of Section 300 of the IPC regarding homicidal death not amounting to murder, which is punishable under Section 304 Part I of the IPC (relied on (2017) 3 SCC 247 *Arjun and another Vs. State of Chhattisgarh*)

Significant Paragraphs: 19 to 23

J U D G M E N T (Oral)

(3.4.2019)

Per: Huluvadi G.Ramesh, J.

Both these Criminal Appeals are being decided by a common judgment as the same are arising out of the impugned judgment dated

4.12.2008 passed by the First Additional Sessions Judge, Balaghat in Sessions Trial No.120/2008, whereby each of the appellants has been convicted and sentenced as under:-

Conviction	Sentence
U/s 147 of the IPC	R.I. for 1 year each
U/s 148 of the IPC	R.I. for 1 year each
U/s 302/149 of the IPC	R.I. for life and fine of Rs.200/- each, in default of payment of fine, R.I. for 6 months each.
U/s 323/149 of the IPC	R.I. for 6 months each

All the above sentences were ordered to run concurrently.

2. The story of the prosecution, in brief, is that complainant Tejwanti Bai (P.W.1) lodged FIR (Ex.P.1) stating that she is resident of village Kolhawa and does the agriculture work. On the date of incident i.e. 3.5.2008 in the night at 10.00 o'clock, his cousin brother Santosh (deceased) and Rajesh Uike came to her house from village Manjhara and told her that appellant Dilip Lodhi resident of village Kolhawa used to make phone calls to his cousin sister Sahajwanti (P.W.4) frequently and therefore, they have come to make him understand. Thereafter, they went towards the house of appellant Dilip. At about 10.30 P.M., on hearing the shouts, she and her husband Rakesh (P.W.2) came out of the house and saw that her cousin brother Santosh Nagpure was being beaten by Dilip Lodhi, Rajaram Lodhi, Dinesh Lodhi, Nago Lodhi, Sukhwanti Bai, Janglal Uike Tota, Rangu Lodhi, Shishupal Lodhi, Rooplal Lodhi, Tamveshwar Lodhi by Gupti, lathis and fisticuffs. Her cousin brother Santosh was lying on the ground and shouting to save him. The accused persons were also beating Rajesh Gond. When Santosh stopped shouting, all the accused persons involved in the incident of Marpeet ran away from the spot. The deceased died on the spot. The complainant did not report the incident at night. On next morning i.e. 4.5.2008 at 7.15 a.m., the complainant lodged FIR Ex.P.1 at Police Station Bharveli, District Balaghat vide Crime No.44/2008. After investigation, the police filed a charge-sheet before the competent Court of law.

3. The trial Court framed charges under Sections 147, 148, 302/149 and 323/149 of the IPC against the appellants/accused persons. They

abjured the guilt. The prosecution in all examined 12 prosecution witnesses. After trial, the learned trial Court has convicted and sentenced all the accused persons as mentioned above. Being aggrieved by the said order of conviction and sentence, the appellants have filed these appeals on the grounds mentioned in the memos of appeal.

4. We have heard learned counsel for the parties and perused the evidence available on record.

5. The arguments of the learned counsel for the appellants are that the order of conviction and sentence as imposed by the trial Court is illegal and perverse. Relying on a judgment of the Apex Court in the case of **Motilal and another Vs. State of Rajasthan (2009) 7 SCC 454**, learned Amicus Curiae contended that the investigation is defective and in violation of the mandatory provision of the M.P. Police Regulations (Extension and Amendment) Rules, 1964, as the FIR was registered after registration of the inquest and there was delay in lodging the FIR. The investigation officer must explain how prior to recording of FIR, inquest has been started and recorded. It is further argued that there are contradictions and omissions in the 161 statements of the eye witnesses and in the FIR. P.W.1 Tejwanti Bai, who is an eye witness, has deposed that she saw the deceased actually getting killed and having died on the spot, but she being an eye witness is moving away from her 161 statement and the FIR. Eye witnesses P.W.1 Tejwanti Bai and P.W.2 Rakesh made exaggeration and improvement in their evidence before the Court. There are infirmities in the prosecution case. Reliance is placed in this regard on a judgment of the Apex Court in the case of **Vijaybhai Bhanabhai Patel Vs. Navnitbhai Nathubhai Patel and others (2004) 10 SCC 583** to contend that the Apex Court upheld the acquittal on the ground of having infirmities and suspicion about prosecution version. Learned Amicus Curiae further submitted that one of the police personnel is relative of the prosecution witnesses, who is posted in the same police station where the FIR has been lodged. No independent witness has been examined by the prosecution.

