IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.642 of 2016

Arising Out of PS. Case No.-35 Year-2014 Thana- BHARGAMA District- Araria

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Md. Ajaj @ Bauka Son of Kalamuddin resident of village - Akasthama, P.S. Bhargama, District - Araria

... ... Appellant/s

Versus

The State Of Bihar

... ... Respondent/s

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with

CRIMINAL APPEAL (DB) No. 397 of 2016

Arising Out of PS. Case No.-35 Year-2014 Thana- BHARGAMA District- Araria

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Md. Kallamuddin son of Late Moshin, resident of Village- Akasthama, P.S.- Bhargama, District- Araria.

... ... Appellant/s

Versus

The State Of Bihar

... ... Respondent/s

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Appearance :

(In CRIMINAL APPEAL (DB) No. 642 of 2016)

For the Appellant/s	:	Mr. Praveen Kumar Agarwal, Advocate
		Mr. Santosh Kumar Singh, Advocate
For the State	:	Ms. Shashi Bala Verma, APP
For the informant	:	Mr. Suraj Narayan Yadav, Advocate
		Mr. Upendra Kumar Chaubey, Advocate

(In CRIMINAL APPEAL (DB) No. 397 of 2016)

For the Appellant/s	:	Mr. Praveen Kumar Agarwal, Advocate
		Mr. Santosh Kumar Singh, Advocate
For the State	:	Ms. Shashi Bala Verma, APP
For the informant	:	Mr. Suraj Narayan Yadav, Advocate
		Mr. Upendra Kumar Chaubey, Advocate

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CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
and
HONOURABLE JUSTICE SMT. SONI SHRIVASTAVA

CAV JUDGMENT

(Per: HONOURABLE JUSTICE SMT. SONI SHRIVASTAVA)

Date : 02-05-2025

The aforesaid two appeals are being taken up for hearing together since they arise out of the same judgment of

conviction and the order of sentence. The aforesaid appeals under Sections 374(2) read with Section 389(1) of the Criminal Procedure Code, 1973 (hereinafter referred as 'Cr.P.C') have been preferred against the common judgment of conviction and order of sentence dated 29.03.2016 and 31.03.2016 respectively, passed in Sessions Trial No.826 of 2014 (arising out of Bhargama P.S. Case No.35 of 2014) by the learned Additional District and Sessions Judge-IV, Araria (hereinafter referred to as 'learned Trial Judge'). By the said judgment, the learned Trial Judge has convicted the appellants of both the aforesaid appeals for commission of offence under Sections 302 read with Section 34 of the I.P.C. and sentenced them to undergo rigorous imprisonment for life with a fine of Rs.10,000/- each and in default thereof has further imposed sentence of simple imprisonment of one (01) year.

3. The short facts of the case, as disclosed in the First Information Report, based on the fardbayan of Md. Saheb (PW-6) recorded on 16.03.2014 at 09:30 a.m. at Akarthapa, is that on 15.03.2014 while his uncle Md. Azarul (PW-2) was getting the court-yard of his house filled with mud, his neighbors Md. Kallamuddin, Md. Saiyed, Md. Ajaj @ Bauka and Md. Saiyyad, objected to taking the tractor through their land. It is further

alleged that in the night all the accused persons held a meeting at their house and decided that they would not allow the tractor laden with earth to go by that way. On the date of occurrence i.e. on 16.03.2014, at around 07:30 a.m., while the mother of the informant, Meena Khatoon (deceased) was at the door and was talking to them in order to resolve the issue, all of a sudden Md. Saiyyed got into a verbal altercation with the informant's mother and started hurling abuses and also exhorted to assault her. It is further alleged that by the time the informant came out, he saw that Md. Kallamuddin, Md. Saiyyed and Md. Naushad had caught hold of his mother and Md. Ajaj @ Bauka, who was ripping a bamboo cob/root of maize by means of an axe, assaulted the mother of the informant on the right side of her neck by the said axe owing to which she fell down and due to serious injury, she died on the spot immediately. Thereafter, a crowd assembled at the place and caught hold of two accused persons while others managed to escape. The informant has also stated that after his statement was read over to him and he had found the same to be correct, he had put his signature over the same (Exhibit-1/1). There are two witnesses to the fardbeyan, one being Md. Sahil Anwar (not examined) and one Sahjahan, PW-8.

4. After recording the fardbeyan, a formal F.I.R. bearing Bhargama P.S. Case No.35 of 2014 was registered for offences under Section 302 read with Section 34 of the I.P.C. on 16.03.2014 at around 2:30 p.m., against four accused persons, being two appellants and two others, who are Md. Saiyyed and Md. Naushad. After thorough investigation, the police submitted a charge sheet on 31.05.2014 against the present two appellants, for offences under Section 302 read with Section 34 of the I.P.C., while keeping the investigation pending against the other accused persons. On the basis of the said charge sheet, cognizance was also taken on 18.06.2014 for offences under Section 302/34 of the I.P.C. against the appellants. The case was committed to the court of sessions on 15.07.2014 and was numbered as Sessions Trial No. 826 of 2014, whereafter the learned Trial Judge framed charges on 03.12.2014 under Section 302/34 of the I.P.C. against the appellants, to which they pleaded not guilty and claimed to be tried.

5. During the course of trial the prosecution has examined nine witnesses to substantiate its case out of whom PW-1, Mohammed Aazrul (uncle of the informant and brother-in-law of the deceased), PW-2, Shahnawaz (son of the deceased and brother of the informant), PW-3, Ghazala Parveen (daughter

of the deceased and sister of the informant), PW-4, Samsuna Khatoon (co-villager), PW-6, Md. Saiyed Alam (informant and son of the deceased) have claimed to be eye-witnesses. PW-8, Sahjahan (cousin brother of the deceased) and PW-9, Md. Sagir (husband of the deceased) are both hearsay witnesses. PW-5, Pradeep Kumar Parveen is the Investigating Officer, as also the SHO of Bargama Police Station while PW-7 Dr. Md. Umar Akbar is the Medical Officer, who had conducted the post mortem examination of the dead body of the deceased. The defence has also examined one witness Jamaluddin as DW1.

6. We have heard the arguments of learned counsel for the appellants, learned counsel for the informant and the learned APP for the State.

