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HIGH COURT OF JUDICATURE AT ALLAHABAD

CRIMINAL APPEAL No. - 7008 of 2011

Jaini Singh And Others …....Appellant(s)

Versus

State Of U.P. …....Respondent(s)

Counsel for Appellant(s)	:	Govind Saran Hajela, Neeja Srivastava, Omvir Babu, Rajeev Nayan Singh, Siddhartha Srivastva, Veer Singh
Counsel for Respondent(s)	:	D.S.Bohra, Veer Singh

Connected with

CRIMINAL APPEAL No. - 7333 of 2011

Vijay Pal Singh …....Appellant(s)

Versus

State Of U.P. …....Respondent(s)

Counsel for Appellant(s)	:	Saurabh Gour
Counsel for Respondent(s)	:	Govt. Advocate

Connected with

CRIMINAL APPEAL No. - 374 of 2012

Girraj Singh And Anr. …....Appellant(s)

Versus

State Of U.P. …....Respondent(s)

Counsel for Appellant(s)	:	Ajay Kumar Pandey, Siddhartha Srivastava, Veer Singh
Counsel for Respondent(s)	:	Dheeraj Singh Bohra, Govt. Advocate

Court No. - 47

HON'BLE RAJEEV MISRA, J.

HON'BLE DR. AJAY KUMAR-II,J

(DELIVERED BY HON'BLE RAJEEV MISRA,J)

1. Challenge in these criminal appeals is to the judgment and order dated 29.11.2011/02.12.2011 passed by Sessions Judge, Bulandshahar in Sessions Trial No. 983 of 2011 (State Vs. Ratan Singh and 5 Others) and Sessions Trial No. 661 of 1996 (State Vs. Vijay Pal Singh), under Sections 147, 148, 302 IPC read with Section 149 IPC, arising out of Case Crime No. 196 of 1993, under Sections 147, 148 and 302 IPC, Police Station-Debai, District-Bulandshahar.

2. Under the impugned judgment and order, appellants-Jaini Singh, Girraj Singh, Brajmohan, Jagmohan @ Munna, Jamuni and Vijay Pal Singh have been convicted under Section 302 read with Section 149 IPC and therefore, sentenced to life imprisonment along with fine of Rs. 10,000/- each and in case of default, appellants are to undergo three months additional simple imprisonment, accused/appellants-Jaini Singh,

Brajmohan, Jamuni and Vijay Pal Singh have further been convicted under Section 147 IPC and therefore, sentenced to additional one year rigorous imprisonment, whereas accused-Jagmohan and Girraj Singh have been additionally convicted under Section 148 IPC and therefore, sentenced to one year and 6 months rigorous imprisonment. The impugned judgment and order further records that all the sentences shall run concurrently.

3. There are six accused/appellants in above-noted appeals. Out of the six accused/appellants, three of the accused/appellants died during the pendency of present appeals. Consequently, the appeals in respect of such accused/appellants were abated. For ready reference, the same is tabulated herein below;-

(i). Vijay Pal Singh died on 03.07.2012

(ii). Braj Mohan died on 02.06.2015

(iii). Girraj Singh died on 14.06.2016

4. Record reveals that in the night of 1/2.07.1993, an incident occurred at 12:00 ‘O’ Clock at Jungle Khairpur, Police Station-Debai, Tehsil-Anoop Shahar, District-Bulandshahar, resulting in the death of 3 persons namely (1) Ram Singh, (2) Veerpal Singh and (3) Virendra Singh.

5. In respect of aforesaid occurrence, Smt. Prakashwati (mother/sister of deceased and widow of Karan Singh) submitted a written report dated 02.07.1993 (Ext-Ka-1) at Police Station-Debai, scribed by one Roop Kishore Sharma.

6. After receipt of aforementioned written report, PW-3 Head Moharrir Rakesh Kumar at Police Station-Debai entered the same in the General Diary of aforementioned Police Station as G.D. Report No.2 (Ext. Ka.-3) and on basis thereof, he prepared the Check FIR dated 02.07.1993 (Ext-Ka-2), which was registered as Case Crime No. 196 of 1993, under

Sections 147, 148 and 302 IPC, Police Station-Debai, District-Bulandshahar. In the aforesaid FIR, 7 persons namely (1) Ratan Singh, (2) Girraj Singh, (3) Jaini Singh, (4) Braj Mohan, (5) Jagmohan, (6) Jamuni and (7) Vijay Pal Singh were nominated as named accused.

7. The prosecution case can be gathered from the perusal of FIR itself. Accordingly, above-mentioned FIR is extracted herein under;-

"निवेदन है कि मेरे भाई राम सिंह व वीर पाल सिंह पुत्र गण जसवन्त सिंह निवासी सिरसा थाना बरला जिला अलीगढ़ और मेरा लड़का वीरेन्द्र सिंह पुत्र करन सिंह निवासी खैरपुर थाना डिबाई जिला बुलन्द शहर जो मेरे भाईयों के पास सिरसा रहता था और इनके साथ में निहाल सिंह पुत्र दर्याव सिंह तथा रुप किशोर शर्मा पुत्र भगवन्त प्रसाद निवासी सिरसा थाना बरला जिला अलीगढ़ भी थे उपरोक्त सभी दिनांक ***1-7-93*** को रात्रि ***8*** बजे मेरे घर पर ***(***खैरपुर***)*** आये यहां आकर गर्मी की वजह से कपड़े उतार कर बैठे ही थे कि रतन सिंह पुत्र प्रहलाद सिंह व जैनी सिंह गिर्राज सिंह व ब्रजमोहन सिंह व मुन्ना सिंह व जमुनी पुत्रगण रतन सिंह और विजय पाल सिंह पुत्र जालिम उपरोक्त सभी मेरे घर पर आये और खेत के फैसले के बारे में कहा कि प्रधान के यहा बैठकर फैसला करेगें तो मैने प्रधान के यहा जाने से मना किया क्योंकि ऐसे फैसले तो कई बार हो चुका है मेरे खेत के बारे में लगभग ***15*** वर्ष से मुकदमा चल रहा है लेकिन उपरोक्त सभी ने काफी आसवासन दिया कि आज अवश्य ही फैसला होगा तो उपरोक्त पांचों व्यक्ति जो सिरसा से आये थे चलने को तैयार हुए तो प्रधान ने कहा कि पास घर के व्यक्तियों मे ही फैसला होगा इसलिए निहाल सिंह घर व रूप किशोर शर्मा मेरे पास ही रह गये और राम सिंह व वीरपाल सिंह व विरेन्द्र सिंह को प्रधान विजय पाल सिंह के यहां ले गये। इसके बाद करीब ***12*** बजे शोर गुल हुआ तो गांव के मोके पर हीरा सिंह व फतह सिंह पुत्र गण शोभा राम व जीत सिंह पुत्र किडोरी सिंह निवासी ***(***काम***)*** थाना गोंडा जिला अलीगढ़ व वीदी सिंह पुत्र शिव लाल निवासी खैरपुर मटरु सिंह पुत्र हरज्ञान सिंह तथा गांव के अन्य व्यक्तियों के साथ मै भी अपनी मक्का के खेत पर जहां घटना स्थल है पहुंची तथा मेरे साथ में सिरसा से आये हुए दोनों व्यक्ति भी थे रात्रि उजियाली थी तथा मेरे व अन्य व्यक्तियों के हाथ में टोर्च भी थी हमने मौके पर रतन सिंह गिर्राज सिंह व जैनी सिंह व ब्रजमोहन सिंह व मुन्ना व जमुनी व विजय पाल सिंह को राम सिंह व वीर पाल सिंह व वीरेन्द्र सिंह पर लाठी बल्लम और फर्सी से प्रहार करते देखा तो हमने गांव वालों को बचाने के लिए आवाज लगाई इसपर सभी कातिलों ने कहा कि इनको भी घेर कर मार डालों इसी समय मेरे दोनों भाईयो व मेरे लड़के को मोके पर ही जान से मार दिया। उपरोक्त वाका सभी गवाहों ने आंखो से देखा है रिपोर्ट लिखकर दर्ज की जाय तथा सभी मुलजिमानो के साथ कानूनी कार्यवाही की जाय। प्रार्थिनी नि० अ० प्रकाशवती बेवा करन सिंह श्रीमती प्रकाशवती बेवा करन सिंह नि० खैरपुर थाना डिवाई**,** जिला बुलन्दशहर लेखक रुप किशोर शर्मा पुत्र श्री भगवन्त प्रसाद गांव सिरसा।

नोट**-** मैं एच०एम० प्रमाणित करता हूं कि चिक हाजा पर नकल तहरीर हिन्दी वादी शब्द व शव्द अंकित की गई है। कार्वन कापी साफ है।***"***

8. After the FIR referred to above was lodged, Incharge Inspector of Police Station-Debai (PW-5), Shiv Prakash Mishra took the investigation of concerned case crime number upon himself. Accordingly, he proceeded with statutory investigation of concerned case crime number in terms of Chapter-XII Cr.P.C. He visited the place of occurrence and recovered plain earth as well as earth mixed with blood from the place of occurrence, where dead bodies of deceased were lying and other places. He also recovered a pair of leather slippers (chappal) from the spot. A memo regarding same was prepared, which is (Ext-Ka-27). Aforesaid recoveries were witnessed by two witnesses namely Kshatrapal Singh and Khachedu.

9. Investigating Officer further recovered the dead bodies of deceased, which were lying in the field. Upon examination of the bodies of deceased, cash Rs. 120/- was found from the person of deceased Ram Singh, Rs. 7/- was found from the person of deceased Veer Pal and Rs. 17/- was wound from the person of deceased Virendra Singh. The said amount was given in the Supurdagi of first informant PW-1 Prakashwati but after preparing a Supurdaginama of the same, which is (Ext-Ka-28). Investigating Officer also prepared the site plan regarding the place, from where, aforementioned recoveries were made, which is (Ext-Ka-31).

10. After completing aforesaid exercise, Investigating Officer initiated proceedings for conducting inquest (Panchnama) of the bodies of deceased. He, therefore, appointed the Panch Witnesses. After completion of inquest proceedings, which were conducted one after the other, Investigating Officer (PW-5) prepared the inquest report (Panchnama); of deceased Ram Singh, which is (Ext-Ka-9); of Virendra Singh, which is (Ext-Ka-15) and of accused Veer Pal Singh, which is (Ext-Ka-21). All the inquest reports are dated 02.07.1993.

11. In the opinion of witnesses of inquest (Panch Witnesses), the death of deceased were categorized as homicidal as the cause of death was opined to be the injuries sustained by them.

12. After the inquest reports of deceased had been prepared, Investigating Officer (PW-5) Shiv Prakash Mishra, prepared the detailed police scroll regarding each of the dead bodies for sending the bodies of deceased for post mortem. The same is as follows;-

(i). Regarding deceased Ram Singh – Ext-Ka-10 Challan Lash, Ext-Ka-11 Photo Nash, Ext-Ka-12 Letter to CMO, Ext-Ka-13 Letter to CMO and Ext-Ka-14 Letter to RI.

(ii). Regarding deceased Virendra Singh – Ext-Ka-16 Challan Lash, Ext-Ka-17 Photo Nash, Ext-Ka-18 Letter to CMO, Ext-Ka-19 Letter to CMO and Ext-Ka-20 Letter to RI.

(iii). Regarding deceased Veerpal – Ext-Ka-22 Challan Lash, Ext-Ka-23 Photo Nash, Ext-Ka-24 Letter to CMO, Ext-Ka-25 Letter to CMO and Ext-Ka-26 Letter to RI.

The dead bodies of deceased were, thereafter, dispatched for post mortem.

13. PW-4 Dr. S. Kant Sharma, the Autopsy Surgeon conducted post mortem of the bodies of deceased on the next day i.e. 03.07.1993. The Autopsy Surgeon found following ante-mortem injuries on the body of deceased Ram Singh;-

"1. Abraded contusion 5 cms x 4 cms on left side face.

2. Incised wound 10 cms x 3 cms x bone deep on right side of mouth. Bone underneath was found cut.

3. Incised wound 3 cms x 0.5 cms in the middle portion of the ear.

4. Contusion 4 cms. X 3 cms over upper part of left eye brow.

5 Two incised wounds 3 cms x0.5 cms x scalp deep and 2.5 cms x 0.5 cms on back of left side forehead 7 cms lateral to out side.

6. Incised wound 13 cms x 2 cms x bone deep on left side head and left ear. Bone under neath was found cut.

7.Abraded contusion 5 cms x 4 cms on upper side of left shoulder.

8. Incised wound 5 cms x 3 cms x bone deep on upper part of the neck.

9. Contusion 3 cms x 4 cms on upper portion of right shoulder.

10. Abraded contusion 2 cm x 1 cm in front of left leg. In the internal examination nothing abnormal was detected by the doctor."

14. After completion of post mortem of the body of deceased Ram Singh, the Autopsy Surgeon prepared the post mortem report dated 03.07.1993 (Ext-Ka-5) in respect of aforementioned deceased. In the opinion of Autopsy Surgeon, the cause of death of deceased could not be ascertained, therefore, the viscera of deceased was preserved for being sent to FSL Laboratory for chemical analysis. The Autopsy Surgeon, further remarked in the post mortem report that the cause of death shall be ascertained after the receipt of viscera report.

15. The autopsy on the body of deceased Veer Pal was also conducted on 03.07.1993 but at 12:30 p.m.. The Autopsy Surgeon found following ante-mortem injuries on the body of aforesaid deceased Veer Pal;-

"1. Incised wound 6cms x 2 cms x bone deep in the middle of nose. Bones underneath were found fractured.

2. Lacerated wound 5.3. cms x 1.4 cms x bone deep in front

3. Lacerated wound 5 cms x 2 cms x bone deep over lower lip, underneath two teeth loose.

4. Lacerated wound 3 cms x 0.5 cms x scalp deep over upper eye lid.

5. Contusion 4 cms x 3 cms on upper part of left side face and below left eye.

6. Lacerated wound 6 cms x 2 cms x bone deep on right side of head and on lateral part also.

7. Lacerated wound 4 cms x 1 cm x bone deep on front side of face.

8. Contusion 5 cms x 4 cms in front of middle of chest.

In the internal examination nothing abnormal was detected."

16. Upon completion of post mortem of the body of aforementioned deceased, the Autopsy Surgeon prepared the post mortem report dated

03.07.1993 (Ext-Ka-5). Again in the opinion of the Autopsy Surgeon, the cause of death of aforementioned deceased could not be ascertained, therefore, the viscera of deceased was preserved for chemical analysis by the FSL Laboratory. In the case of this deceased also, the Autopsy Surgeon, observed that the cause of death of deceased Veer Pal shall be ascertained after the receipt of FSL report.

17. Post mortem of the body of deceased Virendra Singh commenced at 01:00 p.m. on 03.07.1993. The Autopsy Surgeon found following ante-mortem injuries on the body of aforementioned deceased;-

"1. Lacerated wound 6 cms x 5 cms in front of neck. Trachea was lacerated.
2. Incised wound 6 cms x 1 cm x bone deep in the middle of nose. Underneath bones were found fractured.
3. Incised wound 4 cms x 0.5 cm in lower part of Pinna. Pinna was cut
4. Lacerated wound 7 cms. X 1 cms x bone deep on upper part of left eye brow.
5. Incised wound 1.5 cms. X 0.5 cms x skin deep on upper part of left ear.
6. Lacerated wound 4 cms. X 0.8 cms x scalp deep on right side scalp.
7. Lacerated wound 3 cms x1 cm x bone deep on right side face."

18. The Autopsy Surgeon could not conclude regarding the cause of death of this deceased also. He, therefore, remarked that as the cause of death can not be ascertained, the viscera has been preserved. However, he also remarked in the post mortem report that the cause of death of this deceased shall be ascertained after the receipt of FSL report.

19. After completion of aforementioned formalities, Investigating Officer (PW-5) Shiv Prakash Mishra resumed investigation of concerned case crime number. He, therefore, first examined the first informant Smt. Prakashwati (PW-1), Roop Kishore Sharma, the scribe of FIR and eye witness Nehal Singh and recorded their statements under Section 161 Cr.P.C. On the pointing of first informant and witnesses of occurrence, Investigating Officer prepared site plan of the place of occurrence (Ext-

Ka-8) on 02.07.1993. Investigating Officer further examined other witnesses under Section 161 Cr.P.C.

20. Since offence complained of is a cognizable and non bailable offence, therefore, Investigating Officer took steps to secure the custody of accused. As such, most of the accused were arrested but on different dates. The details of the same are reproduced in a chronological manner herein below;-

Date of arrest	Name of arrested accused
03.07.1993	Braj Mohan, Vijendra Singh @ Jamuni and Vijay Pal Singh
20.08.1993	Ratan Singh
22.08.1993	Girraj and Jag Mohan surrendered before Court
16.10.1993	Jaini Singh

21. After arrest of accused, on the pointing of accused Braj Mohan and Vijendra Singh, Investigating Officer (PW-5) recovered a ‘Farsa’ (a sharp edged heavy weapon), which was not having blood stains, another ‘Farsa’, which was having blood stains and one ‘Ballam’ (spear), which was also not having blood stains, from a ‘Chhappar’ kept on the ‘Bhitaura’ (a place to store cow dung cakes) near the tubewell of Ratan Singh. Investigating Officer, accordingly, prepared the recovery memo of same on 03.07.1993, which is (Ext-Ka-30). Aforesaid recovery was witnessed by Constable Dasi Ram, Constable Kalyan Das and two independent witnesses namely Deepak and Jagdish.