Learned counsel for the appellants also submitted that the conviction and sentence of the appellants under Sections 147 and 148

read with Section 149 of the IPC for offence of riot and forming an unlawful assembly are erroneous as from the prosecution version itself, it is clear that the deceased had come to the house of appellant Dilip at night and the incident occurred in front of the house of appellant Dilip, in which family members of the appellants were residing and there were houses of the other villagers also. As such there was no premeditation or common intention of the appellants to commit murder of the deceased. As such, no question arises for committing offence of riot and forming any unlawful assembly. It is also submitted that from the evidence of P.W.1 Tejawanti Bai and P.W.2 Rakesh, it is clear that there were houses of close relations of the deceased, but it is strange that none of the relatives came for their rescue.

Learned counsel for the appellants referring to spot map Ex.P.3 prepared by the Patwari P.W.7-Babulal Dahake contended that it does not say that there was any source of light in the night in the place of incident. As such how can the eye witnesses say that who were the persons and who had caused injuries to the deceased. Relying on a judgment of the Apex Court in the case of **Ishwar Singh Vs. State of U.P. (1976) 4 SCC 355**, it is contended that the evidence shows that in the present case, there was free and sudden fight between the parties. The appellants cannot be convicted under Section 147 and 148 of the IPC. The prosecution must prove the individual assault. Therefore, conviction of the appellants with the aid of section 149 of the IPC is also not sustainable. Recovery of seized weapons has not been proved and blood group of the blood found on the Gupti could not be determined. It is prayed that the appeal be allowed and the appellants be acquitted. In the alternative, it is contended that at the most the offence would fall under Section 304 Part I and not under Section 302 of the IPC.

6. Per contra, learned Government Advocate argued that it is a clear case of commission of murder of the deceased by appellants. All the appellants had participated in the commission of offences. Though there are some contradictions and omissions in the statements of the witnesses, but on that basis alone, the accused persons cannot be exonerated when

there are cogent evidence and recovery of used weapons. Placing reliance on the judgment of the Apex Court in the case of **Molai Vs. State of M.P. (1999) 9 SCC 581**, it is contended that blood stained Gupti was recovered and seized at the instances of appellant Dilip and lathis were recovered and seized from other appellants and even if the blood group was not determined, the presence of blood on the used weapon may be an incriminating circumstance to hold the accused guilty. The learned trial Court has rightly held all the appellants guilty and convicted and sentenced as above. He submits that the impugned judgment does not require any interference by this Court and prays for dismissal of the appeal.

7. The trial Court relying on the evidence of P.W.1-Tejwanti Bai, P.W.2 Rakesh and P.W.4-Sahajwanti Bai came to the conclusion that appellant Dilip wanted to marry Sahajwanti Bai (P.W.4) and used to threaten her for giving information about amount in her account and transferring two acres of land in his name and when her cousin brother deceased Santosh went to make appellant Dilip understand, then appellant Dilip alongwith other accused persons formed an unlawful assembly and in furtherance of the common object caused injuries on various parts of the body of the deceased, resulting in his death. The trial Court holding all the appellants guilty for the said offences convicted and sentenced as above.

8. The points for consideration are that whether the deceased died homicidal death or whether the appellants committed murder of the deceased as held by the trial Court and what offences the appellants have committed and what order?