7. Mr. Praveen Kumar Agarwal, the learned counsel for the appellants has contended at the outset, that there is delay in receipt of the F.I.R. in the Court, inasmuch as while the fardbeyan was recorded and the F.I.R. was also registered on the date of occurrence i.e 16.3.2014, the F.I.R. was received in Court only on 18.03.2014, hence his argument is that the F.I.R. has been ante dated. Learned counsel for the appellants next makes his submissions to assail the veracity of the testimony of the prosecution witnesses, pointing out certain

discrepancies and inconsistencies in their evidence. The credibility of the witnesses has also been challenged since most of the witnesses are related to each other, hence fall in the category of interested witnesses. It is stated that despite the fact that several villagers had assembled at the place of occurrence, no independent witnesses have been examined on behalf of the prosecution and the only independent witness who was examined, i.e. PW-4 (Samsuna Khatoon), happened to be a chance witness as she had stated that she had come to the deceased at that point of time for taking some money. On the ground of PW-4 being a chance witness, it is submitted that her testimony should be scrutinized with care and caution. While referring to the evidence of this independent witness, PW-4, the learned counsel for the appellants has further invited the attention of this Court to her statement made in paragraph 11 wherein she has made a categorical statement with regard to the appellant Kallamuddin that he did not do anything her further to her statement made in paragraph 4, wherein she has stated that she saw the assault but she did not see anyone else. The learned counsel for the appellants has taken us to paragraph 5 and 10 of the deposition of the Investigating Officer (PW-5) according to which, he did not find any incriminating article at the place of

occurrence and did not record the statement of the inquest witnesses. He has further stated that though he tried to look for the axe, which is the murder weapon but he could not find the same.

8. With regard to the evidence of PW-6, the informant, it has been submitted that it is only the informant who has stated in the F.I.R. as also in his deposition, that appellant Kallamuddin and two others were holding the deceased while the other witnesses have not said so. The informant PW-6 is also said to have introduced the story and role of Sitara Khatoon (daughter-in-law of appellant Kallamuddin) to the effect that the deceased was talking with her and it was she who took the deceased to her house for some further conversation. The learned counsel for the appellants has also invited our attention to the fact that the villagers had all come after the death of the deceased and when the police arrived at 8.30 am, both the appellants were hiding and it was the police who had caught them, contrary to the statements of other witnesses who have stated that the villagers had already caught hold of the appellants at the time when the police had arrived and had later handed them over to the police.

9. Learned counsel for the appellants has next referred

to the evidence of the Doctor (PW-7), who conducted the post mortem examination of the dead body of the deceased and had pointed out that out of the three injuries found on the dead body of the deceased, injury no.1 was a deep incised injury but in paragraph 7 of his deposition, the doctor has stated that no bone injury was found on the deceased while stating that a bone injury would only be possible if the axe is used forcefully to assault. In this background, the learned counsel for the appellants makes a submission that since no bone injury has been caused it leads to the inference that no adequate force had been used, hence this makes the case of the defence of falling upon the axe more probable than the prosecution case of assaulting with axe. Besides taking the point of all the witnesses being related and interested, he has also submitted that there is no motive alleged for causing death of the deceased and even if there was some motive, owing to a dispute which took place on the previous day with regard to carrying of earth, the same was not all that serious and was rather too trivial for which an offence of murder would have been committed.

10. The learned counsel for the informant, Mr. Suraj Narayan Yadav, in response, has submitted that there is a specific and direct allegation on the appellants of exhortation

and assault by axe which has caused the death of the deceased on the spot. It has also been submitted by him that the case of the prosecution has been supported by all the prosecution witnesses and no major inconsistency or contradiction has been pointed out. Further, the prosecution witnesses have been able to prove the date, time and also the place of occurrence. The learned counsel for the informant has also invited our attention to the evidence of the defence witness in support of the fact that even he has admitted in his evidence that the death was caused on the spot from the axe of the appellant Md. Ajaj. The defence witness has further admitted that the dispute with regard to the filling of earth had taken place a day earlier and by pointing out towards this fact, the learned counsel has made a submission that the motive very well existed and the contention on behalf of the appellants that there was no motive for committing the occurrence, is negated. The learned counsel for the Informant has further submitted that a consistent version of the prosecution witnesses with regard to the part of the body where the deceased was assaulted, i.e. the right side of the neck, stands supported and corroborated by the medical evidence, inasmuch as Dr. Umar Akbar, PW-7 has found the axe injury caused by a sharp cut weapon below the right ear on the right side of the neck. The

learned counsel for the informant has also pointed out that in view of the fact that the appellants, immediately after the occurrence were caught hold by the villagers and handed over to the police, also goes to confirm the truthfulness of the prosecution case. It has further been submitted by him that while appellant Md. Ajaj has been imputed with the allegation of assault, appellant Kallamuddin is said to be the order giver. In this view of the matter it has been submitted that both the appellants shared a common intention to kill the deceased and the conviction being one under Section 302 read under Section 34 of the I.P.C., there seems to be no infirmity with the same.

11. We have heard Ms. Shashi Bala Verma, learned APP for the State and she, while adopting the submissions made by the learned counsel for the informant has taken us further to the medical evidence and has shown from the evidence of the Doctor (PW-7), who conducted the post-mortem examination of the dead body of the deceased, that he had found a deep incised wound below the right ear traversing in direction extending from right cheek to right side of the neck and exposing the muscles and large vessels of the neck. It is her submission that this kind of an injury would not be possible by falling on the axe as contended by the learned counsel for the appellants. She has

also taken us to the other two injuries being multiple abrasions on the chin, neck and ears and the back, knee joints and legs of the deceased to submit that these injuries also get corroborated by the oral allegations of the other accused persons having assaulted the deceased by means of *lathi* and backside of the axe.

12. We have minutely perused both the oral and the documentary evidence besides hearing the learned counsel for the parties. It would be necessary to cursorily discuss the evidence before proceeding further.

13. Md. Aazrul (PW-1) happens to be the uncle of the informant and the brother-in-law of the deceased and claims to be the eyewitness of the occurrence. As per his evidence, the occurrence took place over one and a half years back, when in the morning at 07:00 AM this witness was loading mud in the trailer of his tractor for filling up mud in his courtyard, he was intercepted by Kallamuddin, Ajaj, Saiyad and Naushad, who objected to the same and the work was thus discontinued. He has further stated that his sister-in-law, Meena Khatoon (deceased), came out of the house and enquired as to why they were raising objection, whereupon appellant Kallamuddin ordered to assault her, pursuant to which, appellant Ajaj

assaulted Meena Khatoon (deceased) with an axe on her right side below the ear. Saiyad also assaulted her by means of a spade on her neck and Naushad resorted to giving indiscriminate *lathi* blows to the deceased. On account of such assault, the deceased fell down then and there was bleeding injury, whereafter the villagers assembled at the place of occurrence. It would appear from paragraph no. 12 of his cross-examination that Kallamuddin had objected to taking of mud, however at that time, there was no altercation between them. It has been further stated that a quarrel took place on the next day, i.e., on 16th, when the sister-in-law of this witness, Meena Khatoon (deceased), asked Sitara Khatoon, who happens to be the daughter-in-law of Kallamuddin, as to why an objection was being raised regarding carrying of mud when the land was vacant, to which she replied that she would not allow carrying of mud from her field. Thereafter, the deceased went back to her house. At that moment, Kallamuddin exhorted to assault the deceased, whereafter the occurrence took place as stated in examination-in-chief. Md. Aazrul (PW-1) has further stated that prior to this occurrence, there had been no altercation between them. The witness has further stated that Ajaj was present in the court and he had his doubts as to whether he was mentally stable

