

Bhavanraj Singh and ors. Vs. State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Sep-26-2008

Reported in : 2009(1)MPHT370

Judge : A.K. Shrivastava and ;Sushma Shrivastava, JJ.

Appellant : Bhavanraj Singh and ors.

Respondent : State of Madhya Pradesh

Disposition : Appeal allowed

Judgement :

A.K. Shrivastava, J.

1. Feeling aggrieved by the judgment of conviction and order of sentence dated 18-12-1998 passed by learned Sessions Judge, Sidhi in Sessions Trial No. 76/97 convicting appellants under Section 302 read with Section 34 of IPC and thereby sentencing them to suffer life imprisonment, the appellants have knocked the door of this Court by preferring this appeal under Section 374(2) of the Code of Criminal Procedure, 1973.

2. Filtering out necessary details the facts lie in narrow compass that on 5-5-1997 at 10 a.m. Ku. Gita Singh was taking care of mango trees at that juncture, appellant Prithvipal Singh alias Rintu came and started plucking mangoes from the

trees, at that juncture Munna Singh also arrived there and he pacified appellant Rintu not to pluck mangoes. On this point some altercation took place between them. Dharamraj Singh (hereinafter referred to as 'the deceased') after evacuating also came there and he also pacified Munna Singh and appellant Rintu not to quarrel as a result of which Rintu caught hold the beard of the deceased and also hurled abuses of mother and sister to him. It is said that at that juncture appellant Bhavanraj Singh and Sant Kumar alias Santu armed with farsa and lathi respectively arrived there and were saying to kill the deceased. It is said that Bhavanraj Singh dealt farsa blow on the head and appellant Sant Kumar wielded lathi on heads and legs of the deceased and also dealt its blows on his head as a result of which deceased fell down. The entire episode was witnessed by Rajua Bai and Phoolmati Bai. These two persons came and uplifted deceased and thereafter accused fled from the place of occurrence.

3. The deceased who was seriously injured at that time was brought to the Police Kotwali where Brijbhushan Singh lodged the First Information Report against the appellants. On lodging of the First Information Report, criminal law was triggered and set in motion. The Investigating Agency sent the deceased who was alive at that juncture for his treatment at District Hospital, Sidhi; arrived at the spot; prepared the spot map; on the death of the deceased on 8-5-1997 sent the dead body for post-mortem; recorded the statement of witnesses; arrested the appellants and seized lathi on the disclosure statement of appellant Bhavanraj Singh; seized the ordinary and blood stained soil from the place of occurrence; sent the blood stained articles for serological examination.

4. After the investigation was over, a charge-sheet was submitted in the Committal Court which on its turn committed the case to the Court of Session from where it was received by the Trial Court for its trial.

5. The learned Trial Judge on the basis of the averments made in the charge-sheet framed charges punishable under Section 302 read with Section 34 of IPC against appellants which they denied and requested for the trial.

6. In order to bring home the charges, the prosecution examined as many as 13 witnesses and placed Exh. P-I to P-25 the documents on record. The defence of

appellants is of false implication and the same defence they set forth in their statements recorded under Section 313, Cr.PC. In support of their defence, they examined one Ram Milan Shukla (D.W. 1) in order to show that eye-witness Phoolmati was not present at the spot.

7. The learned Trial Judge on the basis of the evidence placed on record came to hold that the charges are proved against the appellants and eventually convicted them and passed the sentence to suffer life imprisonment.

8. In this manner the present appeal has been filed by the appellants assailing judgment of conviction and order of sentence.