9. P.W.1 Tejwanti Bai is said to be an eye witness to the incident. She has lodged the FIR Ex.P.1. She has deposed that the deceased was her cousin brother. On the date of incident at 9.45 o'clock in the night, deceased Santosh and Rajesh came to her house and told her to caution appellant Dilip who used to make phone calls repeatedly, whereon, the complainant told deceased Santosh to come next morning along with Kaka as it was already late night. In para 2 she has deposed that after 20 minutes, on hearing the cry of deceased Santosh, she went in front of the

house of appellant Dilip and saw that accused persons Dilip, Dinesh and Kau were assaulting the deceased with lathis, rod and fisticuffs. Appellant Sukhwanti Bai, mother of appellant Dilip was uttering to kill the deceased and she will save them by selling land. The complainant has also deposed that she and her husband Rakesh (P.W.2) tried to stop the accused persons to beat the deceased, but they ran to assault them also. In the night at 2.30 o'clock, the police informed her that Santosh has died. She did not report at night due to fear but on next day, she lodged the FIR Ex.P.1 at the police station. Prior to this, marg intimation was recorded as per Ex.P.2. She has also deposed that spot map was prepared by the Patwari in her presence as per Ex.P.3. She has also deposed that she does not know that for what reason, the accused persons quarrelled and assaulted the deceased.

10. Complainant P.W.1 Tejwanti Bai in para 4 of her cross-examination has admitted that on both sides of her house, there are 40-50 other houses. She has also admitted that opposite to her house, there is a house of her brother-in-law (Jeth) and father-in-law. She has also admitted that between her house and house of appellant Dilip, there are houses of Pratap, Bhuran and Tularam. She has admitted to have given her statements in Ex.D.1. In para 6, she has stated that the accused persons searched her husband for 10 minutes. She has stated that neighbours were looking from the house and out of fear, they did not come out. She has further stated that at 2.30 a.m. in the night, the police came to her house and told to report the matter. At that time, she did not go to the Police Station. On next morning, she reported that matter at the police station after the police took away the dead body of the deceased. In para 8, she has stated that in the Bada of Patle, Basant, Digamber and their brother Khelaram were residing. Devendra is elder son of Khelaram. She has admitted that Devendra is son-in-law of ASI Singrole (investigating officer) posted at Police Station Bharveli. She has also admitted that Basant and Digamber are the cousin brothers of her husband. In para 8, this witness has denied that her husband in connivance with Devendra and ASI Singrole implicated the accused persons in a false case. In para 11, this witness has stated that after two

days from lodging the report, the police had recorded his statement. She has denied the fact that she had not seen the incident of assault with the deceased. She has also denied that she is giving false evidence as taught by the investigating officer. In para 12 of her cross-examination, she has deposed the same thing as in the examination-in-chief.

11. P.W.2 Rakesh Shivhare is the husband of complainant Tejwantibai (P.W.1). He has deposed that on the date of incident at about 10.00 o'clock in the night in front of house of appellant Dilip, accused persons namely Dilip, Kau, Dinesh, Shishupal, Ranglal, Tameshwar and Janglal were assaulting deceased Santosh. On hearing shouts, he and his wife came out of the house and intervened the matter. On asking the reason for marpeet, the accused persons told them to get away else they would kill them also. This witness ran and hid himself in his house and his wife also came inside the house. The accused persons came chasing this witness but this witness exited from the back door of the house and hid himself in the field. P.W.2 further deposed that on next morning, he came to know that deceased Santosh has died. He does not know the reason of marpeet but this witness has deposed that the accused persons assaulted the deceased with rod, gupti and lathi. He has admitted his signatures on spot map Ex.P.4 and spot map Ex.P.3 prepared by Patwari. He has deposed that the police did not seize any article from the spot but he admitted his signature on seizure memo Ex.P.5.