or not. It has further been stated that the witness tried to snatch the axe, but he could not reach the same. He has also admitted that there was prior enmity between the two families with regard to land. He has further stated that after about two and a half hours, the police arrived at the place of occurrence and he gave his statement before the police at around 04:00 PM. Besides his statement, the statements of Gajala Praveen (PW-3) and Samsuna Khatoon (PW-4) were also recorded. He has made a further statement in his cross-examination that the investigating officer (PW-5) had tried to search for the axe, but he could not find the same and lastly he denied the suggestion of defence that the deceased had actually fallen on the axe which was kept by Ajaj for the purpose of ripping the bamboo cob / root leading to her sustaining injuries and it is only on account of old enmity that the allegation of inflicting axe blow has been attributed to Ajaj.

14. Shahnawaz (PW-2), the son of the deceased and brother of the informant also claims to be an eyewitness to the occurrence. He has stated in his evidence that his father, Md. Sagir (PW-9), was working at Delhi while his mother (deceased) used to be at home. She was killed one and a half years back in the house. He refers to the incident of his uncle Aazrul (PW-1)

filling up mud in a tractor, which was to be brought from the field of Kallamuddin and the same was objected to by the latter. It has been stated that on the following day, while the mother of this witness was at her door and was talking to Sitara Khatoon, *hulla* was raised whereupon this witness went there and Kallamuddin also came there and exhorted to kill the mother of this witness and on such exhortation, Ajaj inflicted an axe blow upon the mother of this witness who suffered injury on the right side beneath the neck and also started bleeding. Further, the allegation against Saiyad and Naushad have also been stated in the same manner as PW-1. This witness in his cross-examination admits that Md. Saheb Alam (PW-6) is his brother, whereas the accused persons are not related, but are only neighbours. He has also stated that prior to this occurrence there had been no other quarrel between the parties. The witness has further stated in his cross-examination that an alarm was raised at 07:15 AM, whereupon he reached the place of occurrence along with his uncle Aazrul (PW-1), Samsuna Khatoon (PW-4) and Md. Saheb Alam (PW-6) and were all empty handed. He next stated that Samsuna Khatoon (PW-4) does not belong to his family, however, others are part of his family. It is also stated that when all of them reached there, abuses were being hurdled

at that time. It has further been stated that Ajaj @ Bauka was at home at the time of occurrence and it is then stated that Ajaj was at the place of occurrence and he had assaulted. He further states that his statement was taken by the police on the very day of occurrence and further, he has denied the defence suggestions put to him.

15. Gajala Praveen (PW-3), the daughter of the deceased and the sister of the informant, has been examined as PW-3 and she has also reiterated the same facts with regard to the occurrence. She states that she was in her courtyard while her mother (deceased) was at the door. She refers to the incident which took place a day prior to the date of occurrence, when Aazrul (PW-1) was loading mud on the tractor for the purpose of filling mud in the courtyard, which was objected to by the accused persons and as a consequence, the uncle of the witness, Aazrul (PW-1) ceased loading of mud. This witness has also narrated the same manner of occurrence as stated by the other witnesses. This witness has clarified that although she is a married woman, she was staying at her maternal household. She has also asserted that prior to this occurrence, there had been no other dispute between her family and the family of the accused persons. In paragraph no. 9 of her cross-examination, this

witness has stated that while a verbal altercation was going on between Sitara Khatoon and her mother (deceased), the accused persons came there and other persons arrived at the place of occurrence only after the assault had already taken place and no one came while the occurrence was happening. She has further stated that she along with her family members Aazrul (PW-1), Shahnawaz (PW-2) and Md. Saheb Alam (PW-6) came to rescue the deceased. It would appear from her evidence that Ajaj was ripping the bamboo cob / root from before the occurrence, however, this witness cannot say as to from how long he was doing the same. She has also stated that Ajaj was not mentally unstable at the time of occurrence. The witness has admitted that her statement was taken by the police, however, she says that she does not know as to who informed the police regarding the occurrence. Similar to other witnesses, she has also denied the defence suggestions put to her.

16. Samsuna Khatoon (PW-4) is a co-villager and she has deposed that she had gone to the house of the deceased, Meena Khatoon, for bringing money and there she saw Ajaj giving axe blow upon the deceased on her right side while Naushad hit her with *lathi* and Saiyad assaulted her with the back portion of an axe and owing to the injuries caused by such assault the

deceased fell down and died. This witness also refers to the dispute which took place a day earlier with regard to carrying of mud in a tractor. In her cross-examination, this witness has stated that she does not remember the incident which took place on the first day, but she remembers the occurrence of the second day. She claims herself to be a neighbour of both the deceased and the accused persons. In paragraph no. 4 of her deposition this witness has stated that she ran away after *hulla* was raised, but she had seen the assault and did not see anyone else. In paragraph no. 5 of her deposition she has further stated that Bauka @ Ajaj was standing with axe in his hand and was peeling off the bamboo cob / root. She has also asserted that Ajaj was mentally stable at the time of the occurrence and that two other accused persons Saiyad and Naushad were both in their houses. It would further appear from her evidence that there was no litigation pending between the family of the deceased and the family of the appellants from before. Further, her statement was recorded by the police after two hours of the occurrence at the *darwaza*. In paragraph no. 11 of her evidence this witness has made a categorical statement that appellant Kallamuddin had not done anything and like all other witnesses, she has also denied the defence suggestions.

17. The Investigating Officer-cum-SHO, Bhargama Police Station has been examined as PW-5 in the present case. From his evidence it can be noted that on 16.03.2014, i.e., on the day of occurrence, he recorded the *fardbeyan* of Md. Saheb Alam (PW-6), the informant, at the village Akarthappa and took the signatures of Md. Sahil Anwar and Sahjahan (PW-8) on the said *fardbeyan*, which he had identified. He has further identified his writing and signature on the *fardbeyan* and the formal FIR drawn thereupon, which which have been marked as Exhhibit-1 and 2, respectively. This witness has stated that during the course of investigation, he prepared the inquest report of the dead body (marked as Exhibit-3), which bears his signature and the signature of two other witnesses namely, Abdul Mannan (not examined) and Sahil Anwar (not examined). He did not find anything significant at the place of occurrence, however, he arrested Md. Kallamuddin and Md. Ajaj @ Bauka from the place of occurrence. He also recorded the statements of Md. Aazrul (PW-1), Gajala Praveen (PW-3), Samsuna Khatoon (PW-4), Md. Sagir (PW-9), Sahjahan (PW-8), Shahnawaz (PW-2) and also took the restatement of informant, Md. Saheb Alam (PW-6). This witness had also filed chargesheet against the accused persons under Section 302 of the India Penal Code read with

Section 34 of the Indian Penal Code.

