

**Upender Singh vs.state & Anr**

**Upender Singh vs.state & Anr**

**SooperKanoon Citation :** [sooperkanoon.com/1210355](http://sooperkanoon.com/1210355)

**Court :** Delhi

**Decided On :** Nov-08-2017

**Appellant :** Upender Singh

**Respondent :** State & Anr

**Advocate for Pet/Ap. :** Mr. Mohit Mathur, Mr. Umesh Sinha, Mr. Mritunjay Kumar Singh, Mr. Sumit Mishra, Ms. Amanpreet Kaur, Ms. Radhika Kolluru, Mr. Dinesh Garg, Mr. Nishant Bhardwaj, Ms. Kusum Dhalla

**Judgement :**

\$~ \* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A. 248/2014 & Crl.M.A. 3277/2014 UPENDER SINGH & ANR .....Appellants Through: Mr. Mohit Mathur, Senior Advocate with Mr. Umesh Sinha, Mr. Mritunjay Kumar Singh, Mr. Sumit Mishra, Ms. Amanpreet Kaur, Advocates. STATE versus .....Respondent Through: Ms. Radhika Kolluru, APP Mr. Dinesh Garg with Mr.Kaushal Kishore Kaushik and Mr. Nishant Bhardwaj, Advocates for the Complainant. + CRL.A. 1154/2014 & Crl.M.A. 13215/2014, 15795/2017 UPENDER SINGH STATE & ORS .....Appellant Through: Mr. Mohit Mathur, Senior Advocate with Mr. Umesh Sinha, Mr. Mritunjay Kumar Singh, Mr. Sumit Mishra, Ms. Amanpreet Kaur, Advocates. versus ....Respondents Through: Mr. Dinesh Garg with Mr.Kaushal Kishore Kaushik and Mr. Nishant Bhardwaj, Advocates for R-2 to R-5. + CRL.A. 42/2014 SUBHASH CHAND .....Appellant Through: Mr. Dinesh Garg with Mr.Kaushal Kishore Kaushik and Mr. Nishant Bhardwaj, Advocates. versus Crl.A. 248/2014 & connected matters Page 1 of 19 THE STATE Through: Ms. Kusum Dhalla, APP.

.....Respondent + CRL.A. 766/2014 UPENDER SINGH STATE & ANR  
.....Appellant Through: Mr. Mohit Mathur, Senior Advocate with Mr. Umesh Sinha,  
Mr. Mritunjay Kumar Singh, Mr. Sumit Mishra, Ms. Amanpreet Kaur, Advocates.  
Versus .....Respondent s Through: Ms. Kusum Dhalla, APP. Mr. Dinesh Garg with  
Mr.Kaushal Kishore Kaushik and Mr. Nishant Bhardwaj, Advocates for R-2.  
CORAM: JUSTICE S.MURALIDHAR JUSTICE I.S. MEHTA %

## ORDER

0811.2017 Dr. S. Muralidhar, J.:

1. Arising out of the one incident, two FIRs were registered at Police Station (PS) Kalyan Puri. While FIR No.101 of 2005 was registered under Sections 3 IPC, FIR102of 2005 was registered under Sections 302/3 IPC.

2. Separate trials were conducted in both the FIRs. At the final stages, pursuant to the orders in a transfer petition, both the cases were placed before the same Court which delivered two separate judgments dated 11th December 2013 and orders on sentence dated 18th December 2013 in SC No.90 of 2012 arising out of FIR101of 2005 and SC No.149 of 2005 arising out of FIR102of 2005. CrI.A. 248/2014 & connected matters Page 2 of 19 3. (i) Criminal Appeal No.248 of 2014 is by Upender Singh and Surender Singh challenging their conviction in FIR No.102 of 2005 under Sections 3 and 302/3

IPC and the order on sentence whereby for the offence under Section 3 IPC both the accused were sentenced to undergo life imprisonment, and for the offence under Section 3