12. P.W.2 Rakesh Shivhare in para 5 of his cross-examination has admitted that he was sleeping on the date and time of incident in his house. He woke up and went to the place of incident after hearing shouts. In his police statement Ex.D.2, he had told to the police that when he and his wife tried to stop the accused persons for assaulting the deceased, the accused persons told them to run away from the spot else they would kill them also. The accused persons chased P.W.2 Rakesh upto his house but this witness exited from the back door of his house and hid himself in the field. In para 8 he has stated that on next day, he and his wife went and reported the matter at police Station Bharveli. In para 10 of his cross-examination, P.W.2 Rakesh has admitted that the houses of the accused

persons are nearby his house. He denied the suggestion that there was no incident of marpeet with the deceased by the accused persons. In para 11 he had admitted the fact that he did not see as to who were the accused persons, who assaulted the deceased and on which part of the body. On seeing the incident, he and his wife shouted but nobody came there. The dead body of deceased Santosh was taken away by the police in the night itself. He has denied the suggestion of not intimating about used weapons at the time preparing of panchnama. In para 14 of his cross-examination, he has stated that in the night after seeing the incident he could not get the occasion to see as to where the dead body of the deceased was lying and from which place, the police took away the dead body. He has stated that his first statement was recorded at village Kolhawa at 8.00 o'clock in the morning and second statement was recorded at police station Bharveli at 12.00 noon on the same date.

13. P.W.4 Sahajwanti, to whom the appellant Dilip used to make phone calls, has deposed that deceased Santosh was son of his uncle Suraj Nagpure. On 2.5.2008, she had gone to the house of her uncle Suraj at village Manjhara and she stayed there. On that day, appellant Dilip asked her on phone about the amount in her account and he warned that if she does not marry him, he would kidnap her and commit her murder. At the time, deceased Santosh asked about caller of the phone, then she replied to be of Dilip. Deceased Santosh also talked on phone with Dilip but she was unable to say what was conversation between them. She further deposed that prior to this, appellant Dilip used to come to her house at village Tavejhari and threaten her and he was also asking for amount in her account and for transferring of two acres of land in his name. She has deposed that she narrated the said fact to Chintaman and Chintaman went to house of appellant Dilip and made him to understand but same was of no avail. This witness deposed that she went to village Manjhara to convey this fact. She deposed that deceased went to village Kolhawa saying that he does come back after warning appellant Dilip.

14. On being cross-examined, P.W.4 Sahajwanti bai has stated same thing as deposed in examination-in-chief. In para 5 of her cross-

examination, she has denied that her sister Tejwanti Bai (P.W.1) wanted to get her marriage with appellant Dilip and his friends Tameshwar etc used to object for the marriage. She denied the suggestion that on the date of incident, appellant Dilip was not at his house. She has also denied the suggestion that accused persons assaulted deceased Santosh treating him as a thief. In para 7, this witness has stated that she cannot tell the number of mobile through which the call came and she also does not know the number of her mobile. She has admitted that the police did not seize any mobile from her. She further deposed that on the date of incident, in the night at 3.00 o'clock, the police had recorded her statement. She has admitted that earlier she did not tell anybody about the conversation on mobile.

15. P.W.3 Rajesh Uike, who was friend of the deceased, was with the deceased on the date of incident. He had also received injuries in the incident. Though he has been declared hostile, but in examination-in-chief, he has stated that he does not know the accused persons. He deposed that on the date of incident, in the night, he and deceased Santosh went to the house of Tejwanti Bai (P.W.1) at village Kolhawa. Thereafter, they went to the house of Dilip and called appellant Dilip, then a woman came out from the house and said Dilip is not at home. This witness further deposed that deceased went to the terrace of the house of appellant by climbing on ladders. He further deposed that on the terrace, there was some scuffle of deceased with some boy. That boy shouted saying thief. At that time, a woman also shouted coming out of the house. He has deposed that deceased Santosh came running to him and both together started going back on foot and at that time, villagers ran and caught hold of deceased Santosh and started marpeet with him. He has deposed that he does not know who were those persons. He also deposed that they also assaulted him, on which he became unconscious. In para 2, this witness says that in the night itself, the police came and took away him. He does not know what happened with the deceased because he was unconscious. He came to know about death of Santosh by the police in the Police Station. This witness turned hostile. On being

cross-examined by the defence counsel, he has admitted that 40-50 people assaulted deceased Santosh and they also assaulted him, due to which he became unconscious. He further stated that he does not know who were those persons who did marpeet with the deceased. In para 9 of cross-examination, this witness has stated that in his presence, the police did not conduct the identification parade regarding the incident of village Kolhawa. He further stated that due to dark, he did not identify the assailants.

