

**Barkau Alias Raj Kumar Vs. State of U.P.**

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**Court :** Allahabad

**Decided On :** May-08-1992

**Reported in :** 1993CriLJ2954

**Judge :** B.L. Yadav and ;I.S. Mathur, JJ.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302, 304, 307, 323, 324, 363 and 395; Code of Criminal Procedure (CrPC) , 1974 - Sections 82, 83 and 162; Gambling Act - Sections 13; Excise Act - Sections 60

**Appeal No. :** Criminal Appeal No. 1442 of 1979

**Appellant :** Barkau Alias Raj Kumar

**Respondent :** State of U.P.

**Advocate for Def. :** D.G.A., ;D.S. Tiwari and ;G.P. Dixit, Adv.

**Advocate for Pet/Ap. :** Ram Prasad Singh, Adv.

**Judgement :**

**I.S. Mathur, J.**

1. This appeal is directed against the judgment and order dated 30-3-1979, passed by IX Addl. Sessions Judge, Kanpur, convicting the accused under Section 302, I.P.C. read with Section 34, I.P.C. and sentencing him to Imprisonment for

Life.

2. Appellant Barkau alias Raj Kumar is the son of Ram Kishan alias Bankey. Raj Kumar was a tenant in the premises in town Bithoor belonging to Thakur Laxmi Narainji of which deceased Som Prakash was the manager. A dispute arose between Raj Kumar and deceased Som Prakash as a result of which a suit for eviction was filed which was ultimately decreed, and Ram Kishan was directed to be evicted. Som Prakash got the possession of that premises on 28-1-1976 through court after the dismissal of first appeal No. 366 of 1973. The second appeal was also dismissed by the High Court on 4-12-76. After eviction, Barkau, along with his younger brother Gopal, started residing in a Khandahar in town Bithoor.

3. Ram Narain, the uncle of Som Prakash deceased, was doing pariavi in the civil case of eviction on behalf of Som Prakash. It is alleged that appellant Barkau, along with his younger brother Gopal, committed murder of Ram Narain on 29-12-1972 and they were convicted in Sessions Trial No. 271 of 1973. On appeal they were acquitted by the High Court, vide judgment dated 23-3-1979, after the date of incident resulting in the murder of Som Prakash.

4. The prosecution case is that on 10-5-1977 at about 8.45 A.M. deceased Som Prakash was going towards market in Town Bithoor, Dullu (P.W. 1) was also going to the market and met Som Prakash near the shop of Beni Halwai and both together proceeded towards the market. When they reached near Bajpai crossing, appellant Barkau and his younger brother Gopal came out of their room and attacked Som Prakash. Barkau had a Kanta and Gopal was armed with a Kulhari. On seeing Som Prakash Barkau exhorted 'Aaj Achchha Mauka se Mile Hai Sale Ko Jan Se Khatma Kar Do'. Som Prakash started running towards south raising alarm. Ram Prasad (P.W. 2), who was taking his refreshment in his house, came out of his house, Kunj Behari, Hari Kishor and Ganesh also came there. Som Prakash was chased by appellant and his brother and Dullu also ran behind Som Prakash raising alarm. Ram Prasad also followed them. The appellant and his brother continued to attack Som Prakash with the respective weapons and Som Prakash fell down as a result of injuries about 30 paces from the Bajpai crossing.

In the mean time several other persons also came there and the appellant and his brother escaped. Ram Dulare (P. W. 6), the uncle of Som Prakash, came on the spot on hearing about this incident and found Som Prakash lying injured. He enquired about the incident from Som Prakash and others and got the First Information Report Ex. Ka 10 scribed from one Kunj Behari at Zila Pari-shad Hospital where Som Prakash was taken in precarious condition. Som Prakash was then sent to U. H. M. Hospital in a tempo and Ram Dulare (P.W. 6) went to the police station Bithoor where he lodged the report. The chick First Report (Ex. Ka 4) was prepared by constable clerk Shyamji Shukla (P.W. 5) and a case under Section 307 I.P.C. was registered against the appellant and his brother Gopal.