18. In his cross-examination, the investigating officer (PW-5) has stated that the occurrence dated back to 16.03.2014 at 7:30 AM, when he received a telephonic information, however, he could not disclose the source of such information. He states that he left the Police Station at 08:05 AM to proceed towards the place of occurrence where a crowd had gathered, however he did not recover any article from the place of occurrence. He further states that he first prepared the inquest report and then arrested the accused persons Ajaj and Kallamuddin from the place of occurrence. The two other accused persons Saiyad and Naushad could not be found as both of them had fled away. This witness also states that he has not taken the statements of the other two witnesses to the inquest report but denies the suggestion that there is no independent witness. He has also stated that he tried to look for the axe but the same could not be found till date.

19. Md. Saheb Alam (PW-6) is the informant and also the son of the deceased. In his deposition while reiterating the prosecution story as stated in the fardbeyan, he stated that the accused persons had a meeting in the night and when the deceased was talking to Sitara Khatoon at the darwaza, Ajaj,

Saiyad, Kallamuddin and Naushad came there and started quarreling. He further saw that his mother was held by Kallamuddin, Naushad and Saiyad while Ajaj, who was ripping bamboo cob / root by means of an axe, gave an axe blow upon the mother of the informant on the right side of the neck upon the order given by Kallamuddin, due to which his mother fell down. It is stated that Saiyad also assaulted from the back portion of a spade on the neck of the deceased and his mother died immediately on the spot. He claims to identify the accused persons and has also identified his signature on the *fardbeyan* which has been marked as Exhibit-1/1. This witness has further stated in his cross-examination in paragraph no. 10 that Sitara Khatoon, the daughter-in-law of Kallamuddin, took his mother to her house for some talk and got into a verbal embroil with her. It has been stated that although the mother of this witness was caught hold of in the courtyard of Kallamuddin, but Ajaj did not assault her there, rather he assaulted her outside the courtyard where he was ripping the bamboo cob / root. Other villagers also assembled at the place of occurrence after the death of the deceased. The police is also said to have arrived at the place of occurrence at 08:30 AM and had taken his statement at the *darwaza*. It has further been stated in paragraph

no. 13 that Kallamuddin and Bauka had not fled away, but had rather concealed themselves. However, the police caught them. In paragraph no. 14 of his cross-examination, this witness further states that he had tried to save his mother at the time of altercation, but he was also pushed. He has further stated that the police tried to look for the axe, but the family members of the accused persons had concealed the axe somewhere and the same could not be recovered. He has further stated that there was no dispute between the two families prior to the date of occurrence and has also stated that the appellant Bauka was sane at the time of occurrence. This witness has also denied the defence suggestions like other witnesses.

20. Dr. Umar Akbar, PW-7, is the doctor, who conducted the post mortem examination of the dead body of the deceased namely, Meena Khatoon while he was posted at Sadar Hospital, Araria on 16.03.2014 and upon conducting the said examination, he has found the following (ante mortem) injuries:-

(i) Deep incised wound below right ear transverse in direction extending from right neck exposing muscles and large vessels of neck.

(ii) Multiple abrasion over chin and neck.

(iii) Multiple abrasion over back and knee joints and legs.

(iv) On opening the cranial cavity and thoracic cavity, the corresponding viscera were found intact.

It was opined by the Doctor that the injury no. 1 was caused by sharp cutting weapon and the death, in his opinion, was due to hemorrhage and shock, as a result of the above mentioned injuries, especially injury no. 1, which was sufficient to cause death. The time elapsed since death was said to be 48 hours of the post mortem examination and the Doctor identified his writing and signature on the post mortem report, which was marked as Exhibit-4.

21. In his cross-examination, the Doctor has stated that he found three injuries on the dead body and with regard to injury nos. 2 and 3, it has been stated that the same appeared to be in the nature of scratches caused by pushing and dragging. So far as injury no. 1 is concerned, it has been stated that if an axe is forcefully used for assault, then it may cause bone injury. However, the Doctor states that he did not find any bone injury.

22**.** Sahjahan**,** who happens to be the brother of the deceased and uncle of the informant, has been examined as PW-8 in the present case and he does not claim to be an eye witness

to the occurrence. He has admitted that he was at his home at the time of occurrence and only upon being informed by his nephew (Bhagina), Md. Saheb Alam that his mother has been assaulted by means of axe by Ajaj @ Bauka, this witness went to the house of his sister Meena Khatoon at Akarthapa, to find that the villagers had caught hold of Kallamudin and had confined him and has narrated the story as told to him. During the course of examination, this witness has stated that his house is at village Veernagar, which is at a distance of 1 km from the house of the accused persons situated at Akarthapa and he reached the place of occurrence between 7 to 8 am. However, he was not an eye witness to assault upon his sister (deceased). He further stated that the dispute was with regard to carrying mud and when he reached the place of occurrence, he did not see Saiyad and Naushad. He had further stated that the accused Kallamudin and Ajaj were kept in captivity by the villagers. In his statement before the police, he had stated the facts which were disclosed by his nephew Saheb Alam (PW-6). Lastly, he has also denied the defence suggestion, as given to the other witnesses.

23. Md. Sagir, PW-9, is husband of the deceased and father of the informant. A perusal of his evidence reveals that

he is a hearsay witness and he has stated in his examination-in-chief that he was at Delhi at the time of occurrence and he got to know about the occurrence from his son Saheb Alam, PW-6 that the deceased was killed by the accused persons, whereupon, he came on 17th March, to find the dead body of his wife at his house. He states that his son narrated the entire incident to him as stated by PW-6 in his deposition. In the cross- examination, this witness has stated that the accused persons were his neighbors and that he was not an eye witness of the occurrence. His statement before the police was taken and he narrated the facts as disclosed by his son Sahed Alam (PW-6). This witness has also denied the defence suggestion put to him as the other prosecution witnesses.

