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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./204/2022

BRAJESWAR BORDOLOI AND 4 ORS.
S/O LATE SURATH BORDOLOI, VILLAGE KALIAJARI, PS MORIGAON, DIST MORIGAON, ASSAM 782105

2: SUSHIL BORDOLOI
S/O SRI BRAJESWAR BORDOLOI

VILLAGE KALIAJARI
PS MORIGAON
DIST MORIGAON
ASSAM 782105

3: SHANTI BORDOLOI
S/O SRI BRAJESWAR BORDOLOI

VILLAGE KALIAJARI
PS MORIGAON
DIST MORIGAON
ASSAM 782105

4: RANJAN BORDOLOI
S/O SRI BRAJESWAR BORDOLOI

VILLAGE KALIAJARI
PS MORIGAON
DIST MORIGAON
ASSAM 782105

5: JAYANTA BORDOLOI
S/O SRI BRAJESWAR BORDOLOI

VILLAGE KALIAJARI
PS MORIGAON

DIST MORIGAON
ASSAM 78210

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY THE PP, ASSAM

2:KATIRAM BANGTHAI
S/O LATE ASHOK BANGTHAI

RESIDENT OF KALIYAJARI
PS MORIGAON
DIST MORIGAON
ASSAM 78210

Advocate for the Petitioner : MR A ATREYA, MR D K BHATTACHARYYA

Advocate for the Respondent : PP, ASSAM,

-BEFORE-

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MR. JUSTICE RAJESH MAZUMDAR

Date on which judgment is reserved : 16.07.2026

Date of pronouncement of judgment : 24.07.2026

Whether the pronouncement is of the : N/A
operative part of the judgment ?

Whether the full judgment has been : Yes
pronounced?

JUDGMENT & ORDER (CAV)

(Rajesh Mazumdar, J)

Heard Mr. D.K. Bhattacharyya, learned counsel for the appellants. Also heard Mr. R. R. Kaushik, learned Addl. P.P, Assam, appearing for the State.

2. This appeal has been filed against the conviction and the sentence awarded by the learned Sessions Judge, Morigaon, to the 5 (five) accused, who are appellants herein, in Sessions Case No.24/2025 under Sections 302, 324 and 143, IPC. Although the 5 convicts had preferred a common appeal, the appellant No.1, who was convicted under Section 143 and 302 IPC, had expired during the pendency of the appeal, and the appellant No.2 and appellant No.5, who were convicted under Section 143 of the IPC, have served the sentence imposed upon them. The appellant No.3 and the appellant No.4, who were convicted under Section 143, 302, 324 and under Section 143 and 302 respectively, had been sentenced to undergo rigorous imprisonment for life and they are serving their sentences.

3. Facts Of The Case:

Investigation was set into motion on receipt of an FIR lodged on 26.05.2013 by the informant, who also adduced evidence as PW-3 in the trial, to the effect that the 7 (seven) accused named in the FIR had caused the death

of one Bolu Bangthai by assaulting him with a dao, hoe and axe and had also grievously injured PW No.2, namely Katiram Bangthai. The cause of the incident related to the establishment of a permanent stage for the public beside a PWD road. The prosecution had arrayed 7 (seven) persons as accused, where accused No.1 and the accused Nos. 5 were husband and wife, and the rest of the accused were their sons. All the 7 accused had undergone custody for different periods during the trial.

The investigation culminated in a charge-sheet dated 31.10.2013; charges were framed on 29.06.2015, and after evidence was led through 11 Prosecution witnesses, the judgment was delivered on 02.06.2022, and the order of sentence was passed on 08.06.2022. The accused No.5 and accused No.7 were acquitted during the trial. The following chart depicts the conviction and the sentences imposed on each of the appellants;

Rank of the accused	Name of Accused	Offences Charged with	Whether Acquitted or convicted	Sentence Imposed
A1	Sri Brajeswar	147/148/149/302/324 IPC	Convicted u/s 143, 302 IPC	RI for life and fine of Rs.50,000/- i/d further SIR for 1 (one) year for offence u/s 302 IPC, SI for 30

				days for offence u/s 143 IPC.
A2	Sri Sushil Bordoloi	147/148/149/302/324 IPC	Convicted u/s 143, IPC	SI for 30 days for offence u/s 143 IPC
A3	Sri Shanti Bordoloi	147/148/149/302/324 IPC	Convicted u/s 143, 302, 324 IPC	RI for life and fine of Rs. 50,000/-i/d further SIR for 1 (one) year for offence u/s 302 IPC, SI for 30 days for offence u/s 143 IPC & RI for 1 (one) year for offence u/s 324 IPC
A4	Sri Ranjan Bordoloi	147/148/149/302/324 IPC	Convicted u/s 143, 302, IPC	RI for life and fine of Rs.50,000/-i/d further SI for 1

A6	Sri Jayanta Bordoloi	147/148/149/302/324 IPC	Convicted u/s 143, IPC	(one) year for offence u/s 302 days for offence u/s 143 IPC. SI for 30 days for offence u/s 143 IPC

4. <u>Evidence led by the Prosecution</u>:

A. The Doctor who had conducted the post-mortem on the deceased/victim was presented as PW-1. After having deposed regarding the physical appearance of the victim, the witness described the injuries seen on the victim, and opined that the death of the person was due to cardio-respiratory failure following Haemo- pneumo - thorax and head injuries caused by sharp and heavy weapons which were anti-mortem in nature. Cross-examination on behalf of the defence was declined.

B. PW-2 was a victim who was injured at the hands of the accused, while the deceased/victim was being struck with lethal blows. PW-2 deposed that on that particular day at around 10:30 a.m, the appellant No.4, appellant No.3,

appellant No.5, appellant No.2 and appellant No.1 had damaged the foundation stone of the Rangamancha, which was laid on the same day, and they were doing earthwork at that place. PW-2, the deceased, Upeswar and one Milan had gone there. Appellant No.3 hit the deceased on his back with an 'axe', and the appellant No.1 (deceased) dealt a blow on his head. When PW-2 approached to save the deceased/victim, who was also his brother, appellant No.3 struck an 'axe' blow on his left arm. He lost his senses, was brought to the Morigaon Civil Hospital, where he remained under treatment, and the police recorded his statement at Morigaon Civil Hospital.