5. The investigation of the case was taken up by S. I. Daya Shanker (P.W. 9). He started investigation on 10-5-1977, interrogated the witnesses and proceeded to the place of occurrence. He prepared site plan (Ex. Ka 11) and also took into possession blood stained and sample earth (Exs. Ka 1 and 2) from the spot and prepared recovery memo (Ex. Ka 12). He searched for the accused but they were not found in their house and they were not traceable. He prepared the memo (Ex. Ka 13).

6. Som Prakash was medically examined by Dr. S. K. Govil at 10.45 a.m. on 10-5-1977 and he found the following injuries on the person of Som Prakash :

1. Incised wound  $1\frac{1}{3}$  x  $1\frac{1}{3}$ ' x skull deep on left face just below and lateral to left eye. The lower left eye lid is compressed.
2. Incised wound  $1\frac{1}{2}$ ' x  $1\frac{1}{4}$ ' x scalp deep on upper occipital region.
3. Contusion 3' x 2' in right upper arm in the middle.
4. Contusion  $1\frac{1}{2}$ ' x  $1\frac{1}{3}$ ' in left knee.
5. Incised wound  $1\frac{1}{2}$ ' x  $1\frac{1}{3}$ ' x muscle deep left side back, beyond posterior axillary line,  $3\frac{1}{2}$ ' below left shoulder.

He prepared the injury report (Ex. Ka 3).

7. Som Prakash died in the Hospital at 11.15 a.m. on the same day i.e. 10-5-1977. The information regarding his death was sent to the police station Kotwali by Dr. Govil vide Ex. Ka 2 and it was mentioned in G. D. report (Ex. Ka 33) at 11.28 a.m. Inquest on the dead body was done and the report (Ex. Ka 31) was prepared. The dead body was then sent for post mortem. The autopsy on the dead body was conducted by Dr. R. P. Saxena (P.W. 3) on 10-5-77 at 6 p.m. The Doctor found the following ante mortem injuries on the person of the deceased :-

1. Stitched wound 1 1/3' long on left side face in axillary region.
2. Stitched wound 2' long on back of head.
3. Stitched wound 2' on left side back, adjacent near axilla (on lateral exploration only muscle deep).
4. Contusion 3' x 6' on right upper arm in middle outer side.
5. Abrasion 3/4' x 1/2' on left elbow.
6. Abraded contusion 1' x 3/4' on back of left forearm in middle.
7. Abraded contusion 2' x 1 1/2' on left hand on dorsum.
8. Abraded contusion-3/4' x 1/2' on left knee.
9. Left black eye.

On internal examination the doctor found 'fracture' of occipital and left parietal bones. According to the doctor the death resulted from shock and haemorrhage due to head injury and fracture of skull. He prepared post mortem report (Ex. Ka 1).

8. After receiving the post mortem report the case was converted into one under Section 302, I.P.C. vide G.D. report (Ex. Ka6). Since the accused were absconding, the Investigating Officer obtained processes under Sections 82 and 83 Cr.P.C. vide exhibits Ka 14 to Ka 19 and attached the properties of the accused vide Ex. Ka 20. After investigation, charge sheet (Ex. Ka 26) was submitted

against the accused as absconders. The appellant later surrendered in court while Gopal is still absconding.

9. The appellant pleaded not guilty. The factum of civil litigation was admitted by him. It was also admitted that Ram Narain was murdered and he was convicted in that case by the trial court. He denied that he ever absconded and stated that he was living with his relations at Orai. He denied that he was living in the Khandhar and stated that he has been falsely implicated due to enmity with Ram Prakash (P.W. 2). It was stated by him that Dullu was the servant of deceased Som Prakash.