22. After completion of investigation of aforementioned case crime number, Investigating Officer ultimately submitted the charge sheet/police report in terms of Section 173(2) Cr.P.C. on 13.08.1993 (Ext-Ka-33), whereby and whereunder all the named accused were charge sheeted under Sections 147, 148, 149 and 302 IPC.

23. Upon submission of aforementioned charge sheet/police report, cognizance was taken upon same by the jurisdictional Magistrate in exercise of jurisdiction under Section 190(1)(b) Cr.P.C. However, as offence complained of is triable exclusively by the Court of Sessions, therefore, the jurisdictional Magistrate, as per mandate of Section 227 Cr.P.C. first supplied the documents relied upon by the prosecution to the accused and thereafter, committed the case to the Court of Sessions as required under Section 209 Cr.P.C.

24. As a consequence of above, Sessions Trial No. 983 of 2011 (State Vs. Ratan Singh and 6 Others) came to be registered. Subsequently, the trial of accused Vijay Pal Singh was segregated by Court below purported to be in exercise of jurisdiciton under Section 317(2) Cr.P.C. and registered as Sessions Trial No. 661 of 1996 (State Vs. Vijay Pal Singh).

25. Concerned Sessions Judge proceeded with the trial. Therefore, he in accordance with the mandate of Section 228 Cr.P.C., framed separate and distinct charges under Sections 147, 148, 149 and 302 IPC against charge sheeted accused vide framing of charge order dated 07.07.2020.

26. Aforementioned framing of charge order dated 07.07.2020 passed by Sessions Judge, Bulandshahar was challenged by accused Jagmohan Singh by filing Criminal Revision No. 374 of 2000 (Jagmohan Singh Vs. State of U.P. and Others) before this Court. The same came to be allowed by this Court, vide order dated 24.10.2000. The order dated 24.10.2000 reads as under;-

"This revision has been filed against framing of charge by the learned Sessions Judge, Bulandshahar.

It is contended by the learned counsel for the revisionist that in the post mortem report, the cause of death could not be ascertained and the viscera report was preserved.

It is further stated that viscera report has yet not been received and therefore, there was no primafacie case before the lower court to frame charge under Section 302 IPC. There is sufficient force in this contention because unless viscera report is received, it cannot be deemed that accused committed murder.

The impugned order dated 07.07.2000 is, therefore, set aside and the learned lower court is directed to receive the viscera report and thereafter hearing the accused may frame charge.

The revision is accordingly, disposed of."

27. This Court, vide above order dated 24.10.2000, directed that since the cause of death of deceased has not been ascertained by the Autopsy Surgeon and the FSL report has not yet been received, therefore, charges be framed against charge sheeted accused only after the receipt of FSL report.

28. The Forensic Expert at FSL Laboratory, Agra prepared the chemical analysis report dated 28.02.2003 (Ext-ka-37) in respect of the body parts of deceased Ram Singh, Veer Pal and Virendra Singh, which had been sent for chemical examination. As per the said FSL report, no foreign chemical compound was found in the body parts of deceased sent for chemical examination.

29. After receipt of above-mentioned FSL report dated 28.02.2003 (Ext-Ka-37), Court below as per the mandate of order dated 24.10.2000 passed by this Court again framed charges against accused, vide framing of charge order dated 20.10.2004. Separate and distinct charges were framed against different sets of accused. For ready reference, the same is tabulated herein below;-

Date of framing of charge order	**Accused**	**Under Sections**
20.10.2004	Jaini Singh, Braj Mohan,	147 IPC 302/149 IPC

	Vijendra Singh	
20.10.2004	Jag Mohan, Girraj Singh	148 IPC 302/149 IPC
20.11.2004	Vijay Pal	147 IPC 302/149 IPC

30. It is apposite to mention here that accused Ratan Singh died during the pendency of trial. Accordingly, the trial against aforesaid accused was abated by Court below. As such, no charge was framed against him by Court below.

31. All the accused denied the charges so framed. They pleaded innocence and not guilty and further demanded trial. Resultantly, the trial procedure commenced.

32. Prosecution in discharge of it's burden to bring home the charges so framed against charge sheeted accused, adduced the following witnesses:-

32.1. PW-1 Smt. Prakashwati is the first informant. She is also the mother of deceased Virendra Singh (her son) and sister of deceased Ram Singh and Veerpal (her brothers). After the incident, which occurred in the night of 1/2.07.1993, she had submitted a written report regarding the same at Police Station-Debai scribed by Roop Kishore Sharma. She, proved the same. Accordingly, same was marked as (Ext-Ka-1).

32.2. This witness has assigned rivalry and enmity between the parties because of land dispute. The same is also the motive with the accused to commit the crime in question. According to this witness, her father-in-law Prahlad Singh had two sons i.e. Ratan Singh and Karan Singh. She was married to Karan Singh. From the said wedlock, 3 daughters and one son namely Virendra Singh (deceased) were born. Her husband Karan Singh pre-deceased his father namely Prahlad Singh (father-in-law of PW-1) . After the death of her husband, her father-in-law Prahlad Singh had

executed a registered sale deed regarding 31 Bighas of agricultural land in her favour. After execution of sale deed, accused Ratan Singh and his sons maintained rivalry/enmity with her. Accused Ratan Singh and others had contested a case regarding the sale deed for 11 years.

32.3. She further goes on to depose that on the fateful day, Veerpal, Virendra, Nehal Singh, Roop Kishore and Ram Singh, who are residents of Village-Sirsa, where her parental home (i.e. of first informant) is situate came to Village-Khairpur, District-Bulandshahar, the marital home of PW-1. They arrived before dark. Veerpal and Ram Singh are her brothers. Virendra is her son. Nehal Singh is her cousin brother (Mamera Bhai i.e. son of mother's brother) and Roop Kishore is Pandit at her parental Village-Sirsa.

32.4. At this juncture, Ratan Singh, Girraj, Jaini, Braj Mohan, Jag Mohan, Vijendra and Vijay Pal Pradhan came to her place i.e. the house of first informant.

32.5. Vijay Pal Pradhan is said to have requested the brothers of first informant i.e. Ram Singh and Veer Pal and also her son Virendra Singh to come to his house to settle the dispute. The first informant Prakashwati initially resented the said offer. As this Jaini exclaimed by saying that they had nothing to fear in going to the place of Pradhan as the matter shall be resolved today. Except for Roop Kishore, Panditji and Nehal, the rest happily and affectionally accompanied the aforesaid persons for the place of Pradhan.

32.6. At around 12:00 'O' clock in the night, she heard shouts coming from the field. Hearing the shouts, she, Roop Kishore and Nehal proceeded for the place from where, the shouts were coming carrying torches in their hands. When they reached the field, they heard the accused, (who are same persons, who had come to her house around 08:00 p.m.) shouting that miscreants have come to destroy the crops "बदमाश फसल

नष्ट करने आ गये हैं" and they were assaulting Ram Singh, Veerpal and Virendra. Accused Ratan Singh was armed with 'Farsa', Jag Mohan was also armed with 'Farsa', Girraj was holding a 'Ballam' and Jaini, Braj Mohan, Vijendra @ Jamani were having 'Lathi' and Pradhan Vijay Pal was also having a 'Lathi'. All the accused were assaulting the aforementioned three persons with the weapons in their hands simultaneously.

32.7. On the screams and shouts, various villagers including Jeetu @ Jitendra and Fateh Singh also came on the spot. The first informant is said to have raised her voice that they are not miscreants (Badmash) but her brothers and son. The same statement was uttered by the villagers present. However, the accused are alleged to have rebuked that they are miscreants, kill them, even if they be hanged. Ultimately, they killed the son and brothers of deceased. After committing the crime, the accused ran away.

32.8. She has further stated that her father-in-law had not executed any sale deed in favour of the son of Ratan Singh. The land which was sold to her by her father-in-law was cultivated by herself or by sub-letting it to Fateh Singh and Hira Singh but not to anyone else. Sometimes the accused forcibly cultivated the same. The field in which, the occurrence took place was being cultivated by herself and corn crop was sown in the same.

32.9. Towards the end of her deposition i.e. statement-in-chief, this witness has stated that even when upto to 12:00 'O' clock, when her brothers and son did not return, then they (not she) went to the house of Pradhan to enquire about their whereabouts, then they were informed that no one had come, therefore, they went to the field.

32.10. This witness was cross examined on behalf of accused. A specific suggestion appears to have been put to her regarding her conduct from

08:00 p.m. to 12:00 mid night. This witness in her examination-in-chief has stated that just as she questioned about the whereabouts of her brothers and son at the house of Pradhan, she heard the shouts from the fields and accordingly, proceeded to the field. However, in spite of lengthy cross examination, this witness could not be dislodged regarding the cause of occurrence, place of occurrence, manner of occurrence and presence of accused at the time and place of occurrence. As such, the deposition of this witness remains intact.

33. PW-2 Nehal Singh is also an eye witness of the occurrence. His deposition is similar to that of PW-1 Prakashwati, except for the fact that it is a little more descriptive and specific. This witness has also supported the prosecution by mentioning, how he reached the village of PW-1, the arrival of accused persons at the place of Prakashwati, she allowing the deceased in going to the house of Pradhan and how abruptly, the screams and shouts were heard at 12:00 'O' clock in the night, thereafter, going to the place of occurrence and witnessing the crime in question. He has then described how the police arrived on the spot and how and where the dead bodies of deceased were lying.

33.1. In spite of lengthy cross examination, this witness has remained consistent regarding the deposition made in his statement-in-chief. As such, this witness could not be dislodged by the defence.

34. PW-3 HCP 227 Rakesh Kumar. At the relevant point of time, this witness was posted as Head Clerk at Police Station-Debai. According to this witness, Nehal Singh and Roop Kishore Sharma R/o Sirsa, Police Station-Barla, District-Aligarh came at Police Station-Debai on 02.07.1993 at 02:30 p.m. along with a written report (Tehrir), which was having the thumb mark of Prakashwati (PW-1 first informant). The same was entered in the G.D. of Police Station as G.D. Report No.-2 by Assistant Scriber Rajpal Singh. He recognized the signatures of Rajpal

Singh and proved the same. Accordingly, it was marked as (Ext-Ka-3). On the basis of aforesaid, this witness prepared the Check FIR, which was registered as Case Crime No. 196 of 1993, under Sections 147, 148, 302, IPC, Police Station-Debai, District-Bulandshahar, which was marked as (Ext-Ka-2).

34.1. This witness was cross examined regarding Ext-Ka-2 and Ext-Ka-3. However, nothing adverse could be culled out from him. As such, this witness could not be dislodged.

35. PW-4 Dr. S. Kant Sharma, retired SIS, District Hospital, Agra is the Autopsy Surgeon. He was posted as Child Specialist (Senior) at District Hospital, Bulandshahar at the relevant time. This witness had conducted post mortem of the bodies of deceased on 03.07.1993. According to this witness, he conducted autopsy on the body of deceased Ram Singh on 03.07.1993 at 12:00 p.m. 10 ante-mortem injuries were found on the body of deceased Ram Singh. Regarding the timing of death of deceased Ram Singh, this witness opined that the death would have taken place one and a half day before. The death of this deceased, which occurred on 1/2.07.1993 at 12:00 mid night could have been caused due to ante-mortem injuries. As per this witness, injuries 2, 3, 5, 6 and 8 on the body of deceased could have been caused by a sharp edged weapon, whereas injuries 1, 4, 7, 9 and 10 could have been caused by a blunt weapon like Lathi. He further opined that the sharp edged weapon could be Farsa/Ballam. However, all the internal organs were found intact. He thus proved the aforesaid post mortem report, which was marked as (Ext-Ka-4).

35.1. Aforesaid witness also conducted autopsy on the body of deceased Veerpal at 12:30 p.m. on 03.07.1993. In his opinion, the death of deceased Veerpal would have occurred one and a half day before. The death of this deceased, which occurred on 1/2.07.1993 at 12:00 mid night. could have

been caused due to ante-mortem injuries. He found 8 ante-mortem injuries on the body of this deceased. However, no internal injury was found in the body of deceased. According to the Autopsy Surgeon, injuries 1 and 2 could have been caused by a sharp edged weapon like Farsa and Ballam (spear). Injuries 3 to 8 could have been caused by a blunt weapon like Lathi. Upon internal examination, all the body organs were found intact. He thus proved the post mortem report pertaining to deceased Veerpal, which was marked as (Ext-Ka-5).

35.2. On the same day i.e. 03.07.1993 at 01:00 p.m., the Autopsy Surgeon PW-4 namely Dr. S. Kant Sharma conducted post mortem of the body of deceased Virendra Singh. He found 9 ante-mortem injuries on his body. However, no internal injury was found in the body of this deceased. The index finger of the right hand and the bone of nose were found broken. In the opinion of Autopsy Surgeon, injuries 2, 3 and 5 could have been caused by a sharp edged weapon like Farsa and Ballam (spear), whereas injuries 1, 4, 6, 7 and 10 could have been caused by a blunt weapon like Lathi. Regarding the timing of death, the same would have taken place one and a half day before. The death of deceased on 1/2.07.1993 at 12:00 'O' clock could have been caused due to ante-mortem injuries. However, none of the internal organs had sustained any injury. They were all intact. He thus proved the aforesaid post mortem report, which was marked as (Ext-Ka-6).

35.3. At the end, the Autopsy Surgeon opined that the cause of death of all the deceased was shock and haemorrhage as a result of ante-mortem injuries.

35.4. Aforesaid opinion given by the Autopsy Surgeon is over and above, the post mortem report wherein the cause of death of deceased has not been mentioned. We shall deal with the true import of the said deposition of Autopsy Surgeon in the later part of this judgment.

35.5. This witness was first cross examined on behalf of accused regarding the injuries sustained by the deceased etc. However, the defence failed to dislodge him qua the injuries found on the body of deceased or the timing of death as well as the post mortem. This witness has further deposed that he had received a letter dated 08.07.1993 from Station House Officer, Police Station-Debai, addressed to CMS regarding the medico legal report of deceased so as to ascertain the cause of death of deceased. It is in response to above that the said document i.e. letter dated 12.07.1993 (Ext-Ka-7) was prepared.

35.6. In spite of detailed cross examination, the defence failed to cull out any such fact from him so as to dislodge his deposition. Thus the deposition of this witness is worthy of acceptance and reliance.

36. PW-5 Shiv Prakash Mishra, Dy. SP (Human Rights Commission) was posted as Incharge Inspector at Police Station-Debai at the relevant point of time. This witness has deposed that the F.I.R. of present case was registered in his presence and he took the investigation of same upon himself. He, then first completed the formalities of copying the F.I.R. and written report (Tehrir) in the Case Diary, and then recorded the statement of Head Moharir Rakesh Kumar. Thereafter, he proceeded to the place of occurrence alongwith police force. Upon reaching the place of occurrence, he first recorded the statement of first informant Prakashwati (P.W.-1), followed by the scribe of the written report and eye witnesss Nehal Singh and Roop Kishore. On the pointing of first informant and witnesses regarding place of occurrence, he prepared site plan of the place of occurrence. Same was proved by him and marked as (Ext-Ka-8).

36.1. He then goes to state that he dictated the inquest report (Panchnama) of deceased (Ram Singh) to SI Om Prakash Pandey. The inquest report (Panchnama) of deceased Ram Singh was prepared first. He then proved the same, which was marked as (Ext. Ka.-9). Thereafter the detailed

police scroll for post-mortem of the body of aforesaid deceased was prepared. The same were also proved and marked as Challan Lash (Ext. Ka.-10), Photo Nash (Ext. Ka.-11), Letters to C.M.O. (Ext. Ka.-12) & (Ext. Ka.-13) and Letter to R. I. (Ext. Ka.-14.)

36.2. After completing the inquest proceedings (Panchnama) of deceased Ram Singh, this witness dictated the inquest report (Panchnama) of deceased, Virendra Singh to S.I. Om Prakash Pandey. He proved the inquest report (Panchnama) of aforesaid deceased, which was marked as (Ext. Ka.-15). He also prepared the police papers necessary for getting post-mortem of the body of deceased Virendra Singh conducted. The same were proved by him and accordingly marked as Ext. Ka.-16, Chalan Lash (Ext. Ka.-17), Photo Nash, Letters to C.M.O. (Ext. Ka.-18) & (Ext. Ka.-19) and Letter to R.I. (Ext. Ka. -20).

