

RAJENDER SINGH AND ORS.

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v.

THE STATE OF BIHAR

APRIL 7, 2000

[G.B. PATTANAİK, R.P. SETHI AND SHIVARAJ V. PATIL, JJ.]

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Indian Penal Code, 1860 :

Section 302—Conviction under—No unlawful assembly or any common object to cause assault or murder of deceased—Hence conviction altered to one u/s. 302.

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Sections 302/34 & 324—Conviction under—Of one of the appellants—The circumstances under which appellant has been ascribed to have given a blow on the deceased, it cannot be held that he also shared the common intention with other accused—Therefore conviction u/s. 302/34 cannot be sustained—Hence, convicted u/s. 324.

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Section 300, Exception 4—Held, in the facts of the case, not proved.

Section 34—Common intention and Similar intention—Distinction between—If the distinction is overlooked, it may lead to miscarriage of justice.

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Criminal Trial :

Injury on accused—Non-explanation—Consequence of—Though prosecution not obliged to explain each and every injury on the accused—But failure to explain grievous injury creates suspicion on the ground that true version is concealed by prosecution—In the present case prosecution witnesses held to be trustworthy—Non-explanation of grievous injury on accused—Whether would render the prosecution case untrustworthy—Held, No.

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Contradictory Statement—Reliability on—Contradiction in former statement and the statement during trial—Former statement not legally proved—And not confronted during trial—Held, prosecution case not fatal on the ground of contradiction.

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Indian Evidence Act, 1872—Section 145—Contradiction in statement of witness—Between former statement and the statement during trial—Former

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A *statement not confronted by defence during trial—Held, the provision has not been complied with.*

B Nine accused were alleged to have committed murder of the deceased and having caused injury to others including the eyewitnesses. Appellants/Accused 'R' and 'P' were charged under sections 302 and 307 of IPC. Appellant/Accused 'T' was charged under Section 302. All the nine accused including the appellants were charged under Section 302/149 of IPC. There were also charges u/s s.148, 147, 324 & 323 of IPC.

C Prosecution case is that when PW 8, the informant was ploughing his field, accused came to his field and asked him to stop ploughing, when the informant protested he was assaulted by A-1 & A-2 and the deceased was assaulted first by A-1 and thereafter by all the accused.

D The injured witnesses and the accused were medically examined. Grievous injury was found on the body of the accused 'R'. Statement of the informant/PW-8 was recorded by the Magistrate in the hospital. There were 4 eyewitnesses to the incident.

E The defence case was that the prosecution party was the aggressor, as the incident took place on plot No. 4514, belonging to the accused, and thus the accused party was entitled to right of private defence of property and person.

F During trial, the statement of the informant (PW 8) disclosed that when he was on his plot No. 4513 appellants 'R' and 'P' & accused 'RD' reached there. There was altercation between the accused party and the informant party. In the course of the occurrence appellant 'R' sustained grievous injury. The deceased was armed with farsa, while the accused 'RD', 'S', 'K', 'RS' were armed with lathis and when 'R' gave lalkara, they assaulted PW 8. As per the evidence of PW-2 appellant 'T' had not given any blow to the deceased. PWs 4 & 8 stated that 'T' had given blow on the leg of the deceased, while PW-7 said that all the three appellants had assaulted the deceased but he did not ascribe any particular role to any of them. The Magistrate who had recorded the statement of PW-8, was also examined during trial. In his cross-examination, he had categorically admitted that the statement Exbt. B did not bear the signature and seal either of his office or of the office of the Chief Judicial Magistrate. In his examination-in-chief also he did not state as to who identified PW-8 in

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the hospital.