10. In order to prove its case the prosecution examined Dullu (P.W. 1), Ram Prasad (P.W. 2) Dr. R. P. Saxena (P.W. 3), Dr. Vidya Bhaskar Bajpai (P.W. 4), C/Shyam Ji Shukia (P.W. 5), Ram Dulare (P.W. 6), C/Shabbir Hasan (P.W. 7), C/Rafiq Ahmad (P.W. 8) and S. I. Daya Shankar I. O. (P.W. 9). Besides this oral evidence, the prosecution also tendered in evidence certified copies of the judgment in Civil Appeal No. 336 of 1973 (Ext. Ka 22). Copy of the delivery of possession in Execution case No. 31 of 1975 (Ext. Ka 23), judgment in Second Appeal No. 300 of 1976 (Ext. Ka 24), reports of the Chemical Examiner and Sero-logist (Exts. Ka 27 and Ka 28), affidavit of C/Avadh Behari (Ext. Ka 29) affidavit of Vikram Singh, Clerk C.M.O. Office (Ext. Ka 30), inquest report (Ext. Ka 31), report of out post (Ext. Ka 32) G. D. Report (Ext. Ka 33), photo lash (Ext. Ka 34), letter to R. I. (Ext. Ka 35), letter to C.M.O. (Ext. Ka 36).

11. Genuineness of Exts. Ka 31 to 37 was not disputed by the defence.

12. The appellant did not produce any evidence in defence.

13. We have heard the learned counsel for the appellant and learned Government Advocate and, on a careful scrutiny of the evidence, we are of the opinion that there is no force in this appeal in so far as the culpability of the appellant is concerned. To begin with there was strong motive for the appellant. Som Prakash, who was 'Sarvarakar' of Sri Thakur Laxmi Narainji and was managing the property of the Deity, had filed a civil suit for eviction of the father of the accused from the house in which he was a tenant. The appellant was residing with his father Ram

Kishan. Som Prakash, deceased, was doing pairvi in the case. In this case, the father of the appellant was ultimately evicted from the said premises on 28-1-1976 in Execution case No. 31 of 1975 (vide Ext. Ka 23). A perusal of this document indicates that in this case (Thakur Laxmi Narain Ji v. Ram Kishan), Som Prakash deceased had obtained possession of the disputed property through Court Amin.

14. Earlier Ram Narain uncle of Som Prakash, was doing pairvi in that civil litigation. Ram Narain was murdered and the appellant, along with his brother, Gopal, were accused of that murder and they were prosecuted in Sessions Trial No. 271 of 1973 (vide copy of the judgment Ext. Ka 28). The appellant was, however, acquitted in appeal, vide, judgment and order dated 23-3-1979 (vide Ext. Ka 17). It was contended that the appellant was falsely implicated in that case. Even if the appellant was falsely implicated, it would clearly appear that the appellant had a grudge against the deceased Som Prakash for this reason also.

15. The admitted facts, documentary evidence and the statements of Dullu (P.W.I), .Ram Prasad (P.W. 2) and Ram Dulare (P.W. 6) clearly show that the appellant was inimical to Som Prakash and had quite a strong motive against him.

16. The eye witnesses Dullu (P.W. 1) and Ram Prasad (P.W. 2) have made clear and convincing statements that it was the appellant, who along with his brother, Gopal, assaulted Som Prakash on 10-5-1977 at about 8.45 a.m. Dullu (P.W. 1) has stated that he was going towards Bithoor market, along with deceased Som Prakash and the appellant, along with his brother, Gopal, came there, armed with Kanta and Kulhari, and appellant exhorted that enemy has come and he should be killed. It is also stated by him that on this exhortation Som Prakash ran towards south but appellant and Gopal chased him and started assaulting him and that appellant was mostly attacking with the backside of kanta. He has also stated that Som Prakash fell down about 30-32 paces from the Bajpai crossing and that other persons also came there and on their shouting the appellant and Gopal escaped. Similarly P.W. 2 Ram Prasad has stated that at about 8.30 or 8.45 a.m. he heard a shout that enemy has come and he be killed. Hearing the shout he came out of the house, saw that Som Prakash was running and was being chased by the appellant and Gopal, who were armed with kanta and kulhari respectively. It is also stated

by him that kanta of the appellant was mostly hitting the deceased from the back side. It is further stated by him that on the shouts of the persons who came there the accused escaped.