9. It has been vehemently argued by Shri P.R. Bhawe, learned Senior Counsel and Shri Aditya Adhikari that if the evidence of eye-witnesses is taken into consideration in proper perspective and is marshaled along with medical evidence, their presence becomes highly suspicious because specifically it has been stated by all the eye-witnesses that appellant Bhavanraj Singh was carrying a farsa and repeated blows of farsa were dealt by him on the head of the deceased and on other parts of his body and because not even a single incise wound has been found on the person of the deceased, therefore, the presence of eye-witnesses becomes highly doubtful. In support of their contention, they have placed reliance on decision of Supreme Court *State of U.P. v. Harban Sahai and Ors.* : [1998]2SCR1056 . Shri Aditya Adhikari, learned Counsel has also put emphasis on the role assigned to Prithvipal Singh @ Rintu that the only allegation against this appellant is of catching hold the beard of the deceased and if that would be the position according to learned Counsel his act would not come under the ambit and sweep of Section 34 of IPC because as per prosecution's own case this appellant when plucking the mangoes from the tree and was altercating with Munna Singh at that juncture deceased came to intervene and thereafter this appellant caught hold of his beard and thereafter the alleged incident took place. According to Shri Aditya Adhikari, learned Counsel looking to the scenario the act of catching hold the beard by appellant Rintu earlier to the incident cannot bring his act within the sphere of Section 34 of IPC. In support of his contention Shri Adhikari has placed reliance on two decisions of Supreme Court they are Sukhbir

Singh v. Kirtan Singh and Ors. (2005) 10 SCC 567 and Manoj alias Bhau and Ors. v. State of Maharashtra : 1999 CriLJ2284 . On these premised submissions it has been argued that the charges are not proved and therefore appellants are entitled for acquittal.

10. On the other hand Shri Patel, learned Additional Advocate General argued in support of the impugned judgment and has submitted that since there is unimpeachable evidence of eye-witnesses Rajua Bai (P.W. 1), Phoolmati Bai (P.W. 6), Ku. Gita Singh (P.W. 7) and Munna Singh (P.W. 9), the oral evidence should given more credence than that of medical evidence if there appears to be any discrepancy between them. In support of his contention, learned State Counsel has placed heavy reliance on Dashrath Singh v. State of U.P. AIR 2004 SC 4488. Learned State Counsel has also placed reliance on Punjab Singh v. State of Haryana : 1984 CriLJ921 , and has submitted that the medical evidence cannot override the direct evidence of the eye-witnesses. Learned State Counsel has also placed reliance on State of Madhya Pradesh v. Dharkole alias Govind Singh and Ors. : 2005 CriLJ108 , on the same point. On these premised submissions, it has been argued by learned State Counsel that this appeal sans substance and the same be dismissed.

11. Having heard learned Counsel for the parties, we are of the view that this appeal deserves to be allowed.

12. In the present case, the author of FIR is Brijbhushan Singh (P. W. 5) who is the son of the deceased. According to him, when he was purchasing the grocery items from the shop at that juncture his son Prabhakar came and informed that deceased has been killed. Specifically this witness is saying that Prabhakar informed that appellant Bhavanraj Singh by farsa, Sant Kumar by lathi have killed the deceased. His son Prabhakar also informed that appellant Prithvipal Singh alias Rintu caught hold the beard of the deceased, thereafter Brij Bhushan went to the place of occurrence and found the deceased lying unconscious. The prosecution has not taken any pains to examine Prabhakar and there is no evidence that who informed Prabhakar about the incident because as per prosecution's own case Prabhakar is not an eye-witness. Thus, admittedly the

author of the FIR Brijbhushan Singh is not an eye-witness, though he has proved the First Information Report (Exh. P-9). According to this witness, the deceased died after three days and this fact we find place from the evidence of Dr. Devendra Singh (P.W. 10) who has categorically stated that deceased had died on 5-5-1997 in the District Hospital, Sidhi while undergoing the treatment.

13. The prosecution examined Rajua Bai (P.W. 1), Phoolmati Bai (P.W. 6), Ku. Gita Singh (P.W. 7) and Munna Singh (P.W. 9) as eye-witnesses. We shall examine the evidence of Rajua Bai later on and we think it apposite to appreciate and marshal the evidence of other three eye-witnesses first.