During cross-examination, he stated that they went there when they saw the accused persons doing earthwork at the place of occurrence, and that the plot of land belonged to Kula Pator and Bhadra Pator, which they had gifted to the village people. He stated that he was present when the land was gifted and that there was a written agreement. The place of occurrence was a paddy seedling plot. He denied that the accused had possessed the land for a long time. He denied that the deceased/victim had tried to harm appellant No.4, and in this scuffle, he and the deceased were injured.

C. The informant in the case had deposed as PW-3, and he stated that the deceased was his maternal uncle. PW-3 had gone to the weekly market on that day, and he received a phone call from another maternal uncle about a murder incident that had occurred, and that someone was injured. He deposed that two

days prior to the incident, a Rangamanch was erected on the land belonging to Kula Pator, Bhadra Pator and Gupta Pator. On reaching the place of occurrence, he found the body of the deceased/victim near the LP School of Kaliajari. The injured PW-2 was loaded in an ambulance, and the police was thereafter informed. He accompanied the dead body when it was taken to the police station by the police. Some weapons, which were scattered near the place of occurrence, were also collected and taken to the police station. Thereafter, he lodged the FIR.

On cross-examination, he stated that he did not see the incident but had seen the dead body, and he identified the distance of the school from the house of the accused to be about 70 to 80 meters. He admitted knowing Nikhil Biswas and that he had filed a criminal case against some persons which was pending in the Court. He had written the FIR at the place of occurrence. He admitted knowledge of a quarrel between the accused and the village people over a plot of land which was in possession of Kula Pator.

D. PW-4 was a cousin of the deceased victim, and he stated that he went to the place of occurrence from his house on hearing commotion. He saw the dead body of the victim lying on the ground, and he also saw a ‘dao’ blow injury on his head and an injury caused by an ‘axe’ on his back. He had also seen another injury on the head. According to him, the whole village had come to the spot and gathered there, and he came to know that his brother, PW-2, had suffered injuries on his right shoulder caused by an ‘axe’ by the accused persons. The

police arrived at the place of occurrence after about one and a half to two hours. He had heard that the accused persons had gone to the place of occurrence to destroy the foundation stone for the construction of Rangamanch, and the deceased and the injured victims had tried to resist. On a challenge being made to the accused persons, the incident took place. He has stated that the land was gifted to the villagers by the owners through Execution of a deed and the same had been handed over to the police.

On cross-examination, he stated that as per his knowledge, the land owners gifted the land and he did not know that the land belonged to a lady. All the accused persons belonged to the same family. He denied that the plot of land was given by the lady to the father of the accused and that since that time the accused were in possession of the land and that they had tried to evict the accused from the land. He stated that after the incident, the villagers had surrounded the house of the accused person and set it on fire. On reaching the place of occurrence, he had seen the accused persons running from the place of occurrence. He named a few persons whom he saw at the place of occurrence. He stated that the body of the deceased was lying beside the Rangamanch.

E. PW-5 knew the informant, the deceased and the accused. He deposed that on hearing commotion, he had gone to the place of occurrence, which was about 100 m away from his house. He saw the deceased lying on the ground in an injured condition, and he died after a few minutes. He had crossed the accused persons who were coming from the opposite direction when he was

going to the place of occurrence. He heard that the deceased had been assaulted by dao, axe and spade. He heard that the Tiwa Council had donated money to the villagers for construction of Rangamanch over the land which the accused persons had claimed to belong to them. He had heard that the accused persons had assaulted the deceased and that PW-2 suffered a cut injury in the incident. He also heard that the land belonged to Kularam Pator and his brothers.

In his cross-examination, he deposed that he knew that the case was pending regarding the burning down of the houses of the accused. He had seen a crowd of over 100 people on reaching the place of occurrence; however, he did not know the name of those persons. The villagers had taken possession of the land to construct Rangamanch after verifying the documents, and the accused did not have any plot of land in or around the said plot of land. He saw the deceased on the village road as he was being taken to hospital, and he had not seen the assault upon the deceased.

F. PW-6 was from the same village as the accused, and he also knew the informant and the deceased. He deposed that the Tiwa Autonomous Council had given a grant of Rs.5,00,000/-(rupees five lakhs) to make an auditorium. As there was no suitable land, three brothers, namely, Kula Pator, Bhadra Pator and Gupta Pator, had gifted the piece of land to the village people by executing a deed on 17.05.2013 to construct the auditorium. The construction of the auditorium was inaugurated on 24.05.2013. On the day of the incident, the

accused went to the place where the construction of the auditorium hall was situated and demolished the pillars of the proposed hall. The deceased, the injured, Rupeswar Pator and Milon Pator, had asked the accused persons not to destroy the pillars, but the accused persons assaulted those persons, and Bolu Bangthai died on the spot. PW-2 sustained injuries in the assault. The accused gave a dao blow on various parts of the body of the deceased. He went to the place of occurrence and saw deep cut injuries on the head, back side of the neck and back of the deceased. He saw a deep cut injury on the hand of the injured PW No.2. The accused person ran away from the place of occurrence. There was a huge gathering of the village people, and the Executive Magistrate and higher Police Officer had arrived to control the situation. The police arrested the accused; the dead body was taken away for post-mortem, and the injured were taken to the hospital. The ‘dao’ and the ‘axe' were seized from the place of occurrence. Police also seized a deed and some land documents in connection with the case.

On cross-examination, he stated that the incident had taken place at 10:40 a.m and he arrived at the place of occurrence at 11.30 a.m. He did not see the occurrence but saw the corpse lying near the proposed hall. He heard that the accused had lodged a criminal case against some villagers to escape from the instant case. He denied that the accused persons were possessing the land where the proposed hall was to be constructed. He did not see the seized articles in Court.