IPC to undergo rigorous imprisonment (RI) for five years. For both the offences they were further directed to pay fine of Rs. 1,000 each and in default to undergo SI for one month. (ii) Criminal Appeal No.42 of 2014 arising from FIR No.101 of 2005 is by Subhash Chand challenging his conviction under Section 3

IPC and the order of sentence whereby for the offence under Section 3 IPC he was sentenced to undergo RI for three years with fine of Rs. 1,000 and in default of fine undergo SI for one month. (iii) Criminal Appeal Nos. 766 of 2014 is

by Upender Singh against the judgment dated 11th December 2013 and the order of sentence dated 18th December 2013 in SC90of 2012 arising out of FIR No.101 of 2005 seeking conviction of Subhash Chand for the offence under Section 3 IPC enhancement of the quantum of punishment awarded to him. (iv) Criminal Appeal No.1154 of 2014 is by Upender Singh against the judgment dated 11th December 2013 and the order of sentence dated 18th December 2013 in SC90of 2012 arising out of FIR No.101 of 2005 questioning the acquittal of Pankaj, Raj Kumar @ Raju, Rajeev Mehta @ Banty and Rakesh of the offences under Section 3 IPC. FIR102of 2005 CrI.A. 248/2014 & connected matters Page 3 of 19 4. In the trial arising out of FIR No.102 of 2005, where the convicted accused are Upender Singh and Surender Singh, there were 28 prosecution witnesses and one defence witness Sunita Kumari (DW-1).

5. The prosecution case stands depicted in the versions of Usha Rani (PW-2) and Subhash Chand (PW-3). Subhash was the owner of a milk diary at Ghazipur. He was 50 years of age at the time of incident. He stated that at about 1.30 pm on 6th March 2005 he was returning home from his diary at Ghazipur for lunch. He stated that he was on the road in front of his house at Block No.8 Khichri Pur. His nephew Sandeep (deceased) was going ahead of him at a distance of 25-30 paces. Sandeep was proceeding to the house of his parents in Block No.8, Khichri Pur.

6. Subhash suddenly saw that Sandeep had been surrounded by Surender Singh (A-1), his brothers Upender Singh (A-2) and Satinder Singh (A-3) and their friend Manoj Kumar (A-4). Subhash stated that he knew A-1, A-2 and A-3 as they were earlier residing near his house. PW-3 further stated that A-4 was also residing in Block No.8, Khichri Pur. According to Subhash, all the four accused were armed. A-1 was having knife, A-2 was having a chhuri, A-3 was having a saria and A-4 was having a danda in his hands. Subhash stated states that the four accused started giving blows to Sandeep with their respective weapons. When Subhash rushed forward to save them, Manoj (A-4) gave him a danda blow on his head and Satinder (A-3) gave him a saria blow on his head. He added that he tried to save himself from the knife blow given by A-1 and in the process he received injury on

his right hand.

7. Subhash stated that his sister Usha Rani (PW-2) was present there and she shouted for help by saying Bachao Bachao. Subhash and Sandeep Crl.A. 248/2014 & connected matters Page 4 of 19 fell down on the ground. A-3 and A-4 ran away leaving the danda and saria on the spot. A-1 and A-2 got injuries in the scuffle with the members of the public gathered at the spot. Subhash stated that a Police Control Room (PCR) van reached at the spot, took him, his nephew Sandeep, his sister Usha Rani (PW-2), A-1 and A-2 to the LBS hospital. In his cross-examination, Subhash stated that he had seen blood oozing out of the head injury of A-1 and added that A-1 and A-2 were assaulted by the public with stones. He did not hear any talks between the accused and Sandeep prior to the latter being beaten up. Subhash himself was taken LBS hospital on 6th March 2005 and discharged at 4 am on 7th March 2005. Subhash stated that there were five persons in all in the PCR Van when they reached at LBS Hospital, i.e., himself, PW-2, A-1, A-2 and Sandeep apart from the police officials. Subhash stated that he received information about the death of Sandeep at about 12.30 noon on 5th March 2005 from his wife.