17. The testimony of these witnesses was assailed by the learned counsel for the appellant on various grounds. In regard to Dullu (P.W. 1) it was contended by the learned counsel that he was the servant of the deceased, was co-accused in a murder case along with Sita Ram, father of the deceased and also in another case with one Ram Kumar son of Pilloo who had initiated a case against Barkau. It was also submitted by him that this witness was convicted for offence under Section 13 of the Gambling Act. In our opinion, the learned Sessions Judge rightly rejected all these submissions. Dullu (P.W. 1) denied that he was servant of the deceased. It is further stated by him that he was Mallah by caste and earned his living by doing labour. He also denied the suggestion that he lived in the house of Som Prakash. There is nothing on record to indicate to the contrary.

18. It is true that this witness was co-accused with Sita Ram, the father of the deceased, in a murder case of one Dam Dam but this could be no reason for him to falsely implicate the appellant in the murder of the deceased. It can also be not believed that simply because he was co-accused in a case under Section 307, I.P.C., along with one Ram Kumar, son of Pilloo and Pilloo had initiated a case under Section 395, I.P.C. against the appellant, he came under the influence of Pilloo or Pilloo exerted any influence on him for implicating the appellant falsely. This witness did not know as to whether Pilloo had initiated any case under Section 395, I.P.C. against Barkau. There is no evidence on behalf of the appellant that Pilloo had actually initiated a case under Section 395, I.P.C. against him. Even if it be assumed that there was such a case, there would appear to be no opportunity for Pilloo to influence him or this witness to come up for giving false evidence against the appellant at his behest. It would appear that the name of this witness finds place in the first information report itself, which was lodged that very day soon after the incident.

19. The fact that this witness was convicted Section 13 of the Gambling Act, is also not sufficient, to discard his testimony. Such a witness is not necessarily an

unreliable witness. Even if it be accepted for arguments sake that this witness is a partisan witness, there is no hard and fast rule that the testimony of a partisan witness cannot be acted upon without corroboration. If his presence at the place of occurrence cannot be doubted and his evidence is consistent with the surrounding circumstances and the probability of the case strikes the Court as true, it can be a good foundation for conviction, more so, if assurance is available from medical evidence (Tameshwar Sahi v. State of U.P. AIR 1976 SC 59 : (1976 Cri LJ 6)).

20. In the present case, it is stated in the first information report that this witness Dullu (P.W. 1) was going to the market along with the deceased Som Prakash. According to his statement in cross examination, he lived in the house of one Arujun and there was only one house in between the houses of Som Prakash and Arjun. There is no evidence or circumstance to indicate that this witness could not have been going with the deceased or it was not probable for him to do so. There is, indeed, nothing on record to doubt the testimony of this witness and other witness that he was present at the place of occurrence. There is also nothing in his cross-examination to doubt his testimony, which finds corroboration from the statements of other witnesses and also from medical evidence.