G. PW-7 also belonged to the same village as the informant, the deceased and the accused. He deposed that the villagers had established a community hall at the village and the proposed building was inaugurated on 24.05.2013. On the date of occurrence, at about 10:00 a.m., all the accused went and demolished all the pillars of the proposed hall. On seeing the destruction of the pillars, some village people, including the deceased, the injured, Rupeswar Pator and Milan Pator, went to the site. They asked them the reason for demolishing the pillars. The accused, instead of listening, assaulted them with sharp weapons. He deposed that appellant No.5 hit the neck of the deceased with a 'dao ', causing deep injuries, and that appellant No.3 gave a blow on the back side of the deceased with an 'axe'. Thereafter, appellant No.1 (now deceased) hit the deceased victim on his head with a spade. As a result, the victim fell and succumbed to his injuries on the spot. When the deceased victim was being assaulted, the injured victim tried to save him, but the appellant No.3 assaulted him with a 'dao' on the left hand. Neighboring people came out when hue and cry was raised. PW-7 deposed that he had seen the incident of murder as he reached the place of occurrence just 2-3 minutes before it happened. When he first arrived, he saw an altercation and quarrel between the accused and the deceased. When the accused entered into a hot altercation with the deceased, he thought of interfering, but when he saw the accused person assaulting the deceased with a 'dao' and 'axe', he got frightened and did not dare to proceed. He, however, saw the entire incident. The villagers had taken the injured to the

Morigaon Hospital, and the police also arrived. The accused ran away from the place of occurrence after the incident, and later on, were arrested with the help of the villagers. All the accused were equally responsible for the alleged incident.

During cross-examination, he stated that the accused had filed a case against them also, where he was one of the accused. He had found a gathering of around 20 people when he arrived at the place of occurrence. The dead body was lying on the roadside. He clarified that appellant No.5 did not hit the deceased and actually it was appellant No.4 who had hit the deceased. He denied the suggestion that he did not state before the police that the appellant No.3 had hit the deceased on his back side with an 'axe'. He denied the suggestion that the accused persons were possessing and enjoying the plot of land where the Rangamancha was situated. Police had arrived after about 15 to 20 minutes of the incident. He was present when the police arrived. The dead body was taken for post-mortem at about 4:30 p.m.

H. PW-8 knew the informant and the accused. He deposed that the villagers had laid the foundation stone for the construction of a community hall on a plot of land donated by Kula Pator, Bhadra Pator and Gupta Pator. After two or three days of the foundation ceremonies, the accused person had gone to the plot of land and destroyed the foundation stone and the post. When this witness, along with the deceased, the injured and Rupeswar, approached them not to cause any damage, the appellant No.4 suddenly hit the deceased with a 'dao', and

thereafter the appellant No.3 also dealt a blow with a wooden 'axe' on the shoulder of the deceased. The appellant No.1 had also hit the deceased on his head with a spade. The deceased fell as a result of the blows, and there was profuse bleeding. The injured victim, namely PW-2, was also assaulted by the appellant No.4. They raised hue and cry, and the roadside people came to the place of occurrence. The accused fled away from the place when the village people started together.

In his cross-examination, he deposed that he did not know the dag number and patta number of the land where the community hall was proposed. He denied that the accused person possessed the plot of land where the community hall was proposed. He deposed that the accused were demarcating boundaries on the plot of land on the date of occurrence. The accused had also lodged a case against some of the villagers.

I. PW-9 knew the informant and the deceased, and he also knew all the accused persons. He deposed that on 24.05.2013, the village people laid the foundation for the construction of a community hall. The plot of land was donated by Kula Pator and Bhadra Pator, to whom the land originally belonged. After two days of the foundation ceremony, appellant No. 1, along with his sons, who are also appellants herein, went to the said plot of land and destroyed the foundation stone of the community hall, and thereafter, they demarcated the land. He had seen the accused destroying the foundation stone. He deposed that when the deceased asked the accused why they were doing so, the

appellant No.4 hit the deceased on his back with a 'dao' and the appellant No.3 hit him on his back side with an axe. When PW-2 approached the accused persons, appellant No.3 hit the arms of PW-2 with an axe. The appellant No.1 had also assaulted the deceased on his head with a spade. The deceased died on the spot, and there was profound bleeding. The incident took place in front of his eyes. On raising hue and cry, neighboring people started to come to the place of occurrence, and the accused fled away from the place of occurrence.

In his cross-examination, he denied that the accused had been cultivating the plot of land which was the centre of the dispute. The accused had reached the place of occurrence before their arrival. Though he was with the deceased, he did not sustain injuries, and he could not prevent the deceased from being assaulted. He deposed that the accused had lodged the case regarding the destruction, etc. of their house. The police found the dead body of the deceased on the road. The place where the foundation stone was laid and the road are two different places. He denied their suggestions put to him but affirmed that the two wives of appellant No.1 were not present at the place of occurrence. He denied the suggestion that the accused had been possessing and cultivating the land for a long time and that the false case had been lodged only to evict them from the said land.

J. PW-10 claimed to be one of the owners of the land which was donated to set up the community hall. He was in the market of the village when he heard that the accused had killed the deceased. He and his brothers had donated the land

to set up the community hall. On the date of the incident, the accused had demolished the foundation stone of the community hall. The deceased, the injured, Rupeswar Pator and Milan Pator, had restrained the accused from causing harm to the foundation stone. During the quarrel, the accused assaulted the deceased, who died. They also cut the hand of PW-2. He went to the place of occurrence after hearing the incident, saw the dead body of the deceased, and the village people told him that the 5 (five) accused had killed the deceased and cut the hand of PW-2.

On cross-examination, he stated that he did not see the occurrence. He saw the dead body lying near a school gate. He did not see the injuries on the deceased. The land had been donated by making an affidavit, and it was in their possession prior to the incident. The villagers had demolished the newly built house of the accused near the proposed community hall. They had handed over the land document of the community hall to the police.

K. PW-11 was a retired police officer who, as investigating officer during his service period, had visited the place of occurrence when he was serving as a Sub Inspector in the Morigaon Police Station. He deposed that information had been received that there was a quarrel between two parties over a land dispute in which a person was assaulted with a 'dao' and he died. GDE No.476 dated 26.05.2013, which he later corrected to be GDE 746 dated 26.5.2013, had been made. On instruction of the Officer-in-Charge, he went to the place of occurrence, inspected the same and drew a sketch map. He found about one

thousand men and women at the place of occurrence, and that the accused person was hiding in a house and people were throwing stones at it. He found the dead body, and from the public, he identified the same. He also found PW-2 in an injured condition. The dead body and the injured were moved to the Morigaon Civil Hospital with the help of CRPF escorts, while he remained at the place of occurrence. He had arrested the accused and had seized one axe, one wooden-handled dao, one spade and one kekura dao. The formal FIR had been lodged around 7:00 p.m. by the informant. He had seized one copy of the Court affidavit, a copy of Khazana Receipt, a copy of an agreement and a copy of the Jamabandi. He was transferred and the case diary handed over to the Officer-in-Charge.