8. In her deposition PW-2 (Usha Rani) stated that she was going to purchase some articles from the shop situated at the corner of the gali in Block 8 Khichri Pur on 6th March 2005 between 1.30 and 1.45 pm. when she noticed that Sandeep coming towards his mothers house on foot. A- 1, A-2 and A-3 along with A-4 attacked Sandeep. She knew A-1 to A-3 prior to the incident as they were earlier residing near her house but later on shifted to Vaishali. A-4 was also living near her house but later on shifted to some other place. Usha Rani stated that A-1 was having a knife, A-2 was having a chhuri, A-3 was having screw driver type rod and A-4 was having a danda. All of them started giving Sandeep blows with their respective weapons. She identified the four accused in the Court. She added that A-3 gave a saria blow to Subhash on his head. A-4 gave a danda blow while A-1 gave a knife blow on Subhashs right hand. Usha Page 5 of 19 Crl.A. 248/2014 & connected matters Rani stated that A-3 and A-4 ran away from the spot leaving behind their weapons. She further stated that the people from the locality caught hold of A-1 and A-2 and a scuffle took place.

9. In her cross-examination, PW-2 stated that all the accused had come from Ghazipur side. She noticed that when she reached the spot they were attacking Sandeep. She could not state which of the accused had given the first blow, second blow etc. She further stated that A-1 and A-2 were given beatings and were attacked by the crowd with of stones. Her statement was recorded by the police after 9 pm on 7th March 2005. In her cross-examination, she was confronted with the improvements made by her in the Court qua the statement given by her to the police. She stated in her cross-examination that Sandeep was first taken to the casualty ward of the GTB hospital but she remained outside. Thereafter, he was shifted to St. Stephens Hospital on the night of 6th/7th March 2005. Till her return from St. Stephen Hospital at about 2/2.30 pm on 7th March 2005 no police officer visited.

10. The counter version was provided by DW-1 Sunita Kumari who stated that she was working in her house at 8/493, Block No.8, Khichri Pur, Delhi. She heard a noise outside the house in the gali. She came out of the house and saw a crowd gathered in the corner. She noticed that A-2 was lying in the pool of blood on the ground. She stated that Raju, Subhash, Sandeep and Banty (accused in FIR No.101 of 2005) were having iron rod/knives and hitting A-1 on his head. Pankaj, Rakesh along with some other persons were having dandas and iron rods and were hitting A-2. She raised a noise. Raju, Banty, Rakesh and Pankaj ran away from the spot. Subhash and Sandeep were caught by the public gathered there. She denied that Usha Rani was present at the spot. In her cross- Crl.A. 248/2014 & connected matters Page 6 of 19 examination, Sunita Kumari disclosed that she was cousin of A1- to A-3. She stated that when she went to register the FIR at PS Kalyan Puri, Inspector Mahesh Yadav refused to record her statement. She stated that she did not complain to any senior officer about it. FIR101of 2005 11. The version of the accused, Surrender and Upender is given in FIR No.101 of 2005. In the case arising out o FIR101of 2005 there were two witnesses: Surrender Singh (PW-2) and Upender Singh (PW-3). Surrender stated that on 6th March 2005 at 1.40 pm he along with his brother Upender (PW-3) were returning home after visiting their aunt at Khichri Pur, Delhi. When they reached the corner, Raju (A-3), Subhash (A-1), Sandeep (deceased), Pankaj (A-2), Rakesh (A-5), Banty (A-4) along with two or three boys armed with iron rods, knives and clubs stopped them

stating that on the last occasion Surender and Upender had escaped but on that day they would see as to who would save them alive. After that declaration the accused started assaulting Surender and Upender.