16. P.W.12 Dr. B.M.Sharanagat who has conducted the autopsy of dead body of deceased Santosh on 4.5.2008 at District Hospital, Balaghat. He has opined that the cause of death is shock as a result of extensive haemorrhage and injuries to vital organs like liver, kidney, spleen and lung. The injuries are antemortem in nature. As per his post-mortem report Ex.P.30, following injuries were found on the body of the deceased:-

“Rigor mortis was present in all 4 limbs. Multiple contusions and abrasions of varying sizes were present over face, chest (front and back), both arms and forearms, both thighs and legs. Both thighs were swollen and look free at both hip joints, dislocation of joints. An Incised wound 2 x 2 x 10 cm depth, touching the head of right femur by probe present on right thigh on its upper end. Both sides of ribs especially 6,7, 8, 9, 10th were fractured. All injuries were antemortem in nature.

On internal examination, the doctor has found that liver was torn on right side at lobe, spleen was torn and right kidney were torn on anterior aspect.”

17. P.W.6 Dr. Anoop Singh Tidgam has medically examined injured witness Rajesh (P.W.3) and found that the all the injuries sustained by him are simple in nature. As per his injury report Ex.P.15, following injuries were found:-

1. Contusion 3” x 2” on left arm back by hard and blunt object.
2. Abrasion 2” x 1/2” on right shoulder by hard and blunt object

3. Contusion 2" x 2" on back of right thigh by hard and blunt object
4. Contusion 1/2" x 1/2" just lateral to left eyebrow by hard and blunt object.

18. As per memorandum of disclosure Ex.P.7 made by appellant Dilip under Section 27 of the Evidence Act, used weapon Gupti has been recovered and seized at his instance as per seizure memo Ex.P.11. According to memorandums of disclosure Ex.P.8, Ex.P.9, Ex.P.10 made by accused persons Kau @ Rajaram, Ranglal Banote and Shishupal Banote under Section 27 of the Evidence, lathis were recovered and seized on their behest as per seizure memos Ex.P.12, Ex.P.13 and Ex.P.14 respectively. These seized articles were sent to FSL, Sagar and as per FSL report Ex.P.32, no sign of blood was found on lathis but on Gupti, the stain of blood was found. However, the blood group could not be determined.

19. On going through the evidence of complainant P.W.1 Tejwanti Bai, who is eye witness to the incident, it reveals that she named three of the accused persons namely Dilip, Dinesh and Kau armed with lathi and rod and they were assaulting the deceased. Her evidence shows that appellant Sukhwanti Bai who was mother of appellant Dilip was uttering to the appellants to off the deceased and she would save them by selling land. There is recovery of sharp pointed weapon (Gupti) at the instance of appellant Dilip. As per medical evidence, the deceased sustained injuries caused by sharp pointed weapon and also by hard and blunt object. However her husband P.W.2 Rakesh who is also said to be eye witness to the incident, named seven accused persons namely Dilip, Kau, Dinesh, Shishupal, Ranglal, Tameshwar and Janglal involved in the incident of marpeet with the deceased. However, it appears that main over-act was attributed to appellant Dilip, who assaulted and caused fatal injuries to the deceased with Gupti. It is evident that deceased came to the house of appellant Dilip at village Kolhawa to caution him because he used to make phone calls to his cousin sister Sahajwanti (P.W.4) and threaten her. The incident is said to have taken place at 10.00 o'clock in the night. The deceased Santosh who was cousin brother of Tejwanti Bai

(P.W.1) came to her house to enquire about misbehaviour of appellant Dilip with Sahajwanti (P.W.4) regarding which P.W.4 Sahajwanti Bai has mentioned in her evidence. The evidence of P.W.1 Tejwanti Bai is against four accused persons noted above. The main overt act is specifically alleged against appellant Dilip who caused fatal injuries whereas other appellants assaulted with lathis. Though recovery of Gupti at the instance of appellant Dilip and lathis at the instance of other appellants has not been proved by the seizure witnesses, but the fact remains that from the version of eye witness P.W.1 Tejwanti Bai, there were four accused persons and as per evidence of P.W.2 Rakesh, who is also eye witness to the incident, he named seven accused persons noted above. Though some omnibus statements were made by these eye witnesses but to some extent, their evidence is found to be credible and trustworthy and cannot be disbelieved in toto. The Apex Court in the case of **Motiram Padu Joshi and others Vs. State of Maharashtra** reported as **(2018) 9 SCC 429** held that relationship is not a ground affecting credibility of a witness. However, judicial approach has to be cautious in dealing with such evidence. But, evidence given by related witness should not be discarded only on ground that such witness is related.