During cross-examination, he said that the case was registered on 26.05.2013 at 7:30 p.m. while the incident occurred at 10:40 a.m. on the same day. He had arrived at the place of occurrence at 11:35 a.m on the basis of the GDE No.746/2013 which was made at 10:55 a.m. on the same day. The seized articles were not sent for forensic laboratory tests. He had not made any investigation regarding possession over the land where the incident took place.

L. PW 12 was the police officer who had, on being handed over the case diary, submitted the charge-sheet since he found that the investigation of the case was complete. On cross-examination, he stated that from the CD, it appeared that blood-stained articles were not sent for forensic laboratory examination.

M. The Court also examined a Doctor as CW1. The doctor deposed that the report prepared by the Doctor who had examined PW No.2 described the wound, the weapon used, and the nature of injuries sustained. In his cross-examination, he deposed that there was no mention of the age of the patient or the age of the injury.

N. The Court thereafter recorded the deposition of an ASI of police attached to the Morigaon police station as CW-2, who exhibited the GD entries number 746 and 748 dated 26.05.2013.

The accused were thereafter examined under section 313 of the Cr.P.C, where the convicted appellants had indicated that the land where the incident had occurred was in their possession and that the appellant No.4 had struck the deceased after the deceased had assaulted the appellant No.1. It was admitted by then that they had removed the posts of the proposed community hall and that they had assaulted the deceased. The injury on the hand of PW-2 was also admitted without admitting that the appellants caused the said injury. The two ladies, who were accused along with the appellants herein, had denied their presence at the place of occurrence.

The appellants, who were found guilty of offences under Section 143, 324 and 302 IPC, were thereafter heard on the point of sentence, and thereafter, by the judgement dated 02.06.2022, conviction was recorded against the appellants herein, acquitting two of the female accused, and sentences as described hereinbefore were imposed upon the convicts.

5. <u>Stand Of The Appellants:</u>

I. Mr. D.K. Bhattacharya, learned counsel for the appellants, has submitted that the impugned order of conviction which has been assailed in this appeal suffers from impropriety inasmuch as, the said judgement failed to take into consideration the fact that the petitioners had exercised their right of private defence, and that, exercise of such right would bring the appellants herein out of the purview of an act of offence under the criminal law. The learned counsel for the appellants has submitted that the plea taken by the appellants, that they were in possession of the land in which the incident had occurred, is a plausible one, and viewed in that light, the appellants had the right of defending their property against intrusion by the deceased, the injured witness and any other person, who sought to construct a community hall on their land. The learned counsel for the appellants has submitted that it had come in evidence that during investigation, the investigating agency had seized certain affidavits, an agreement and certain documents relating to land revenue. Still, such documents had not been placed before the Trial Court where evidence was led for the prosecution without any explanation. The learned counsel for the appellants has submitted that such non-production of vital documents before the learned Trial Court would indicate that such documents would have proved the ownership and possession of the appellants over the piece of land in which the incident took place. Stretching the aforesaid proposition a bit further, the

learned counsel for the appellant has submitted that since it is an admitted position that the deceased and the injured witness along with two other persons had entered into the property of the accused, the accused were within their rights to take such steps as would assure protection of their private property.

II. He has further submitted that the prosecution failed to prove beyond reasonable doubt that the appellants had struck the deceased, either with the knowledge or the intent, to either cause death or such bodily injury that could cause death. According to the learned counsel, the above, juxtaposed with the explanation given by the defence that they had assaulted the deceased only when the appellant No.1, who happened to be the father of the other appellants, had been assaulted by the deceased, it would be beyond the contours of law and justice to presume the guilt of the appellants as sought to be projected by the prosecution. He has submitted that the assertion of the appellants, that they were in possession of land, the proved fact by the prosecution that the deceased and the injured victim had entered into an altercation with the appellants in the said land and had assaulted the appellant No.1, and the assertion that the appellants only retaliated, would show that the appellants had exercised their right of defence, not only their property but also their bodies from incurring injuries. He has also referred to discrepancies in the evidence led by the prosecution regarding the place where the police had recovered the body.

III. The learned counsel for the appellants has thereafter submitted that the failure of the prosecution to have the offending weapon identified by the doctor vis-a-vis the injuries would also prove fatal to the case of the prosecution. He submitted that when the blood-stained earth had been collected but not sent for FSL, such failure would lead to the site of crime not being proved. He thereafter submitted that the absence of any forensic laboratory tests or serological tests of the alleged weapon of crime would also prove fatal to the case of the prosecution.

IV. He has submitted that the failure of the learned Trial Court to discuss the contradictory versions made by different alleged eye witnesses and the failure of the learned Trial Court to evaluate the explanation given by the appellants in the statement recorded under Section 313 of the Cr.P.C also requires the impugned judgment to be set aside.

V. The learned counsel for the appellants has submitted that the records of the Trial Court would show that on their production, the arrested accused appellants were found to have sustained injuries on their bodies and the failure of the prosecution to explain such injuries on their persons would also be another loose link to weaken the prosecution case. The learned counsel has referred to the following citation in support of his arguments:

6. <u>Cases Relied Upon By Appellants:</u>

A. Doctor to be shown offending weapon;

Kartarey and Ors v. State of U.P reported in ***(1976) 1 SCC 172 ;***

> *"24. It is true that neither the parties nor the trial Court asked the medical witness, Dr. Radha Mohan as to whether the injuries found on the deceased could be caused with this particular chhura Ex. 1. It seems that this weapon was not shown to the doctor at all. The prosecution remained content with the general answer given by the doctor that the injuries to the deceased appear to have been caused with "sharpedged weapon süch as chhuri and katar."*
>
> *"26. We take this opportunity of emphasising the importance of elicit-ing the opinion of the medical witness, who had examined the injuries of the victim, more specifically on this point, for the proper administration of justice. particularly in a case where injuries found are forensically of the same species. e.g. stab wounds, and the problem before the Court is whether all or any of those injuries could be caused with one or more than one weapon. It is the duty of the prosecution, and no less of the Court, to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may, sometimes, cause aberration in the course of justice.'*