12. According to Surender, A-2, A-5 and two-three others who were not know to them, started assaulting him and Upender with iron rods on their head and other parts of the body, as a result of which Surender started bleeding. He noticed that Banty (A-4) and Raju (A-3) had overpowered his brother Upender (PW-3). A-1 and Sandeep (deceased) started assaulting Upender with iron rods. Upender sustained serious injuries, became unconscious and fell on the ground. Surender stated that on hearing the commotion, his aunt Jayanti Devi and his cousin sister Sunita @ Gudia (PW-16) reached there. They called the PCR van which removed Surender and Upender to the LBS Hospital at Khichri Pur, Delhi. Surender was discharged from the hospital on the same day. CrI.A. 248/2014 & connected matters Page 7 of 19 13. Surender further stated that on 8th March 2005 he was arrested and sent to Tihar Jail. In his cross-examination, Surender stated that prior to shifting to Vaishali Surender and Upender were residing at Khichri Pur, in the neighbourhood of Sandeep (deceased). He stated that at the time of the incident, Sandeep was residing somewhere in Pandav Nagar. Surender admitted that Sandeep was known to him prior to the date of incident. He denied that when Surender and Upender were assaulting Sandeep and Subhash, public persons had pelted stones on them with a view to rescuing Subhash and Sandeep.

14. Upender Singh (PW-3) also stated that while returning home to Vaishali, Ghaziabad along with his brother Surender Singh (PW-2), they reached some distance away from the house of their aunt, located at Khichri Pur when A-1 and his associates, i.e., Raju (A-3), Rakesh (A-5), Banty (A-4), Pankaj (A-2) and Sandeep (deceased) along with other three associates started assaulting Surender and Upender with iron rods. Upender stated that Raju and Banty got hold of his hands while Subhash (A-1) and Sandeep wielded iron rod blows over his head. He then fell down and became unconscious. Prior to becoming unconscious, he noticed that Pankaj and Rakesh along with their three associates were assaulting his brother Surender. Upender further stated that after five days, he regained his consciousness in LNJP Hospital. On 16th March 2005 he was

taken away to Tihar Jail.

15. In his cross-examination, Upender admitted that Subhash and Sandeep were known to him prior to the incident and they were residing at the same locality earlier. He maintained that at the time of incident he was residing in Vaishali, Ghaziabad. He denied that he and his brother Crl.A. 248/2014 & connected matters Page 8 of 19 Surender (PW-2) were chased by public persons and were assaulted with stones. Upender was confronted with his previous statement to the police as regards the improvements made by him during deposition in Court.

16. Subhash and Usha Rani, who were the key prosecution witnesses in FIR No.102 of 2005 against Surender and Upender, were examined as defence witnesses, DW-1 and DW-2 respectively, in the trial arising from in FIR101of 2005.

17. What emerges from the above narration is that both sets of complainants, i.e., Subhash in FIR No.102 of 2005 and Surender and Upender in FIR No.101 of 2005 do not deny their respective presence at the spot on the relevant date. It is also not denied that as a result of the clash, Sandeep died, and Subhash, Surender and Upender sustained injuries. Injuries 18. Now understand what the nature of injuries was, we first turn to the post-mortem of Sandeep (Ex.PW8/A) in FIR No.102 of 2005. The following external injuries on his dead body were noted by Dr. K.L. Sharma (PW-8) who conducted the post-mortem examination: 1. Stitched xiphisternam to symphysis pubis in mid line of abdomen. lapartomy wound extending surgical from 2. Surgical incised wound, transberace, medial end has one stitch and rest wound was open (this was drainage wound) 3. Incised penetrating wound, fusiform which was placed vertically over left side of lower chest in anterior auxilliary line. Margins were clean cut and angles were acute, 1x05 cm. Upper angle being 15 cm vertically below left nipple. Blood was oozing from this wound (stab wound). Crl.A. 248/2014 & connected matters Page 9 of 19 4. Incised penetrating wound over left side chest in the left hypochondrium area, elliptical in shape, vertical, bewelled cut 1.5 x 1 cm being 5 cm oblique blow injury No.3. The blood was oozing and one stitch applied by surgeon, therefore, no protrusion of omentem seen (stab wound).