21. The testimony of Ram Prasad (P. W. 2) has been assailed on the ground that he is a chance witness his bahnoi (Laxmi narain) was arrested in a case under Section 363, I.P.C. and the woman was recovered from his house and that the brother of the appellant was a witness in the said case against Laxmi Narain. This witness has denied knowledge about the appellant being a witness in the case under Section 363 I.P.C. against his Bahnoi Ram Prasad. The appellant did not file any document and there is nothing on record to indicate that the appellant was a witness in that case. As such, it cannot be said that this witness was inimical to the appellant. It was also contended by the learned counsel for the appellant that this witness was arrested under Section 60 Excise Act for being in possession of Charas. This witness has, no doubt admitted that he was convicted under Section 60, Excise Act but this fact alone could not be sufficient to discredit his testimony or to hold him to be an unreliable witness. On a perusal of his testimony which is otherwise quite reliable, it can also not be stated that this witness was a chance witness. According to this statement, there is an opening of his house towards



West, the site plan Ext. Ka 1 also indicates the same. He has also given a definite explanation of his being inside the house at the time of the occurrence and we find no reason to disbelieve his version on this account. Since; he had his house in the vicinity of the place of occurrence and he has given plausible explanation for being in the house at the time of occurrence, he cannot be called a chance witness.

22. The learned counsel for the appellant lastly pointed out an admission by this witness Ram Prasad (P.W. 2) that his statement was not taken by the Investigating Officer. No doubt it is so stated by this witness but the Investigating Officer S. I. Daya Shankar (P.W. 9) has categorically stated that the statement of this witness was taken by him. The case diary does contain his statement. The learned sessions Judge had perused the case diary and has recorded in his judgment that the statement of P.W. 2 Ram Prasad finds place therein. It seems that this witness could not quite understand the purport of this question. It would have been proper for the learned Sessions Judge or the Public Prosecutor to have got this point clarified by the witness. In the over all circumstances of this case, we are not inclined to reject his testimony on the ground suggested by the learned counsel.

23. The learned counsel for the appellant then contended that admittedly some other witnesses had also come but these 'independent' witnesses have not been examined and adverse inference be drawn. We are unable to find any force in this submission. Under the law, plurality of evidence is not at all required for the bringing home the guilt of the accused. It is the quality of the evidence and not the plurality of witnesses which is important in the appraisal of evidence. *Rameshwar v. State of U.P.* 1987 Cri. L. J. 442. Even single witness testimony can be sufficient to prove the guilt of the accused, if found entirely reliable. Evidence has to be weighed and not counted. *Thevar v. State of Madras*, AIR 1957 SC 614: (1957 Cri LJ 1062).

24. Even if we discard the testimony of Ram Prasad (P.W. 2) for arguments sake, for the reasons suggested by the learned counsel for the appellant, there will still be no reason for not relying upon the evidence of Dullu (P.W. 1) and to base the conviction of the appellant on his testimony as corroborated by the medical

evidence and other facts and circumstances.

25. Indeed, the ocular testimony is fully supported by medical and other evidence. Both the witnesses, as also the informant Ram Dulare (P.W. 6) have stated that the occurrence took place at about 8.30 a.m. or 8.45 a.m. The learned counsel for the appellant made a vague suggestion that the occurrence might have taken place at some other time. However, it would appear that the time of occurrence has been mentioned to be 8.45 a.m. in the first information report. Injury report, Ext. Ka 3, prepared by Dr. Govil shows that the deceased was examined at 10.45 a.m. before his death and, according to the opinion of the doctor, the injuries were fresh. Dr. Vidya Bhaskar (P.W. 4) has also stated that the deceased was brought to his dispensary in the morning of 10-5-1977 and the Admission Register of U.H.M. Hospital (Ext. Ka 2) shows that he was admitted there at 10.45 a.m. All these facts clearly support the version of the prosecution witnesses that the occurrence took place at about 8.45 a.m. on 10-5-1977. In this connection it may also be noted that the deceased Som Prakash did not die suddenly and was alive when he was examined by Dr. Govil (vide Ext. Ka 3). If the occurrence had taken place earlier and there was likelihood of deceased's life being saved, his relatives would not have detained him until 10.45 a.m. and would have taken him to the hospital immediately. Therefore, it must be held that the statement of the prosecution witnesses as to the time of occurrence is fully supported by the medical evidence.