36.3. Thereafter this witness dictated the inquest report of deceased Veerpal to S. I. Om Prakash Pandey. The inquest report pertaining to aforesaid deceased was proved by him and thus marked as (Ext. Ka.-21). He also prepared the police papers for getting the post-mortem of deceased conducted, which were also proved by him and marked as Ext. Ka-22, Chalan Lash (Ext. Ka.-23), Photo Nash (Ext. Ka.-24), Letter to C.M.O. (Ext. Ka.-24) and (Ext. Ka.-25) and Letter to R.I. (Ext. Ka. -26).

36.4. He has then stated that after completing aforementioned exercise, all the three dead bodies were dispatched for post-mortem through Constable 716 Jaswant Singh and Constable 1039 Raj Singh alongwith relevant papers and specimen of seal.

36.5. This witness, thereafter, recovered earth mixed with blood and plain earth from place of occurrence and other places. Same were sealed separately. He has also recovered a pair of leather slippers (chappal) from the place of occurrence. Accordingly, a memo of same was prepared. The memo is signed by himself and two witnesses namely (1) Chatrapal Singh

and (2) Khachedu Singh. He proved the said memo, which was marked as (Ext-Ka-27).

36.6. Upon examination of the body of deceased, this witness had recovered cash from their person, which is Rs. 120/- from the person of deceased Ram Singh, Rs. 7/- from the person of deceased Veer Pal and Rs. 17/- from the person of deceased Virendra Singh. He, thereafter, handed over the same in Supurdagi of PW-1 Prakashwati, and accordingly, prepared a supurdaginama of same. The same was proved by him and accordingly, marked as (Ext-Ka-28).

36.7. He then goes to detail the steps taken by him regarding arrest of accused. He arrested accused; (i). Brij Mohan Singh (ii). Vijendra Singh @ Jamuni and (iii). Vijay Pal Singh on 03.07.1993. On their pointing out, he recovered some of the weapons used in the commission of crime in question and prepared a memo of the same. The same bears the signature of himself, accused and witnesses. He then proved the same, which was marked as (Ext-Ka-31).

36.8. It was lastly deposed by him that as per the order of Senior Superintendent of Police, Bulandshahar, the investigation of concerned case crime number was transferred to Incharge Inspector, Anoop Shahar namely S. K. Singh.

36.9. This witness was cross-examined on behalf of accused but the papers proved by him could not be proved as false nor the said witness himself could be dislodged as nothing adverse could be culled out from him. As such, his testimony remains intact.

37. PW-6 Inspector Santosh Kumar Singh, presently posted in Vigilance Unit Hydel, Mathura deposed before Court below as PW-6. This witness was posted as Station House Officer at Police Station-Debai on 08.07.1993. He was subsequently entrusted the investigation of concerned case crime number. On 08.07.1993 itself, he entered the inquest reports

(Panchnama) of deceased Ram Singh, Veerpal and Virendra in the case diary. He, thereafter, sent a letter dated 08.07.1993 to the Chief Medical Superintendent for medico legal report of the deceased to ascertain the cause of their death. He received the document (Ext-Ka-7), which is the Medico Legal Reprot dated 15.07.1993 prepared by PW-4 Dr. S. Kant Sharma, the Autopsy Surgeon. He has then stated that accused Girraj and Jag Mohan surrendered before Court on 16.07.1993. It was further stated that he submitted the report in respect of the proceedings under Section 82/83 Cr.P.C. initiated against the accused for securing their arrest. He also stated that he obtained an order from Court for initiating proceedings under Section 83 Cr.P.C. against accused Jaini Singh. Consequently, proceedings under Section 83 Cr.P.C. were initiated against accused Jaini Singh. He, thereafter, submitted the charge sheet dated 13.08.1993 against arrested accused Braj Mohan, Jag Mohan, Jamuni and Vijay Pal and not arrested accused Ratan Singh and Jaini. He also proved the aforesaid charge sheet, which was marked as (Ext-Ka-33).

37.1. This witness has further deposed that accused Ratan Singh was arrested on 20.08.1993 and then his statement was recorded. He also made an endorsement in the case diary of the articles sent to FSL Laboratory, Agra for examination, vide letter dated 19.08.1993.

37.2. According to this witness, accused Jaini Singh was arrested on 16.10.1993 and SI O.P. Pandey recorded his statement. This witness then goes to depose that the FSL report was received by SSI Deep Chandra. Thereafter, the same was submitted in Court by SSI Deep Chandra. He recognises his signatures as he was posted along with him. He, thereafter, entered the said report in the case diary on 26.03.1994. He also proved the same, which was marked as (Ext-Ka-34).

37.3. The accused were granted an opportunity by Court below to cross examine this witness. However, the accused did not avail the opportunity so granted.

38. PW-7 Om Prakash Pandey, SI Police Station-Bilari, District-Moradabad deposed before Court below as PW-7. On 02.07.1993, this witness was posted as Sub Inspector at Police Station-Debai, District-Bulandshahar. He was part of the police force, which went to the place of occurrence after the FIR was lodged. This witness has further stated that he prepared the inquest report (Panchnama) of the deceased on the dictation of Station House Officer. He, accordingly, proved the inquest reports (Panchnamas), which were marked as Exts-Ka-9, Ka-15 and Ka-21) respectively. He arrested accused Jaini Singh at Lucknow and took him on judicial remand. He, thereafter, recorded the statement of accused Jaini Singh and entered the same in the case diary.

38.1. In spite of opportunity having been granted by Court below, the accused did not cross examine this witness.

39. At the behest of prosecution, one Uma Shankar was summoned as a court witness. This witness deposed before Court below as CW-1. According to this witness, in the year, 2008, he was incharge of the Malkhana (Police Property Room). In his deposition before Court below, he has stated that the weapons recovered in connection with concerned case crime number were not given to him at the time of taking over charge of the Malkhana of Police Station-Debai. From perusal of the Malkhana Register, it is evident that the concerned articles (weapons) were received from the FSL Laboratory. The previous Malkhana Incharge had submitted his report that on account of water logging in the Malkhana, the goods kept therein were destroyed. Nothing remains of the same. There is an endorsement in the Malkhana Register of the articles destroyed. He produced the photo copy of the Malkhana Register and also the original

Malkhana Register. Upon examination, the same was marked as (Ext-Ka-22). The original letter by which, the articles/weapons pertaining to concerned case crime number were sent to FSL Laboratory is affixed on the Malkhana Register. He produced the photo copy of the same. Upon comparision of the same, it was marked as (Ext-Ka-22).

39.1. In spite of opportunity having been granted to the accused to cross examine this witness, the defence did not cross examine him.

40. Apart from relying upon the depositions of aforementioned prosecution witnesses, prosecution also relied upon documentary evidence in proof of it's case. The same is tabulated herein below;-

Ext-Ka-1	Written report dated 02.07.1993 submitted by PW-1 Prakaswati at Police Station Debai and proved by PW-1.
Ext-Ka-2	FIR dated 02.07.1993 lodged by PW-1 Prakashwati, prepared by PW-3 HCP 227 Rakesh Kumar and proved by PW-3
Ext-Ka-3	G.D. Entry No.2, prepared by Assistant Scriber Rajpal Singh and proved by PW-3 HCP 227 Rakesh Kumar
Ext-Ka-4	Post mortem report dated 03.07.1993 of deceased Ram Singh prepared by PW-4 Dr. S. Kant Sharma and proved by PW-4.
Ext-Ka-5	Post mortem report dated 03.07.1993 of deceased Veer Pal prepared by PW-4 Dr. S. Kant Sharma and proved by PW-4.
Ext-Ka-6	Post mortem report dated 03.07.1993 of deceased Virendra Singh prepared by PW-4 Dr. S. Kant Sharma and proved by PW-4.
Ext-Ka-7	Medico Legal Report of deceased prepared by PW-4 Dr. S. Kant Sharma, the Autopsy Surgeon and proved by PW-4.
Ext-Ka-8	Site plan of the place of occurrence prepared by PW-5 Shiv Prakash Mishra, Incharge Inspector, Police Station-Debai and proved by PW-5.

Ext-Ka-9	Inquest report (Panchnama) dated 02.07.1993 of deceased Ram Singh prepared by PW-5 Incharge Inspector Shiv Prakash Mishra and proved by PW-5.
Ext-Ka-10	Challan Lash prepared and proved by PW-5 Incharge Inspector Shiv Prakash Mishra
Ext-Ka-11	Photo Nash prepared and proved by PW-5 Incharge Inspector Shiv Prakash Mishra
Ext-Ka-12	Letter to CMO prepared and proved by PW-5 Incharge Inspector Shiv Prakash Mishra
Ext-Ka-13	Letter to CMO prepared and proved by PW-5 Incharge Inspector Shiv Prakash Mishra
Ext-Ka-14	Letter to RI prepared and proved by PW-5 Incharge Inspector Shiv Prakash Mishra
Ext-Ka-15	Inquest report (Panchnama) dated 02.07.1993 of deceased Virendra Singh prepared by PW-5 Incharge Inspector Shiv Prakash Mishra and proved by PW-5.
Ext-Ka-16	Chalan Lash prepared and proved by PW-5 Incharge Inspector Shiv Prakash Mishra
Ext-Ka-17	Photo Nash prepared and proved by PW-5 Incharge Inspector Shiv Prakash Mishra
Ext-Ka-18	Letter to CMO prepared and proved by PW-5 Incharge Inspector Shiv Prakash Mishra
Ext-Ka-19	Letter to CMO prepared and proved by PW-5 Incharge Inspector Shiv Prakash Mishra
Ext-Ka-20	Letter to RI prepared and proved by PW-5 Incharge Inspector Shiv Prakash Mishra
Ext-Ka-21	Inquest report (Panchnama) dated 02.07.1993 of deceased Veer Pal prepared by PW-5 Inspector Incharge Shiv Prakash Mishra and proved by PW-5.
Ext-Ka-22	Chalan Lash prepared and proved by PW-5 Incharge Inspector Shiv Prakash Mishra

Ext-Ka-23	Photo Nash prepared and proved by PW-5 Incharge Inspector Shiv Prakash Mishra
Ext-Ka-24	Letter to CMO prepared and proved by PW-5 Incharge Inspector Shiv Prakash Mishra
Ext-Ka-25	Letter to CMO prepared and proved by PW-5 Incharge Inspector Shiv Prakash Mishra
Ext-Ka-26	Letter to RI prepared and proved by PW-5 Incharge Inspector Shiv Prakash Mishra
Ext-Ka-27	Recovery memo regarding recovery of plain earth/earth mixed with blood from the place of occurrence and other places, pair of leather slippers (chappal).
Ext-Ka-28	Supurdaginama of the currency notes recovered from the bodies of three deceased prepared by PW-5 Investigating Officer/Incharge Inspector Shiv Prakash Mishra and proved by PW-5
Ext-Ka-29	Site Plan of the place from where recovery of weapon of assault was made.
Ext-Ka-30	Recovery of some of the weapons used in the commission of crime i.e. two Farsa and one Ballam (spear) prepared by PW-5 Inspector Incharge Shiv Prakash Mishra and proved by PW-5.
Ext-Ka-31	Recovery of some of the weapons used in the commission of crime i.e. two Farsa and one Ballam (spear) prepared by PW-5 Inspector Incharge Shiv Prakash Mishra and proved by PW-5.
Ext-Ka-32	Letter dated 08.07.1993 written by the SO, Police Station-Debai to the CMS for obtaining medico legal opinion regarding cause of death of deceased
Ext-Ka-33	Charge sheet dated 13.08.1993 prepared by PW-6 Inspector Santosh Kumar Singh and proved by PW-5.
Ext-Ka-34	FSL Report regarding body parts of deceased sent for

	chemical examination.
Ext-Ka-35	Letter along with the list regarding sending of material to FSL Laboratory
Ext-Ka-36	Letter along with the list regarding material sent to FSL Laboratory
Ext-Ka-37	FSL Report prepared by FSL Laboratory Agra

41. After the prosecution evidence was over, all the adverse and incriminating circumstances were put to the accused in question answer form for their version. We may point out again that while accused Ratan Singh died during the pendency of trial, three other accused namely Girraj Singh, Braj Mohan and Vijay Pal died during the pendency of present appeals. In view of above, we shall, therefore, refer to the statements of accused Jaini Singh, Jagmohan and Jamuni only as recorded under Section 313 Cr.P.C.

41.1. In reply to question no.-1, accused Jaini Singh stated that the sale deed was got executed fraudulently by Prakashwati from Prahlad Singh. After the death of Prahlad Singh, she entered into a compromise with Ratan Singh. In reply to question no.-14, he has stated that he is innocent. He received information of the occurrence while he was at Lucknow and had sent Braj Mohan and Vijendra to the village. Rest of the suggestions put to him were denied by repeatedly stating that it is false or he does not know.

41.2. Though this accused has pleaded alibi in his statement under Section 313 Cr.P.C. However, neither he himself deposed before Court below as a witness to prove the said plea nor he adduced any defence witness in proof of the said plea. Moreover, he has not come out with his version of the occurrence, therefore, the only version of the occurrence is the prosecution version.

41.3. Jagmohan. The statement of this accused under Section 313 Cr.P.C. is almost identical to that of accused Jaini Singh. In answer to question no.-1, he has stated that the sale deed was got executed fraudulently by Prakashwati. Rest of the suggestions made to him were denied either by saying that it is false or he does not know. In answer to question no.-14, this accused has stated that he is innocent and on account of village party politics, he has been falsely implicated in the crime in question. This accused has also not come out with his version of the occurrence. As such, the only version of the occurrence is the prosecution version. Apart from above, neither this accused deposed before Court below as a witness nor he adduced any defence witness to prove the plea of innocence raised by him in answer to question no.-14.

41.4. Jamuni. The statement of accused Jamuni is also identical to that of accused Jaini Singh. In answer to question no.-1, this accused has stated that Prakashwati fraudulently got the sale deed executed. Rest of the suggestions put to him were denied by either saying that it is false or he does not know. In reply to question no.-14, this accused has raised the plea of alibi by stating that information of the incident in question was received by him when he was at Lucknow. However, neither he deposed before Court below as defence witness to prove the plea of alibi raised by him nor he adduced any defence witness in proof of the plea of alibi raised by him. No other version of the occurrence has emerged in the statement of this accused. As such, the only version of occurrence is the prosecution version.

42. Though no oral evidence was adduced by the accused nor they themselves, deposed before Court below as defence witnesses, they however did file certain documents before court below. The same has also been noted by court below at internal page 20 of the impugned judgement, which is as follows:-

" The certified copy of the sale deed dated 16.8.1975 executed by Sri Prahlad Singh in favour of the complainant Smt. Prakashwati in respect of the land, photo copy of the sale deed dated 27.8.1975 executed by Sri Prahlad Singh in favour of Smt. Prakasshwati in respect of the land, photo copy of the plaint of O.S.No.51 of 1977 Prahlad Singh Vs. Smt. Prakashwati, photo copy of the compromise dated 3.7.79 filed in the above said case, photo copy of judgment in C.Misc. Case No.42 of 1982, papers relating to the illness of wife of Jaini Singh and photo copy of the death certificate of wife of Jaini. Apart from i.e.12 other papers were also filed from the side of the accused, which are Khatauni Intkhab of village Madwa District Raebareli, photo copy of Kisan Wahi of Kunwar Jagjeet Singh, photo copy of Kisan Wahi of Kunwar Ram Singh. Kptwajo pf Sardar Shamsher Singh, Photo copy of Khatauni of village Madwa, Photo copy of Ration Card, Photo copy of Pass Book of State Bank of India, Photo copy of Vijaya Bank, Photo copy of Driving Licence of Jaini Singh, Photo copy of Khatauni, copy of appointment letter of Jaini Singh. No. oral evidence has been adduced by the accused persons."

43. At this stage, it would be beneficial to refer to the prosecution case. The same has been crystallized by court below at internal pages 21/22 of the impugned judgement. The same is, accordingly, extracted herein-under;-

"As per prosecution case the complainant and the accused Ratan Singh, Jaini Singh, Girraj Singh, Braj Mohan, Jag Mohan and Jamni belong to one family, while accused Vijaypal Singh is the village Pradhan and Pattidar of accused. Father-in-law of the complainant had executed sale deed in her favour in respect of the agricultural land, due to which there was litigation between the complainant and Ratan Singh and his sons. On this account both the parties were inimical to each other. On the date of incident i.e. 1.7.1993 Rai Singh, Virendra, Veerpal, Nihal Singh, Roop Kishore came from village Sirsa P.S. Virla District Aligarh for participating in the talks for resolving the dispute between the parties at the instance

of village Pradhan. On that day at about 8 P.M. Rai Singh, Veer Pal Singh[brothers of the complainant] and Virendra Singh [son of the complainant] went with the accused persons to the place of village Pradhan accused Vijay Pal Singh. At about 12.00 in the night, alarm was being heard from out side the village, on which the complainant alongwith witnesses reached there. It was Moon lit night and the witnesses were also having torches with them. They saw accused Ratan Singh having Pharsha, Jagmohan with Pharsha, Girraj with Ballam, Jaini, Braj Mohan and Bijendra alias Jamni and Vijay Pal having lathis with them. All of them were seen assaulting Rai Singh, Veerpal singh and Virendra Singh with their weapons, due to which all the three succumbed to the injuries caused by the accused persons."