5. Surgical incised wound 1 x cm over left side pelvic region (drainage wound).

6. Incised punctured wound, margins were ragged 1.5 x 1 cm, muscles were protruding out over outer upper back of left forearm, upper margin being 3.5 cm below the back of elbow joint (drainage wound).

7. The bruise brownish blue in colour 5 x 3 cm over outer part of left shoulder.

8. Linear scratch abrasion 0.5 cm in length below the left eye orbit over the cheek.

19. The cause of death of Sandeep was the combined effect of haemorrhage shock and asphyxia consequent to the stab injuries Nos. 3 and 4. Dr. Sharma further opined that all injuries were ante-mortem in nature and that injury Nos. 3, 4 and 6 (stab injuries) were sufficient to cause death in the ordinary cause of nature.

20. As far as Subhash Chand is concerned, he was examined by Dr. Ashok Dua (PW-7) who was at the relevant time working as CMO in LBS Hospital. Dr. Dua found the following injuries: 1. Multiple. CLW over fronto partial region one is 5.0 cm x 0.5 cm, second 0.3 cm x 0.5 cm and third 2.0 cm x 0.5 cm 2. Incised wound about 2.0 cm x 1.0 cm right side of ringer finger.

3. CLW over nose 0.5 cm x 0.5 cm 21. Dr. Dua added that he found that Subhash was conscious and fully aware of the surroundings and he was replying to my questions and his Page 10 of 19 CrI.A. 248/2014 & connected matters BP was 110/70. He clarified that against all the three multiple CLW, he mentioned SCD (Sub-cutaneous Deep) which meant only skin was cut and there was no cutting of muscle and bone. 22. The other two persons injured were Upender and Surender. Upender was examined by Dr. Dua who found that a contused lacerated wound (LCW) CLW5cm approx on the fronto partial region, fresh, bleeding and oozing. He opined that the injuries sustained on Upender was to be simple caused by blunt object. As far as Surender was concerned, the injury was a CLW4x .05 cm x 3 cm front peritoccipital region, fresh bleeding, oozing. He opined that the injury sustained by Surender was simple caused by blunt object.

23. As far as Upender was concerned, Dr. Manoj Teotia (PW-13) confirmed that Upender was admitted in the Central Jail No.2, M.I. Room on 17th March 2005 and he was discharged on 1st April 2005. According to PW-13, Upender was admitted with the alleged history of head injury sustained on 7th March 2005 with

sub arcnoid haemorrhage with contusion on left fronto parietal region. 24. Thus it is seen that as far as FIR No.102 of 2005 is concerned, the two key PWs supporting the prosecution were Usha Rani (PW2) and Subhash (PW3). As far as FIR No.101 of 2005 is concerned the case of the prosecution hinged on the evidence of the two injured eye-witnesses Surender Singh (PW2) and Upender Singh (PW3), sought to be corroborated by Sunita (PW16). The trial Court therefore, had to determine whether these eye witnesses accounts were reliable. Judgment of the trial Court in FIR102of 2005 CrI.A. 248/2014 & connected matters Page 11 of 19 25. In the judgment in the case arising out of FIR No.102 of 2005, the trial Court held as under: 43. Statements of PW2 and PW3 are found to be consistent regarding the manner in which both were assaulted by accused Surender and Upender. As per them, Accused Surender and Upender were armed with knives and with these knives they have assaulted deceased Sandeep and PW-3 Subhash. Their statements are found to be credible and trustworthy regarding the involvement of accused Surender and Upender in this assault on deceased Sandeep and PW3. However, statements of these witnesses and other surrounding circumstances create doubt regarding the involvement of accused Satender and Manoj in this incident. As per prosecution case, accused Surender and Upender were present at the spot and were taken by PCR to LBS Hospital along with PW3 and deceased Sandeep. Ex.PW7/C and Ex PW8/D are the MLC of accused Upender and Surender, as per which they did not sustain any serious injuries in this incident. They were conscious and oriented. As per PW2 and PW3, both the accused Surender and Upender were apprehended by public persons. As already discussed, no public witness has been examined to support statements of PW2 and PW3 to this effect. The point to ponder is that if as per PW2 and PW3, two accused Satender and Manoj managed to run away, then why accused Surender and Upender also did not slip away from the spot. The point which confronts this conclusion, that if only Surender and Upender were involved in the assault, then prosecution version about recovery of four weapons of offence gets falsified. There are no finger prints taken by IO PW28 from these weapons to establish which accused court has come to the conclusion that it is a case of free fight and both groups were armed with weapons. It is thereby quite possible that two weapon were wielded by accused Surender and Upender and two were