24. The defence has also examined one witness in its favour being DW-1, Jamalluddin, who has stated in his examination-in-chief that he knows both the parties as he is from the neighbouring village. He has stated that on the date of occurrence at about 7 a.m., he had gone to the house of Ajaj @ Bauka for taking an amount of Rs. 1000/- which the later had taken from him ten days earlier. When he reached there, he saw that hulla being raised and Ajaj @ Bauka was ripping/peeling a Bamboo cob/root, by means of an axe, which he left in the

courtyard and went away. He has further stated that the deceased Meena Khatoon, slipped on the said bamboo and fell down to hurt herself from the axe and owing to such injury, she died on the spot. This witness has stated that Ajaj never gave an axe blow. Neither Ajaj assaulted by means of *lathi* nor Kallamudin did anything. He has further stated that Saiyad and Md. Naushad, sons of Kallamuddin, had gone to Delhi six months prior to the occurrence. During the cross- examination, this witness has stated that his house is near the house of the informant Md. Saheb Alam, PW-6 and he has also made a reference to the incident which took place one day prior to the date of occurrence, with regard to the filling of mud by the informant and others, which was objected to by the accused persons. The witness has further stated that the deceased Meena Khatoon had suffered injury on the right side of neck by the same axe which was being used by Ajaj for ripping/peeling a Bamboo cob/root. However, the witness also clarifies that Ajaj @ Bauka did not kill the deceased.

25. After closing the prosecution evidence, the Trial Court recorded the statements of the appellants under Section 313 of the Cr.P.C on 29.2.2016, enabling them to personally explain the circumstances appearing in the evidence against

them however, they claimed themselves to be innocent in their respective statements.

26. The learned Trial Judge, upon appreciation, analysis and scrutiny of the evidence adduced at the trial has found the appellants guilty of the offences and has sentenced them to imprisonment and fine, by its impugned judgment and order.

Analysis and consideration

27. We have perused the impugned judgment of the learned trial court, the entire materials on record and have given thoughtful consideration to the rival submissions made by the learned counsel for the appellants as well as the learned APP for the State and the learned counsel for the informant.

28. We have already discussed the contents of the FIR in detail earlier and the same discloses a direct and specific allegation upon the appellant Md. Ajaj of inflicting an axe blow on the head of the deceased Meena Khatoon, upon exhortation given by the appellant Md. Kallamuddin.

29. Out of the 9 witnesses examined by the prosecution, PW-1 Md. Aazrul, PW-2 Shahnawaz, PW-3 Ghazala Parveen, PW-4 Samsuna Khatoon and PW-6 Md. Saiyyad Alam claim to be eye witnesses to the occurrence in

question. PW-8 Sahjahan and PW-9 Md. Sagir can both be categorized as hearsay witnesses while PW-5 is the Investigating Officer and PW-7 is the doctor who conducted the postmortem examination of the dead body of the deceased.

30. On going through the discussions made hereinabove in the preceeding paragraphs with regard to the evidence of the eye witnesses of the present case, it is apparent that they have by and large supported the case of the prosecution. PW-1 Md. Aazrul, the uncle of the informant, can be referred to as a key witness to this case as he is directly connected with the genesis of the occurrence. It is true that the name of one Sitara Khatoon, the daughter-in-law of the appellant Kallamuddin has been introduced during the cross-examination by stating that the occurrence of assault happened while the deceased was talking to the said Sitara Khatoon. However, barring this minor discrepancy, PW-1 seems to have supported the prosecution story right from the genesis of the occurrence to the actual incident of assault. Thus, considering the evidence of PW-1 in totality, he appears to be a truthful witness and the defence has not been able to doubt his presence at the place of occurrence at the relevant time by eliciting any substantial material by way of contradiction. This witness rather

has stood to the test of cross-examination. Similarly, PW-2, Shahnawaz, who is the son of the deceased and the brother of the informant, has also supported the prosecution case but for missing out on some minor details. The defence has only tried to doubt his presence at the place of occurrence by suggesting that he had been studying in Gujarat which he has though admitted in paragraph 5 of his cross-examination but has clarified by stating that he had been studying at Gujarat only since last one year and it would be evident from his deposition that the occurrence had taken place prior to that. PW-3 Ghazala Parveen, the daughter of the deceased, while admitting that she was married a year back in a different village has also claimed to be an eye witness and has also supported the prosecution case and the defence has not been able to impeach her evidence but for the statement made by her in paragraph 9 of her cross-examination wherein she states that no one had reached at the time of occurrence and people came only after the assault.

31. PW-4 Samsuna Khatoon is said to be the only independent witness to the occurrence who also claims to be an eye witness. From paragraph 4 of her cross-examination, it would appear that she saw the assault but did not see any one else and in paragraph 11, she has made a specific assertion that

the appellant Kallamuddin did not do anything. The evidence of this witness does not seem to be very much in tune with the evidence of other family members on material particulars. It also needs to be taken into consideration that the presence of this witness has not been mentioned in the evidence of the other prosecution witnesses and she being a chance witness, her evidence needs to be viewed with greater circumspection.

32. PW-6 Md. Saheb Alam is the informant himself, upon whose fardbeyan the present case has been initiated. From perusal of his evidence, it would appear that while supporting the prosecution case as disclosed in the fardbeyan, he has narrated the sequence of events but has introduced the story of his mother (deceased) being in conversation with Sitara Khatoon (daughter-in-law of the appellant Kallamuddin), who had taken her to her house, whereafter, the verbal altercation started. It is a fact that Md. Saheb Alam (PW-6) is the only witness who talks about the deceased being held by the appellant Kallamuddin and the co-accused Md. Saiyyad and Md. Naushad when the appellant Ajaj inflicted the axe blow on the right side of the neck of the deceased. The informant has, however, made a departure from his earlier statement that after the occurrence the crowd had apprehended the aforesaid two

appellants whereas others had managed to flee away, by stating in his evidence that the two appellants Kallamuddin and Ajaj were hiding in the house and the police after arrival at the place of occurrence at 8.30 AM, took them into custody. The defence has tried to raise a doubt with regard to the fact that if the appellants were apprehended at the place of occurrence by crowd or by the police, it does not stand to reason as to why the the axe was not recovered by the police. This witness has tried to tender an explanation by stating that the axe was concealed somewhere by the family members of the appellants. Barring some minor discrepancies, the informant has stood in support of the prosecution case as stated in the fardbeyan.