B. Blood stained earth to be sent to FSL-Failure leads to situs of crime not being proved;

Ganesh Datt v. State of Uttarakhand reported in ***(2014) 12 SCC 389;***

> *"22. The situs of attack is also alleged to be not established by the prosecution. In the first information report the complainant PW 3 Ram Lakhan has stated that he*

and his sons were sitting in their flour mill and were chatting at about 6.00 a.m. when the assailants came and attacked them. In the testimony, PW 1 Bali Raj has stated that they were sitting in front of their house when the assault took place. PW 2 Moti Lal has testified that the attack did not occur on flour mill but occurred in the verandah of the house of Prabhunath. PW 3 Ram Lakhan has testified that the place of occurrence is about 50 steps away from the flour mill. Thus there is inconsistency about the place of occurrence in their testimonies and a doubt creeps in. Though bloodstained earth was claimed to have been seized from the occurrence place by the investigating officer PW 7 Surender Singh, it was not sent for chemical examination which could have fixed the situs of the assault. In almost all criminal cases the bloodstained earth found from the place of occurrence is invariably sent to the chemical examination and the report along with the earth is produced in the court and yet this is one exceptional case where this procedure was departed from for reasons best known to the prosecution."

C. Alleged weapons of crime not sent for FSL to determine presence of blood on it;

SK. Yusuf vs. State of West Bengal reported in ***(2011) 11 SCC 754;***

"*35. Be that as it may, the spade had not been sent for chemical analysis as admitted by Digambar Mondal (PW 19), IO himself and there was no explanation furnished as for what reason it was not sent. In case of circumstantial evidence, not sending the weapon used in crime for chemical analysis is fatal for the reason that the circumstantial evidence may not lead to the only irresistible conclusion that the appellant was the perpetrator of the crime and none else and that in the absence of any report of serologist as to the presence of human blood on the weapon may make*

the conviction of the accused unsustainable. (Vide Akhilesh Hajam v. State of Bihar).”

D. Contradictory versions by alleged eye-witnesses-material discrepancy in their evidence;

Joy Devaraj v. State of Kerala reported in ***(2024) SCC OnLine SC 966;***

“15. During commission of the attack leading to the crime, there were 15 (fifteen) people forming part of the unlawful assembly. We presume, it must have been a very chaotic situation leading to certain discrepancies having arisen in the statements of the witnesses. We cannot expect all the witnesses, when under attack by the accused persons seeking to terrorize those protesting against liquor trade, to possess stellar memories with an accurate recollection of the events. The appellant was required to demonstrate that the incongruities in the statements of the several eye witnesses shook the roots of their credibility. The threshold for disbelieving a witness is not mere discrepancy or inconsistency but material discrepancy and inconsistency, which renders the account narrated by the witnesses so highly improbable that the same may safely be discarded altogether from consideration.”

E. Explanation given in statement under Section 313 Cr.P.C. ought to be considered;

Jai Prakash Tiwari v. State of Madhya Pradesh reported in ***(2022) SCC OnLine SC 966;***

“20. This Court in the case of Satbir Singh v. State of Haryana, (2021) 6 SCC 1, while emphasising upon the significance of Section 313 CrPC, has delineated the duty of the trial Court and held thus:

"22. It is a matter of grave concern that, often, trial courts record the statement of an accused under Section 313 CrPC in a very casual and cursory manner, without specifically questioning the accused as to his defence. It ought to be noted that the examination of an accused under Section 313 CrPC cannot be treated as a mere procedural formality, as it is based on the fundamental principle of fairness. This provision incorporates the valuable principle of natural justice "audi alteram partem", as it enables the accused to offer an explanation for the incriminatory material appearing against him. Therefore, it imposes an obligation on the part of the court to question the accused fairly, with care and caution. The court must put incriminating circumstances before the accused and seek his response. A duty is also cast on the counsel of the accused to prepare his defence, since the inception of the trial, with due caution..."

"*26. The purpose of Section 313 CrPC is to provide the accused a reasonable opportunity to explain the adverse circumstances which have emerged against him during the course of trial. A reasonable opportunity entails putting all the adverse evidences in the form of questions so as to give an opportunity to the accused to articulate his defence and give his explanation.*"

"*29. It is an established principle of criminal law that the burden of proving the guilt of the accused beyond reasonable doubt is upon the prosecution. Where an accused sets up a defence or offers an explanation, it is well-settled that he is not required to prove his defence beyond a reasonable doubt but only by preponderance of probabilities. [See M. Abbas v. State of Kerala, (2001) 10 SCC 103]. Further, it has been held by this Court in Parminder Kaur v. State of Punjab, (2020) 8 SCC 811 that "once a plausible version has been put forth in defence at the Section 313 CrPC*

examination stage, then it is for the prosecution to negate such defence plea."

F. Injuries on the accused persons ought to be proved by the Prosecution;

Lakshmi Singh & Ors. v. State of Bihar reported in ***(1976) 4 SCC 394;***

"*12. PW 8 Dr. S. P. Jaiswal who had examined Brahmdeo deceased and had conducted the post-mortem of the deceased had also examined the accused Dasrath Singh, whom he identified in the court, on April 22, 1966 and found the following injuries on his person:*

1. Bruise 3"x" on the dorsal part of the right forearm about in the middle and there was compound fracture of the fibula bone about in the middle.

2. Incised wound 1" x 2 mm x skin subcutaneous deep on the lateral part of the left upper arm, near the shoulder joint.

3. Punctured wound 1" x 2 mm x 4 mm on the lateral side of the left thigh about 5 inches below the hip joint.

According to the doctor injury I was grievous in nature as it resulted in compound fracture of the fibula bone. injuries were also serious injuries which had been inflicted by a sharpcutting weapon. Having regard to the circumstances of the case there can be no doubt that Dasrath Singh must have received these injuries in the course of the assault, because it has not been suggested or contended that the injuries could be self-inflicted nor is it believable. In these circum-stances, therefore, it was the bounden duty of the prosecution to give a reasonable explanation for the injuries sustained by the accused Dasrath Singh in the course of the occurrence. Not only the prosecution has given no explanation, but some of the witnesses have made a clear statement that they did not see any injuries on the person of the accused. Indeed if the eyewitnesses could have given such graphic details regarding the assault

on the two deceased and Dasain Singh and yet they deliberately suppressed the injuries on the person of the accused, this is a most important circumstance to discredit the entire prosecution case. It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence. This matter was argued before the High Court and we are constrained to observe that the learned Judges without appreciating the ratio of this Court in Mohar Rai v. State of Bihar tried to brush it aside on most untenable grounds. The question whether the Investigating Officer was informed about the injuries is wholly irrelevant to the issue, particularly when the very doctor who examined one of the deceased and the prosecution witnesses is the person who examined the appellant Dasrath Singh also. In the case referred to above, this Court clearly observed as follows:

The trial Court as well as the High Court wholly ignored the significance of the injuries found on the appellants. Mohar Rai had sustained as many as 13 injuries and Bharath Rai 14. We get it from the evidence of PW 15 that he noticed injuries on the person of Mohar Rai when he was produced before him immediately after the occurrence. Therefore the version of the appellants that they sustained injuries at the time of the occurrence is highly probabilised. Under these circumstances the prosecution had a duty to explain those injuries.... In our judgment the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabilise the plea taken by the appellants.