Trial court concluded that the occurrence took place on plot No. 4513 which admittedly belonged to the informant, therefore plea of self defence was not acceptable, and on the basis of the ocular evidence of the four eye witnesses and the evidence of the doctor, convicted the appellants u/s. 302/34, 307 & 324 IPC. Trial court also concluded that the necessary ingredients for formation of unlawful assembly having the common object of causing murder of the deceased was not fulfilled as at no point of time five accused persons had come together and therefore the constructive liability of all the accused does not arise. The trial court also positively found that only the appellants had made overt act by assaulting the deceased, and the other six accused were acquitted.

High Court confirmed the conviction and sentence and found that non-explanation of injury on the person of one of the accused was not fatal.

In appeal to this court, it was contended by the appellant that the prosecution case was not sustainable on the grounds that grievous injury on the person of the accused 'R' was not explained by the prosecution and there was contradiction between the former statement of the informant, made before the magistrate and his statement during trial; that the case fell under exception 4 to section 300 as the same was not pre-meditated; and that accused 'T' cannot be held liable by attracting section 34 as there is no material to indicate that 'R' assaulted the deceased in furtherance of common intention shared by him and 'T'. The respondent-State contended that non-explanation of injury cannot be held fatal, when the oral testimony of the four eye witnesses has been found to be trustworthy; that the former statement of PW-8 cannot be relied upon, since during trial his former statement was not confronted and thus the provisions of Section 145 of Evidence Act has not been complied with; that Exception 4 to Section 300 IPC is not applicable; and that 'T' also must be held liable by applicability of Section 34.

Partly allowing the appeal, this Court

HELD : 1.1. The contention of the appellant that failure to explain injury on the person of accused 'R' is fatal cannot be accepted as there is no infirmity in the conclusion arrived at by the High Court that the

A prosecution witnesses are trustworthy and, therefore, non-explanation of injury in question be held to be fatal. [1083-E-F]

B *Mohar Rai and Bharath Rai v. State of Bihar*, [1968] 3 SCR 525; *Lakshmi Singh v. State of Bihar*, [1976] 4 SCC CrI. 671; *Vijayee Singh v. State of U.P.*, [1990] 3 SCC 190; *Ram Sunder Yadav v. State of Bihar*, [1998] 7 SCC 365 and *Bhaba Nanda Sharma v. State of Assam*, [1977] 4 SCC 396, referred to.

C 1.2. Ordinarily the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in course of the occurrence, if the injuries are minor in nature, but at the same time if the prosecution fails to explain a grievous injury on one of the accused person which is established to have been caused in course of the same occurrence then certainly the court looks at the prosecution case with little suspicion on the ground that the prosecution has suppressed the true version of the incident. [1082-D-E]

D 2.1. The contention that the prosecution case fails on account of contradiction in the statements of PW-8 i.e. the statement made before the Magistrate and that made during trial. Under the circumstances that Exbt. B did not bear the seal and signature of Chief Judicial Magistrate or his office and that in his examination-in-Chief he had not stated to have identified PW-8 before recording his statement, it is difficult to hold that Exhibit-B has been legally proved to be the former statement of PW-8. Then again on scrutiny of the evidence of PW-8 it is crystal clear that the witness has not been confronted with that part of his alleged former statement which the defence wanted him to contradict. The witness has merely been asked as to whether he stated before the Magistrate that accused 'S' has assaulted deceased to which he had replied he does not recall as to what he stated before the Magistrate. In these circumstances it cannot be held that the provision of Section 145 of the Evidence Act has been complied with in the case in hand. So far as accused 'R' is concerned, there has been no variance in his so-called former statement Exhibit B and his statement in the Court when he was examined as PW-8 clearly asserting that 'R' assaulted the deceased by means of Bhala. [1085-C-F]

H 2.2. During trial it is open for a party to make use of the former statement for such purpose as the law provides. But if the witness during trial is intended to be contradicted by his former statement then his atten-

tion has to be drawn to those parts of the statement which are required to be used for the purpose of contradicting him before the said statement in question can be proved as provided under Section 145 of the Evidence Act. [1084-A-B]

Bhagwan Singh v. The State of Punjab, [1952] SCR 812; *Tahsildar Singh and Another v. The State of Uttar Pradesh*, [1959] Supp. 2 SCR 875 and *Binay Kumar Singh & Ors. etc. etc. v. State of Bihar*, [1997] 1 SCR 283, referred to.