33. The contention on behalf of the appellants with regard to all the above-mentioned eye witnesses as also two other hearsay witnesses PW-8 and PW-9, is that they are all interested witnesses as they are all related to each other except for PW-4 Samsuna Khatoon. They have also raised an argument that despite the fact that several co-villagers had assembled at the place of occurrence after the incident, no independent witness has been examined on behalf of the prosecution except PW-4 who is a chance witness. The most natural witnesses to the concerned offences which took place at 7.00 AM in the

morning at the darwaza of their house, would no doubt be the family members of the deceased and the other witnesses would have only have arrived upon hulla (alarm) after the occurrence had happened. The occurrence seems to have happened so quickly that it would not have given an opportunity to the other co-villagers to become a witness to the same. Moreover, it remains a settled proposition that the evidence has to be weighed and not counted and Section 134 of the Indian Evidence Act clarifies beyond doubt that it is the quality and not quantity of the evidence which is material. In the present case, when an inmate of the family has been done to death, it does not stand to reason as to why the family members would falsely implicate any person and would let the real culprit go scot-free. We find that there is overwhelming evidence of the prosecution witnesses who have deposed as eye witnesses of the incident in question and there appears to be no strong reason to doubt the veracity of their testimony, despite the fact that they are related to the deceased. Non-examination of the independent witnesses would, therefore, not be a ground to doubt the prosecution case.

34. With regard to the issue of credibility of a related witness, paragraph no. 26 of a judgment rendered by a Three Judges Bench of the Hon'ble Apex Court, reported in ***AIR 1953***

SC 364* (*Dalip Singh and Others vs. The State of Punjab), is being reproduced herein below:-

> "**26.** A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

35. The defence has very emphatically contended that non-recovery of the murder weapon i.e. the axe by the Investigating Officer and also any other objective evidence collected from the place of occurrence makes the entire case suspicious. In this regard, we have noted that all the prosecution

witnesses, including the defence witness, are consistent on the point of death being caused by the axe of the appellant Ajaj, the only difference being that the prosecution witnesses allege infliction of axe blow by the appellant Ajaj whereas the defence witness propagates the story that the deceased had slipped and had fallen upon the axe with which the appellant Ajaj was ripping the bamboo cob. In any view of the matter, it remains an admitted fact that the death of the deceased was caused by the said axe and the same stands corroborated by the medical evidence adduced in the case, inasmuch as PW-7, the doctor, who conducted the postmortem examination on the dead body of the deceased, has clearly stated that the deceased had received a deep incised wound caused by a sharp cutting weapon. Thus, in view of the consistent evidence of all the prosecution witnesses with regard to the assault by axe, merely on the ground of non-recovery of the murder weapon, the case of the prosecution cannot be thrown out. More so, some of the prosecution witnesses have made specific statements that the axe was concealed by the family members of the appellants, hence could not be found. The recovery of the axe would have acted as an additional link in the prosecution case but the mere absence of the same would not have devastating effect on the

consistent case of the prosecution.

36. With regard to the contention raised on behalf of the appellants that there was no motive for the act alleged, it is gathered from the circumstances starting right from the fardbeyan to the deposition of the witnesses during trial that the prosecution has alleged a definite genesis of the occurrence, being the objection raised by the accused persons to the loading of mud in the tractor for taking the same through their fields to the house of PW-1 Md. Aazrul, who is the brother-in-law of the deceased. The dispute which took place with regard to the same and a day prior to the date of occurrence is consistently supported by all the prosecution witnesses. The verbal embroil which took place on the date of occurrence between the deceased and the accused persons with respect to the same issue which the deceased had raised, finds support from the evidence of the prosecution witnesses. Thus, in such view of the matter, the prosecution has succeeded in establishing the genesis of the occurrence which provided the motive to the accused persons for committing the said murder. It could be, however a matter for consideration as to whether this motive was so grave and serious that the accused persons would have been intended to cause death of the deceased.

37. It has also been argued by the learned counsel for the appellants that there was a delay in receipt of the FIR in the court which leads to the possibility of ante-dating of the said FIR. To consider this aspect of the matter, we have considered the concerned materials on record and find that the fardbeyan of the informant was recorded with all promptness on the very date of the occurrence at 9.30 AM i.e. within two hours of the occurrence which was duly signed by the informant (PW-6) and marked as exhibit. The said fardbeyan also bears the signature of two witnesses, one being Sahjahan (PW-8) who had arrived at the place of occurrence upon intimation given by the informant. The formal FIR was drawn up on the same day at about 2.30 PM and the Investigating Officer also prepared the inquest report (Exhibit-3) on the same day at 10.00 AM after recording the farbdeyan of the informant. The defence has not posed any question or made any suggestion to any other witness especially PW-5 (I.O.), PW-6 (informant) and PW-8, the witness and the signatory to the FIR which would make any indication towards the defence contention of ante-dating, ante-timing of the FIR. In absence of any such suggestion and also considering the attending circumstances, mere delay of one day would not adversely affect the sanctity of the FIR.

38. At this stage, we may make a reference to the case of **Laxmibai & Anr. Vs. Bhagwantbuva & Others** reported in **(2013) 4 SCC 97**, wherein it has been held that if a party wishes to raise any doubt as regards the correctness of statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part which is being objected to, without which it is not possible to impeach credibility of the witness. A reference has also been made in the said judgment to Section 138 of the Indian Evidence Act, 1872 which enables the opposite party to cross-examine the witness with regard to the information tendered in evidence by him during examination-in-chief.

39. Upon careful consideration of the rival contentions of the parties, we find that there is specific and direct allegation of assault by axe upon the appellant Ajaj causing the instantaneous death of the deceased on the spot, upon exhortation given by the appellant Kallamuddin and the same has been consistently supported by all the prosecution witnesses. The defence has not been able to point out any major contradictions which would go to the root of the case. Some minor discrepancies and inconsistencies have been referred, but the same would not be of much consequence and would not

demolish the prosecution case. The prosecution has not only succeeded in proving the genesis of the occurrence, but has also proved the date of occurrence, the time of occurrence as well as the place of occurrence. The medical evidence adduced on behalf of the prosecution also totally corroborates the ocular account given by the prosecution witnesses. The defence argument of the deceased getting injured due to fall upon the axe, does not at all sound appealing and has to be rather rejected in view of the nature of the injury suffered by the deceased as disclosed in the postmortem report, which is a deep incised wound below right ear traverse in direction extending from right side of neck to right cheek, exposing muscles and large vessels of neck. It would be apparent that this kind of an injury would not be possible by falling upon an axe. It rather depicts the use of the axe in causing the said injury.

40. However, the doctor who conducted the postmortem examination on the dead body of the deceased (PW-7) has stated in his cross-examination that if there is a forceful assault by the spade/axe, bone injury could be possible, but in the present case he has opined that no bone injury has been found. This circumstance has been used by the defence to contend that even if the axe blow has been inflicted, the same

has not been inflicted with enough force to cause injury to the bone. On a collective consideration of the case of the prosecution and also the medical evidence given by the doctor (PW-7), one thing would undoubtedly emerge that there is a single incised injury and there is no repetition of blows by the appellant Ajaj. So far as other injuries on the body of the deceased are concerned, they are in the nature of abrasions which in the doctor's opinion are scratches caused due to dragging etc.