44. Court below upon examination of the prosecution case as noted above and evaluation of the evidence on record both oral and documentary, as well as the statements of accused recorded under Section 313 Cr.P.C. came to the conclusion that two points of determination arise for determination in the trial. The same are extracted herein under:-

(i). Whether all the accused persons were members of an unlawful assembly and were armed with deadly weapons like Farsa, Ballam and Lathies at the time of the date of incident.

(ii). Whether, all the accused persons in prosecution of the common object of said unlawful assembly committed triple murders of Ram Singh, Veer Pal Singh and Virendra Singh in the night intervening 1/2.07.1993 at about mid-night within Village -Khairpur, P.S. Debai, District-Bulandshahar.

45. On behalf of accused, the following submissions were urged before Court below in proof of their innocence;-

(i). No motive can be attached with the accused to commit the crime in question.

(ii). The FIR is ante-timed.

(iii). In the inquest report, neither the names of accused have been written nor it has been mentioned therein as to which accused caused injury to which of the deceased.

(iv). There was no source of light at the time of incident,

(v). PW-1 Prakashwati and PW-2 Nehal Singh are alleged to be eye witness of the occurrence. However, both the witnesses are interested and related witness.

(vi). There are material contradictions in the statements of PW-1 and PW-2.

(vii). The place of occurrence alleged by the prosecution is not the place of alleged occurrence. The corn crop standing on the land in dispute was not damaged and it is the Jwar and Bajra crop which was found destroyed.

(viii). As per post mortem report of the deceased, the cause of death of deceased could not be ascertained and viscera was preserved but there is no viscera report on the record.

(ix). All the injuries on the bodies of deceased persons are above chest, which creates a doubt regarding the manner of occurrence.

(x). Police has failed to produce the recovered material including the weapons of assault etc.

46. Ultimately, Court below upon threadbare scrutiny of the prosecution case and after evaluating the submissions urged on behalf of accused in proof of their innocence in the light of evidence on record, came to the conclusion that the accused are guilty of causing murder of Ram Singh, Veer Pal and Virendra Singh. Accordingly, Court below, vide judgment and order dated 27.11.2011/02.12.2011, convicted and sentenced the accused in the manner as noted above on the following grounds/reasons;

46.1. There was rivalry and enmity between the parties, because of sale deed of 31 bigha of agricultural land executed in favour of PW-1 Prakashwati by Prahalad Singh her father-in-law/ the common ancestor,

on account of above, there was clear motive with the accused to commit the crime in question, the incident in question was witnessed by P.W.-1, Prakashwati, first informant and P.W.2-Nehal Singh, both the eye witnesses have given a clear account of the manner of occurrence, though P.W.-1 and P.W.-2 were cross-examined at length on behalf of accused but they could not be dislodged as they remained consistent, the medical evidence clearly supports the occular version of the occurrence, the F.I.R. is not ante-timed as suggested on behalf of accused but a prompt one, the formal witnesses, who deposed before court below, have proved the papers relied upon by the prosecution and further the said formal witnesses in their depositions before court below remained consistent throughout, the defence failed to prove the fallacy in the prosecution case as alleged by them. P.W.-4, the Autopsy Surgeon, who had conducted post-mortem of the body of deceased, in his deposition before court below, has stated the cause of death of deceased was shock and asphyxia as a result of ante-mortem injuries sustained by the deceased, the same is clearly corroborated from the post-mortem report as numerous injuries caused by sharp edged weapon/ blunt weapon were found on the bodies of deceased and also the depositions of PW-1 and PW-2, the eye witnesses of occurrence, who have stated that all the accused were assaulting the deceased with the weapons in their hands i.e. Farsa, Ballam and Lathi, the recovery of some of the weapons of assault on the pointing of some of the accused clearly proves the guilt of accused.

47. Feeling aggrieved by the above judgment and order dated 29.11.2011/02.12.2011 passed by the Sessions Judge, Bulandshahar, the appellants, who are convicted accused, approached this Court by means of aforementioned Criminal Appeals.

48. During the pendency of present Criminal Appeals, the State Government passed an order dated 15.03.2017, whereby remission was

granted to accused Jaini Singh. The order dated 15.03.2017 is, accordingly, extracted herein below;-

"उत्तर प्रदेश शासन
कारागार प्रशासन एवं सुधार अनुभाग-2
संख्या-141/2017/2283/22-2-2016-17(19)/2016
लखनऊः दिनांकः 15 मार्च, 2017
आदेश

उत्तर प्रदेश के मा० राज्यपाल, भारत के संविधान के अनुच्छेद-161 के अधीन शक्तियों का प्रयोग करते हुए जिला कारागार, बुलन्दशहर के सिद्धदोष बन्दी जैनी सिंह (बन्दी संख्या-534/11) पुत्र श्री रतन सिंह, निवासी ग्राम-खैरपुर, थाना-डिबाई, जिला-बुलन्दशहर वर्तमान पता-11/2, बटलर रोड, लखनऊ, जिन्हें सत्र परीक्षण संख्या-983/1995 के अन्तर्गत भारतीय दण्ड विधान की धारा-302/149, 148 के अधीन दिनांक 02-12-2011 को मा० सत्र न्यायाधीश, बुलन्दशहर द्वारा आजीवन कारावास के दण्ड से दण्डित किया गया, की शेष सजा का परिहार करते हैं तथा यह आदेश देते हैं कि उक्त बन्दी द्वारा अपनी शेष दण्डावधि में शान्ति व्यवस्था बनाये रखने के लिए जिला मजिस्ट्रेट, बुलन्दशहर के संतोषानुसार दो जमानतें तथा उतनी ही धनराशि का एक जाती मुचलका प्रस्तुत करने पर चन्दी को कारागार से मुक्त कर दिया जाय।"

49. Pursuant to above order dated 15.03.2017, accused Jaini Singh was released.

50. Aforementioned order dated 15.03.2017 passed by the State Government came to be challenged by Prakashwati (first informant/mother and sister of deceased) before this Court by filing Criminal Misc. Writ Petition No. 22682 of 2017 (Prakashwati Vs. State of U.P. and Others). The writ petition came to be allowed by this Court, vide order dated 26.02.2021. Consequently, the order dated 15.03.2017 passed by the State Government was quashed.

51. Feeling aggrieved by the above order dated 26.02.2021 passed by this Court accused Jaini Singh approached the Supreme Court by filing SLP (Crl.) No. 5453 of 2021 (Jaini Singh Vs. State of U.P.). The same was

dismissed, vide order dated 30.07.2021. The order dated 30.07.2021 reads as under;-

"Heard learned counsel for the petitioner.

We do not find any ground to interfere with the order passed by the High Court. The Special Leave Petition is, accordingly, dismissed.

Pending application(s), if any, stands disposed of accordingly."

52. As a consequence of the above order dated 26.02.2011 passed by this Court, accused Jaini Singh surrendered before Court below on 24.03.2021. Since then, he is under incarceration.

53. Mr. V.P. Srivastava, the learned Senior counsel assisted by Mr. Rajeev Nayan Singh and Mrs. Neeja Srivastava, the learned counsel for appellants, in challenge to the conviction and sentence awarded to accused/appellants under the impugned judgment and order passed by Court below, made the following submissions in support of present appeals:-

(i). The accused have exercised the right of private defence as the deceased had come to the land of accused in the dead of night i.e. at 12:00 'O' clock to destroy the standing corn crop sown by them.

(ii). None of the accused have sustained any such injury on their person, which can be said to be the cause of death of deceased. None of the internal organs were found to be damaged by the Autopsy Surgeon. The Autopsy Surgeon, who had conducted post mortem of the bodies of deceased, came to the conclusion that cause of death of deceased can not be ascertained. Accordingly, the viscera of deceased was preserved for being sent to FSL Laboratory for chemical analysis. The Autopsy Surgon has clearly remarked in the post mortem report that the cause of death shall be ascertained after the receipt of viscera report. As per the FSL report, no foreign chemical compound was found in the body parts of deceased sent for chemical examination. In view of above, it cannot be

said that the accused have exceeded their right of private defence of person and property.

(iii). Since as per the post mortem report, the cause of death of deceased is unknown and further no foreign chemical compound was found in the body parts of deceased sent for chemical examination, therefore, no offence under Section 302 IPC can be said to be made out against accused/appellants.

(iv). The Autopsy Surgeon (PW-5) in his deposition before Court below has stated that the cause of death of deceased is shock and haemorrhage as a result of ante-mortem injuries. The same is a clear afterthought and also over and above the post mortem reports prepared by PW-5, wherein the Autopsy Surgeon has made a clear endorsement that cause of death cannot be ascertained and therefore, viscera is preserved. It further contains an endorsement that cause of death shall be ascertained after the viscera report is received. In view of above, the deposition of PW-5 to the extent, it assigns the cause of death of deceased is liable to be ignored.

(v). In the alternative, it was also urged by the learned Senior counsel that the occurrence had taken place on account of mischief on the part of deceased as they came to the land of accused late at night leading to grave and sudden provocation, therefore, there was no pre-determined mind on the part of accused to cause death of deceased. As such, offence complained of is covered under Exception 3 of Section 300 IPC and therefore, cannot travel beyond Section 304 Part-I IPC.

(vi). On the edifice of aforesaid submissions, the learned Senior counsel for appellants vehemently urged that present appeals be allowed and the impugned conviction and sentence awarded to accused/appellants by Court below be set aside/modified.

54. On the other hand, Mr. Kunwar Ritesh Kumar, the learned A.G.A. for State-opposite party-1 vehemently opposed the present appeals. He

strenuously urged that it is explicit from the record that there was pre-meditated mind on the part of accused to commit the crime in question. As per the deposition of PW-1 Prakashwati, the accused persons had come to her home. The Pradhan namely Vijay Pal stated that the family members should come to his place so that the dispute can be resolved. On the resentment shown by the first informant, to the offer that the family members of first informant accompany Vijay Pal to his place, accused Jaini rebuked by saying that there is nothing to fear as the matter shall be resolved today definitely. Secondly there is strong motive on the part of accused to commit the crime in question as Karan Singh son of Prahlad Singh had predeceased his father. On account of above, Prahlad Singh executed a registered sale deed dated 20.08.1975 in favour of Prakashwati, widow of Karan Singh, regarding 31 Bighas of agricultural land on account of which, there was rivalry and enmity between the parties. Thus the land dispute between the parties is the motive behind the occurrence. Lastly on account of act of accused, the injured died on the the spot immediately after the the assault was committed, as such the death of deceased was instantaneous. As such, there was knowledge and intention on the part of accused to cause the death of deceased.

54.1. On the above conspectus, the learned A.G.A. would submit that Court below has rightly convicted and sentenced the accused uniformly under Sections 302/149 IPC. Moreover, Court below has neither ignored any material piece of evidence nor has it misconstrued any vital evidence, therefore, no perversity can be attached to the impugned judgment either. The conviction and sentence awarded to accused/appellants commensurates with the gravity of charges alleged against them and is the outcome of due and logical appraisal and appreciation of the weight of evidence on record. He, therefore, contended that the present appeals are liable to be dismissed.

55. Mr. D.S. Bohra, the learned counsel representing first informant has also opposed the present appeals. However, he has not added anything new but has adopted the arguments raised by the learned A.G.A. in opposition to the present appeals.

56. In view of the submissions urged by the learned counsel for respective parties, prima-facie the primary question which requires consideration by this Court is whether the case in hand shall fall under Section 302 IPC as held by Court below or under Section 304 Part-I as suggested by the learned Senior counsel for appellants.

57. Before proceeding to analyse the submissions urged by the counsel for the parties, the circumstances supporting the accused and the incriminating circumstances emerging against the accused as are discernible from the record may be taken note of.

58. The following circumstances lead to an inference that the case in hand shall fall under Section 304 Part-I IPC.

(A). The incident giving rise to present criminal proceedings occurred in the night of 1/2.07.1993 at 12:00 ‘O’ clock in a field in which corn crop was sown.

(B). The field in which, the occurrence is alleged to have occurred is alleged to be belonging to the first informant Prakashwati as Prahlad Singh her father-in-law executed a registered sale deed of 31 Bighas of agricultural land.

(C). No documentary evidence was adduced by the prosecution to establish the cultivatory possession of first informant PW-1 Prakashwati over the land in dispute. As such, the burden required to be discharged under Section 110 of the Evidence Act was not discharged.

(D). No evidence was filed by the prosecution that subsequent to the registered sale deed executed by Prahlad Singh, the name of first

informant (PW-1 Prakashwati) came to be recorded in the revenue records and thereafter she became the recorded tenure holder (Bhumidhar) of the land in dispute/owner in possession of the land in dispute.

(E). PW-1 Prakashwati in her deposition before Court below has stated that the land, which came to her by reason of the sale deed executed in her favour by Prahlad Singh was either cultivated by herself or by subletting it to Fateh Singh and Hira Singh. However, Fateh Singh and Hira Singh were not adduced in evidence.

(F). PW-1 Prakashwati in her deposition has stated that the land, where the occurrence took place was sometimes cultivated by her and sometimes forcibly by the accused. However, the land in which, the occurrence took place was cultivated by her. However, except for this statement occurring in the deposition of PW-1 before Court below, no other evidence was adduced by the prosecution to prove and establish the possession of PW-1 over the land where the occurrence took place. The copy of Khasra, which is the document of possession was not filed by the prosecution before Court below to establish and prove the possession of PW-1 Prakashwati over the land, where the occurrence took place. No attempt was made by PW-1 Prakashwati to explain her continuous/uninterrupted possession over the land, where the occurrence took place. Once PW-1 Prakashwati in her deposition before Court below herself stated that sometimes the accused forcibly cultivated the same then it was incumbent upon her to explain the time, when she again came into possession as well as how she came in possession. However, no attempt was made by PW-1 Prakashwati in that regard. Since P.W.-1, Prakashwati wanted the court to believe the fact that she was in actual possession over the land where the occurrence took place, therefore, the burden was upon the prosecution itself to prove the said fact by leading cogent and reliable evidence. However, the prosecution has failed to discharge the said burden. As such, the burden required in terms of Section 103 of the Evidence Act was not discharged.

(G). The deceased Veerpal and Ram Singh are the brothers of first informant PW-1 Prakashwati. They are residents of District-Aligarh. Another accused Virendra, who is son of first informant/PW-1 used to reside at the place of his maternal grand parents (Nanihal). On the fateful day, all the deceased had come from Aligarh to Bulandshahar. How and why, the deceased reached the place of occurrence, in the dead of night, has not been explained by the prosecution.

(H). The sale deed executed by Prahlad Singh in favour of P.W.-1, Prakashwati was not filed by the prosecution before Court below in evidence. Further no attempt was made to identify the land where the occurrence took place with it's Survey Plot Number nor an effort was made to establish that the said Survey Plot Number is included in the sale deed executed by Prahlad Singh in favour of Smt. Prakashwati PW-1..

(I). Admittedly the registered sale deed executed by Prahlad Singh (the father-in-law of first informant/PW-1 Prakashwati) in favour of PW-1 was challenged before Civil Court by the accused.

(J). From the deposition of PW-1, it can be easily gathered that on account of the sale deed executed by Prahlad Singh regarding 31 Bighas of agricultural land in favour of first informant PW-1 Prakashwati, there was dispute/rivalry/enmity between the parties.

(K). The aforesaid circumstance is further exemplified from the fact that when the Pradhan Vijay Pal and other accused came to the house of first informant at around 08:00 p.m. and requested that they i.e. (son & brothers of first informant) should come to his place for settlement of dispute, the first informant i.e. mother and sister of deceased showed her resentment regarding the deceased i.e. her son and brothers accompanying the accused to the house of Pradhan. However, in spite of above, she readily agreed to the same subsequently. The said circumstance remains unexplained by the prosecution.

(L). However, irrespective of above, there is nothing on record to show that any attempt was made by first informant PW-1 to find out the whereabouts of her son & brothers from 08:00 p.m. to 12:00 a.m. There is no evidence to show the whereabouts of deceased from 08:00 p.m. to 12:00 mid night either.

(M). The accused can be classified as aggressors only when it is established that first informant PW-1 Prakashwati was in actual cultivatory possession of the land, where the occurrence took place i.e. the discharge of burden regarding ownership in respect of agricultural land.

(N). Since the prosecution has failed to establish the actual cultivatory possession of the first informant PW-1 Prakashwati over the land, where the occurrence took place, which was necessarily required in terms of Section 110 of the Evidence Act, therefore, the accused cannot be classified as aggressors.

(O). The right of Private Defence of person and property is recognized under the Code i.e. Sections 95-106 I.P.C.

