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exhorting appellant no.2 to assault the deceased and, therefore, rightly convicted him u/s.304 Part I with the help of s.34 – A distinction has, however, to be made in the facts and circumstances of the case between the sentence awarded to the appellant no.1 who is over sixty five years old and that to be awarded to appellant no.2 – In the totality of the circumstances, a rigorous sentence of three years to appellant no.1 and seven years to appellant no.2 meet the ends of justice – Sentence/Sentencing.

The prosecution case was that one day prior to the incident, the victim-deceased protested against the nuisance committed by one 'S' in front of his house. This led to verbal altercation. The next day, appellant no.1 who was nephew of 'S' came to the house of the deceased and threatened him. In the evening of the same day, appellant no.2, the brother of appellant no.1 called the son of the deceased outside his house near the drain and started beating him. The deceased who was leaving for market intervened to save his son. Appellant no.2 started beating the deceased with fists and blows. Appellant no.1 was allegedly standing nearby and instigating him. The son of the deceased cried for help that attracted local people who rushed to the spot and took the deceased to hospital in injured condition where he succumbed to injuries inflicted by appellant no.2 with a brick.

The trial court convicted both the appellants under Section 304 Part I r/w Section 34 IPC and sentenced to undergo rigorous imprisonment for ten years besides a fine of Rs.5000 each and in default to suffer further imprisonment for a period of one year. The High Court upheld the conviction and sentence. The instant appeal was filed challenging the order of the High Court.

Partly allowing the appeal, the Court

A HELD: There was no evidence to suggest any pre-
 meditation on the part of the appellants to assault the
 deceased or to show that assailants intended to kill the
 deceased. There was no previous enmity between the
 parties who were residents of the same locality except
 B that there was a minor incident in which some hot words
 were exchanged between the deceased and 'S'. Even on
 the following day, the incident near the drain involved
 appellant No.1 and the complainant-son of the deceased.
 C It was only when the deceased noticed the incident and
 intervened to save the complainant, that appellant no.2
 started assaulting the deceased and inflicted injuries on
 his body that resulted in his death. Both the courts below
 have no doubt believed the prosecution case that
 appellant no.1 was exhorting appellant no.2 to assault the
 D deceased and, therefore, convicted him under Section
 304 Part I with the help of Section 34 IPC. A distinction
 has, however, to be made in the facts and circumstances
 of the case between the sentence awarded to the
 appellant no.1 who is over sixty five years old and that
 E to be awarded to appellant no.2. In the totality of the
 circumstances, a rigorous sentence of three years to
 appellant no.1 and seven years to appellant no.2- would
 meet the ends of justice. The sentence of fine and
 imprisonment in default of payment thereof will, however,
 F remain unaltered. [Para 8] [235-D-H; 236-A-B]

CRIMINAL APPELLATE JURISDICTION : Civil Appeal No.
 876 of 2012.

G From the Judgment & Order dated 15.7.2010 of the High
 Court of Calcutta in C.R.A. No. 641 of 2006.

Ranjan Mukherjee, Mangaaljit Mukherjee, S. Bhowmick,
 S.C. Ghosh, Garima Bose for the Appellant.

H Chandra Bhushan Prasad, Kripa Shankar Prasad, Anip
 Sachthey, Mohit Paul, Shagun Matta for the Respondent.

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The Judgment of the Court was delivered by

A

T.S. THAKUR, J. 1. Leave granted.

2. This appeal arises out of a judgment and order dated 15th July, 2010 passed by the High Court of judicature at Calcutta whereby Criminal Appeal No.641 of 2006 filed by the appellants has been dismissed and their conviction for the offence of culpable homicide not amounting to murder punishable under Section 304 Part I read with Section 34 IPC and sentence of rigorous imprisonment for a period of 10 years and fine upheld.

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C

3. Facts giving rise to the commission of the offence by the appellants and their eventual conviction have been set out in the judgment under appeal which need not be recounted again especially because notice in this appeal was issued by us limited to the question of quantum of sentence to be awarded to the appellants. Suffice it to say that the unfortunate incident in which the deceased-Shyamalendu who was then working as Income Tax Inspector did no more than object to the commission of the nuisance in front of his house escalated into an uncalled for assault on him that culminated in his death. The prosecution case is that on 21st May, 2001 at about 7.00 p.m. Sudhir who was also a resident of the same locality was found committing nuisance in an open drain in front of the house of the deceased. The deceased appears to have objected to the nuisance leading to a verbal altercation between the two. On the following day at about 11.30 a.m. the appellant Bishnu Sarkar who happens to be the nephew of Sudhir came to the house of the deceased and threatened him. The deceased tried to reason with the appellant Bishnu Sarkar that he had done nothing wrong in protesting against the nuisance. At about 6.00 p.m. in the evening on the same day Madhav Sarkar, appellant No.2 and brother of Bishnu Sarkar is alleged to have called PW-1 Debabrato Mazumder son of the deceased and the complainant in the case to the slab near the drain and started

