

**Judgment reserved on: 02.11.2020**  
**Judgment delivered on: 28.12.2020**

**IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL**

**Government Appeal No. 82 of 2013**

State of Uttarakhand

....Appellant

Versus

Smt. Phoolwa & others

....Respondents

**Present:**-Mr. J.S. Virk, Deputy Advocate General with Mr. R.K. Joshi, Brief Holder for the State/appellant.  
Mr. Lalit Sharma, Advocate for the respondents.

**Coram: Hon'ble Sudhanshu Dhulia, J.**  
**Hon'ble Alok Kumar Verma, J.**

**Hon'ble Sudhanshu Dhulia, J.**

This is an appeal filed by the State which arises out of judgment and order dated 04.03.2013 passed by Sessions Judge, Udham Singh Nagar in Sessions Trial No. 306 of 2011, whereby the three accused, namely, Smt. Phoolwa, Muni Maharaj and Shiv Raj who were charged and faced trial for an offence under Section 304 (read with Section 34 of IPC), have been acquitted by the trial court.

2. As per the case of the prosecution, the complainant Raj Kumari lodged an FIR at Police Station Kotwali, Kichha (District Udham Singh Nagar) on 01.09.2011 at 09:10 AM. The FIR states that last evening i.e. on 31.08.2011, at about 06:00 PM her neighbours, namely, Ms. Phoolwa (wife of Late Rajendra), and her two sons Muni Maharaj and Shiv Raj had beaten up her husband on some dispute regarding cutting of few

branches of a tree. When an alarm was raised by her husband, other neighbours, namely, Dhaneshwar, Kailash and others came to his rescue and the assailants ran away. The complainant with the help of her neighbours took her husband, who was seriously injured, to Kichha Government Hospital, from where he was referred to the Government Hospital at Rudrapur (District Headquarters). He was taken to the hospital in a No. 108 Ambulance, but in the hospital he was declared dead by the doctors.

3. The inquest was done on 01.09.2011 where the opinion given by the "panchas" was that since the cause of death appears to be the injuries sustained by the deceased on his head, the body be sent for post-mortem.

4. The post-mortem which was done on 01.09.2011 discloses the following anti-mortem injury:-

1. A huge traumatic swelling in an area measuring 12 cm x 10 cm extending on the temporal region of the forehead.

5. The police completed its investigation and thereafter filed a charge-sheet against the three accused Smt. Phoolwa, Muni Maharaj and Shiv Raj under Section 304 of IPC. The matter was committed to sessions by the learned Judicial Magistrate, Rudrapur and the learned Sessions Judge, Udham Singh Nagar formally framed the charges under Section 304 read with Section 34 of IPC against all the three accused.

6. The prosecution in order to establish its case presented as many as nine witnesses.

7. Apart from the prosecution witnesses, the prosecution has also produced post-mortem report, inquest report, recovery memo, forensic report, etc., as documentary evidences.

8. PW1 is Smt. Raj Kumari, who is the wife of the deceased and the complainant and also an eyewitness to the incident in her examination-in-chief on 28.02.2012 states that the incident is of 31.08.2011 around 06:00 PM when she was in her house along with her husband Sukul and her children. Since it was hot inside her “jhopadi”\*, they were sitting outside in their courtyard. On the North side of the house her husband had constructed a temporary “jhula” for his child. Her neighbour Smt. Phoolwa (one of the accused), wife of Late Rajendra had sown some vegetables nearby and had also dug certain branches of a tree in order to protect the vegetables she was growing. These branches dug by Smt. Phoolwa were causing hindrance to the “jhula”, and as such her husband removed those branches which angered Phoolwa. For this reason, Phoolwa and both her sons Shiv Raj and Muni Maharaj started abusing her husband. When her husband asked them not to use filthy language, they came with “dandas” and started hitting her husband. When she came to the rescue of her husband, she was also beaten up. Her husband was then taken to Kichha Hospital, but considering his serious condition, he was referred to the District Hospital at

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Rudrapur, where he was declared dead. She then states that her husband Sukul died between 11:00-12:00 in the night due to the injuries caused by the assailants. The dead body of her husband was kept in the hospital and the next day the post-mortem was performed. She then states that at about 09:00 AM the next day, she lodged an FIR at the concerned Police Station.

9. PW-1 Smt. Raj Kumari was put to a cross-examination by the defence, but nothing worthwhile has come out in this regard, which may put any kind of doubt on the veracity of her deposition.