wielded by PW3 and deceased Sandeep. 26. The Trial Court proceeded to observe that PW2 and PW3 are trying to mix truth with falsehood by falsely implicating accused Satender and Manoj. It is the duty of the Court to separate falsehood and if after scrutinizing the remaining evidence carefully the same is found to be trustworthy and the substratum of then prosecution case can be believed to that extent. that prosecution case remains intact, CrI.A. 248/2014 & connected matters Page 12 of 19 27. The trial Court finally acquitted Satender and Manoj for the offence under Section 302/3

IPC. However, it held that the prosecution has proved its case beyond reasonable doubt against Surender and Upender (A-1 and A-2). Both the accused were held guilty for the offences punishable under Section 302/3

IPC. Judgment of the trial Court in FIR101of 2005 28. When it came to the case arising out of FIR No.101 of 2005 where the accused were Subhash Chand (A-1), Pankaj (A-2), Raj Kumar @ Raju (A-3), Rajeev Mehta @ Banty (A-4) and Rakesh (A-5), the trial Court held that as far as the involvement of A-2 to A-5 was concerned, PW2 has certainly made some improvements. It also held that PW-2, i.e., Surender had also "made improvement regarding reaching of his aunt Jayanti Devi and his cousin sister PW16 at the spot after hearing the noise of commotion. However, because of these improvements, made by both PW2 and PW3, discussed above, their whole statements cannot be rendered untrustworthy and not believable. Their presence at the spot at the time of incident, having sustained injuries in this case and being taken to LBS hospital by PW6 from the spot, stands duly established. Because of these improvements made by these witnesses, entire prosecution case cannot be rendered under shadow of doubt. Law is settled that in such scenario that particular statement of prosecution witness can be believed which get duly supported from other evidence proved on record. 29. Consequently, while acquitting A-2 to A-5, the trial Court held that the prosecution had proved its case beyond reasonable doubt that Subhash Chand (A-1) had committed offence punishable under Section 3

IPC. The trial Court took note of the fact that Upender (PW3) remained admitted in jail hospital after his arrest from 17th March 2005 to 1st April CrI.A. 248/2014 & connected matters Page 13 of 19 2005 and continued receiving his treatment for the same injury from IHBAS even after being released from jail. It concluded that

treatment record of PW3 and other medical evidence which has come on record proves that he suffered grievous and serious injuries in this incident. 30. This Court has heard the submissions of Mr. Mohit Mathur, learned Senior counsel and Mr. Umesh Sinha, Advocate for Surender Singh and Upender Singh (in Criminal Appeal Nos. 248 of 2014, 1154 of 2014 and 766 of 2014), Mr. Dinesh Garg, learned counsel for Subhash Chand (Criminal Appeal No.42 of 2014) and Ms. Radhika Kolluru and Ms. Kusum Dhalla, learned APP for the State in all the matters. Free fight and culpable homicide 31. In the case against Upender Singh and Surender Singh arising out of FIR No.102 of 2005, the finding of the trial Court is that it was a case of free fight and both groups were armed with weapons.