41. After a careful scrutiny of the entire evidence on record, we find that the evidence of the prosecution witnesses are cogent, convincing and reliable and in such view of the matter, the prosecution has been able to prove its case, beyond reasonable doubt, to the extent that the death of the deceased was caused by the assault inflicted by the appellant Ajaj by means of an axe upon the neck of the deceased, which was done upon exhortation made by the appellant Kallamuddin.

42. The only question now to be considered is as to whether the present case would fall within the ambit of Section 302 IPC or would be one covered by Section 304 Part II of the IPC. Despite the consistent evidence of the prosecution witnesses with regard to the appellant Ajaj inflicting axe blow

upon the deceased, there is neither any allegation nor any injury found to show any repetition of blows. The medical evidence clearly demonstrates that there is a single incised injury caused by sharp cutting weapon and the same further suggests that there is no injury of the bone, which is indicative of the fact that blow was not very forceful. The entire sequence of events are not suggestive of any premeditated plan to commit the death of the deceased. Rather the death of the deceased has taken place on account of a sudden fight in the heat of passion. It is apparent from the facts of the case that the appellant Ajaj was ripping a bamboo cob with an axe, as consistently stated by all the prosecution witnesses, including the defence witness. The prosecution has nowhere made out a case that the appellant Ajaj was armed with an axe on account of some premeditated plan to kill the deceased, nor it is the case of the prosecution that the appellant Ajaj had concealed the axe somewhere which he brought to commit murder of the deceased. The prosecution case rather reveals, without any ambiguity that the appellant Ajaj was engaged in the work of ripping the bamboo cob with the help of the said axe and it is for no other reason that he was armed with an axe.

43. It is also a fact that there had been no

confrontation with the deceased on the day prior to the date of occurrence, but it is only after the conversation started becoming heated and got converted into verbal embroil, that the appellant Kallamuddin exhorted at the spur of the moment to assault her, whereupon the appellant Ajaj, without giving any thought, immediately dealt an axe blow on the neck of the deceased causing her death. So far as Kallamuddin is concerned, at best the allegation upon him is that of exhortation to assault in the background of the verbal altercation and heated exchange of words. There is a possibility that appellant Kallamuddin only ordered to assault, totally oblivious of the fact that on such order appellant Ajaj would inflict an axe blow on the neck of the deceased causing her death. At this stage, the evidence of PW-4 may also be referred to, who has stated that Kallamuddin did not do anything and it was Ajaj who inflicted the axe blow.

45. A consideration of the individual act of the appellant Ajaj would also demonstrate in the background of the prosecution evidence, that he was already engaged in ripping of the bamboo cob with an axe which he suddenly used to assault the deceased upon exhortation by the appellant Kallamuddin without having intended to cause death of the deceased. From the entire conspectus of the case and considering the factual

matrix, it can be safely concluded that in absence of any intention on the part of the appellants to cause death, the present case would not fall within the ambit of Section 302 of the IPC to describe it as murder but it would only make out an offence of culpable homicide not amounting to murder, punishable under Section 304 part II of the IPC as the very act of using an axe for assault, even if used at the spur of the moment in a sudden fight, existence of knowledge that such an act is likely to cause bodily injury which in turn is likely to cause death of the deceased, cannot be denied.

46. We may refer to the Judgment rendered by the Hon'ble Apex Court in the case of ***Khokhan @ Khokan Vishwas Vs. State of Chhattisgarh***, reported in ***(2021) 3 SCC 365***, wherein the Hon'ble Supreme Court of India, in paragraph-9 has considered Exception-4 to Section 300 IPC and has held as under:-

> "**9.** Section 300 IPC is in two parts. The first part is when culpable homicide can be said to be the murder and the second part is the exceptions when the culpable homicide is not murder. The relevant part of Section 300 IPC for our purpose would be Clause 4 to Section 300 and Exception 4 to Section 300 IPC. As per Clause 4 to Section 300 IPC, 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, such culpable homicide can be said to be the murder. However, as per Exception 4 to Section 300, 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. As per Explanation to Exception 4 to Section 300 IPC, it is immaterial in such cases which party offers the provocation or commits the first assault."

47. In ***Litta Singh and another Vs. State of Rajasthan***, reported in ***(2015) 15 SCC 327***, the Hon'ble Supreme Court of India while converting the conviction under Section 302 to 304 Part II IPC has held as under:-

"**23.** Considering the nature of the injury caused to the deceased and the weapons i.e. lathi and gandasi (sickle) used by them, it cannot be ruled out that they assaulted the deceased with the knowledge that the injury may cause death of the person. Moreover, there is no evidence from the side of the prosecution that the accused persons preplanned to cause death and with that intention they were waiting for the deceased coming from the field and then with an intention to kill the deceased they assaulted him.

24. It is a well-settled proposition of law that the

intention to cause death with the knowledge that the death will probably be caused, is a very important consideration for coming to the conclusion that death is indeed a murder with intention to cause death or the knowledge that death will probably be caused. From the testimonies of the witnesses, it does not reveal that the accused persons intended to cause death and with that intention they started inflicting injuries on the body of the deceased. Even more important aspect is that while they were beating the deceased the witnesses reached the place and shouted whereupon the accused persons immediately ran away instead of inflicting more injuries with the intent to kill the deceased.

26. After analysing the entire evidence, it is evidently clear that the occurrence took place suddenly and there was no premeditation on the part of the appellants. There is no evidence that the appellants made special preparation for assaulting the deceased with the intent to kill him. There is no dispute that the appellants assaulted the deceased in such a manner that the deceased suffered grievous injuries which were sufficient to cause death, but we are convinced that the injury was not intended by the appellants to kill the deceased.

27. In the facts and circumstances of the case, in our considered opinion, the instant case falls under Section 304 Part II IPC as stated above. Although the appellants had no intention to cause death but it can safely be inferred that the

> appellants knew that such bodily injury was likely to cause death, hence the appellants are guilty of culpable homicide not amounting to murder and are liable to be punished under Section 304 Part II IPC."

48. After analyzing the entire evidence in the present case too, we find that there is no evidence that the appellants had made any special preparation for assaulting the deceased with an intent to kill her. The unfortunate occurrence was a fall out of the sudden heated exchange of words between the deceased and the accused persons and the circumstances strongly indicate that the appellants were not harbouring any intention to kill the deceased and never made any preparations for the same.

49. Thus, based on a conspectus of the abovementioned facts and circumstances of the case and the law prevailing on the subject matter, it has weighed upon us to come to a finding that the present case would fall under Section 304 part II of the IPC, especially in view of the fact that from the evidence adduced by the prosecution, intention to kill the deceased does not get established and moreover, the prosecution has neither been able to establish, nor has alleged presence of premeditated mind of the appellants to cause murder of the deceased. The entire occurrence seems to have

happened in a sudden fight on the spur of the moment and under the heat of passion, hence the element of intention to cause death of the deceased seems to be missing.