3. On scrutinising the evidence of four eye-witnesses PWs 2, 4, 7 and 8 who have depicted the *entire scenario*, the contention that in the present case Exception 4 to Section 300 would be applicable, cannot be accepted. From the evidence on record it is established that while the prosecution party was on their land it is accused who protested and prevented them from continuing with ploughing but when they did not stop accused persons rushed to the nearby plot which is their land and got weapons in their hands and assaulted the prosecution party ultimately injuring several members of the prosecution party and causing the death of one of them while they were fully unarmed.

Conviction u/s. 302/34 of appellant-accused 'T' is set aside and is convicted under Section 324 and conviction of appellant-accused 'R' is altered to one under Section 302 instead of 302/34. The circumstances under which 'T' has been ascribed to have given a blow on the leg of the deceased, it is difficult to hold that he also shared the common intention with 'R' for causing murder of the deceased which developed at the spur of the moment and his conviction under Section 302/34 cannot be sustained. Though the prosecution had made out the case that nine accused in all formed and unlawful assembly the common object of which assembly was to murder but the Sessions Judge on appreciation of the evidence came to the conclusion that there had been no unlawful assembly nor there was any common object to cause assault or murder of deceased.

[1086-B-C; 1087-C-F]

5. There lies a distinction between the common intention and similar intention and question whether there exists common intention in all the persons who made some overt act resulting in the death of some of the persons of other party is a question of fact and can be inferred only from the circumstances. The distinction between common intention and similar

A intention may be fine, but is nonetheless a real one and if overlooked, may lead to miscarriage of justice. [1087-D-E]

Dukhmochan Pandey and Others Etc. v. State of Bihar, [1997] 8 SCC 405, referred to.

B CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1183 of 1997.

From the Judgment and Order dated 21.5.97 of the Patna High Court in Crl.A. No. 146 of 1985.

C R.K. Jain, P.S. Mishra, Akhilesh Kumar Pandey, S.K. Sinha, Chandra Shekhar, Vishnu Sharma, Upendra Mishra, Ramjee Prasad and B.B. Singh for the appearing parties.

The Judgment of the Court was delivered by

D **PATTANAİK, J.** The two appellants, Rajendra Singh and Triloki Singh have assailed their conviction and sentence passed by the First Additional Sessions Judge, Saran in Sessions Trial No. 189 of 1981, which has been upheld in Appeal by the High Court of Patna in Criminal Appeal No. 146 of 1985. Before the learned Trial Judge in all there were nine

E accused persons but six of them were acquitted and only two appellants alongwith one Prabhunath Singh were convicted but said Prabhunath died during the pendency of appeal in the High Court, and as such, there are two appellants in this Court. The prosecution case in nutshell is; that on 4th July, 1977 an incident occurred in village Jaidpur Tola Pilui in the district of Saran and one Kameshwar Singh was murdered. Satyanarain PW 8 gave the First

F Information Report at 6.00 p.m. at Sadar Hospital, Chapra where he was lying injured, alleging therein that at 11.45 a.m. while the informant was getting his field ploughed by a tractor which he had hired from PW 5 these appellants and others came and asked the informant party not to plough the field but when the informant protested he was abused and then accused No.