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H

A beating him. The deceased who was leaving for the market
intervened to save Debabrato Mazumder. Madhav Sarkar left
the complainant and started beating the deceased with fists and
blows. Appellant Bishnu Sarkar was allegedly standing nearby
and instigating him. The complainant cried for help that
B attracted some local people who rushed to the place and took
the deceased to the hospital in an injured condition where he
succumbed to the injuries inflicted by Madhav Sarkar-appellant
no.2 with the help of a brick.

C 4. The police filed a charge-sheet against the appellants
after completing the investigation for commission of offences
punishable under Section 304 read with Section 34 IPC. At the
trial the prosecution examined as many as 13 witnesses
including the Investigating Officer to prove the charge while the
D defence examined Parvat Kumar Paria besides placing
reliance on certain documents. By its order dated 30th August,
2006 the Trial Court came to the conclusion that the deceased
had died a homicidal death because of the injuries inflicted by
Madhab Sarkar-appellant no.2 at the exhortation of appellant
E no.1-Bishnu Sarkar. Both of them were accordingly convicted
under Section 304 Part I read with Section 34 IPC and
sentenced to undergo rigorous imprisonment for ten years
besides a fine of Rs.5,000/- each and in default to suffer further
imprisonment for a period of one year. The High Court by the
F order impugned before us affirmed the said conviction and
sentence while dismissing the appeal filed by the appellants.

G 5. Appearing for the appellants Mr. Ranjan Mukherjee
submitted that the appellant-Bishnu Sarkar had not inflicted any
injury on the deceased and that all that was alleged against him
was that he exhorted appellant no.2-Madhab to assault the
deceased and teach him a lesson. It was further submitted that
the appellant-Bishnu Sarkar is more than 65 years of age and
had already undergone 1½ years sentence in jail. He is also
afflicted with various age related ailments that call for a lenient
H view in his case.

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6. In so far as appellant no.2 was concerned, Mr. Mukherjee argued that the incident was more than 12 years old and that a drawn long trial and proceedings in appeal have already put the said appellant to tremendous financial and physical hardship. Being the only earning member of the family even appellant no.2, argued Mr. Mukherjee, deserves a reduction in the sentence especially when there was no intention to kill the deceased and the whole incident had taken place in the heat of passion on account of a sudden quarrel unfortunately culminating in the demise of the deceased.

7. Learned counsel appearing for the respondent, on the other hand, argued that the nature of injuries sustained by the deceased and the manner in which the incident had taken place did not justify the reduction in the sentence awarded to the appellants.

8. There is no evidence to suggest any pre-meditation on the part of the appellants to assault the deceased leave alone evidence to show that assailants intended to kill the deceased. There was no previous enmity between the parties who were residents of the same locality except that there was a minor incident in which some hot words were exchanged between the deceased and Sudhir. Even on the following day i.e. on 22nd May, 2001 the incident near the drain involved the appellant-Bishnu Sarkar and the complainant- Debabrato Mazumder son of the deceased. It was only when the deceased noticed the incident and intervened to save the complainant, that Madhab Sarkar started assaulting the deceased and inflicted injuries on his body that resulted in his death. Both the Courts below have no doubt believed the prosecution case that appellant-Bishnu Sarkar was exhorting appellant-Madhab Sarkar to assault the deceased and, therefore, convicted him under Section 304 Part I with the help of Section 34 IPC. A distinction has, however, to be made in the facts and circumstances of the case between the sentence awarded to the appellant-Bishnu Sarkar who is over sixty five years old and that to be awarded to appellant-

- A Madhab Sarkar. In the totality of the circumstances to which we have referred above, we are of the view that a rigorous sentence of three years to appellant no.1-Bishnu Poda Sarkar and seven years to appellant no.2-Madhab Sarkar would meet the ends of justice. The sentence of fine and imprisonment in default of payment thereof will, however, remain unaltered.
- B We accordingly allow the appeal in part and to the extent indicated above in modification of the orders passed by the Courts below.

D.G.

Appeal Partly allowed.