This Court clearly pointed out that where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probabilise the plea taken by the appellants. The High Court in the present case has not correctly applied the principles laid down by this Court in the decision referred to above. In some of the recent cases, the same principle was laid down. In Puran Singh v. State of Punjab, which was also a murder case, this Court, while following an earlier case, observed as follows: [SCC p. 531: SCC (CRI) p. 621, para 20]

In State of Gujarat v. Bai Fatima one of us (Untwalia, J.) speaking for the Court, observed as follows: [SCC p. 13: SCC (Cri) p. 390, para 17]

In a situation like this when the prosecution fails to explain the injuries on the person of an accused, depending on the facts of each case, any of the three results may follow:

(1) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self-defence.

(2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(3) It does not affect the prosecution case at all.

The facts of the present case clearly fall within the four corners of either of the first two principles laid down by this judgment. In the instant case, either the accused were fully Justified in causing the death of the deceased and were protected by the right of private defence or that if the prosecution does not explain the injuries on the person of the the deceased the entire prosecution case is doubtful and the genesis of the occurrence is shrouded in deep mystery, which is sufficient to demolish the entire

prosecution case.

It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is un-reliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. In the instant case, when it is held, as it must be, that the appellant Dasrath Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the court to rely on the evidence of PWs 1 to 4 and 6, more particularly, when some of these witnesses have lied by stating that they did not see any injuries on the person of the accused. Thus neither the Sessions Judge nor the High Court appears to have given due consideration to this important lacuna or infirmity appearing in the prosecution case. We must hasten to add that as held by this Court in State of Gujarat v. Bai Fatima (supra) there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply

to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. The present, however, is certainly not such a case, and the High Court was, therefore, in error in brushing aside this serious infirmity in the prosecution case on unconvincing premises."

G. Right of Private defence of life and property;

Darshan Singh v. State of Punjab and Anr. reported in ***(2010) 2 SCC 333;***

"*25. When enacting Sections 96 to 106 of the Penal Code, excepting from d its penal provisions, certain classes of acts, done in good faith for the purpose of repelling unlawful aggressions, the legislature clearly intended to arouse and encourage the manly spirit of self-defence amongst the citizens, when faced with grave danger. The law does not require a law-abiding citizen to behave like a coward when confronted with an imminent unlawful aggression. As repeatedly observed by this Court there is nothing more degrading to the human spirit than to run away in face of danger. The right of private defence is thus designed to serve a social purpose and deserves to be fostered within the prescribed limits."*

"*27. Killing in defence of a person, according to English Law, will amount to either justifiable or excusable homicide or chance medley, as the latter is termed, according to the circumstances of the case."*

"*28. But there is another form of homicide which is excusable in self-defence. There are cases where the necessity for self-defence arises in a sudden quarrel in*

which both parties engage, or on account of the initial provocation given by the person who has to defend himself in the end against an assault endangering life."

"*29. The Penal Code defines homicide in self-defence as a form of substantive right, and therefore, save and except the restrictions imposed on the right of the Code itself, it seems that the special rule of English Law as to the duty of retreating will have no application to this country where there is a real need for defending oneself against deadly assaults."*

"*30. The right to protect one's own person and property against the unlawful aggressions of others is a right inherent in man. The duty of protecting the person and property of others is a duty which a man owes to society of which he is a member and the preservation of which is both his interest and duty. It is, indeed, a duty which flows from human sympathy. As Bentham said:*

> *"It is a noble movement of the heart, that indignation which kindles at the sight of the feeble injured by the strong. It is a noble movement which makes us forget our danger at the first cry of distress.... It concerns the public safety that every honest man should consider himself as the natural protector of every other."*

But such protection must not be extended beyond the necessities of the case, otherwise it will encourage a spirit or lawlessness and disorder. The right has, therefore, been restricted to offences against the human body and those relating to aggression on property."

"*31. When there is real apprehension that the aggressor might cause death or grievous hurt, in that event the right of private defence of the defender could even*

extend to causing of death. A mere reasonable apprehension is enough to put the right of self-defence into operation, but it is also a settled position of law that a right of self-defence is only a right to defend oneself and not to retaliate. It is not a right to take revenge."

"*34. 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. 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. 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.*

"*35. This Court in number of cases has laid down that when a person is exercising his right of private defence, it is not possible to weigh the force with which the right is exercised. The principle is common to all civilised jurisprudence. In Brown v. United States, it was observed that a person in fear of his life is not expected to modulate his defence step by step or tier by tier. Holmes, J. in the aforementioned case aptly observed: (L Ed p. 963) "Detached reflection cannot be demanded in the presence of an uplifted knife."*

"*36. According to Section 99 of the Penal Code the injury which is inflicted by the person exercising the right should commensurate with the injury with which he is threatened. At the same time, it is difficult to expect from a person exercising this*

right in good faith, to weigh "with golden scales" what maximum amount of force is necessary to keep within the right: every reasonable allowance should be made for the bona fide defender. The courts in one voice have said that it would be wholly unrealistic to expect of a person under assault to modulate his defence step by step according to attack.

"37. The courts have always consistently held that the right of private defence extends to the killing of the actual or potential assailant when there is a reasonable and imminent apprehension of the atrocious crimes enumerated in the six clauses of Section 100 IPC. According to the combined effect of two clauses of Section 100 IPC taking the life of the assailant would be justified on the plea of private defence; if the assault causes reasonable apprehension of death or grievous hurt to the person exercising the right. A person who is in imminent and reasonable danger of losing his life or limb may in the exercise of right of self-defence inflict any harm, even extending to death on his assailant either when the assault is attempted or directly threatened."