20. So far as the argument with regard to delay in lodging the FIR, omnibus statement and exaggerations in the evidence of the eye witnesses before the Court and identification of the accused persons in the absence of light in the place of incident, is concerned, from the evidence of P.W.1 Tejwanti Bai, P.W.2 Rakesh and P.W.4 Sahajwanti, it is evident that appellant Dilip was making phone calls and because of his misbehaviour, P.W.4 Sahajwanti came to neighbouring village to the village of the accused persons. But even then appellant Dilip used to make phone calls and threaten her. The Apex Court in the case of **Motiram Padu Joshi** (supra) has also held that FIR is not an encyclopaedia which should contain all details of incident. It may be sufficient if broad facts of prosecution case about the occurrence appear. Omission as to names of assailants or witnesses may not all times be

fatal to prosecution, if FIR is lodged without delay. Unless there are indications of fabrication, Court cannot reject prosecution case as given in FIR merely because of omission. The object of FIR is to set law in motion. The Apex Court in the case of **Motilal and another Vs. State of Rajasthan (2009) SCC 454** has held that it is true that a faulty investigation cannot be a determinative factor and would not be sufficient to throw out a credible prosecution version. It would depend upon the facts of each case. In the case in hand, though there is minor omission in the prosecution case, but the evidence of the eye witnesses could not be discarded in toto.

21. The Apex Court in the case of **Ishwar Singh Vs. State of U.P.** reported as **(1976) 4 SCC 355** has held that reappraisal of evidence reveals that the case was one of free and sudden fight between both parties, as such no conviction under Section 147 or Section 148 of IPC can be sustained. The prosecution must then prove individual assault. No conviction with the help of Section 149 of the IPC can also be sustained. In the present case, the evidence shows that the deceased himself went to the house of appellant Dilip where his family members and other villagers were there residing and there free and sudden fight took place, as such there is no question of riot and forming of an unlawful assembly. In view of the said judgment of the Apex Court, we are of the view that the prosecution is not able to prove its case for offences under Sections 147, 148 read with 149 of the IPC and they are entitled to be acquitted for the said offences.

22. In the recent judgment in the case of **Arjun and another Vs. State of Chhattisgarh** reported as **(2017) 3 SCC 247**, the Apex Court has held that when and if there is intent and knowledge, then the same would be a case of Section 304 Part I IPC and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304 Part II IPC.

23. In the case in hand, the evidence of eye witnesses P.W.1 Tejawanti Bai and P.W.2 Rakesh corroborated with medico-legal evidence goes to

show the fact that the deceased died homicidal death. The evidence of P.W.1 Tejwanti Bai and P.W.2 Rakesh appears to be not convincing as to whether everybody had participated in the crime and whether they committed the offence with common intention forming unlawful assembly. It appears that the case has to be dealt with their individual overt act. The incident had taken place in connection with the dispute arose as stated above, the deceased came from the different village to the village of the appellants and he was assaulted by the appellants. The conduct of the each appellant does not amount to abetment for commission of offence of murder, as prosecution witnesses do not say that what was the role of each appellant except the fact that the appellant Dilip caused injuries to the deceased with Gupti which finds support from the medical evidence and nature of the injuries sustained by the deceased. Though there is evidence with regard to recovery of the used weapons but the seizure witnesses have not supported the prosecution case, but the fact remains that in the absence of light in the place of incident which occurred at night, it was difficult to identify the assailants, probably the eye witnesses identified the assailants by their conduct because they were the residents of the same village. The evidence of the eye witnesses cannot be discarded totally. May be, that in the absence of light, the eye witnesses might not have seen the actual assault given by the each appellant and with which weapon, but from the medical evidence, the doctor has found grievous injuries sustained by the deceased. According to the prosecution case and on perusal of overall evidence, it is evident that the deceased himself came to the house of the appellants and all of sudden, free fight took place and appellant Dilip assaulted with Gupti and other appellants by lathis and fisticuffs without premeditation, motive or mens rea. But the facts remains that all of sudden fight took place in the night and the appellant Dilip without premeditation or intention to commit his murder caused injuries to deceased with Gupti, but he had knowledge and intention that the injuries so inflicted in the ordinary course of nature would be sufficient to cause death of the deceased. At the most the offence would fall under Exception part of Section 300 of the IPC regarding homicidal death not