G 1 assaulted him by means of Bhala on his abdomen whereas accused No. 2 assaulted him on his chest. Deceased Kameshwar who was the nephew of the informant was assaulted by accused no. 1 in his abdomen and thereafter all the accused persons assaulted him. The prosecution also further alleged that brother of the informant Banwari Singh had also been assaulted by accused

H nos. 7, 1 and 2 and the acquitted persons assaulted him by means of lathi. It

is also the further case of the prosecution that PW 7 who is the nephew of the informant had also been assaulted. On the basis of the aforesaid First Information Report Sub Inspector of Police PW 9 registered a case and started investigation. The Investigating Officer went to the village and held the inquest over the dead body at 9.45 p.m. and prepared an Inquest Report Exhibit -7. The dead body was sent for autopsy which was conducted by doctor PW 3. The said doctor had also examined the injuries on the person of the informant on the requisition of the Investigating Officer. Finally Chargesheet was submitted as against 9 accused persons, as already stated, against Rajender Singh, Prabhunath Singh and Triloki under Section 302 for the murder of Kameshwar and against all the nine accused persons including the six acquitted under Section 302/149 for being members of an unlawful assembly in prosecution of the common object of which assembly Rajender and others assaulted the deceased and then murdered. Rajender Singh and Prabhunath Singh were further charged under Section 307 and there were charges under Section 148 and 147 and also under Sections 324 and 323 of Indian Penal Code. From the evidence of doctor- PW 3 who conducted the post mortem on the dead body of Kameshwar it is crystal clear that the death was homicidal and the said conclusion of the learned Sessions Judge has been affirmed by the High Court in appeal and had not been assailed before us. To bring home the charges against the accused persons the prosecution relied upon four eye witnesses, namely, PWs 2, 4, 7 and 8. The defence also examined the Magistrate as DW 1 who is alleged to have recorded the statement of informant PW 8 at the hospital on the date of occurrence while he was lying in injured condition. The said statement has been marked as 'Exhibit B'. From the cross-examination of the prosecution witnesses, the defence case appears to be that the occurrence in fact took place on Plot No. 4514 belonging to the accused lying contiguous south of plot no. 4513 while the accused persons were on their field and, therefore, it is the prosecution party who are the aggressors and the accused persons are entitled to right of private defence of property as well as person. On a thorough analysis of the entire evidence on record the learned Sessions Judge came to the conclusion that the occurrence took place on plot no. 4513 which admittedly belongs to the informant and, therefore, the plea of the accused that they were exercising their right of private defence of property as well as person on their land is not acceptable. This conclusion of the learned Sessions Judge has been re-affirmed in appeal by the High Court and Mr. P.S.Mishra, learned senior counsel appearing for the appellants also fairly did not assail the same. The learned Sessions Judge convicted the appellants on the basis of the

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A ocular evidence of four eye witnesses, namely, PWs. 2, 4, 7 and 8 of whom
PWs 7 and 8 had been injured. He had also relied upon the evidence of the
doctor-PW3 who was posted at Sadar Hospital, Chapra and who had
conducted the autopsy on the dead body of deceased Kameshwar and had
submitted the post mortem report Exhibit 2 and who had also examined the
B injured persons. The Sessions Judge convicted the appellants under Section
302/34 IPC and sentenced them to imprisonment for life. They were also
convicted by the Sessions Judge under Section 307 and sentenced to
imprisonment for 7 years and for their conviction under Section 324 they
were sentenced to undergo RI for one year. The High Court in appeal has
affirmed the conviction and sentence of the appellants on all three counts.
C It may be stated at this stage that since 9 accused persons stood their trial
facing a charge under Section 302/149 IPC the Sessions Judge discussed the
evidence of the prosecution witness, more particularly, PWs 2 and 7 and
came to the conclusion that at no point of time five accused persons had
come together and, therefore, the necessary ingredients for formation of
D unlawful assembly having the common object to cause murder of Kameshwar
is not satisfied. Consequently the question of constructive liability of all the
accused persons does not arise. It also positively found that it is only
Rajendernath, Prabhunath and Triloki who had made overt act by assaulting
the deceased. According to the doctor PW3 the deceased had the following
three antimortem injuries:

E “(i) Penetrating injury 1” x 1/2 x 1-1/2” in the chest cavity
arising first above, left nipple and one inch 1” lateral to the nipple
pieroring in 4th intercostal space. On further examination, the left
F alura was found punctured at the said site and thereby punctured the
left lung to its upper portions 1/3” x 1/2”. The left side of chest
cavity was having about 8 ones of altered blood.