14. According to Phoolmati (P.W. 6) on the date of incident at 10 a.m. she went to fetch the water from the Well which is in the field. Nearby the field there are some trees of Mango and Babool. According to this witness the mango trees are of the deceased. She has said that Bhavanraj Singh was carrying/farsa and Rintu was catching the beard of the deceased and appellant Sant Kumar was having a lathi. Specifically this witness is saying against appellant Bhavanraj Singh that he dealt farsa blow on the head of the deceased and second blow of farsa was also given on the rear side of the head, thereafter Bhavanraj Singh also dealt farsa blows nearby the armpit as a result of which deceased fell down. For appellant Sant Kumar, she has said that he wielded lathi blows on the person of the deceased. According to her, blow of lathi landed on the back as well as on the head of the deceased. Immediately this witness rushed towards the deceased and when she scolded on the appellants they fled from the place of occurrence. This witness is also evidencing the presence of other eye-witnesses Ku. Gita Singh and Rajua Bai. In cross-examination she has stated that wielding lathi by appellant Sant Kumar was stated by her to the Police in her case diary statement (Exh. D- 2) but we find that there is complete omission of causing injury by appellant Sant Kumar on the person of the deceased. According to this witness if the factum of giving lathi blows by appellant Sant Kumar did not find place in her case diary statement (Exh. D-2), she has no reason to state. In Para 6 of her cross-examination this witness has stated that several blows of farsa were dealt by appellant Bhavanraj Singh on the person of the deceased. This witness by profession is a beggar and she has specifically admitted in Para 15 of her cross-examination that begging is

the only means of her livelihood. She has also admitted that deceased used to help her financially and was also providing food stuff to her. This witness appears to be a chance witness because according to her own statement she went to fetch the water from the Well when the incident took place. Looking to her profession that she is a beggar coupled with the fact that she was being helped by the deceased financially as well as grains etc. were also being provided to her by the deceased and his family, it is difficult to hold her testimony to be truthful. According to this witness after the incident took place, son of the deceased, namely, Brijbhushan Singh arrived at the spot and he carried the deceased along with him. However, Brijbhushan Singh (P.W. 5) who is the author of the FIR has not at all stated in his evidence about the presence of this witness when he arrived at the place of occurrence. The presence of this witness has also not been stated by Brijbhushan Singh in FIR (Exh. P-9) and in his case diary statement (Exh. D-I). The evidence of this witness is also doubtful because there is material omission of causing injury by lathi by appellant Sant Kumar in her case diary statement (Exh. D-2) and the causing of injury by farsa by Bhavanraj Singh is altogether contrary to the medical evidence because there is no incise wound on the person of the deceased.

15. The other eye-witness is Ku. Gita Singh (P.W. 7). She has also stated that appellant Rintu was plucking mangoes and when she asked him not to pluck the mangoes, her brother Munna Singh was also there and he also pacified appellant Rintu. Thereafter some quarrel took place between her brother and appellant Rintu and at that juncture her grand-father (deceased) after evacuating also came to the spot. The deceased also asked her brother and appellant Rintu not to quarrel but appellant Rintu caught hold the beard of the deceased and hurled the abuse of mother. Thereafter appellants Bhavanraj Singh and Santu Singh arrived there and they were scolding to kill the deceased. According to this witness appellant Bhavanraj Singh was having a farsa and Santu Singh having a lathi. Bhavanraj Singh dealt/ana blow on the head of the deceased and Santu Singh gave lathi blows which landed on the hands and legs of the deceased. Specifically this witness is saying that appellant Bhavanraj Singh dealt 3-4 blows of farsa on the head of the deceased and Santu Singh also dealt 3-4 blows of lathi as a result of which the deceased fell down. When this witness and Munna Singh were uplifting

the deceased, at that juncture Phoolmati Bai also arrived there. According to this witness Rajua Bai was also witnessing the incident and she also arrived there. In cross-examination, the factum of not stating that role of appellant Sant Kumar alias Santu wielding lathi to the deceased and arrival of Rajua at the place of occurrence was narrated to her but she says that in her case diary statement (Exh. D-3) she narrated these facts but why all these facts are not mentioned, she cannot say. We have gone through her case diary statement (Exh. D-3) and we find that causing injuries by lathis by appellant Sant Kumar has not at all been stated by this witness and there is complete omission in this regard. Similarly, the presence of Rajua Bai has also not been stated by her in Exh. D-3. Hence pocketing the witness Phoolmati (P.W. 6) and using her as witness to give evidence at the wishes of complainant side can be inferred. This witness is also saying that appellant Bhavanraj Singh dealt repeated farsa blows on the person of the deceased and appellant Sant Kumar dealt lathi blows. We have already held that factum of wielding lathi by appellant Sant Kumar is material omission since this fact has not at all been stated by her in case diary statement (Exh. D-3). So far as role assigned to the appellant Bhavanraj Singh of causing injury by farsa is concerned, at this juncture we would like to observe that no incised wound has been found on the person of the deceased. Hereinafter we will discuss the evidence of the doctor. This witness has also admitted that Phoolmati (P.W. 6) is a beggar, but, she initially denied that her family is providing financial aid to her, however, when she was further cross-examined later on she admitted that some financial aid is being provided by her family to Phoolmati.