26. The statements of the witnesses in regard to the place of occurrence also find support from the independent evidence relating to the discovery of human blood at the spot where the deceased is said to have fallen after being assaulted. The Investigating Officer Daya Shankar (P.W. 9) found blood at the spot, marked 'C' in the site plan (Ext. Ka 11), which is the place stated by the prosecution witnesses, namely Dullu (P.W.1), Ram Prasad (P.W. 2) and Ram Dulare (P.W. 6). The reports of the Chemical Examiner and Serologist (Exts. Ka 27 and Ka 28) show that the blood stained earth (collected by the Investigating Officer) was stained with blood, and this was human blood.

27. It was contended that, according to the prosecution witness Dullu (P.W. 1), the deceased had fallen on the Pakki Road but the blood was found on the kachchi patri. It may be noticed that the metalled portion of the road and kachchi patri are contiguous. Kachchi patri is, in fact, of the same road and it was quite possible that the deceased might have actually fallen down on the pakki road and his head might have slid on the kachchi patri and blood would have fallen there. Therefore, the statement that Som Prakash fell on the pakki patri cannot be said to be inconsistent with the discovery of the blood on the kachchi patri.

28. The submission of the learned Counsel for the appellant that, had the occurrence taken place at the place stated by the prosecution witnesses, there must have been found trail of blood from the place where the appellant and his brother are alleged to have started assaulting the deceased and the place where he actually fell down but no such blood had fallen down and, as such, the prosecution version in regard to the manner of assault is incorrect, can also be not accepted. Ram Prasad (P.W. 2) has stated that blood did not fall down in between the places. It would appear that the injuries from which the blood could have come out, were on the head and shoulder of the deceased and the deceased was wearing kurta pajama. It is quite likely that blood which might have fallen down from these injuries, would have been soaked by the clothes and it fell on the road only when Som Prakash fell down.

29. The learned Counsel for the appellant next challenged the testimony of these witnesses on the ground that there is contradiction and inconsistency in their version and medical evidence in regard to the manner of assault. It is submitted by him that, according to the first information report, the appellant and his brother assaulted the deceased with kanta and kulhari but the injury report indicates contusions also besides three incised injuries. It is also pointed out by him that even though the first information report does not state that the appellant hit the deceased with the back portion of kanta, the prosecution witnesses P.W. 1 Dullu and P.W. 2 Ram Prasad tried to make improvement by stating that the appellant was hitting the deceased mostly with the back portion of kanta. We are unable to find any force in this submission. In the first place, it is not necessary that minutest details should find place in the first information report and it is sufficient if a broad

picture is presented and revealed in the first information report. No exception can be taken if the first information report merely contains the broad features of the crime. *P. Narayanan v. State of Andhra Pradesh*, 1975 SCC (Cri) 427 : (1975 Cri LJ 1062). Moreover the first information report can be used to discredit the testimony of the maker of the report and the prosecution case cannot be thrown out merely on the ground that entirely different version is given therein by its maker. *D.R. Bhagare v. State of Maharashtra*, 1973 Cri LJ 680 (SC) : (AIR 1973 SC 476).

30. In the present case the first information report does contain the broad factual statement that the appellant and his brother assaulted the deceased with kanta and kulhari. If it is not stated therein that the back side of kanta had also fallen on the deceased or the appellant was hitting the deceased mostly with the back portion of kanta, it cannot be said to be material omission amounting to contradiction. The version given in the first information report can very well be read in conformity with the statements made in the Court or made under Section 162, Cr.P.C.