On further dissection, both lungs were found pale, right side of
chest was having blood in its chambers. Left side was found empty.
On desoretion of abdomen liver was sound pale. The stomach
G contained about 10 ones of rice mixed food materials. The bladder
was empty.

(ii) There was penetrating injury in the posterior aspect of upper
part of right leg 1/2” x 3/4 x 1-1/4” and ruptuned the popliteal blood
vessels. On further examination about 3/4 once of altered blood
H came out.

(iii) Incised wound on the back in fourth thoracic vertebral column 1/3" x 1/4" x 1/5". "

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In the opinion of the doctor death was due to shock and hemorrhage and injury no. 1 was sufficient to cause death in the ordinary course of nature.

Mr. Mishra, learned senior counsel appearing for the appellants raised the following contentions:-

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(i) The serious injury on accused Rajender not having been explained the prosecution case must be held to be untrue and, therefore, the conviction and sentence cannot be sustained.

(ii) In view of the statement of Satyanarain recorded by the Magistrate on 4th July, 1977 which has been exhibited as Exhibit- B clearly giving out a different prosecution story than the one which was presented in the Court during trial the entire prosecution case must fail.

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(iii) In any view of the matter and taking into consideration the narration of events as unfolded through the prosecution witnesses there being no pre-meditation and on account of a sudden quarrel in course of sudden fight, the accused persons having assaulted the deceased in heat of passion exception 4 to Section 300 Indian Penal Code can apply and, therefore, the offence will be not under Section 302 but under Section 304 Part I Indian Penal Code.

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(iv) Even taking the prosecution case in toto accused Triloki cannot be held liable by attracting Section 34 in view of the fact that there is no material to indicate that Rajender assaulted the deceased in furtherance of common intention shared by him and Triloki.

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Mr. B.B. Singh, learned counsel appearing for the State on the other hand contended, that in the facts and circumstances of the case non-explanation of injury on Rajender cannot be held to be fatal, more so, when the oral testimony of the four eye witnesses has been found to be trustworthy. He further contended that the former statement of Satyanarain has not been confronted to him while he was examined as PW 8, and therefore, the provisions of Section 145 of the Evidence Act has not been complied with, and in this view of the matter the said document cannot be relied upon. He

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A has also contended that even in the said statement Rajender assaulted deceased Kameshwar with Bhala had been stated, and therefore, the entire prosecution case cannot be said to be a concocted one. According to Mr. Singh the very fact that accused persons went to their adjacent land brought out the weapon of offence and assaulted the deceased, would negate the contention of the defence that there was no pre-meditation. That apart, common intention developed at the spur of the moment when both Rajender and Triloki came armed and assaulted deceased and, therefore, the question of applicability of exception 4 to Section 300 does not arise.

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C He has lastly contended that in the facts and circumstances of the case Triloki also must be held liable by applicability of Section 34 and no error has been committed in convicting both the appellants in Section 34 of Indian Penal Code.

D So far as the question whether non-explanation of the injuries on accused Rajender *ipso facto* can be held to be fatal to the prosecution case, it is too well settled that ordinarily the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in course of the occurrence, if the injuries are minor in nature, but at the same time if the prosecution fails to explain a grievous injury on one of the accused person which is established to have been caused in course of the same occurrence then certainly the Court looks at the prosecution case with little suspicion on the ground that the prosecution has suppressed the true version of the incident. In the case in hand accused appellant Rajender had one penetrating wound, three incised wound and one lacerated wound and of these injuries the penetrating wound on the left axillary area in the 5th inter costal space 1/2" x 1/3" x 3/4" was grievous in nature as per the evidence of doctor - PW-3 who had examined him. On the basis of the evidence of PW-3 as well as PW-11 the Courts have come to the conclusion that there is no room for doubt that the appellants and their men had injuries on their person on the date of occurrence. The question, therefore, remains to be considered is whether non-explanation of said injuries on accused appellant Rajender can form the basis of a conclusion that the prosecution version is untrue. In *Mohar Rai and Bharath Rai v. State of Bihar*, [1968] 3 SUPREME COURT REPORTS - 525, this Court had held that the failure of the prosecution to offer any explanation regarding the injuries found on the accused shows that the evidence of the prosecution witness relating to the incident is not true or at any rate not wholly true and further those injuries probabalise plea taken by the accused persons. But in *Lakshmi Singh v. State*