50. Therefore, upon thoughtful consideration of the prosecution case and the evidence adduced in support of the same, we hold that the appellants are liable to be convicted under Section 304 Part II of the IPC. As such, the conviction of the appellants under Section 302/34 of the IPC is altered to one under Section 304 Part II of the IPC.

51. Before coming to the sentence part, we would like to refer to few case laws wherein the conviction of the accused persons have been converted from Section 302 IPC to one under Section 304 Part II IPC and lesser than the maximum sentence has been awarded or the accused persons have been sentenced to undergo the custody period already undergone by them.

52. In the case of ***Randhir Singh vs. State of Punjab*** reported in ***AIR 1982 SC 55***, the facts of the case was that the appellant had given a blow with a *Kassi* on the head of the deceased who suffered injuries on his head and later on succumbed to the injuries received. Paragraphs-9 and 10 of the said judgment are being quoted hereunder for ready

reference:-

> "**9.** In our opinion, having regard to the totality of circumstances viz. there is only one injury, that the weapon was not carried by the appellant in advance, that there was no premeditation, that he was a young college going boy, that there was some altercation between the deceased and his father and that the death occurred nearly after six days, one can only say that the appellant must be attributed the knowledge that he was likely to cause an injury which was likely to cause death. Under these circumstances, in our opinion, the appellant is shown to have committed an offence under Section 304 Part II of the Penal Code, 1860 and he must be convicted for the same and sentenced to suffer rigorous imprisonment for five years.
>
> **10.** Accordingly this appeal is allowed and the conviction of the appellant is altered from Section 302 of the IPC to Section 304 Part II of the IPC, and the sentence of life imprisonment is reduced to rigorous imprisonment for five years."

53. We would also like to refer to a judgment rendered by the Hon'ble Supreme Court of India, by a three judges bench, reported in ***(2018) 8 SCC 228* (*Deepak Vs. State of Uttar Pradesh)***, wherein the facts were that the assault by way of a sword blow by the appellant in the rib-cage area of deceased caused a punctured wound and subsequently led to the death of the deceased. The case was also supported by an

injured witness and other eye witnesses. Paragraphs-7 and 8 of the judgment are quoted hereunder for ready reference:-

> "**7.** On consideration of the entirety of the evidence, it can safely be concluded that the occurrence took place in the heat of the moment and the assault was made without premeditation on the spur of time. The fact that the appellant may have rushed to his house across the road and returned with a sword, is not sufficient to infer an intention to kill, both because of the genesis of the occurrence and the single assault by the appellant, coupled with the duration of the entire episode for 1½ to 2 minutes. Had there been any intention to do away with the life of the deceased, nothing prevented the appellant from making a second assault to ensure his death, rather than to have run away. The intention appears more to have been to teach a lesson by the venting of ire by an irked neighbour, due to loud playing of the tape recorder. But in the nature of weapon used, the assault made in the rib-cage area, knowledge that death was likely to ensue will have to be attributed to the appellant.
>
> **8.** In the entirety of the evidence, the facts and circumstances of the case, we are unable to sustain the conviction of the appellant under Section 302 IPC and are satisfied that it deserves to be altered to Section 304 Part II IPC. It is ordered accordingly. Considering the period of custody undergone after his conviction, we alter the sentence to the period of custody already undergone. The appellant may be released forthwith if not required in any other case."

54. It would also be apt to refer to a judgment rendered by the Hon'ble Supreme Court of India, reported in ***(2011)14 SCC 471* (*Buddhu Singh & Others Vs. State of Bihar)***, wherein once again the issue of conversion of

conviction from Section 302 IPC to Section 304 Part II IPC was considered although the death was caused by an axe blow on the head of the deceased. We think it proper to quote paragraphs-8 and 9 of the said judgment herein below:-

> "**8.** Considering the overall material, we are of the view that there is hardly anything on record which can be said against accused Ledwa Singh and Balchand Singh though the common intention on their part could be attributed since they had done the overt act of grappling with and pinning down the deceased. Now, seeing that his father and brother had been grappling with the deceased, accused Buddhu Singh dealt an axe-blow which could not be said to be intended towards the head. It could have landed anywhere. However, it landed on the head of the deceased. Therefore, the element of intention is ruled out. Again the defence raised on behalf of the accused that there could not have been the intention to commit the murder of the deceased is justified by the fact that accused Buddhu Singh did not repeat the assault. Under the circumstances, we feel that the prosecution has been able to establish the guilt of the accused persons under Section 304 Part II IPC.
>
> **9.** We, accordingly, modify the finding of the High Court and convert the conviction of the accused from Section 302 IPC to Section 304 Part II IPC and sentence each of them to the period already undergone. Accused Buddhu Singh is stated to be in jail for the last five years whereas other accused persons, namely, Ledwa Singh and Balchand Singh are stated to be in jail for the last ten years. They be released from the jail forthwith unless they are required in any other case."

55. In view of the law laid down by the Hon'ble Apex

Court, in the abovementioned judicial pronouncements, we have given a careful consideration to the facts of the present case for the purpose of awarding a proper sentence. So far as appellant of Cr. Appeal (DB) No.397 of 2016 (Md. Kallamuddin) is concerned, besides the other considerations of being an order-giver and not being the one who resorted to assault, his age is also required to be taken into consideration. In his statement under Section 313 Cr.P.C. as recorded on 29.02.2016, he has disclosed his age as 85 years whereas the learned court below has assessed his age to be 70 years. Further, he has remained in custody for more than 8 years.

56. So far as the appellant in Cr.Appeal (DB) No.642 of 2016 (Md. Ajaj @ Bauka) is concerned, he has been continuously languishing in custody since 18.03.2014 i.e. for more than 11 years. The appellants have also suffered the rigours of trial for a substantially long period.

57. Taking all the aforesaid factors into consideration, for the altered conviction under Section 304 Part II of the IPC, we alter the sentence of the appellants to the period of custody already undergone by them.

58. The appellant Md. Kallamuddin in Cr. Appeal (DB) No.397 of 2016 is on bail, hence he is discharged from the

liability of his bail bonds. The appellant Md. Ajaj @ Bauka in Cr. Appeal (DB) No.642 of 2016, who is in custody, is directed to be released from jail forthwith unless required in any other case.

59. Accordingly, the appeal is partly allowed to the extent indicated hereinabove.

Mohit Kumar Shah, J. I agree **(Soni Shrivastava, J)**

(Mohit Kumar Shah, J)

N.K/Arvind-

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