(P). Since the deceased themselves came to the field of accused and attempted to damage the corn crop sown by accused in the dead of night i.e. 12:00 ‘O’ clock, therefore, they committed mischief, which lead to grave and sudden provocation. As such, there was no pre-meditated mind on the part of accused to cause the death of deceased. The accused have exercised their right of private defence. Moreover, the accused were not armed with any firearm or any other dangerous weapon but with Lathi, Ballam (spear) and Farsa, which necessarily, farmers carry with them when go out to their fields at night.

(Q). The case in hand is thus one of culpable homicide not amounting to murder and is, therefore, covered under Exception-3 of the exceptions contained in Section 300 IPC and Exception 4 to Section 300 IPC.

Consequently, the offence complained of shall not travel beyond Section 304-Part-I IPC.

Circumstances adverse to the accused;-

59. (i). The deceased were well acquainted with the accused and therefore, the accused could easily recognize the deceased even in the dead of night. Therefore, the exclamation made by the accused at the time of occurrence that miscreants have come to the field to destroy the crops is unbelievable.

(ii). There is no evidence to show that there was a sudden act leading to grave and sudden provocation resulting in uncontrolled use of force and thereby, causing the death of deceased.

(iii). No evidence has been adduced by the accused to show their cultivatory possession over the land, where the occurrence took place.

(iv). There was a pre-meditated mind with the accused to cause the murder of deceased as it has come in the deposition of PW-1 Prakashwati that at the time of departure of accused along with the deceased, the accused exclaimed that today the matter shall be solved. The exact words occurring in the deposition of P.W.-1 may be extracted herein below;-

"मेरा लडका वीरेन्द्र मेरे गांव मे ननिसाल में रहता था। तभी रतन सिंह गिरराज, जैनी, बृज मोहन, जग मोहन विजेन्द्र व विजयपाल प्रधान मेरे घर आये और मेरे भाईयो से प्रधान ने कहा कि हमारे घर चलो मैने रात के समय जाने से मना किया तो जैनी ने कहा कि मामाजी डरो मत प्रधान जी के यहाँ चला। ये सभी बड़े प्यार मोहब्बत से बोले कि प्रधान जी के यहाँ चलो आज फेसला हो जायेगा।"

(v). There is clear motive in causing the murder of Virendra Son of PW-1 Prakashwati because of the land dispute and that he was the sole male disendant of PW-1 Prakashwati, first informant.

(vi). The injuries found on the bodies of deceased clearly show that the deceased were assaulted repeatedly, which in turn reflects the guilty mind of accused to commit assault upon them till their death i.e. uncontrolled

use of force. This shows that there was knowledge and intention on the part of accused to cause the death of deceased.

(vii). The Autopsy Surgeon, who had conducted post mortem of the bodies of deceased has clearly opined in his deposition before Court below as PW-4 that the cause of death of deceased is shock and haemorrhage as a result of ante-mortem injuries.

(viii). As such, the medical evidence clearly supports the ocular version of the occurrence as unfolded in the depositions of P.W.-1 and P.W.-2

(ix). Even if the Autopsy Surgeon has not mentioned the cause of death of deceased in the post mortem report or no foreign chemical compound was found in the body parts of deceased sent for chemical examination, it cannot be said that accused are not guilty of committing the crime in question, which is primarily an offence under Section 302/149 IPC because the death of deceased was instantaneous i.e. immediately after the occurrence on account of acts of assault by accused on the deceased.

(x). The Autopsy Sugeon can explain the post mortem report in his deposition before Court below and in case of any ambiguity in the post mortem report and the oral deposition, the oral evidence shall prevail.

(xi). In view of the manner in which criminality was committed by the accused i.e. deliberate and repeated blows on the bodies of deceased with Farsa, Lathi & Ballam, the deceased had sustained numerous incised and lacerated wounds on their person. As such, the case in hand shall not fall within Exception 3 of exceptions to Section 300 IPC or Exception 4 of the exceptions of Section 300 IPC but under Section 302/149 IPC as rightly held by Court below.

(xii). PW-1 Prakashwati (first informant) and PW-2 Nehal Singh have clearly supported the prosecution in their deposition before Court below. They have given a clear and reliable account of the cause of occurrence,

the manner of occurrence, the presence of accused at the time and place of occurrence and the weapons used by each of the accused. As such, neither the cause of occurrence nor the manner of occurrence nor the presence of accused at the time and place of occurrence itself can be doubted. The prosecution has thus proved the guilt of accused beyond reasonable doubt.

60. Having heard, the learned Senior counsel for appellants, the learned A.G.A. for State-opposite party, the learned counsel representing first informant, upon perusal of record and particularly the circumstances supporting the prosecution case and the incriminating circumstances that have emerged on record against accused, this Court finds that the following questions merit consideration by this Court;-

Q-1. Whether the deposition of PW-4 Dr. S. Kant Sharma, the Autopsy Surgeon, who had conducted postmortem of the bodies of deceased, can be discarded to the extent, he has deposed regarding the cause of death of deceased more particularly, when the same could not be ascertained by him at the time of postmortem report and therefore, viscera of the deceased was preserved followed by an endorsement in the post mortem itself that the cause of death of deceased shall be ascertained after the receipt of the FSL report but no foreign chemical compound was found in the body parts of deceased sent for chemical examination?

Q-2. Whether the accused/appellants can be classified as aggressors even when the prosecution failed to establish the actual physical/cultivatory possession of PW-1 Prakashwati over the land in dispute as required under Section 110 of the Evidence Act?

Q-3. Whether the prosecution has discharged it’s burden in terms of Section 103 of the Evidence Act by leading cogent and reliable evidence to make the Court believe her case that first informant PW-1 is the rightful owner in possession of the land in dispute?

Q-4. Whether in view of the peculiar facts and circumstances of the case as have emerged on record, the case in hand shall fall within Section 304 Part-I IPC being covered under the 3rd exception to Section 300 IPC?

Q-5. Whether the conviction and sentence awarded to accused-appellants under Sections 302/149 IPC uniformly and to some under Section 147 IPC and few under Section 148 IPC can be sustained in the facts and circumstances of the case.

Question No.-1;

61. The first question is taken first. Admittedly PW-4 Dr. S. Kant Sharma conducted autopsy on the bodies of deceased. This witness had prepared post mortem reports of the bodies of deceased, which are Exts-Ka-4, Ka-5 and Ka-6. However, no opinion regarding the cause of death of deceased has been mentioned therein. Meaning thereby that the cause of death of deceased could not be ascertained by the Autopsy Surgeon at the time of autopsy on the bodies of deceased. Accordingly, the viscera of deceased was preserved for being sent to FSL Laboratory for verico chemical analysis. The Autopsy Surgeon has made a clear remark in the Post-Mortem report that the cause of death of deceased shall be ascertained after the receipt of viscera report. The FSL report was submitted on 20.08.2003 (Ext-Ka-37). However, as per the said FSL report, no foreign chemical compound was found in the body parts of deceased sent for chemical examination.

62. Irrespective of above, the Autopsy Surgen, in his deposition before Court below has opined that the cause of death of deceased is shock and haemorrhage as a result of ante-mortem injuries. This witness has further explained that some of the injuries sustained by the deceased are incised wounds, which could have been caused by a sharp edged weapon like Farsa and Ballam (spear), whereas, the lacerated wounds could have been caused by Lathi. He has, however, failed to further identify as to which of

the injuries were caused by Farsa and which of the injuries were caused by a Ballam (spear).

63. Mr. V.P. Srivastava, the learned Senior counsel for appellants has seriously castigated the deposition of the Autopsy Surgeon to the extent, he has assigned the cause of death of deceased. According to the learned Senior counsel, the deposition of Autopsy Surgeon to the extent noted above is unworthy of acceptance and therefore, liable to be discarded. On the day, post mortem of the bodies of deceased were conducted, there was no such reason discernible from record, which prevented the Autopsy Surgeon from giving his opinion regarding the cause of death of deceased. As the Autopsy Surgeon himself could not specifically opine regarding the cause of death of deceased, therefore, the viscera of deceased was preserved for being sent to FSL Laboratory for chemical analysis. He then referred to the post mortem reports of deceased and on basis thereof, he contends that the Autopsy Surgeon has himself observed in writing that cause of death of deceased shall be ascertained after the receipt of FSL report. Admittedly, no foreign chemical compound was wound in the body parts of deceased sent for chemical examination as per the FSL report dated 03.08.2003. As such, there is no cause of death of deceased. Thus the cause of death of deceased pointed out by the Autopsy Surgeon in his deposition before Court is nothing else but exaggeration, embellishment and also contradictory to his previous statement under Section 161 Cr.P.C., where also the cause of death of deceased has not been mentioned. Thus the improvement made by the Autopsy Surgeon in his deposition before court below regarding the cause of death of deceased is not worthy of acceptance being an afterthought. However, as no plausible explanation regarding above has been offered by the Autopsy Surgeon, in his deposition before Court below, the above-mentioned opinion occurring in the deposition of the Autopsy Surgeon is, therefore, liable to be discarded by this Court.

64. Per contra, the learned A.G.A. Mr. Kunwar Ritesh Kumar vehemently opposed the submissions urged by the learned Senior counsel. According to the learned A.G.A., the deposition of Autopsy Surgeon regarding the cause of death of deceased is only explanatory, meaning thereby that the Autopsy Surgeon has explained the post mortem report by giving better details. Therefore, the said part of the deposition of the Autopsy Surgeon in both reliable and acceptable.

65. At the first flush, the submissions urged by the learned Senior counsel did raise over eye-brows. However, upon deeper scrutiny, we find that the same is devoid of substance.

66. In order to answer the question as noted above, three primary questions be dealt with regarding the statement of Autopsy Surgen as a prosecution witness;

(A). Whether the opinion expressed by the Autopsy Surgeon in the post mortem report is the last word and not open to any further explanation?

(B). In case of inconsistency/contradiction in the documentary evidence, which at present in the post mortem report and the oral evidence which is the deposition of the Autopsy Surgeon (PW-4) which one shall prevail?

(C). Whether the cause of death of deceased with reference to the post mortem reports can be inferred by the Court itself or not?

67. The post mortem repost is only a reliable suggestive piece of evidence and ultimately, it is the Court which has to conclude regarding the cause of death prima-facie as per legally admissible material on record as Court is expert of experts. However, due regard is required to be given to the report of the expert.

68. The post mortem report falls in the realm of expert opinion. Therefore, by reason of Section 45 of the Evidence Act, the expert, who had prepared the post mortem report is required to appear before Court and prove the

same. This admittedly has been done and therefore, there is no issue on that score.

69. The controversy, which has arisen in this case that in case of inconsistency in between the medical report and oral evidence which one shall prevail. The same is is no longer res-integra. At this stage, we may refer to the judgement of Supreme Court in **State of Haryana Vs. Bhagrath and Others, (1999) 5 SCC 96,** wherein Court has also dealt with aforesaid issue. Paragraphs 15 and 16 of the aforesaid report are relevant for the controversy noted above. Accordingly, the same are reproduced herein below;-

"15. The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject.

16. Looking at the width of the wound on the neck (4.5 cm) and its length (14 cm) a doctor should not have ruled out the possibility of two successive strikes with a sharp weapon falling at the same situs resulting in such a wide incised wound. If the doctor does not agree to the possibility of causing such a wound the doctor should have put forth cogent reasons in support of such an opinion. But PW 7 did not give any such reason for the curt answer given by him that such an injury could not have been caused by two strikes with the same weapon or with

different weapons of the same type. We are, therefore, not persuaded to entertain any doubt regarding the prosecution version on that score."

70. Reference may also be made to the judgment of Supreme Court in **Ghulam Hassan Beigh Vs. Mohammad Maqbool and Others, (2022) 12 SCC 657,** wherein Court has dealt with an issue similar in hand in paragraph 31 of the report. Accordingly, the same is reproduced herein below;-

"31. To put it in other words, whether the cause of death has any nexus with the alleged assault on the deceased by the accused persons could have been determined only after the recording of oral evidence of the eyewitnesses and the expert witness along with the other substantive evidence on record. The post-mortem report of the doctor is his previous statement based on his examination of the dead body. It is not substantive evidence. The doctor's statement in court is alone the substantive evidence. The post-mortem report can be used only to corroborate his statement under Section 157, or to refresh his memory under Section 159, or to contradict his statement in the witness box under Section 145 of the Evidence Act, 1872. A medical witness called in as an expert to assist the court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by explaining the terms of science so that the court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the court."

71. In view of aforesaid authoritative pronouncements of Supreme Court, the ultimate conclusion, which is logically deduceable is that the Autopsy

Surgeon can explain the post mortem report in his deposition before Court. As such, that part of the deposition of P.W.-4 whereby he has explained the cause of death of deceased shall not fall in the category of embellishment, exaggeration or an after thought as suggested by the learned Senior counsel. Once the post-mortem report stands proved, the injuries found on the body of deceased also stand proved. The cause of death opined by the Autopsy Surgeon in his deposition before court below is the outcome of logical conclusion or to put in other way, the only conclusion which could be drawn from the post mortem report. As such, the contention raised by the learned Senior counsel in challenge to the cause of death of deceased opined by the Autopsy Surgeon, in his deposition before Courrt below, even though, it is beyond the post mortem report, is answered against the accused. We thus hold that the opinion given by Autopsy Surgeon PW-4 in his deposition before Courrt below regarding the cause of death of deceased is both permissible and reliable being a logical outcome and that no other view is possible regarding the cause of death of deceased as per the injuries found on the body of deceased and mentioned in the post mortem report.

Question No.-2 -

72. Considering the gravity of offence in hand, we feel it necessary to examine the said question more deeply as much depends upon the fate of the answer to this question.

73. Section 110 of the Evidence Act deals with burden of proof of ownership. The same reads as under;-

"Section 110 of the Evidence Act- Burden of proof as to ownership-

When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

74. It is the specific case of PW-1 Prakashwati, the first informant that the land from where the dead bodies of deceased were recovered, which according to her, is also the place of incident, belongs to her. The basis of title regarding same is the registered sale deed dated 16.08.1975 executed by Prahlad Singh, the common ancestor of the parties/father-in-law of Prakashwati on account of death of Karan Singh (Son of Prahlad Singh) and husband of PW-1 Prakashwati.

75. However, merely on an execution of sale deed regarding agricultual land, a person cannot be deemed to be in possession over the land, which is subject matter of sale deed. Therefore, firstly the burden was upon the prosecution to establish that subsequent to the sale deed, the first informant, PW-1 Prakashwati became the owner/tenure holder of the land, where the occurrence took place as her name was recorded in the revenue records regarding the land, which is the subject matter of sale deed. Admittedly, this burden has not been discharged by the prosecution as neither the certified copy of the sale deed was filed by the prosecution in evidence before Court below. Secondly no attempt was made to identify the Survey Plot Number/Khasra No. of the land, where the occurrence took place nor an attempt was made to establish that the said land is included in the aforementioned sale deed.

76. No document was adduced by the prosecution to establish the fact that subsequent to the sale deed referred to above, the name of vendee i.e. PW-1 Prakashwati came to be recorded in the revenue record qua the land, which is the subject matter of sale deed as Bhumidhar. The sale deed was executed in favour of Prakashwati in the year, 1975, whereas the incident occurred in the year, 1993. In spite of the fact that a period of 18 years had rolled by, there was no change in the record of rights i.e. Khatauni. In view of above, it cannot be presumed that the first informant PW-1 Prakashwati became the owner in possession of the land in dispute. The prosecution in order to prove the guilt of accused for an offence under

Section 302 IPC was therefore, under heavy burden to establish that first informant PW-1 was in actual cultivatory possession over the land in dispute. Only, if the prosecution succeeds in establishing so, can the accused be classified as aggressors.

76.1. At this juncture, it would be appropriate to refer to the deposition of PW-1 Prakashwati, wherein she has stated that the land sold to her under the sale deed executed by Prahlad Singh was cultivated by herself or by sub-letting it to Fateh Singh and Hira Singh and no one else. She has further stated that sometimes, the accused forcibly cultivated the same. However, the land, where the occurrence took place, was being cultivated by her and corn crop was sown in the same.

76.2. The deposition of PW-1 Prakashwati regarding cultivatory possession over the land, where the occurrence took place is devoid of material particulars. No attempt was made by PW-1 Prakashwati to substantiate the said statement. Neither the details of land, which was forcibly cultivated by the accused has been mentioned nor the time period, in which, forcible cultivation was made by accused has been given. Similarly, no material particulars have been stated as to when and how and in which surrvey plot nos., she entered into possession or how her possession was long and uninterrupted possession, has also not been detailed. Fateh Singh and Hira Singh were also not adduced in evidence to prove the factum of sub-letting alleged by PW-1 Prakashwati.

76.3. Thus, the prosecution has failed to prove that the first informant i.e. Prakashwati PW-1 was in cultivatory possession over the land in dispute since long and at the time of occurrence. A very paradoxical situation has emerged rather. Even though, PW-1 Prakashwati, the first informant is not the recorded tenure holder of the land, where the occurrence took place as there is no evidence in that regard yet she alleges to be in possession over the same. Admittedly, the copy of Khasara, which is the

document of possession was not filed before Court below. PW-1 Prakashwati rather miserably failed to prove and establish her possession over the land in dispute from before the date of occurrence or on the date of occurrence. Therefore, the burden as required under Section 110 of the Evidence Act was not discharged by the prosecution. As such, the prosecution failed to discharge the burden as required under Section 110 of the Evidence Act and therefore, failed to prove that PW-1 Prakashwati was in actual cultivatory possession over the land, where the occurrence took place.