of Bihar, [1976] 4 Supreme Court Cases (Crl.) 671, this Court considered *Mohar Rai* (Supra) and came to hold that non-explanation of the injuries on the accused by the prosecution may affect the prosecution case and such non-explanation may assume greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution. The question was considered by a three Judge Bench of this Court in the case of *Vijayee Singh v. State of U.P.*, [1990] 3 Supreme Court Cases 190, and this Court held that if the prosecution evidence is clear, cogent and creditworthy and the Court can distinguish the truth from the falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence and consequently the whole case and much depends on the facts and circumstances of each case. In *Vijayee Singh's* case (supra) the Court held that non-explanation of injury on the accused person does not affect the prosecution case as a whole.

This question again came up before a three Judge Bench recently in case of *Ram Sunder Yadav and Others v. State of Bihar*, [1998] 7 Supreme Court Case 365, where this Court re-affirmed the statement of law made by the earlier three Judge Bench in *Vijayee Singh's* case (supra) and also relied upon another three Judge Bench decision of the Court in *Bhaba Nanda Sharma and Others v. State of Assam*, [1977] 4 Supreme Court Cases 396, and as such accepted the principle that if the evidence is clear, cogent and creditworthy then non-explanation of the injury on the accused *ipso facto* cannot be a basis to discard the entire prosecution case. The High Court in the impugned judgment has relied upon the aforesaid principle and examined the evidence of the four eye witnesses and agreeing with the learned Sessions Judge came to the conclusion that the prosecution witnesses are trustworthy and, therefore, non-explanation of injury in question cannot be held to be fatal, and we see no infirmity with the said conclusion in view of the law laid down by this Court, as held earlier. We, therefore, are not persuaded to accept the first submission of Mr. Mishra, learned senior counsel appearing for the accused appellants.

So far the second contention of Mr. Mishra is concerned, it is no doubt true that on 4th July, 1977 Satyanarain who has been examined as PW-8 in course of trial had been examined by a Magistrate as he had been seriously injured and that statement has been exhibited as Exhibit-B and in fact the Magistrate who had recorded the statement has been examined by the defence as DW-1. This statement of Satyanarain recorded by the Magistrate