16. The other eye-witness is Munna Singh (P.W. 9) and he is the person who altercated with Rintu on the point of plucking mangoes from the trees. According to this witness when appellant Prithvipal Singh was hurling abuses, since he refrained from plucking the mangoes at that juncture deceased came there and he also pacified appellant Rintu. On this appellant Prithvipal Singh leaving him aside rushed towards the deceased and caught hold of his beard. Thereafter, appellants Bhavanraj Singh and Sant Kumar also arrived there and Bhavanraj Singh dealt farsa blows on the head of the deceased. According to this witness, appellant Sant Kumar dealt lathi blows to the deceased as a result of which deceased fell down.

17. The statement which P.W. 9 is giving in Para 5 is somersaulting the entire case of prosecution. According to him report (FIR) was lodged by him, but it was signed by his uncle, i.e., Brij Bhushan. Thereafter this witness is saying that his statement was not recorded by the police. According to him, after the incident, he went to Singroli and came back after 8-9 days from there. Firmly this witness is saying that after coming back from Singroli he did not meet with the police personnel. Again by changing his stand, this witness is saying that police personnel summoned him in police line and recorded his statement after one or two days of the incident. According to us, his statement is self-contradictory because at one place he is saying that his statement was not recorded by the police but at another place he says that on his report his uncle signed. Brijbhushan Singh (P.W. 5) is not at all saying that any report was lodged by this witness, namely, Munna Singh (P.W. 9) and on the report of Munna Singh, he (Brijbhushan Singh) signed. On the contrary Brijbhushan Singh is firmly saying that he is the author of FIR. In Paras 5 and 6 of his cross-examination this witness Munna Singh at one place saying that after the incident he went to Singroli and came back after 8-9 days and he was not present when his grand-father died. On the other hand in Para 6 he is saying that he did not remember on which date he went to Singroli and he is not remembering whether his statement was recorded by police on 7-5-1997. Even if we ignore this self-contradictory statement of this witness, there is material omission in his case diary statement (Exh. D-4) about causing of injuries by lathi by appellant Sant Kumar. This omission was confronted to this witness in Para 8 of his cross-examination but this witness put his inability that why the said fact has not been stated by him in his case diary statement. We also find that there is serious contradiction in the statement of this witness because according to him appellant Sant Kumar dealt lathi blow to the deceased but in his case diary statement (Exh. D-4) role of appellant Sant Kumar is only this much that he grappled with the deceased. So far as causing of injuries by farsa to the deceased by appellant Bhavanraj Singh is concerned, it is belied by medical evidence. In the medical evidence lacerated wounds are found on the person of the deceased.

18. After appreciating and marshalling the evidence of eye-witnesses Phoolmati (P.W. 6), Ku. Gita Singh (P.W. 7) and Munna Singh (P.W. 9), the scene which is created is that some altercation took place between appellant Prithvipal Singh

alias Rintu and Munna Singh on the point of plucking mangoes from the trees and when deceased tried to intervene the appellant Prithvipal Singh alias Rintu caught hold the beard of the deceased and thereafter the entry of other two appellants Bhavanraj Singh and Sant Kumar is introduced in the picture, who according to these eye-witnesses, dealt farsa and lathi blows respectively. Giving lathi blows by appellant Sant Kumar to the deceased is a material omission since this fact has not at all been mentioned by any eye-witness in their case diary statements. Causing the injuries by appellant Bhavanraj Singh by farsa how far this story is true and in order to take out the grain from the chaff, we shall now examine the medical evidence.