31. Even if it be accepted for arguments sake that the statements made by these witnesses in the Court to the effect that the appellant was hitting the deceased mostly with the back portion of kanta, was an afterthought, in order to explain the medical evidence this could not be sufficient to discard their testimony or to reject the prosecution version. The deceased was admittedly trying to save his life and was in the process of running away from the assailants and the assailants were chasing and assaulting him in this position. Where two persons set themselves on a victim and attack him in quick succession or in the manner stated above, it may not be possible for a witness standing at a distance or running along with the deceased to say where and how each assault was made or whether the weapon hit the victim from the sharp edge side or back side. In this process it is likely that back of the kanta may have come into contact with the body of the victim now and then. *Babu Lodh v. State of Uttar Pradesh*, (1992) 2 SCC 352 (sic). Therefore, we are unable to accept the submission of the learned counsel for the appellant that there is any material inconsistency between the testimony of the prosecution witnesses and the medical evidence.

32. The case of the prosecution was sought to be challenged on the ground of some alleged infirmities in the first information report also. The infirmities pointed out were that the scribe Ram Dulare P.W. 6 did not know the meaning of the word 'urf' used in the first information report and it does not also mention that the appellant was hitting the deceased from the back side of kanta. We have already found above that the absence of the details to the effect that the deceased was also being hit from the back side of kanta in the first information report, cannot be considered to be a material omission amounting to contradiction. In regard to the use of word 'U RP, it may be mentioned that Ram Pulare himself was not an eye-witness and: he admittedly scribed the first information report on the dictates of the deceased Som Prakash and other witnesses. It is quite likely that either the deceased or any of the eyewitnesses might have used the word 'URF and the scribe Ram Dulare would have written it as such. In our opinion, this circumstance does not affect the authenticity of the first information report or the correctness of the prosecution version. It would thus appear that the ocular testimony is fully supported by the medical evidence and other evidence and these facts and circumstances do show the culpability of the appellant in this crime.

33. There is yet another circumstance also which supports the prosecution version and it is the fact that the accused absconded after the incident. Where the accused, after being named in the F.I.R. absconds or remains away from the village and the proceedings under Sections 82 and 83, Cr.P.C. were started against him and he appeared thereafter only, it is a circumstance against the accused if no plausible explanation is given by him for such absence. (Ram Autar v. State, 1988 Allahabad Vidhi Nirnay 74; State of U.P. v. Anil Singh, 1988 (3) Crimes 367 : (1989 Cri LJ 88).

34. In the present case, it would appear that the appellant absconded from the village and proceedings under Sections 82 and 83, Cr.P.C. were done against him and his property was attached (vide Exits. Ka 14 to Ka20) and he was apprehended only after about four and half months on 27-9-1977. The only explanation given by the accused is that he was residing in his relative's house and surrendered in Court when he came to know about the warrant against him. However, there is no plausible reason given by him or otherwise appearing from the

record as to why the appellant did not reside at his normal place of residence in his own village and went to reside with his relative in Orai. There is also nothing to show otherwise that he really was residing at his relative's house at Orai.

35. On a consideration of the facts and circumstances mentioned above and the legal position, we agree with the learned Sessions Judge's finding that the appellant had assaulted Sam Pra,kash resulting in his murder. There was strong motive for the appellant to assault the deceased, because, it was the deceased who was responsible for getting the father of the appellant evicted from the house through Court .Amin after prolonged litigation which resulted in the apellant's being ousted from trie house. The appellant also thought that he has beenifalsely implicated at the behest of theideceased in a case relating to murder of Ram Narain. The testimony of prosecution witnesses namely P.W, 1 Dillu, P.W. 2 Ram Prasad and P.W. 6 Ram Dulare is wholly trustworthy and does not suffer from any material infirmity. The medical evidence and the proof of the recovery of the blood at the alleged place of occurrence fully supports the ocular testimony. The fact that the appellant absconded and remained away for as long a period as four and half months, is also a strong circumstance against him. In our opinion, therefore, the Sessions Judge is right in his finding him regard to the involvement of the appellant and no interference therein is called for.