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A may be a former statement by Satyanarain relating to the same fact at about
a time when the fight took place and when said Satyanarain was examined
as PW-8 during trial it would be open for a party to make use of the former
statement for such purpose as the law provides. But if the witness during trial
is intended to be contradicted by his former statement then his attention has
to be drawn to those parts of the statement which are required to be used
for the purpose of contradicting him before the said statement in question can
be proved as provided under Section 145 of the Evidence Act. Mr. Mishra
learned senior counsel appearing for the appellant relying upon the decision
of this Court in *Bhagwan Singh v. The State of Punjab*, [1952] Supreme
Court Reports 812, contended before us that if there has been substantial
compliance of Section 145 of the Evidence Act and if the necessary
particulars of the former statement has been put to the witness in cross-
examination then notwithstanding the fact that the provisions of Section 145
of the Evidence Act is not complied with in letter i.e. by not drawing the
attention of the witness to that part of the former statement yet the statement
could be utilised and the veracity of the witness could be impeached.
According to Mr. Mishra the former statement of PW-8 which has been
exhibited as Exhibit B was to the effect that Kameshwar was assaulted with
Bhala by Rajender and Surender and he did not see whether any other person
had been assaulted or not, whereas in course of trial the substantive evidence
of the witness is that it is Rajender and Triloki who assaulted the deceased
and, therefore, it belies the entire prosecution case. The question of contra-
dicting evidence and the requirements of compliance of Section 145 of the
Evidence Act has been considered by this Court in the Constitution Bench
decision in the case of *Tahsildar Singh and Another v. The State of Uttar
Pradesh*, [1959] Supp. 2 Supreme Court Reports 875. The Court in the
aforesaid case was examining the question as to when an omission in the
former statement can be held to be a contradiction and it has also been
indicated as to how a witness can be contradicted in respect of his former
statement by drawing particular attention to that portion of the former
statement. This question has been recently considered in the case of *Binay
Kumar Singh & Ors. etc. etc. v. State of Bihar*, [1997] 1 Supreme Court Cases
283, and the Court has taken note of the earlier decision in *Bhagwan Singh*
(Supra) and explained away the same with the observation that on the facts
of that case there cannot be dispute with the proposition laid down therein. But
in elaborating the second limb of Section 145 of the Evidence Act it was held
that if it is intended to contradict him by the writing his attention must be
called to those parts of it which are to be used for the purpose for contradicting

him. It has been further held that if the witness disowns to have made any statement which is inconsistent with his present stand, his testimony in Court on that score would not be vitiated until the cross-examiner proceeds to comply with the procedure prescribed in the second limb of Section 145 of the Evidence Act. Bearing in mind the aforesaid proposition and on scrutinising the evidence of DW-1, we find that the Magistrate who is supposed to have exhibited the document in his cross-examination categorically admitted that neither any signature nor seal of either of the Chief Judicial Magistrate or of his office on the statement Exhibit B. If according to the Magistrate on recording the statement of Satyanarain he had sent the same to the Chief Judicial Magistrate, it is inconceivable as to how the document would not bear the signature nor seal of either of the Chief Judicial Magistrate or of his office. The Magistrate in his examination-in-chief also does not state as to who identified Satyanarain in the hospital before recording his statement. It is under these circumstances it is difficult to hold that Exhibit-B has been legally proved to be the former statement of Satyanarain who has been examined as PW-8. Then again on scrutiny of the evidence PW-8 it is crystal clear that the witness has not been confronted with that part of his alleged former statement which the defence want him to be contradicted. The witness has merely been asked as to whether he stated before the Magistrate that accused Surendra has assaulted Kameshwar to which he had replied he does not recall as to what he stated before the Magistrate. In this state of affairs it is difficult for us to hold that the provisions of Section 145 of the Evidence Act has been complied with in the case in hand. Then again, so far as accused Rajender is concerned, there has been no variance in his so-called former statement Exhibit B and his statement in the Court when he was examined as PW- 8 clearly asserting that Rajender assaulted the deceased Kameshwar by means of Bhala. In the aforesaid premises, we are unable to accept the second submission of Mr. Mishra and the same accordingly stands rejected.

So far as the third contention of Mr. Mishra is concerned, the question for consideration would be as to whether the ingredients of Exception 4 to Section 300 of the Indian Penal Code can be said to have been satisfied? The necessary ingredients of Exception 4 to Section 300 are :

- (a) a sudden fight;
- (b) absence of pre-meditation
- (c) no undue advantage or cruelty,

A but the occasion must be sudden and not as a cloak for pre existing malice. It is only an un-premeditated assault committed in the heat of passion upon a sudden quarrel which would come within Exception 4 and it is necessary that all the three ingredients must be found. From the evidence on record it is established that while the prosecution party was on their land it is accused who protested and prevented them from continuing with ploughing but when they did not stop accused persons rushed to the nearby plot which is their land and got weapons in their hands and assaulted the prosecution party ultimately injuring several members of the prosecution party and causing the death of one of them while they were fully unarmed. In this view of the matter on scrutinising the evidence of four eye witnesses PWs 2, 4, 7 and 8 who have depicted the entire scenario it is not possible for us to agree with the submission of Mr. Mishra, learned senior counsel appearing for the appellants that the case is one where exception 4 to Section 300 would be applicable. We, therefore, reject the said submission of the learned counsel.