77. Reference in this regard be made to the judgment of Supreme Court in **Ram Pat and Others Vs. State of Haryana, (2009) 7 SCC 614**, wherein Court has dealt with the provisions of Section 110 of the Evidence Act with reference to agricultural land in a criminal case. Paragraphs 34 and 35 of the report are relevant for the controversy in hand. Accordingly, the same are reproduced herein below;-

"34. The sole question, therefore, which arose for consideration before the learned trial judge and consequently before the High Court was as to whether the purported overt acts committed by the accused on 28.6.1993 would amount to `settled possession' so as to enable them to exercise their right of private defence in respect of the property.

35. Strong reliance has been placed before the learned trial judge as also before us on Puran Singh & Ors. vs. The State of Punjab [(1975) 4 SCC 518] wherein Fazal Ali, J. speaking for the Bench considered the earlier decision of this Court in Munshi Ram vs. Delhi Administration [(1968) 2 SCR 455], to hold:

"...This particular expression has persuaded the High Court to hold that since the possession of the appellants party in this case was only a month old, it cannot be deemed to be a settled possession. We, however, think that this is not what this Court meant in defining the nature of the

settled possession. It is indeed difficult to lay down any hard and fast rule as to when the possession of a trespasser can mature into a settled possession. But what this Court really meant was that the possession of a trespasser must be effective, undisturbed and to the knowledge of the owner or without any attempt at concealment. For instance a stray or a casual act of possession would not amount to settled possession. There is no special charm or magic in the word 'settled possession' nor is it a ritualistic formula which can be confined in a strait jacket but it has been used to mean such clear and effective possession of a person, even if he is a trespasser, who gets the right under the criminal law to defend his property against attack even by the true owner. Similarly an occupation of the property by a person as an agent or a servant at the instance of the owner will not amount to actual physical possession. Thus in our opinion the nature of possession in such cases which may entitle a trespasser to exercise the right of private defence of property and person should contain the following attributes:

(i) that the trespasser must be in actual physical possession of property over a sufficiently long period;

(ii) that the possession must be to the knowledge either express or implied of the owner or without any attempt at concealment and which contains an element of animus prossendie. The nature of possession of the trespasser would however be a matter to be decided on facts and circumstances of each case;

(iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced in by the true owner; and

(iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the

crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession, in which case the trespasser will have a right of private defence and the true owner will have no right of private defence.

These principles logically flow from a long catena of cases decided by this Court as well as other High Courts some of which have been referred to in the judgment of this Court in Munshi Ram's case (supra)."

xxx xxx xxx "18. The second point that falls for determination is as to what is the extent of right of private defence which the accused can claim in this case? In this connection, the High Court has given a finding that since the prosecution party had entered the land in. possession of the accused and were trying to plough it, the appellants should have taken recourse to the public-authorities instead of indulging in free fight with the prosecution. In other words, the High Court found that the right of private defence available to the accused was under the limitations provided for in Sections 99 to 102 of the Indian Penal Code and these limitations apply to the facts of the present case, and the accused cannot claim any right of private defence. With respect we find ourselves unable to agree with this somewhat broad statement of the law. It is true that the right of private defence of person or property is to be exercised under the following limitations:

(i) that if there is sufficient time for recourse to the public authorities the right is not available;

(ii) that more harm than necessary should not be caused;

(iii) that there must be a reasonable apprehension of death or of grievous hurt to the person or damage to the property concerned."

(See also Rame Gowda (Dead) by L.Rs. vs. M. Varadappa Naidu (Dead) by L.Rs. & Anr. [(2004) 1 SCC 769] The four attributes of settled possession referred to in Puran Singh (supra), in our opinion, ought to be read conjunctively and not disjunctively."

78. When the facts of the present case as noted herein above are examined in the light of above noted observations made by the Supreme Court, there is no room of doubt that the prosecution has failed to establish that first informant Prakashwati PW-1 was in actual cultivatory possession of the land from where the dead bodies of deceased were recovered/place of incident in the manner as observed by the Apex Court in aforementioned judgment. In view above, the accused cannot be classified as aggressors.

79. As a logical conclusion of the aforesaid discussion, we conclude that prosecution has failed to discharge it's burden of proving the fact that first informant PW-1 Prakashwati was in cultivatory possession over the land in dispute from much before the time of occurrence or at the time of occurrence. As such, the accused are entitled to the benefit of same. It is, accordingly, answered by holding that since the prosecution i.e. PW-1 has failed to discharge the burden in terms of Section 110 of the Evidence Act, the accused cannot be classified as aggressors.

Question No.-3.

80. The field in which, corn crop was sown is the place of occurrence from where, the dead bodies of deceased were recorded. It has come in the deposition of PW-1 that after the death of her husband, Karan Singh, her father-in-law Prahlad Singh had executed a registered sale deed dated 16.08.1975 regarding 31 Bighas of agricultural land in her favour. The land where the occurrence took place is alleged to be mentioned in the said sale deed. She has further stated that the said land was either cultivated by herself or by sub-letting the same to Fateh Singh and Hira Singh and no one else. She has also stated that land was being cultivated

by herself and sometimes the accused forcibly cultivated the same. However, the land where the occurrence took place was cultivated by her. It is thus the specific case of the prosecution that first informant PW-1 was in actual cultivatory possession of the land, where the occurrence took place/from where the dead bodies of deceased were recovered. Thus what can be denuded from above is that first informant PW-1 Prakashwati alleges that she was in actual cultivatory possession over the land, where the occurrence took place or from where the dead bodies of deceased were recovered and therefore, the accused are aggressors as they had come to the said land of first informant i.e. PW-1 in the dead of night of the fateful day, which is 1/2.07.1993.

81. The logical corollary of above is that the prosecution wants the Court to believe that first informant PW-1 was in actual cultivatory possession of the land, where the occurrence took place or from where the dead bodies of deceased were recovered and therefore, the accused are aggressors.

82. Section 103 of the Evidence Act deals with burden of proof as to particular fact. It reads as under;-

"Section 103 of the Evidence Act -Burden of proof as to particular fact. -

The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

83. Admittedly, 31 Bighas of agricultural land was sold by Prahlad Singh to PW-1 Prakashwati, the first informant, vide registered sale deed dated 16.08.1975. Prosecution did not file in evidence the certified copy of the aforesaid sale deed. Even though, the certified copy of the sale deed was filed by the accused before Court below, no attempt was made by the prosecution to prove and establish the Survey Plot No./Khasra No. of the

land, where the occurrence took place/from where the dead bodies of deceased were recovered and that the said land/survey plot number, is mentioned in the sale deed referred to above. Except for a bold statement in the deposition of PW-1 that Prahlad Singh, her father-in-law had executed a registered sale deed of 31 Bighas of agricultural land, in her favour and she is cultivating the same, there is no other evidence on record.

84. Agricultural land in the State of U.P. at the relevant point of time were governed by the provisions of The U.P. Zamindari Abolition & Land Reforms Act, 1952. Under the aforesaid Act, State is the ultimate owner of agricultural land. The agriculturists, who are the tenure holders, have transferable or non transferable rights. The person in whose favour, the land is recorded is called Bhumidhar and in case, he is having transferable rights, he is described as Bhumidhar with transferable rights. Khatanui is the document to title, which denotes the name of the recorded tenure holder i.e. whose name is recorded in the revenue record over particular land. Khasra is the document of possession, which proves the possession of a person over particular land. In the present case, neither of the said documents were filed by the prosecution before Court below.

85. Apart from above, upon execution of a sale deed, which is a transfer other than natural succession then proceedings under Section 34 of the U.P. Land Revenue Act, have to be initiated by the vendee for getting the name of transferee (vendee) to be recorded in the revenue records qua the land, which is the subject matter of sale as there is no automatic mutation. However, no document was filed by the prosecution before Court below to show that subsequent to the sale deed executed by Prahlad Singh, proceedings under Section 34 of the U.P. Land Revenue Act, were initiated for getting the name of vendee i.e. Smt. Prakashwati PW-1 to be recorded in the revenue records qua the land so transferred as Bhumidhar with transferable rights. The order, if any, passed by the competent

authority directing therein that the name of vendee Smt. Prakashwati be recorded in the revenue records was filed in evidence and lastly that pursuant to such an order of competent authority, the name of PW-1 Prakashwati is recorded. Once the vendee herself is not the recorded tenure holder of the land, where the incident took place, therefore, she could not be in actual cultivatory possession over the land, where the occurrence took place.

86. On the above conspectus of facts and law, the logical conclusion is that though a registered sale deed of 31 Bighas of agricultural land was executed by Prahlad Singh, the common ancestor of the parties in favour of his widowed daughter-in-law Prakashwati PW-1 but the vendee i.e. Prakashwati never came to be recorded as the tenure holder of the said land. The said conclusion gets further fortified from the facts that neitther the copy of Khatauni nor the Khasra of the land, where the occurrence took place was produced in evidence by PW-1 Prakashwati, the first informant to establish her actual cultivatory possession over the said land. As such, the prosecution has failed to discharge the said burden, which it was required to discharge in terms of Section 103 of the Evidence Act i.e. the failure to lead evidence to make the Court believe a particular fact. In view of above, the accused cannot be classified as aggressors.

87. The view taken by us stands fortified by the judgment of Supreme Court in **Jayantibhai Bhenkar Bhai Vs. State of Gujarat, (2002) 8 SCC 165.** Paragraph 19 of the report is relevant for the controversy in hand. The same is accordingly reproduced herein below;-

"19. The plea of alibi flows from Section 11 and is demonstrated by Illustration (a). Sarkar on Evidence (15th Edn., p. 258) states the word "alibi" is of Latin origin and means "elsewhere". It is a convenient term used for the defence taken by an accused that when the occurrence took place he was so far away from the place of occurrence that it is

highly improbable that he would have participated in the crime. Alibi is not an exception (special or general) envisaged in the Penal Code, 1860 or any other law. It is only a rule of evidence recognized in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. The burden of proving commission of offence by the accused so as to fasten the liability of guilt on him remains on the prosecution and would not be lessened by the mere fact that the accused had adopted the defence of alibi. The plea of alibi taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving the defence of alibi. But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of alibi to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence. An obligation is cast on the court to weigh in scales the evidence adduced by the prosecution in proving the guilt of the accused and the evidence adduced by the accused in proving his defence of alibi. If the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the place and time of occurrence, the court would evaluate the prosecution evidence to see if the evidence adduced on behalf of the prosecution leaves any slot available to fit therein the defence of alibi. The burden of the accused is undoubtedly heavy. <u>This flows from Section 103 of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. However, while weighing the prosecution case and the defence case, pitted against each other, if the balance tilts in favour of the accused, the prosecution</u>

***would fail and the accused would be entitled to the benefit of that reasonable doubt which would emerge in the mind of the court.*"**

88. Accordingly, Question No.-4 is answered in favour of the accused by holding that since the prosecution wanted the Court to believe that PW-1 Prakashwati was in possession over the land, where the occurrence took place on the date of occurrence/for a considerable period of time but the prosecution has failed to prove that the first informant/PW-1 Prakashwati (vendee of the registered sale deed dated 16.08.1975) was the recorded tenure holder of the land in dispute and also in actual cultivatory possession of the land, where the occurrence took place. As such, the accused cannot be classified as aggressors. In short, since the prosecution has failed to discharge the burden in terms of Section 103 of the Evidence Act i.e. the Court should believe the fact that PW-1 Prakashwati was in possession over the land, where the occurrence took place, the accused cannot be classified as aggressors.

QUESTION NOs.-4 and 5;-

89. This brings us to deal with Question Nos. 4 and 5, which are not only inter-linked but also inter-twined. Therefore, they are being dealt with together. Appellants have been convicted uniformly under Section 302 read with Section 149 I.P.C. The said conviction has been awarded to accused-appellants by court below primarily on the ground that present case is a case of direct evidenc. There are two eye witnesses of the occurrence i.e. P.W.-1, Prakashwati, the first informant (mother and sister of deceased) and P.W.-2 Nehal Singh. Court below has concluded that both the prosecution witnesses of fact i.e. P.W.-1 and P.W.-2 are eye witnesses of the occurrence, their presence at the time and place of occurrence is proved beyond shadow of doubt, their depositions regarding the time of occurrence, the place of occurrence, the manner of occurrence, the scene at the time of occurrence, the presence and role of accused at the

time and place of occurrence are clear, categorical and unambiguous, therefore, worthy of acceptance. The medical evidence supports the ocular version. On the said findings, the accused have been convicted under Section 302/149 IPC by court below.

90. At this stage, it needs to be noticed that in a case of direct evidence, the court is required to consider two questions:-

(a). The presence of the witness at the time and place of occurrence.

(b). Whether his deposition clearly establishes his presence at the place of occurrence and that his deposition regarding the manner of occurrence is both credible and reliable i.e. not factitious.

91. The Apex Court in the case of **Shahaja Alias Shahajan Ismail Mohd. Shaikh Vs. State of Maharashtra, (2023) 12 SCC 558** has observed about the manner in which the deposition of an eye witness is to be considered. Paragraph 29 of the said report is relevant for the controversy in hand. Accordingly, the same is reproduced herein-under:-

"29. The appreciation of ocular evidence is a hard task. There is no fixed or straitjacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:

29.1. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief

29.2. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

29.3. When eyewitness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.

29.4. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

29.5. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

29.6. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

29.7. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

29.8. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

29.9. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

29.10. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

29.11. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

29.12. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

29.13. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness."

92. When the depositions of two prosecution witnesses of fact i.e. PW-1 and PW-2 are examined in the light of aforementioned observations, this Court finds that the same are worthy of credit and reliance.

93. Mr. V. P. Srivastava, the learned senior counsel for appellants during the course of hearing fairly conceded that the deposition of P.W.-1 and P.W.-2 qua the time of occurrence, place of occurrence, manner of occurrence, presence of accused at the time and place of occurrence, the motive behind the occurrence are natural and reliable. In fact they are of impeccable character. On account of aforesaid, no illegality even prima-facie can be attached to the conclusion drawn by Court below regarding the complicity of accused in the crime in question.

94. However, according to the learned Senior counsel, there is a peculiar circumstance of this case, which if established in favour of accused will turn the table other way i.e. possession of the land where the occurrence took place at the time of occurrence. In case the land where the occurrence took place stands proved to be in actual cultivatory possession of the first informant, P.W.-1, Prakashwati, then the accused shall have to be classified as aggressors then in that eventuality, the view taken by the court below is liable to be sustained. However, if the cultivatory possession of the first informant, P.W.-1, Prakashwati, at the time of occurrence or for a reasonable period before the occurrence, is not established over the land where the occurrence took place, then in such a circumstance, the right of private defence as contemplated under Sections 95, 96, 97 and 105 I.P.C. read with Section 105 of the Evidence Act shall step in and the case shall be one of culpable homicide not amount to

murder. Therefore, no offence under Section 302/149 I.P.C. can be said to have been committed by the accused. In such a situation, the offence complained of shall be covered under Section 304-Part-I IPC. In the submission of the learned Senior counsel for appellants, the first informant PW-1 Prakashwati, in her statement-in-chief has admitted the possession of accused, when she says says that the accused exclaimed that miscreants (Badmash) have come to destroy the crops. Since the possession of the accused over the land, where the occurrence took place, is admitted to the prosecution, therefore, the case in hand shall fall within Section 304-Part-I IPC.

95. While dealing with Questions 2 and 3, it has already been held by us that P.W.-1, Prakashwati wanted the Court to believe the fact that land where the occurrence took place belongs to her and she was in possession over same at the time of occurrence by reason of the sale deed executed by Prahlad Singh. However, except for the bald statement in her deposition before court below that the land sold to her was being cultivated by herself or by sub-letting it to Fateh Singh and Hira Singh but not to anyone else. Sometimes the accused forcibly cultivated the same. The field in which, the occurrence took place was being cultivated by herself and corn crop was sown in the same. It would be apt to reproduce the exact words stated by PW-1 in her deposition before Court below;-

“बैनामा वाली जमीन को कभी मैं जोतने के लिए उठा आती हूँ कभी मुल्जिमान जबरन जोत लेते है। मैंने उक्त खेत को जोतने के लिए फतेह सिंहए हीरा सिंह को उठाया है। इनके अलावा और किसी को नहीं उठाया। यह कहना गलत है कि जमीन मैंने कभी जोतने के लिए न उठाई हो और केवल मुलजिमान ही उसको जोत रहे हों।”

96. Except for above, there is no other evidence on record in this regard. PW-1 Prakashwati in her deposition has not mentioned the material facts regarding her claim that she is in possession over the land, where the occurrence took place. Once PW-1 Prakashwati deposed before Court

below that sometimes the accused forcibly cultivated the land, it was incumbent upon her to explain the said statement i.e. the time period when the accused forcibly cultivated the land, the survey plot no. of the land so cultivated by them, the time period and the manner, she re-entered into possession over the same and that her possession was long and uninterrupted possession. What follows from above is that P.W.-1 has failed to establish the fact that she is in possession of the land, where the occurrence took place as she is the owner of the same. The said burden was also required to be discharged in terms of Section 93 and 103 of the Indian Evidence Act. Apart from above, there was an equal burden upon the prosecution to establish by leading cogent evidence that she was in cultivatory possession over the land in dispute, which burden was required to be discharged in terms of Section 110 of the Evidence Act. Since the land, where the occurrence took place is agricultural land, the right to have possession over the land could be established by filing the Khatauni and the Khasra of the land in dispute. No evidence in that regard was adduced by the prosecution either. Therefore, it cannot be conclusively concluded that PW-1 Prakashwati was in actual cultivatory possession/settled possession over the land, where the occurrence took place. As such, the accused cannot be classified as aggressors, who came to the land of PW-1 Prakashwati in the dead of night to commit the crime in question.