36. The learned counsel for the appellant, however, submitted that, even if we find that the appellant was involved in the crime, his conviction could not have been made under Section 302, I.P.C. and he should have been convicted under Section 323, I.P.C. or Section 324 read with Section 34, I.P.C. We fend to agree with the learned counsel in so far as his submission to the effect that the conviction could not have been made under Section 302, I.P.C, is concerned. In our opinion, considering the entire facts and circumstances of the case, the appellant should have been convicted under Section 304, Part II, I.P.C. read with S, 34,I.P.C According to both eye-witnesses, namely Dullu (P.W. 1), and Ram Prasad (P.W. 2), the appellant was mostly hitting the deceased with the back side of kanta. If it were the intention of the appellant to cause the death of the deceased, there was no reason for him not to use the weapon in its normal manner i.e. from the sharp edged side and to use it from the back side as a lathi. It is also to be noted that the

appellant does not appear to have assaulted the deceased after he fell down, even though he was alive and rehained alive for about two hours thereafter. There are only three injuries which could be attributed to sharp edged weapon. According to Dr. R. P. Saxena, P.W. 3, if injury No. 2 were not caused, there was little likelihood of death.

37. In *Shyam Sunder v. State of U. P.*, 1991 (1) SCC Suppl 382, the appellant is alleged to have exhorted and instigated but he himself hit the deceased from the butt of the gun. In that case it was the other accused who fired the gun all of a sudden. The Supreme Court held that there was no intention to cause death or to cause such bodily injury as was likely to cause death. The Supreme Court, accordingly altered the conviction from Section 302, I.P.C. to Section 324, I.P.C. and sentenced the appellant to three years' rigorous imprisonment.

38. In *State of M.P. v. Jhaddu*, 1991 SCC (Cri) 716, the appellant assaulted the deceased on chest, which was a vital part, resulting in the fracture of ribs. It was held by the Supreme Court that, though it cannot be said that there was an intention to cause death or such bodily injury was likely to cause death, but it may be presumed that the appellant had knowledge that the injury was likely to cause death. Accordingly, the Supreme Court upheld the finding of the High Court that the appellant should be convicted under Section 304, Part II, I.P.C. read with 34, I.P.C and sentenced to ten years' rigorous imprisonment.

39. In *Sukhdeo Singh v. State of Punjab*, AIR 1992 SC 755 : (1992 Cri LJ 700), the appellant attacked the deceased when he had fallen down and there was no specific evidence to indicate that fatal injury was caused by the appellant. The Supreme Court altered the conviction from Section 302, I.P.C. to Section 304, Part II, I.P.C. and sentenced the appellant to five years' rigorous imprisonment.

40. In the present case, as already noted, the facts and circumstances do not indicate that there was any intention to cause death or such bodily injury as was likely to cause death, However, unlike the case of *Shiam Sunder*, it could be inferred, in the present case, that the appellant had knowledge that the injury caused was likely to cause death. The attack was made with sharp edged weapons in pursuance of the common intention of himself and his brother Gopal.

The fatal injury, namely injury No. 2, is on the vital part. Injuries Nos. 1 and 3 are also the injuries caused by sharp edged weapon. In view of all these facts, it seems just and proper that the appellant should be convicted under Section 304 Part II read with Section 34, I.P.C. and not under Section 302, I.P.C.

41. In our opinion, therefore, the appeal should be partly allowed. The conviction under Section 302, I.P.C. and sentence of life imprisonment be set aside and, instead, the appellant should be convicted under Section 304 Part II read with Section 34, I.P.C. and sentenced to seven years' rigorous imprisonment.

42. The appeal is accordingly partly allowed. The judgment and order of the learned Additional Sessions Judge is modified to the extent that the conviction of the appellant under Section 302/34, I.P.C. and sentence of life imprisonment is set aside and, instead, he is convicted under Section 304, Part II read with Section 34, I.P.C. and sentenced to seven years' rigorous imprisonment. The appellant is on bail. He shall be taken into custody forthwith to serve out the sentence awarded to him.

Let a copy of this judgment be sent to the Chief Judicial Magistrate, Kanpur to ensure compliance of this judgment and order.

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