D The only contention that survives for our consideration is whether Triloki could be held liable by application of Section 34. From the injuries on the deceased as found by the doctor PW-3 it is crystal clear that the injury no. 1 was found to be sufficient to cause death in the ordinary course of nature and said injury is attributable to the assault given by accused Rajender on the chest of the deceased. So far as Triloki is concerned, as per the evidence of PW-2 he has given a blow on Satyanarain PW-8 and Banwari, the other injured who has not been examined and he had not inflicted any injury on the deceased. According to PW-4 Triloki had given a blow on the leg of Kameshwar. According to PW-7 Kameshwar was assaulted by Rajender, Triloki and Prabhunath but he has not ascribed as to which accused assaulted which part of the body of the deceased and narration is one of general nature. So far as the evidence of injured PW-8 is concerned Triloki Singh hit Kameshwar on his leg. Leaving aside the contradiction amongst each other with regard to the assault by Triloki and taking into account the entire scenario it is difficult for us to hold that Triloki also shared the common intention with Rajender when Rajender gave a fatal blow on the deceased. It may be noticed at this stage that though the prosecution had made out the case that nine accused in all formed an unlawful assembly the common object of which assembly was to murder deceased Kameshwar but the learned Sessions Judge on appreciation of the evidence came to the conclusion that there had been no unlawful assembly nor there was any common object to cause assault or murder of deceased Kameshwar. From the

evidence of PW-8 it is apparent that while he was on Plot No. 4513 Rajender Singh, Prabhu Nath and Ramdev reached near PW-8 and told him not to plough the field at that point of time the accused persons had no arms with them. It is further apparent that there was altercations between the prosecution party, more particularly PW-8 and the accused persons and that the accused persons picked up some weapon and assaulted Kameshwar as well as other persons injured. It is further established that in course of the occurrence accused Rajender sustained a grievous injury. The said evidence of PW-8 also indicates that Kameshwar himself was armed with a Farsa while Ramdeo Singh, Surender, Kishun Pandit and Rudal Singh were armed with lathis and when Rajender Singh gave a lalkara Prabhunath Jagnarain and Kishun Pandit assaulted PW-8. It is under these circumstances when Triloki Singh has been ascribed to give a blow on the leg of the deceased. It is difficult to hold that he also shared the common intention with Rajender for causing murder of the deceased which developed at the spur of the moment. In the case of *Dukhmochan Pandey and Others etc. v. State of Bihar*, [1997] 8 Supreme Court Cases 405, this Court has held that there lies a distinction between the common intention and similar intention and question whether there exists common intention in all the persons who made some overt act resulting in the death of some of the persons of other party is a question of fact and can be inferred only from the circumstances. This Court had held that the distinction between a common intention and the similar intention may be fine, but is nonetheless a real one and if overlooked, may lead to miscarriage of justice. Following the ratio in the aforesaid case and applying to the facts and circumstances of the present case, as unfolded through the eye witnesses, it is not possible for us to hold that Triloki also shared the common intention with accused Rajender and his conviction under Section 302/34 cannot be sustained. We accordingly set aside the same and instead convict him under Section 324 Indian Penal Code and sentence him to imprisonment for a period of two years.

Conviction of appellant Rajender is altered to one under Section 302 Indian Penal Code instead of 302/34 Indian Penal Code and sentence of imprisonment for life is affirmed. All other conviction and sentence of the two appellants remain unaltered. Appeal is thus partly allowed.

K.K.T.

Appeal partly allowed.