19. After the incident the deceased who was alive was referred to District Hospital, Sidhi on 5-5-1997 and Dr. Devendra Singh (P.W. 10) attended him first at 11.20 A.M. Dr. Devendra Singh on examining the deceased/injured found following injuries on his person:

(1) There are five lacerated wounds with contusions marks over head one placed over Lt Parietal region, 3 over middle of skull (vertex) while one over occipital region. Size of each vary $4 \times \frac{1}{2} \times \frac{1}{2}$ cm to $(7 \times \frac{1}{2} \times \frac{1}{2} - 3)$ and $2 \times \frac{1}{2} \times \frac{1}{2}$ cuts, + 1 4 are placed Anteroposteriorly while last is placed transversely, severe bleeding taking place from L/Ws.

(2) A double lining contusion mark present over Lt scapular region placed transversely huge swelling present (10×3 cms).

(3) A double lining contusion mark over Lt elbow on ext. aspect 2×1 cm with $\frac{1}{2} \times \frac{1}{2}$ cm L/W.

According to doctor the condition of the injured was serious and he was unconscious, he was not even able to identify his neighbour and relatives. Further he has stated that all the injuries were caused by hard and blunt object within six hours. This doctor has proved his MLC Report (Exh. P-12-A). After the death of the deceased, post-mortem was conducted by Dr. Uday Singh and according to him, he found following injuries on the person of the deceased:

- (1) Lacerated wound, over central scalp.
- (2) Lacerated wound over Lt. temporal region.
- (3) Lacerated wound over right temporal region.
- (4) Lacerated wound over occipital region, measuring 5,6, 8,3 cm stitched.
- (5) Abrasion on right upper |rd ext. aspect 5 x 2 cm.

All the wounds were stitched except 5th one. Scalp wounds are vertically placed.

20. According to autopsy surgeon the death was homicidal. The autopsy surgeon has further stated that since the injuries were stitched, therefore, he is unable to state that by which object the injuries were caused to the deceased. MLC Dr. Devendra in cross-examination Para 9 has specifically admitted and stated that the injuries sustained to the deceased were not caused by sharp edged weapon. It is a matter of common knowledge that farsa is a sharp edged weapon and the doctor has also stated that injuries attributed to the deceased could not have been sustained by sharp edged weapon. The autopsy surgeon Dr. Uday Singh (P. W. 8) is also saying that there were multiple fractures inside the head and these injuries cannot come by farsa because the impact of farsa would be of cut injury. In very specific words and firmly the autopsy surgeon is saying that multiple fractures would come only by hard and blunt object and not by sharp object. After the cross-examination, the autopsy surgeon was re-examined by the Public Prosecutor and in Para 12 of his re-examination he is saying that if sharp edged weapon is not having sharp edge, in that situation if by applying sufficient force the impact of lacerated wound may come. Thereafter, when he was again cross-examined by the defence Counsel on account of his re-examination by Public Prosecutor, again he has admitted that if the farsa is not having sharp edge in that situation lacerated wound may come but if the edge is even very slight, the impact of cut wound will come. Further he has admitted that sometimes appearance of lacerated wound is that of an incised wound and it can be ascertained by microscope. Again this autopsy surgeon is saying that if farsa is not having any sharp edge even then the impact of wound would be of incised wound. There is no evidence on record that

farsa which was used as weapon in the commission of the offence by appellant Bhavanraj Singh was not having any sharp edge. There is nothing on record in order to indicate that the impugned farsa was sent to any doctor in order to obtain his opinion whether any lacerated wound may come by said farsa. Indeed, farsa was not at all seized by the Investigating Agency. On going through memorandum statement (Exh. P-2) under Section 27 of the Evidence Act of appellant Bhavanraj Singh, it is revealed that on his disclosure leading to recovery of lathi has been recovered vide seizure memo (Exh. P-3) from him. No farsa has been seized by the Investigating Agency from any appellant.

21. The Supreme Court in *Hallu and Ors. v. State of Madhya Pradesh* : 1974 CriLJ1385 , has categorically held that normally when witness says that an axe or a spear is used there is no warrant for supposing that what the witness means is that the blunt side of the weapon was used and if that be the implication it is the duty of the prosecution to obtain a clarification from the witness as to whether a sharp-edged or a piercing instrument was used as a blunt weapon. We think it apposite to quote Para 11 of the decision which reads thus:-

The High Court however refused to attach any importance to this aspect of the matter by saying the witnesses had not stated that 'the miscreants dealt axe blows from the sharp-side or used the spear as a piercing weapon'. According to the High Court axes and spears may have been used from the blunt side and therefore the evidence of the eye-witnesses could safely be accepted. We should have thought that normally when the witness says that an axe or a spear is used there is no warrant for supposing that what the witness means is that the blunt side of the weapon was used. If that be the implication it is the duty of the prosecution to obtain a clarification from the witness as to whether a sharp-edged or a piercing instrument was used as a blunt weapon.