97. However, that is not the end of the matter. The above discussion leads to a logical question that whether the accused have exercised the right of private defence to life and property but have exceeded in the exercise of said right or not.

98. To answer the aforesaid question, which is rather parabolic, we shall first refer to the provisions contained in IPC relating to culpable homicide/murder and then the provisions of the Code relating to the right of private defence of person and property.

99. Section 299 IPC defines culpable homicide and reads as under;-

"Section 299 IPC -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.

Explanation-1- A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation-2-. Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation-3-. The causing of the death of a child in the mother' womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

100. Section 300 IPC defines murder and is, accordingly, reproduced herein below;-

Section 300 IPC - Murder - 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.

<u>Exception -1</u> - When culpable homicide is not murder – Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:

First - That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly - That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly - That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanations -Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

<u>Exception 2</u> -Culpable homicide is not murder if the offender in the exercise in good faith of the right of private defence or person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

<u>Exception 3</u> - Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of

public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

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.

Explanations - It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5 - 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.

101. Section 302 IPC provides punishment for an offence of murder. Accordingly, Section 302 IPC is extracted herein below;-

Section 302 IPC- Punishment for murder-

Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

102. Section 304 IPC provides for punishment for culpable homicide not amounting to murder. It reads as under;-

Section 304 IPC- Punishment for culpable homicide not amounting to murder

Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death. or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act 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."

103. When culpable homicide does not amount to murder was considered at length and in detail by the Supreme Court in the case of **Virsa Singh Vs. State of Punjab, AIR 1958 SC 465.** In fact, aforementioned judgment remains the *locus classicus* on the point. However, in some subsequent judgments of the Supreme Court, a departure was made from the ratio laid down in the case of **Virsa Singh (Supra).**

104. In the case of **Kesar Singh and Another Vs. State of Haryana, (2008) 15 SCC 753**, the Court was dealing with an offence of murder. The questions before the Court were whether offence complained of shall be punishable under Section 302 IPC i.e. murder or 304 IPC i.e. culpable homicide not amounting to murder. The Bench referred to the earlier judgment in the case of **Virsa Singh (Supra)** in *extenso* as well as the contrary view taken in the subsequent judgments. The facts of aforesaid case are quite similar inasmuch as, the issue involved in both the cases is almost similar. Since the Bench has taken an in depth analysis of the provisions of the Code ie. IPC referred to above and the ratio laid down in the previous judgment in the case of **Virsa Singh (Supra)**, we shall, therefore, refer the said judgment in extenso;-

105. The Bench in the case of **Kesar Singh (Supra)**, in paragraphs 7, 8, 9, 10, 11, 12, 13 and 14 of the report dealt with the provisions of Section 299 and 300 IPC. Paragraph 9 of the report is relevant, wherein the Bench has drawn a distinction between the provisions of Section 299 and 300 IPC. Accordingly, paragraph 9 of the report is reproduced herein below;-

"9. The distinction between the first part and the second part of Section 304 of the Penal Code, therefore, must be considered having regard to

the provisions contained in Sections 299 and 300 of the Penal Code. Clause (a) of Section 299 corresponds to clause (1) of Section 300, clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300 and clause (c) of Section 299 corresponds with clause (4) of Section 300 of the Code. This can best be understood if Sections 299 and 300 of the Code are noticed side by side:

	Section 299		***Section 300***
A person commits culpable homicide, if the act by which the death is caused is done		***Subject to certain exceptions culpable homicide is murder, if the act by which the death is caused is done***	
(a)	***with the intention of causing death; or***	***(1)***	***with the intention of causing death; or***
(b)	***with the intention of causing such bodily injury as is likely to cause death; or***	***(2)***	***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***
		(3)	***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***
(c)	***with the knowledge that … the act is likely to cause death***	***(4)***	***with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and there is no excuse for incurring the risk.***

106. In paragraph 10 and 11, the Bench has pointed out the difference between murder and homicide. Accordingly, paragraphs 10 and 11 of the report are also reproduced herein under;-

"10. The distinguishing feature is the mens rea. What is prerequisite in terms of clause (2) of Section 300 is the knowledge possessed by the offender in regard to the particular victim being in such a peculiar condition or state of health that the intentional harm caused to him is likely to be fatal. Intention to cause death is not an essential ingredient of clause (2). When there is an intention of causing a bodily injury coupled with knowledge of the offender as regards likelihood of such injury being sufficient to cause the death of a particular victim would be sufficient to bring the offence within the ambit of this clause. For determination of the said question, it would be convenient if the exceptions contained in Section 300 are taken into consideration as (sic and) if the case falls under the said exceptions there would not be any question of applicability of the main provision of Section 300 of the Penal Code.

11. The distinction between culpable homicide amounting to murder and not amounting to murder is well known. Culpable homicide is genus, murder is its specie. The culpable homicide, excluding the special characteristics of murder, would amount to culpable homicide not amounting to murder. The Code recognises three degrees of culpable homicide. When a culpable homicide is of the first degree, it comes within the purview of the definition of Section 300 and it will amount to murder. The second degree which becomes punishable in the first part of Section 304 is culpable homicide of the second degree. Then there is culpable homicide of third degree which is the least side of culpable homicide and the punishment provided for is also the lowest among the punishments for the three grades. It is punishable under the second part of Section 304."

107. The Bench ultimately analysed the manner of proving the charge of culpable homicide not amounting to murder in paragraph 16 of the report, which reads as under;-

"16. We may notice the findings under different heads:

1. What must the prosecution prove?

It was observed that the prosecution must prove the following facts before it can bring a case under Section 300 "Thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

2. The standard laid down

It was said that the intention that the section requires must be related, not only to the bodily injury inflicted, but also to the clause, "and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death". This is a favourite argument in this kind of case but may not be entirely correct. If there is an intention to inflict an injury that is sufficient to cause death in the ordinary course of nature, then the intention is to kill and in that event, the "thirdly" would be unnecessary because the act would fall under the first part of the section, namely—

"If the act by which the death is caused is done with the intention of causing death."

In our opinion, the two clauses are disjunctive and separate. The first is subjective to the offender:

"If it is done with the intention of causing bodily injury to any person."

It must, of course, first be found that bodily injury was caused and the nature of the injury must be established, that is to say, whether the injury is on the leg or the arm or the stomach, how deep it penetrated, whether any vital organs were cut and so forth. These are purely objective facts and leave no room for inference or deduction : to that extent the enquiry is objective; but when it comes to the question of

intention, that is subjective to the offender and it must be proved that he had an intention to cause the bodily injury that is found to be present.

Once that is found, the enquiry shifts to the next clause:

"and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

The first part of this is descriptive of the earlier part of the section, namely, the infliction of bodily injury with the intention to inflict it, that is to say, if the circumstances justify an inference that a man's intention was only to inflict a blow on the lower part of the leg, or some lesser blow, and it can be shown that the blow landed in the region of the heart by accident, then, though an injury to the heart is shown to be present, the intention to inflict an injury in that region, or of that nature, is not proved. In that case, the first part of the clause does not come into play. But once it is proved that there was an intention to inflict the injury that is found to be present, then the earlier part of the clause we are now examining — "and the bodily injury intended to be inflicted" is merely descriptive.

All it means is that it is not enough to prove that the injury found to be present is sufficient to cause death in the ordinary course of nature; it must in addition be shown that the injury is of the kind that falls within the earlier clause, namely, that the injury found to be present was the injury that was intended to be inflicted. Whether it was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury and has nothing to do with the question of intention.

In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous part of the body, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to inquire into every last detail as, for instance, whether the accused intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad based and simple and based on commonsense : the

kind of enquiry that "an ordinary man" could readily appreciate and understand.

To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 "Thirdly":

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved; these are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

Once these four elements are established by the prosecution (and, indisputably, the burden is on the prosecution throughout) the offence is murder under Section 300 "Thirdly". It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury is actually found to be proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the

consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional."

108. The Bench then referred to the view earlier taken in the case of **Virsa Singh (Supra)**, and reproduced the same in paragraph 19 of the report;-

19. The following para in Virsa Singh [AIR 1958 SC 465 : 1958 Cri LJ 818 : 1958 SCR 1495] is illustrative : (AIR p. 468, para 16)

"16. … The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, it neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question."

Another passage which is relevant for our purpose reads, thus : (AIR p. 468, para 17)

"17. It is true that in a given case the enquiry may be linked up with the seriousness of the injury. For example, if it can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial scratch and that by accident his victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the

injury that he intended to inflict to be as serious as it turned out to be but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not one of law but one of fact; and whether the conclusion should be one way or the other is a matter of proof, where necessary, by calling in aid all reasonable inferences of fact in the absence of direct testimony. It is not one for guesswork and fanciful conjecture."

109. The Court, thereafter, formulated the points, which are required to be considered while dealing with a case of murder/culpable homicide and delineated its views as follows;-

"20. The Jai Prakash case [Jai Prakash v. State (Delhi Admn.), (1991) 2 SCC 32 : 1991 SCC (Cri) 299] brings the law back to Virsa Singh [AIR 1958 SC 465 : 1958 Cri LJ 818 : 1958 SCR 1495] position.

<u>I. Presumption as regards intention</u>

21. Let us place on record the different approaches in the two decisions. In Virsa Singh [AIR 1958 SC 465 : 1958 Cri LJ 818 : 1958 SCR 1495] : (AIR p. 468, para 15)

"15. … In the absence of evidence, or reasonable explanation, that the prisoner did not intend to stab in the stomach with a degree of force sufficient to penetrate that far into the body, or to indicate that his act was a regrettable accident and that he intended otherwise, it would be perverse to conclude that he did not intend to inflict the injury that he did. Once that intent is established (and no other conclusion is reasonably possible in this case, and in any case it is a question of fact), the rest is a matter for objective determination from the medical and other evidence about the nature and seriousness of the injury."

In Jai Prakash [Jai Prakash v. State (Delhi Admn.), (1991) 2 SCC 32 : 1991 SCC (Cri) 299] : (SCC p. 43, para 13)

"13. … In clause Thirdly the words 'intended to be inflicted' are significant. As noted already, when a person commits an act, he is presumed to expect the natural consequences. But from the mere fact

that the injury caused is sufficient in the ordinary course of nature to cause death it does not necessarily follow that the offender intended to cause the injury of that nature. However, the presumption arises that he intended to cause that particular injury."

II. Evidence to be considered

22. In Jai Prakash [Jai Prakash v. State (Delhi Admn.), (1991) 2 SCC 32 : 1991 SCC (Cri) 299] :

"13. … In such a situation the court has to ascertain whether the facts and circumstances in the case are such as to rebut the presumption and such facts and circumstances cannot be laid down in an abstract rule and they will vary from case to case. However, as pointed out in Virsa Singh case [AIR 1958 SC 465 : 1958 Cri LJ 818 : 1958 SCR 1495] the weapon used, the degree of force released in wielding it, the antecedent relations of the parties, the manner in which the attack was made that is to say sudden or premeditated, whether the injury was inflicted during a struggle or grappling, the number of injuries inflicted and their nature and the part of the body where the injury was inflicted are some of the relevant factors. These and other factors which may arise in a case have to be considered and if on a totality of these circumstances a doubt arises as to the nature of the offence, the benefit has to go to the accused. …

(SCC p. 43, para 13)

12. … The 'intention' and 'knowledge' of the accused are subjective and invisible states of mind and their existence has to be gathered from the circumstances, such as the weapon used, the ferocity of attack, multiplicity of injuries and all other surrounding circumstances.

(SCC p. 41, para 12)

23. Shifting the inquiry to the next clause "and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death", it was held : (Virsa Singh case [AIR 1958 SC 465 : 1958 Cri LJ 818 : 1958 SCR 1495] , AIR p. 467, para 11)

"11. In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines

as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad-based and simple and based on commonsense; the kind of enquiry that 'twelve good men and true' could readily appreciate and understand."

24. In determining the question even the manner in which the injury was inflicted and his knowledge as to whether it would be a severe one or a serious one would also be a relevant factor. (See also State of A.P. v. Rayavarapu Punnayya [(1976) 4 SCC 382 : 1976 SCC (Cri) 659] .)

25. In a case where the death occurred after nine days, this Court opined that the prosecution failed to objectively prove the injury sufficient to cause death in the ordinary course of nature. (See Jayaraj v. State of T.N. [(1976) 2 SCC 788 : 1976 SCC (Cri) 293]) For the said purpose, the circumstances surrounding the incident would also be relevant. In Patel Rasiklal Becharbhai v. State of Gujarat [1993 Supp (1) SCC 217 : 1993 SCC (Cri) 252] and Gurdeep Singh v. Jaswant Singh [1992 Supp (3) SCC 103 : 1993 SCC (Cri) 278] , in a situation of this nature, this Court held Part II of Section 304 to be applicable.

<u>Knowledge versus Intention</u>

26. We must keep in mind the distinction between knowledge and intention. Knowledge in the context of Section 299 would, inter alia, mean consciousness or realisation or understanding. The distinction

between the terms "knowledge" and "intention" again is a difference of degrees. An inference of knowledge that it is likely to cause death must be arrived at keeping in view the fact situation obtaining in each case. The accused must be aware of the consequences of his act.

27. Knowledge denotes a bare state of conscious awareness of certain facts in which the human mind might itself remain supine or inactive whereas intention connotes a conscious state in which mental faculties are roused into activity and summed up into action for the deliberate purpose of being directed towards a particular and specific end which the human mind conceives and perceives before itself. This was discussed extensively in Jai Prakash v. State (Delhi Admn.) [Jai Prakash v. State (Delhi Admn.), (1991) 2 SCC 32 : 1991 SCC (Cri) 299] , stating : (SCC pp. 39, 41-42, paras 10 & 12)

"10. … We may note at this stage that 'intention' is different from 'motive' or 'ignorance' or 'negligence'. It is the 'knowledge' or 'intention' with which the act is done that makes difference, in arriving at a conclusion whether the offence is culpable homicide or murder. Therefore, it is necessary to know the meaning of these expressions as used in these provisions. …

****

12. … The 'intention' and 'knowledge' of the accused are subjective and invisible states of mind and their existence has to be gathered from the circumstances, such as the weapon used, the ferocity of attack, multiplicity of injuries and all other surrounding circumstances. The framers of the Code designedly used the words 'intention' and 'knowledge' and it is accepted that the knowledge of the consequences which may result in doing an act is not the same thing as the intention that such consequences should ensue. Firstly, when an act is done by a person, it is presumed that he must have been aware that certain specified harmful consequences would or could follow. But that knowledge is bare awareness and not the same thing as intention that

such consequences should ensue. As compared to 'knowledge', 'intention' requires something more than the mere foresight of the consequences, namely, the purposeful doing of a thing to achieve a particular end."

110. In paragraph 31 of the report, the Court referred to the facts of the case and in paragraph 35 of the report, Court dealt with the title of the parties over the land. It then explained the meaning of the term fight in paragraph 36. Accordingly, paragraphs 35 and 36 of the report are reproduced herein below;-

"35. The land belongs to the accused. The title is not in dispute. They had a right over the land. They could excavate the same. The quarrel started because the deceased wanted them to leave some passage. Both the courts have held that it was a sudden fight which does not appear to be wholly correct.

36. The word "fight" is used to convey something more than a verbal quarrel. It postulates a bilateral transaction in which blows are exchanged. In order to constitute a fight, it is necessary that blows should be exchanged even if they all do not find their target. (Ratanlal and Dhirajlal, Vol. 2, p. 1364, Footnote 4) No material in this regard has been brought on record."

111. The Court, ultimately, delivered it's conclusion in paragraph 42 of the report. The same is as under;-

"42. It is, therefore, a case where Virsa Singh [AIR 1958 SC 465 : 1958 Cri LJ 818 : 1958 SCR 1495] would be applicable. The injury inflicted was a serious one, it by itself may not be decisive but is one of the relevant factors in regard to the application of Fourthly (sic Thirdly) [See Editorial Note in Shortnote A.] of Section 300. Application of the said provisions must be made keeping in mind the fact situation obtaining and the legal principles noticed hereinbefore."