32. An attempt was made by learned counsel appearing for Subhash Chand to question the above finding. However, the fact remains that as far as the separate judgment in a case arising out of FIR No.102 of 2005, neither the Complainant nor the State has in fact challenged the judgment of the trial Court qua Surender and Upender. Added to this is the fact that against the same judgment arising out of FIR No.102 of 2005 acquitting Satender and Manoj, (co-accused to whom two weapons were attributed) the State filed a Criminal Leave Petition (Crl LP) in this Court which got dismissed. That order, the Court is informed, was affirmed by the Supreme Court by the dismissal of the further SLP by the State. Crl.A. 248/2014 & connected matters Page 14 of 19 33. That being the position, the above finding of the trial Court that it was a free fight remains undisturbed as far as the State and the Complainant are concerned.

34. As far the accused Upender and Surender are concerned, there is merit in the contention that even indeed it was free fight with both groups being armed, the question of Upender and Surender committing an offence of murder under Section 3

IPC for the death of Sandeep does not arise. Exception 4 to Section 300 IPC reads as under: 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 take undue advantage or acted in a cruel or unusual manner. Explanation - It is immaterial in such cases which party offers the provocation or commits the first assault. 35. In the present case, therefore,

even without going to the question whether it was Surender and Upender who provoked and not Subhash Chand and Sandeep, it is not in dispute that both the groups were armed. The injuries received by Upender have been proved by the medical evidence as capable of being inflicted by iron rods. Both Surender and Upender received CLWs caused by blunt force as a result of being hit by iron rod and danda used by Subhash Chand and Sandeep.

36. In this context it may be noticed that in *Jagat Singh v. State of Himachal Pradesh* (2011) 2 SCC234 the Supreme Court held that where the persons in both the groups sustained injuries in a free fight, the ends of justice would be met by altering the conviction from Section 302 to Section 323 IPC. In the present case since the unchallenged finding of the trial Court is that it was a free fight in the heat of passion between two CrI.A. 248/2014 & connected matters Page 15 of 19 groups that resulted in the death of Sandeep who was himself armed, Exception 4 to Section 300 IPC gets straightway attracted. Therefore, the offence at highest is culpable homicide not amounting to murder.

37. Turning now to Section 304 IPC, the Court is of the view that the punishment would be that under Part II of Section 304 IPC, i.e., punishable for culpable homicide, viz., an act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death. In similar circumstances, in *Dharam v. State of Haryana* AIR 2007 SC397 the Court altered the conviction from Section 302 IPC to 304 Part II IPC. The same principle would apply in the present case for the simple reason that both the groups were armed and there was a free fight.

38. Learned counsel for Subhash Chand contended that Subhash Chand was exercising his right of private defence. He was candid that such a plea was not taken before the trial Court. He, however, urged that he could take such plea even at this stage. In support of this submission he relied upon the decision in *State of Rajasthan v. Manoj Kumar* (2014) 5 SCC744 39. At the outset it requires to be noticed that the above decision was not in the context of a free fight between two armed groups. In that case there was little doubt as to who the aggressors were. In the above context the Supreme Court observed that even where the plea of

private defence was not taken earlier, if it arose from the material available on record it could be taken even at the level of the High Court. As far as the present case is concerned, it was a free fight between two armed groups. Nothing in the entire record indicates that Subhash Chand was exercising the right of CrI.A. 248/2014 & connected matters Page 16 of 19 private defence. The injuries on Upender are not explained by the above alternative theory of exercise by Subhash of his right of private defence. Further, no suggestion was given to the PWs in their cross-examination that Subhash Chand and the other co-accused were acting in exercise of their right of private defence. Consequently, the Court rejects this plea. Sentence for the offence under Section 304 Part II IPC40 It is seen from the nominal roll that as of date, both Upender and Surender have completed more than four years of actual sentence and have earned more than a years remission. Therefore, together with the remission, each has completed more than five years in prison. Learned APP further confirms that there is no previous history as far as Upender and Surender are concerned. In other words, there has been no other criminal case involving either of them.