22. The Supreme Court in *Gurmej Singh and Ors. v. State of Punjab* : 1992 CriLJ293 , in Para 8 has held that if the prosecution witnesses are silent on the point that which side of the weapon was used, normally it will be presumed that the sharp side of the weapon was used and not the blunt side but where the prosecution witnesses have stated that blunt side of gandasi has been used, there

is no room for believing the sharp side of the weapon which would be normally used had in fact been used. In the case of Gurmej Singh (supra), the evidence of witnesses was that the blunt side was used and, therefore the Supreme Court upheld that conviction. But in the present case, there is no iota of evidence that blunt side of farsa was used by appellant Bhavanraj Singh. So far as causing of injury by lathi by Sant Kumar is concerned, we have already held that it is a material omission. The Supreme Court in Bhola Singh v. State of Punjab AIR 1999 SCW 380, dealt this situation and in Para 5 has categorically held that omission on the part of eye-witnesses in mentioning the nature of weapon which was used in the commission of the offence and their version that the accused had used blunt side of the weapon was set out to fit in with post-mortem report, makes their presence at the time of occurrence doubtful. We think it apposite to quote that part of Para 5 of this decision which reads thus:

We have carefully gone through the evidence of Kartar Singh (P.W. 1) and Didar Singh (P.W. 2), the two eye-witnesses. If they had really witnessed the occurrence as had taken place, they would have certainly described the weapons used in causing injuries to the deceased-Saun Singh, leading to his death. It is highly improbable and unlikely that when the accused armed with sharp weapons like Gandasa and Ghop had used only the blunt edged side and not the sharp edged side of the said weapons. We are convinced that these two eye-witnesses had set out this version only to fit in what had been found in the post-mortem report. The normal way in which a Gandasa and Ghop could be used was only from the sharp edged side and not from the blunt edged side. Therefore, it is highly unlikely that the two eye-witnesses (P. W. 1 and P. W. 2) could have seen the incident as had taken place. It gives rise to serious doubt as to their presence at the time of incident. The Trial Court and the High Court did not duly appreciate this aspect of the matter and, therefore, we are of the view that there is an error in this regard. Hence, we accept the case as set forth on behalf of the appellant. We allow this appeal, set aside the conviction passed by the Trial Court as confirmed by the High Court and set him at liberty.

(Emphasis supplied)

23. In a later decision *Thaman Kumar v. State of Union Territory of Chandigarh*, : 2003 CriLJ3070 , the Supreme Court has held that the conflict between oral testimony and medical evidence can be of varied dimensions and shapes. Further, it has been held by the Supreme Court that there may be a case where there is total absence of injuries which are normally caused by a particular weapon. By explaining other type of cases it has been held by the Supreme Court that where the injuries found on the victim are of the type which are possible by the weapon of assault but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon or where the injuries found on victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they were deposed to have been caused by the eye-witness, it has been held by the Apex Court that in the first category it can legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful but in other two cases, the ocular evidence shall be given preference to the medical evidence. It would be condign to quote Para 16 of the said decision which reads thus:

16. The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eye-witnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third categories no such inference can straight away be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the

reliability of ocular testimony.

(Emphasis supplied)

By testing the evidence, facts and circumstances of the present case on the touchstone and anvil of the above said decision of Thaman Kumar (supra), and other decisions of Supreme Court which we have quoted hereinabove since all the eye-witnesses in singular voice are saying that farsa was used by appellant Bhavanraj Singh and nowhere they have stated that blunt side of farsa was used, according to us, since there is total absence of the incised wound, the version of eye-witnesses cannot prevail over the medical evidence and the evidence of the eye-witnesses cannot be said to be truthful version.