112. Subsequently, the Apex Court in **Anbazhagan Vs. State, 2023 SCC OnLine SC 857** has considered the provisions of Section 304 IPC and altered the conviction of accused under Section 304-Part-I IPC to Section 304-Part-II IPC. The Bench after noticing the earlier precedents ultimately in paragraph 66 of the report crystallized the principles of law regarding interpretation of Exceptions to Section 300 IPC. Accordingly, paragraph 66 of the aforesaid report is reproduced herein below;-

"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. To illustrate:'A' is bound hand and foot. 'B' comes and placing his revolver against the head of 'A', shoots 'A' in his head killing him instantaneously. Here, there will be no difficulty in holding that the intention of 'B' in shooting 'A' was to kill him, though only single injury was caused. The case would, therefore, be of murder falling within Clause (1) of Section 300 of the IPC. Taking another instance, 'B' sneaks into the bed room of his enemy 'A' while the latter is asleep on his bed. Taking aim at the left chest of 'A', 'B' forcibly plunges a sword in the left chest of 'A' and runs away. 'A' dies shortly thereafter. The injury to 'A' was found to be sufficient in ordinary course of nature to cause death. There may be no difficulty in holding that 'B' intentionally inflicted the particular injury found to be caused and that the said injury was objectively sufficient in the ordinary course of nature to cause death. This would bring the act of 'B' within Clause (3) of Section 300 of the IPC and render him guilty of the offence of murder although only 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."

113. Having noted the provisions of the Code relating to culpable homicide and murder and the relevant case law on the above, we shall now refer to the right of private defence as recognized under the Code i.e. Sections 95 to 106 of IPC. In the case in hand, the provisions contained in Sections 95, 96, 97 and 105 IPC are relevant. Accordingly, the same are reproduced herein below;-

"Section 95 IPC - Act causing slight harm -

Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

Section 96 IPC - Things done in private defence-

Nothing is an offence which is done in the exercise of the right of private defence.

Section 97 IPC

Every person has a right, subject to the restrictions contained in section 99, to defend:

1. ***His own body, and the body of any other person, against any offence affecting the human body;***
2. ***The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.***

Section 105 IPC - Commencement and continuance of the right of private defence of property -

The right of private defence of property commences when a reasonable apprehension of danger to the property commences. The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered.

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues."

114. However, the right of private defence of person and property under Sections 95, 96, 97 and 105 IPC is subject to Section 105 of the Evidence Act. Section 105 of the Evidence Act reads as under;-

Section 105 Evidence Act -

The section deals with 'Burden of proving that case of accused comes within exception'. It reads as follows:

"105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exception in the Indian Penal Code (XLV of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

There are three illustrations below section 105. They read as follows:

"(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(b) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(c) Section 325 of the Indian Penal Code (XLV of 1860) provides that whoever, except in the case provided for by Section 335, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under Section 325. The burden of proving the circumstances bringing the case under Section 335 lies on A".

115. Section 105 of the Evidence Act refers to General Exceptions and Special Exceptions. While General Exceptions are mentioned in Chapter-

IV of IPC i.e. Section 76 to 106 of IPC, the Special Exceptions are to be found in Section 300 IPC.

116. The right of private defence to person and property is raised by the accused. The burden of proof of such right of accused and how it can be derived from the material on record has been considered by the Apex Court in **Bishna @ Bhiswadeb Mahato Vs. State of West Bengal, (2005) 12 SCC 657.** Following was observed by the Bench in paragraph 78 of the report;-

"78. Section 105 of the Evidence Act casts the burden of proof on the accused who sets up the plea of self-defence and in the absence of proof, it may not be possible for the court to presume the correctness or otherwise of the said plea. No positive evidence although is required to be adduced by the accused; it is possible for him to prove the said fact by eliciting the necessary materials from the witnesses examined by the prosecution. He can establish his plea also from the attending circumstances, as may transpire from the evidence led by the prosecution itself."

117. Another peculiar feature of the right of private defence of person and property is that though the burden of proof of same is cast upon the accused but it does not follow that the plea of private defence should be separately taken and if not taken shall not be available to be considered though made out from the record. In this regard, reference be made to the judgment of Supreme Court in **Kashi Ram Vs. State of UP, (2002) 1 SCC 71**, wherein the Court relying upon the earlier judgment in the case of **Vijai Singh Vs. State of U.P., (1990) 3 SCC 190** denuded it's views in paragraph 24 of the report. For ready reference the same is reproduced herein below;-

"24. The High Court was also not right in criticising and discarding availability of plea of self-defence to the accused persons on the ground

that the plea was not specifically taken by the accused in their statements under Section 313 CrPC and because the accused Prabhu did not enter in the witness box. Though Section 105 of the Evidence Act enacts a rule regarding burden of proof but it does not follow therefrom that the plea of private defence should be specifically taken and if not taken shall not be available to be considered though made out from the evidence available in the case. A plea of self-defence can be taken by introducing such plea in the cross-examination of prosecution witnesses or in the statement of the accused persons recorded under Section 313 CrPC or by adducing defence evidence. And, even if the plea is not introduced in any one of these three modes still it can be raised during the course of submissions by relying on the probabilities and circumstances obtaining in the case as held by this Court in Vijayee Singh case [(1990) 3 SCC 190 : 1990 SCC (Cri) 378 : AIR 1990 SC 1459] . It is basic criminal jurisprudence that an accused cannot be compelled to be examined as a witness and no adverse inference can be drawn against the defence merely because an accused person has chosen to abstain from the witness box."

118. The Apex Court in the case of **Ram Pat and Others Vs. State of Haryana, (2009) 7 SCC 614**, has considered the issue as to what is the right of private defence, when it is available and what is the burden required to be discharged to take the benefit of the right of private defence. The Bench in paragraphs 50, 51, 52 and 53 of the aforesaid report has delved into the said question and observed as under;-

"50. The right of private defence can be exercised provided any occasion arises therefor. The learned trial judge wrongly held so, on the premise that the appellants were in settled possession of the property. If they were not, they had no right of private defence to defend the possession of the property. They were, thus, the aggressors being fully armed.

51. We are not unmindful of the fact that right of private defence need not be specifically raised. {See Bishna Alias Bhiswadeb Mahato & ors. vs. State of W.B. [(2005) 12 SCC 657]}.

We may notice that in Surendra & Anr. v. State of Maharashtra ***[(2006) 11 SCC 434], this Court held:***

"26. We are not unmindful of the fact that in all circumstances injuries on the person of the accused need not be explained but a different standard would be applied in a case where a specific plea of right of private defence has been raised. It may be true that in the event prosecution discharges its primary burden of proof, the onus would shift on the accused but the same would not mean that the burden can be discharged only by examining defence witnesses.

27. The learned courts below committed a manifest error of law in opining that the Appellants had not discharged the initial burden which is cast on them. Even such a plea need not be specifically raised. The Courts may only see as to whether the plea of exercise of private defence was probable in the facts and circumstances of the case.

32. In regard to the duty of the prosecution to explain the injuries on the part of the accused, this Court observed:

`78. Section 105 ***of the Evidence Act casts the burden of proof on the accused who sets up the plea of self- defence and in the absence of proof, it may not be possible for the court to presume the correctness or otherwise of the said plea. No positive evidence although is required to be adduced by the accused; it is possible for him to prove the said fact by eliciting the necessary materials from the witnesses examined by the prosecution. He can establish his plea also from the attending circumstances, as may transpire from the evidence led by the prosecution itself.***

79. In a large number of cases, this Court, however, has laid down the law that a person who is apprehending death or bodily injury cannot weigh in golden scales on the spur of the moment and in the heat of circumstances, the number of injuries required to disarm the assailants who were armed with weapons. In moments of excitement and disturbed equilibrium it is often difficult to expect the parties to preserve composure and use exactly only so much force in retaliation commensurate with the danger apprehended to him where assault is imminent by use of force. All circumstances are required to be viewed with pragmatism and any hypertechnical approach should be avoided.

80. To put it simply, if a defence is made out, the accused is entitled to be acquitted and if not he will be convicted of murder. But in case of use of excessive force, he would be convicted under Section 304 ***IPC."***

52. In Satya Narain Yadav v. Gajanand & Anr. ***[2008 (10) SCALE 728], this Court held:***

"14. As noted in Butta Singh v. The State of Punjab (AIR 1991 SC 1316), a person who is apprehending death or bodily injury cannot weigh in golden scales in the spur of moment and in the heat of circumstances, the number of injuries required to disarm the assailants who were armed with weapons. In moments of excitement and disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use exactly only so much force in retaliation commensurate with the danger apprehended to him where assault is imminent by use of force, it would be lawful to repel the force in self-defence and the right of private defence commences, as soon as the threat becomes so imminent. Such situations have to be pragmatically viewed and not with high- powered spectacles or microscopes to detect slight or even marginal overstepping. Due weightage has to be given to, and hyper technical approach has to be avoided in considering what

happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private-defence can legitimately be negatived. The Court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially, as noted above, a finding of fact."

53. In Bhanwar Singh & Ors. vs. State of M.P. ***[2008 (7) scale 633], this Court held:***

"51. To put it pithily, the right of private defence is a defence right. It is neither a right of aggression or of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self creation. Necessity must be present, real or apparent.

52. The basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the state machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract

parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon host of factors like the prevailing circumstances at the spot, his feelings at the relevant time; the confusion and the excitement depending on the nature of assault on him etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence."

It was furthermore observed that it is not in all situations that such a right can be claimed only because some of the accused persons have suffered injuries even if they are simple."

119. Thus when the case in hand is examined in the light of caution given by the Apex Court as noted herein above and also the evidence on record, it is a proved fact that the first informant PW-1 Prakashwati could not establish before Court below that subsequent to the sale deed, she became the recorded tenure holder of the land in dispute and also in possession over the land, where the occurrence took place. Since the prosecution wanted the Court to believe the fact that PW-1 Prakashwati is in possession/was in possession over the land, where the occurrence took place for a considerable time at the time of occurrence, the burden was upon her in terms of Section 103 of the Evidence Act to prove the same. The said fact could be established by adducing documentary evidence as required under Section 93 of the Evidence Act. However, the prosecution miserable failed to discharge the said burden. Moreover, in order to christen the accused as aggressors, the prosecution was further required to establish cultivatory possession of PW-1 Prakashwati over the land, where the occurrence took place in terms of Section 110 of the Evidence Act. However, even this burden could not be discharged by the prosecution. Therefore, considering the factual scenario that the deceased came to the

land, which was not recorded in the name of PW-1 Prakashwati nor it could be established that PW-1 Prakashwati was in cultivatory possession of the land, where the occurrence took place in the dead of night at 12:00 'O' clock and the accused resisting their right and possession over the land, which could not be proved to be belonging to first informant PW-1 Prakashwati, the accused exercised their right of private defence on account of the mischief played by the deceased causing grave and sudden provocation, which is referable to Section 97 IPC.

120. Having analysed the facts of the case, in the light of provisions contained in the Code i.e. IPC regarding the right of private defence of person and property, this Court has to now consider; whether the acts of accused is covered within the special exceptions as mentioned in Section 105 of the Evidence Act, which refers to the exceptions contained in Section 300 IPC have to be read together to decide the questions, whether offence complained of is murder or culpable homicide not amounting to murder as held by the Apex Court in the case of **Anbazhagan (Supra)**. The provisions of Section 299 and Section 300 IPC Admittedly, the deceased were assaulted repeatedly on account of which, each of the deceased sustained numerous injuries on his person, which is both incised and lacerated. It has come in evidence that three of the accused were armed with sharp edged weapons i.e. Farsa and Ballam (spear), whereas rest of the accused had 'Lathis'. As per the tenor of depositions of PW-1 Prakashwati and PW-2 Nehal Singh, the assault upon deceased was made repeatedly and continuously by the accused. In spite of the exclamation made by PW-1 Prakashwati that they are her brothers and son as well as similar statements by other villagers present on the spot, coupled with the fact that some of the accused had come to the house of first informant PW-1 Prakashwati on the same day at around 08:00 p.m. and in their company, the deceased went to the house of Pradhan, who is no one else but the accused Vijay Pal, yet the assault upon deceased continued

uninterrupted knowing that they are the brothers and son of PW-1 Prakashwati. Even if, PW-1 and PW-2, in their depositions before Court below, have not stated that the accused assaulted the deceased with an intention to kill the deceased or that PW-4, the Autopsy Surgeon, in his deposition has not pointed out that the injuries found on the bodies of deceased were either grievous or fatal, or that none of the internal organs of the deceased were found damaged, the corresponding action of accused i.e. assault upon the deceased in a deliberate and ruthless manner clearly reflects the guilty intention of accused. The same is exemplified from the fact that the cause of death of deceased as disclosed by the Autopsy Surgeon PW-4 in his deposition before Court below, is shock and haemorrhage, which means excess loss of blood. The same is clearly attributable to the injuries inflicted upon the bodies of deceased by the accused. In such a circumstance, principle 3 of principles laid down in the case of **Anbazhagan (Supra),** stands clearly attracted. Para 42 of the judgment in **Kesar Singh (Supra)**, also supports the view taken by us. As such, the accused are guilty of committing an offence, which is culpable homicide but not amounting to murder, as the case in hand falls within the two clauses of cases of culpable homicide as described in Section 299 IPC read with the 4th exception to Section 304 IPC.

CONCLUSION ;-

121. Upon evaluation of the prosecution case/the guilt of accused in the light of facts and circumstances of the case as well as the evidence on record the fact that prosecution has not been able to prove the crucial fact that first informant Prakashwati PW-1 is the recorded tenure holder of the land, where the occurrence took place, as neither the certified copy of the document of title i.e. the registered sale deed dated 20.08.1975 was filed in evidence before court below nor proved in evidence as required under Section 93 of the Evidence Act nor an attempt was made to identify the Survey Plot No./Khasra No. of the land, where the occurrence took place

and establish that the same is included in the sale deed executed by Prahlad Singh in favour of PW-1 Prakashwati, first informant. Since the land where the occurrence took place is an agricultural land, the burden was upon the prosecution to establish/prove by filing documentary evidence i.e. Khatauni, which is the record of rights that PW-1 Prakashwati is the recorded tenure holder (Bhumidhar) of the land in dispute. The possession of P.W.-1, Prakashwati could be proved by filing the Khasra, which is the record of possession. However, the same were also not filed before Court below. Similarly, the prosecution could succeed in prosecuting the accused under Section 302 IPC., if it established the actual cultivatory possession of first informant PW-1 Prakashwati over the land, where the occurrence took place. Since the prosecution has failed to prove the cultivatory possession of PW-1 Prakashwati over the land, where the occurrence took place, therefore, the prosecution has failed to discharge the burden required to be discharged in terms of Section 110 of the Evidence Act. Since the prosecution wanted the Court to believe that the first informant P.W.-1 Prakashwati was in possession over the land, where the occurrence took place/from where the dead bodies of deceased were recovered, therefore, the burden was upon the prosecution itself to establish the said fact. As the prosecution miserably failed to prove the said fact, the prosecution has miserably failed to discharge the burden as required under Section 103 of the Evidence Act also. It is the admitted case of the prosecution that the occurrence took place at 12:00 ‘O’ clock in the night. The presence of deceased in the dead of night over land, which has not been proved to be belonging to them would actually amount to mischief as provided in Section 97 IPC. It is this mischief, which has led to grave and sudden provocation, which is the cause of occurrence resulting in the death of deceased. In view of above, the act of accused in causing the death of deceased will not be murder punishable under Section 302 IPC but

culpable homicide not amounting to murder provided under Section 304 IPC.

122. We have already held that the case of the accused appellants is covered under the first two clauses of Section 299 IPC and Section 304 IPC, therefore, they are liable to be sentenced under Section 304 (Part-I) IPC.

123. In view of the discussion made above, the impugned judgment and order passed by Court below, convicting the accused/appellants under Section 302 IPC read with Section 149, 147 and 148 I.P.C. cannot be sustained.

124. As a result, the present appeals succeed and are liable to be allowed.

125. They are, accordingly, **allowed** in the manner mentioned below.

126. The conviction and sentence awarded to accused/appellants under Sections 302/149, 147 & 149 I.P.C. by Court below shall stand modified to one under Section 304 (Part-I) IPC. All the accused are, therefore, sentenced to 14 years rigorous imprisonment. The amount of fine awarded by Court below against accused is sustained. In case of default, the coercive measures as directed by Court below shall become applicable. All the accused/appellants shall be released provided they have undergone the sentence awarded by us and further, if they are not required in respect of any other offence.

November 26, 2025 **(Dr. Ajay Kumar-II,J.)** **(Rajeev Misra,J.)**

Vinay

Digitally signed by :-
VINAY KUMAR
High Court of Judicature at Allahabad