41. Keeping in view the factors, the Court alters convictions of Surender and Upender from Section 302/3

IPC to Section 304 II/3

IPC. The sentences awarded to them is altered to five years RI for each of the offences under Section 304 Part II/34 IPC and 3

IPC. Both the sentences are directed to run concurrently. Other appeals 42.

Turning now to the appeal filed by Subhash Chand, it is sought to be contended by learned counsel that he was acting in the exercise of right of self-defence, but that plea has already been rejected by this Court. On the side of Upender Singh, it is sought to be argued that given the nature of injuries suffered by Upender Singh, for which is stated to still be undergoing treatment, the offence made out was one under Section 3

IPC and not Section 3

IPC. CrI.A. 248/2014 & connected matters Page 17 of 19 43. What holds good for both Surender and Upender holds good for Subhash as well. Since it was a free fight between two armed groups, and the offence committed by Surender and Upender has been held at the highest as culpable homicide not amounting to

murder, correspondingly, as far as Subhash Chand is concerned, the offence committed by him cannot be one under Section 302 IPC. He has rightly been convicted for the offence under Section 304 IPC.

44. However, as far as sentence is concerned, the Court is of the view that there are certain factors which weigh in favour of Subhash Chand for a more lenient punishment. He is today above 55 years of age and he has no previous involvement in any criminal case. Section 308 states that the sentence may extend to three years, or with fine, or with both and if hurt is caused to any person it may extend to seven years, or with fine or with both. There is no minimum mandatory sentence for the offence under Section 304 IPC.

45. Although Subhash Chand has not served any substantive portion of the sentence awarded to him by the trial Court, i.e., three years RI, the Court is of the view that he can be extended the benefit of probation in exercise of the powers under Section 360 of the Code of Criminal Procedure 1973, subject of course to his complying with the requirements of the grant of probation.

46. The Court is of the further view that considering the fact that Upender is still undergoing treatment of injuries suffered by him during the free fight, Subhash Chand should be asked to deposit as substantial sum as fine to account for the medical expenses of Upender. CrI.A. 248/2014 & connected matters Page 18 of 19 47. Accordingly, while setting aside the order of sentence dated 18th December 2013 whereby Subhash Chand was sentenced to three years RI with fine of Rs. 1,000/-, the Court directs that Subhash Chand be released on probation for good conduct by requiring him to enter into a bond in the sum of Rs. 50,000 with one surety in the like amount to the satisfaction of the trial Court in terms of Section 360 (1) of Cr PC. For this purpose, Subhash Chand will appear before the trial Court on 27th November 2017. Subhash Chand will by that date deposit a sum of Rs. 1 lakh as fine in the trial Court and upon such deposit the said amount will be disbursed by the trial Court to Upender Singh upon proper identification forthwith. Conclusion 48. Both Criminal Appeal Nos. 248 and 42 of 2014 are disposed of in

the above terms. Consequently, Criminal Appeal No.1154 of 2014 which seeks conviction of Subhash Chand under Section 3 IPC and the enhancement of the sentence awarded to him is dismissed.

49. There being no cogent evidence regarding involvement of A2-to A-5 in FIR101of 2005, their acquittal does not call for interference. Accordingly Criminal Appeal No.766 of 2014 is dismissed. All pending applications are disposed of.  
NOVEMBER08 2017 Rm S.MURALIDHAR,J.

**I.S. MEHTA, J.**

CrI.A. 248/2014 & connected matters Page 19 of 19

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**