24. Now we shall analyze the statement of eye-witness Rajua (P.W. 1) whose statement we did not consider in aforesaid paras and in Para 13 we stated that her testimony will be considered later on. Admittedly case diary statement of this witness was not recorded and this witness was directly brought in Court and was examined by the prosecution. In order to fit in her evidence with the post-mortem report, she is saying that appellant Santu (Sant Kumar) dealt lathi blow on the person of the deceased though she is also saying that Bhavanraj Singh dealt farsa blow on the person of the deceased. If this witness was an eye-witness why her statement was not recorded by Investigating Agency. This witness in Para 7 of her cross-examination has categorically admitted that Investigating Agency did not put any question to her and she also did not state any incident to them. She even did not say to anybody that how the incident had occurred. If this witness was present at the spot and if the version of other eye-witnesses affirming her presence at the spot at the time of occurrence is true, there was no reason why her statement was not recorded by the Investigating Agency. Thus, according to us the evidence of this witness has been engineered and manufactured in order to fit in the slot of post-mortem report. Hence we are constrained to take the aid from the decision of Bhola Singh (supra), wherein it has been categorically held by the Supreme Court that thrusting of story of using sharp edged weapon from the blunt side in order to fit in the post-mortem report, said type of evidence should not be given any credence. Thus, according to us the evidence of Rajua (P.W. 1) is also not helpful

to the prosecution.

25. The decision of Dashrath Singh (supra), placed reliance by learned State Counsel is not applicable in the present case because in that case the case of prosecution was that there was an incised wound on the scalp and in that stipulation the Supreme Court held that sometime the impact of hard and blunt object may be of incised wound. In that case, the bamboo (hard and blunt object) was used as weapon for causing the injury. But the present case is just reverse.

Here the allegation is that the blow was dealt by sharp edged weapon (farsa) and learned Counsel could not point out that the impact of sharp edged weapon could be that of a laceration and, therefore, the decision of Dashrath Singh (supra) is not applicable. The decision of Punjab Singh (supra) is also not applicable because in that case two alternative possibilities were found in the medical evidence. The decision of Dharkole alias Govind Singh (supra), is also not applicable because in that case the eye-witnesses were found to be reliable and trustworthy but in the present case we have held hereinabove that eye-witnesses are not reliable.

26. Thus according to us, the conviction of appellants Bhavanraj Singh and Sant Kumar alias Santu under Section 302/34 of IPC cannot be allowed to remain stand and they are entitled to benefit of doubt.

27. Since we have already given benefit of doubt to appellants Bhavanraj Singh and Sant Kumar, the conviction of appellant Prithvipal Singh @ Rintu under Section 302/34 of IPC cannot be sustained. But, we would like to advert ourselves to the role assigned to him in the commission of offence. According to the case of prosecution, this appellant at the time of plucking the mangoes had altercation with Munna Singh and he also quarreled with him and thereafter when the deceased arrived and pacified this appellant, he caught hold the beard of the deceased and hurled the abuses and thereafter as per the case of prosecution appellant Bhavanraj Singh and Sant Kumar came and wielded farsa and lathi blows respectively. Thus, according to the prosecution the incident occurred in two phases. In the first phase, witness Munna Singh and this appellant Prithvipal Singh are quarreling with each other and when deceased intervened, this appellant caught hold of his beard. Thereafter his role came to an end and in the second

phase as per the case of prosecution the role of other appellants came into existence. There is no evidence that when the alleged blows of farsa and lathi were being dealt by appellant Bhavanraj Singh and Sant Kumar, this appellant played any vital role and therefore according to us it cannot be said that this appellant shared any common intention with Bhavanraj Singh and Sant Kumar to kill the deceased and therefore his conviction under Section 302/34, IPC cannot be sustained.

28. Abjudicatio this appeal succeeds and is hereby allowed. The judgment of conviction and order of sentence passed by learned Trial Court convicting appellants under Section 302/34, IPC cannot be allowed to remain stand and the same is hereby set aside.

29. The appellants are acquitted from all the charges. Appellant No. 3 Sant Kumar alias Santu is in jail, he be set at liberty forthwith if not required in any other case. Appellants Bhavanraj Singh and Prithvipal Singh @ Rintu are on bail, their bail bonds are discharged.