"38. When we see the principles of law in the light of facts of this case where Darshan Singh in his statement under Section 313 CrPC has categorically stated that "Gurcharan Singh gave a gandasa-blow hitting my father Bakhtawar Singh on the head as a result of which he fell down. I felt that my father had been killed. Gurcharan Singh then advanced towards me holding the gandasa. I apprehended that I too would be killed and I then pulled the trigger of my gun in self-defence". Gurcharan Singh died of gunshot injury. In the facts and circumstances of this case the appellant, Darshan Singh had the serious apprehension of death or at least the grievous hurt when he exercised his right of private defence to save himself."

"*58. The following principles emerge on scrutiny of the following judgments:*

(i) Self-preservation is the basic human instinct and is duly recognised by the criminal jurisprudence of all civilised countries. All free, democratic and civilised countries recognise the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self-defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private

defence beyond reasonable doubt.

(ix) The Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self-defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened."

The learned counsel for the appellants has finally referred to the judgment of the Apex Court rendered in ***Sunil @ Sonu vs. State (NCT of Delhi)*** reported in ***(2024) SCC OnLine SC 2626, Hare Ram Yadav vs. State of Bihar*** reported in ***(2025) 1 SCC 339*** and the judgment of this Court rendered to ***Soleman Ali (Hussain) vs. State of Assam*** (judgment dated 08.12.2015 Crl.A. No.174/2013) and submitted that since there is no allegation that any of the appellants had acted with brutality and since it was also brought on record that the injuries had occurred at the heat of the moment, the appellants deserve a consideration for alteration of conviction to one under Part I of Section 304 IPC instead of a conviction under Section 302, of the IPC.

7. <u>Stand Of The State:</u>

The learned APP has submitted that the fact that the deceased and the PW-2 had sustained injuries due to the assault of the accused appellant are proved facts, more so because the accused appellant did not take a stand during the trial that they were not involved in the assault. It has been submitted that there were eyewitnesses, including PW-2 who was himself injured in the

assault, to the effect that while one of the appellants had struck the deceased on his head, two other appellants had dealt blows on his back and on his neck. It has also been submitted that ocular evidence is the best form of evidence and in this present case, there is no reason to doubt the version of the eyewitnesses. The learned APP has further submitted that the discrepancies, if any, in the versions of the eye witnesses in the present case are minor, which do not affect the veracity of the deposition regarding the cause of death and the nature of the injuries. The learned App has submitted that the failure to send the seized article or blood-stained earth for forensic laboratory and serological tests does not affect the merit of the case of the prosecution when specific ocular evidence is available to bring home the guilt of the appellants. It has been further submitted that the defence did not lead any evidence to make out a case of exercise of the right of private defence. The defence had not attempted to exhibit that the land where the incident had occurred was either in the possession of the accused or that they were attempting to defend their right over the property. The learned APP has submitted that the citations relied upon by the learned counsel for the appellant do not come to the aid of the appellants as the judgments were delivered in a different factual situation.

The learned APP has relied upon the following citations;

8. <u>Cases Relied Upon by State:</u>

A. ***Om Pal & Ors. vs. State of U.P*** (now State of Uttarakhand)

"*35. It is settled that the testimony of an injured eyewitness is accorded a special status in law. As being a stamped witness, his presence cannot be doubted. The testimony of an injured eyewitness has its own relevancy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of the injured eyewitness should be generally given due importance unless there are glaring contradictions.*"

"*36. While dealing with the importance of the injured eyewitness testimony, this Court in Jarnail Singh & Ors. vs. State of Punjab¹2 held as under*

> *"28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In Shivalingappa Kallayanappa v. State of Karnataka [1994 Supp (3) SCC 235: 1994 SCC (Cri) 1694] this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.*
>
> "*29. In State of U.P. v. Kishan Chand [(2004) 7 SCC 629: 2004 SCC (Cri) 2021] a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence, In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishan v. State of Haryana [(2006) 12 SCC 459: (2007) 2 SCC (Cri) 214]). Thus, we are of the considered opinion that*

evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below."

"*37. In Abdul Sayeed (supra), this Court explained that injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, deposition by the injured eyewitness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.*"

"*38. In the present case before us, it is clear from the record that the defence had not at all challenged the version of PW-2, but on the contrary, the defence had admitted his presence at the spot of the said occurrence.*"

"*39. Keeping in view the principle that an injured eyewitness enjoys a presumption of truth and the fact that the same is supported by the medical evidence, testimony of PW-2 does not suffer from any infirmity and has to be considered while fixing the guilt of the appellants.*"

B. ***Anil Kumar vs. The State of Kerala*** on 1 November, 2023;

"*21. The exception clearly in unequivocal term states that it would be applicable where culpable homicide is committed not only without premeditated mind in a sudden fight or quarrel but also without the offender taking "undue advantage" of the situation. In the instant case, the appellant upon seeing the deceased drenched in kerosene clearly took advantage of the situation and lighted a matchstick and threw it upon her so that she can be burnt. The appellant having taken "undue advantage" of the situation cannot be extended the benefit of Exception 4 to Section 300 IPC so as to bring the case within the ambit of Part I of 304 IPC.*"

C. Guru @ Gurubaran & Ors. vs. State Rep. by Insp. Of police;

"*6.It was next urged that the offence was not of murder but may amount to culpable homicide not amounting to murder. It has been urged that the case would fall within Exception 4 to Section 300 IPC, which reads as follows:*

> *"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."*

"*7. We are of the view that the accused cannot take benefit of this Exception. It has come in evidence that all the accused persons came armed. Two were armed with sickles, one with an iron pipe and the other with wooden staffs. Even if it is assumed that they may not have come with the intention of killing, the fact that they were armed, clearly indicates that the occurrence did not take place in the heat of passion, upon a sudden quarrel. As pointed out above, both sides were coming to attend a Panchayat to settle a dispute. Where was the need to carry arms if the intention was only to settle a dispute? Even otherwise, we feel that Exception 4 is not applicable because the manner in which the blow was given right on the middle of the head, brings this case squarely within clause "Fourthly" of Section 300 IPC, which reads as follows:*

> *'**300. Murder -** XXX XXX XXX*
>
> *Secondly - XXX XXX XXX*
>
> *Thirdly- XXX XXX XXX*
>
> *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."