amounting to murder, which is punishable under Section 304 Part I of the IPC so far as appellant Dilip is concerned. So far as appellants Sukhwanti Bai and Maruti alias Nago are concerned, the prosecution is not able to prove their participation for the offences mentioned above. More so, no overt-act has been alleged against them by the eye witnesses. Appellant Maruti alias Nago has also not been named involving in the commission of offences. We are of the view that appellants Sukhwanti Bai and Maruti alias Nago deserve to be acquitted extending benefit of doubt for the offences as mentioned above. So far as other appellants Rooplal alias Roopchand Lihare, Tameshwar Damahe, Rajaram alias Kau, Jaglal alias Tota, Raju alias Ranglal and Shishupal are concerned, as per evidence of the eye witnesses coupled with the medico-legal evidence, the prosecution is able to prove that they have caused grievous injuries to deceased by lathis and fisticuffs. We find it appropriate to convict them under Section 325 of the IPC.

24. In view of the aforesaid discussion, **Criminal Appeal No.2562/2008** and **Criminal Appeal No.2578/2008** are allowed in part modifying the impugned order of conviction and sentence as awarded by the trial Court as under:-

(i) Conviction and sentence as awarded by the trial Court against appellant **Maruti alias Nago** and appellant **Sukhwanti Bai** for the offences under Sections 147, 148, 302/149 and 323/149 of the IPC are set aside and they are acquitted of the said offences.

(ii) Conviction and sentence as awarded by the trial Court against appellants **Rooplal alias Roopchand Lihare, Tameshwar Damahe, Rajaram alias Kau, Jaglal alias Tota, Raju alias Ranglal** and **Shishupal** for the offences under Section 147, 148, 302/149 and 323/149 of the IPC are set aside. They are acquitted for the said offences. But the said appellants- Rooplal alias Roopchand Lihare, Tameshwar Damahe, Rajaram alias Kau, Jaglal alias Tota, Raju alias Ranglal and Shishupal are convicted **under Section 325 of the IPC and sentenced to R.I. for three years and fine of Rs.1000/- each, in default of payment of fine,**

additional R.I. for two months each. So far as appellant **Dilip Damahe** is concerned, the conviction and sentence as awarded by the trial Court against him for the offences under Section 147, 148, and 323/149 of the IPC are set aside and he is acquitted for the said offences. But his conviction under Section 302/149 of the IPC is altered to that under Section 304 Part I of the IPC, hence appellant **Dilip Damahe** is convicted **under Section 304-Part I of the IPC and sentenced to R.I. for 10 yeas and fine of Rs.2000/-, in default of payment of fine, additional R.I. for 2 months.** As stated, these appellants are on bail. Their bail bonds stand cancelled. The period already undergone by them in jail during investigation, trial or post-conviction be set off extending benefit of provision of Section 428 of the Cr.P.C. If they have not completed the sentence as imposed by this Court, they are directed to surrender before the trial Court within one month from today to serve out their remaining part of sentence, failing which, the trial Court shall take steps against them to serve out their remaining part of sentence as imposed by this Court.

25. We appreciate the learned Amicus Curiae for his assistance given in disposal of these appeals. The High Court Legal Services Committee shall pay fee of Rs.4000/- to him.

(Huluvadi G. Ramesh)
Judge

(B.K.Shrivastava)
Judge

C.