It has accordingly been prayed to dismiss the appeal.

9. <u>Conclusion:</u>

I. We have considered the submissions made, perused the records and considered the citations relied upon.

II. PW-2 had received injuries when he had tried to interfere with the appellants assaulting the deceased victim. He had seen the fatal blows being inflicted on the deceased. PW-7 had seen the accused demolishing the pillars of the proposed community hall and had also witnessed the deceased and the injured, along with two other persons, verbally restraining the accused. He had seen the accused give blows with sharp weapons on different body parts of the deceased. PW-7 had thought of interfering; however, seeing the assault by 'dao' and axe, he did not dare to proceed. PW-8 had deposed that he was present with the deceased and the injured along with Rupeswar when they approached the accused asking them not to cause damage to the foundation stone and the posts. He had seen the appellant No.4 hit the deceased with a dao, appellant No.3 deal a blow with an axe and appellant No.1 (since deceased) deal a blow on the head of the deceased victim. He saw PW-2 being assaulted by appellant No.4. PW-9 had also seen the appellants destroying the foundation stone of the community hall. He had seen the appellant No.4 and the appellant No.3 hit the deceased victim on his back with a 'dao' and an axe. He saw the PW-2 being hit

on his arms. He also saw the appellant No.1 (since deceased) assault the deceased victim on his head with a spade. Thus, the ocular evidence in the present case is overwhelming. It was not the case of the defence during trial that there could have been other reasons for the death of the victim or that PW-2 has suffered injury apart from the assault made by the accused. The defence did not attempt to improbablise the presence of the eyewitnesses. The appellants have not raised any definite plea or put forward any positive case which would be inconsistent with that of the prosecution. Therefore, this Court does not find any reason to disbelieve the version of the eyewitnesses. This Court is of the considered view that the proposition as enunciated by the Apex Court in Om Pal and Ors. (supra), the relevant portion of which has already been extracted hereinabove, is squarely applicable to the facts of the present case.

III. In so far as the argument of the learned counsel for the appellant, regarding the exercise of right of private defence is concerned, we are of the considered view that the facts prevailing for exercise of such a right has not only to be asserted by a person claiming immunity from conviction, cogent evidence has also to be led by the claimant to the effect that the act complaint of had been committed for defence of either life, body or property. In the present case, there has been no attempt on the part of the appellants to establish, even on preponderance of probability, that they had ownership or possession over the

plot of land where the community hall had been proposed, at the time of the incident, though they had admitted in their examination under Section 313 Cr.P.C that the land had originally belonged to them. The defence/accused appellant did not lead any evidence to establish or even propose any positive plea inconsistent with the case of the prosecution. There was nothing on record before the learned Trial Court or even before this Court to indicate that the presence of the appellants in the plot of land or their act of demolition of posts of the proposed community hall on the day of occurrence were either legal or lawful. We therefore do not find any merit in the assertion that the appellants had assaulted the deceased and the injured witness in exercise of the right of private defence, either of life or of property.

IV. In so far as the reliance placed by learned counsel for the appellant on the case of Lakhsmi Singh (supra) regarding non-explanation of injuries on the accused is concerned, this Court notices that the facts of Lakhsmi Singh (supra) were at variance from the present case. In that case, the Court had come to a conclusion that the prosecution witnesses were sworn enemies of the accused and the probability of a conspiracy to implicate the accused falsely due to longstanding litigation between the accused and the witnesses could not be said to be without substance. The Court on that occasion had also observed that the doctor who had examined the deceased had also examined the accused and he had found injuries on the accused also. It was in such circumstances that the

Court had found that it was the bounden duty of the prosecution to give reasonable explanation for the injuries sustained by the accused in the course of the occurrence. In the present case, there is nothing on record to indicate that the accused were found to carry injuries during an inspection by any doctor. The learned remand Magistrate has indeed recorded the presence of injuries on the appellant No.4 and the appellant No.1 at the time of production, after two days and three days respectively after the incident; however, there is no indication regarding the nature of the injuries seen on the said appellants. As held in the case of the ***State of Gujrat vs. Bai Fatima*** reported in ***(1975) 2 SCC 7*** non explanation of the injuries by the prosecution may not affect the prosecution case where the injuries are minor and superficial, where the evidence is clear, cogent, independent, disinterested, probable, consistent and credit worthy to the extent that it far outweighs the effect of the omission on the part of the prosecution to explain that injuries. We have already observed that the ocular evidence in the present case is consistent and trustworthy and the appellants have not asserted in any convincing manner that the witnesses bore any enmity towards the accused. We are therefore not convinced by the reliance placed on the case of Lakshmi Singh (supra).

V. With regard to the reliance placed by the learned counsel for the appellant on the case of Kartarey (supra), this Court notices that in that case the issue was as to whether the deceased had been stabbed by a single weapon brandished

by a single assailant or whether more than one assailant had joined in the attack with different weapons. It is in those circumstances that the Apex Court had observed that when injuries are found forensically of the same species. The problem before the Court is whether any or all of the injuries could be caused with one or more than one weapon; it would be the bounden duty of the prosecution and the Court to elicit from the medical witness his opinion after showing him the weapon vis-a-vis the injuries detected. The present case does not pose any such question, and hence the reliance on the case of Kartarey (supra) is unfounded.

VI. On the facts of the present case and in the light of overwhelming ocular evidence, we are of the considered opinion that failure on the part of the prosecution to have the blood-stained earth or the alleged weapon of crime examined in the FSL does not affect the prosecution case.

VII. The assault on the deceased and the PW-2 was made with sharp cutting weapons such as 'dao' and axe, at a time when the accused were verbally being restrained from demolishing posts set up for a community hall. The accused had entered the plot of land to destroy a property which the village would commonly own, and it can not be said that they did not expect resistance from the villagers. In such circumstances, altercations and fight with the deceased and the PW-2 cannot be said to have occurred suddenly and without pre-meditation. The nature of the assault does not indicate that injuries were inflicted without

knowledge or intent of causing death. We therefore cannot accept the prayer of the appellants to convert the conviction to one under Part-I of Section 304 IPC.

VIII. Consequently, the appeal is dismissed. The Trial Court Records be sent back along with the copy of this order.

JUDGE **JUDGE**

Comparing Assistant