10. PW-2 Durga is the daughter of the deceased who was examined on 02.04.2012. At the time of her examination, she was 17 years of age, which means that she was 16 years of age at the time of the incident. Her deposition is similar to that of her mother PW-1. She admits in her cross-examination that one of the accused Shiv Raj is deaf and dumb and on the date of the incident, she was cooking meal for the family and saw the assailants attacking her father with "dandas".

11. PW-3 Kailash is an independent witness and is a neighbour of both the assailants and the deceased. He states that he works as a tractor driver for a landlord called Dharmendra Mehta. On 31.08.2011 when he was returning to his house at about 05-05:30 PM, he heard the noise coming from the house of Sukul. When he went to the house of Sukul, he saw Phoolwa and her two sons Muni Maharaj and Shiv Raj attacking the deceased with "dandas". Sukul was lying on the floor. He went to save the deceased and rescued him from the assailants. He

further states that even when the deceased was lying on the floor, Phoolwa kept on exhorting her children to inflict blows on Sukul. Meanwhile, other villagers came to the spot and the assailants ran away. Sukul was grievously injured and he was asking for water. He was given water, but he could not drink. Then he was taken to the hospital. When he was taken to Rudrapur Hospital, he was declared dead.

12. This witness PW-3 Kailash was cross-examined by the defence. A suggestion was given to this witness that since he is the brother-in-law of the deceased, therefore he is giving statement against the accused. To which, he replied that his house is about 100 feet away from the house of the deceased and he went to the house of the deceased when he heard the cry of people. He also admitted that Shiv Raj (one of the assailants), is deaf and dumb.

13. PW-4 is Tulsi, who came to know about the incident the next day in the morning of 01.09.2011 when he was told that Sukul was killed by Shiv Raj, Muni Maharaj and their mother Phoolwa. He is also the witness of the recovery of the weapons, which were "lathis", recovered from Shiv Raj and Muni Maharaj.

14. PW-5 is the doctor P.C. Pant who conducted the post-mortem of the body of the deceased. He states that on 01.09.2011 he was posted as Medical Officer at Government Hospital, Rudrapur. On the said date he conducted the post-mortem of the deceased Sukul. The age of the deceased was 35 years. There were rigor mortis present in the entire body of the deceased. Both the eyes

were closed and both the pupils were blackened and bruised. Blood was oozing out from both the nostrils and ears of the deceased.

15. On post-mortem, it was found that the main cause of death was coma due to the head injury as after opening of the skull a huge clot of blood was found and the frontal bone was also found broken. The doctor who conducted the post-mortem also confirmed that the deceased died at about 11:00 to 12:00 in the night due to the injuries caused at about 06:00 PM the same day. He also confirmed that the injury could be caused by a "lathi". On being cross-examined by the defence that such an injury can be caused by falling on the ground, this witness clearly rejected that suggestion and said that such an injury cannot be caused by merely falling on the ground and has been caused by a very heavy blow of "lathi" or by a blunt object.

16. The rest are the formal witnesses, which only strengthen the case of the prosecution.

17. In this case, the accused were examined under Section 313 of CrPC. In their statements under Section 313 CrPC, the accused have denied all the charges and the statements of the prosecution witnesses against them. They have pleaded innocence and have stated that they have falsely been implicated in the case.

18. The trial court came to the conclusion that the recovery of two "dandas" made from Shiv Raj as well as from Muni Maharaj cannot be believed because as far as Shiv Raj is concerned, he is deaf and dumb, and

therefore, for this reason, the recovery is doubtful. The trial court had also come to the conclusion that since there was only one injury on the body of the deceased, therefore, the prosecution story is not corroborated by the medical evidence. On this ground, the trial court had acquitted all the accused.

19. As far as the conclusion of the trial court regarding the recovery being doubtful is concerned, this conclusion arrived at by the trial court is totally baseless. Merely because Shiv Raj is deaf and dumb does not make him innocent, or place any doubt on the recovery. Moreover, there are independent witnesses to the recovery who are not police personnel. The recovery cannot be doubted.

20. As regarding only one injury sustained by the deceased, although the injury is one, but on the head. The front of the skull was broken. This itself cannot be a reason for acquitting the accused.

21. In any case the eyewitness accounts clearly make out a case where a crime has been committed by all the three accused persons "in furtherance of the common intention". It is a case of Section 304 read with Section 34 IPC.

22. Most importantly there are at least three eyewitnesses to the incident. Two of them though related to the deceased, yet are the natural witnesses as the incident happened right in front of their house.

23. The assailants/accused all of them come from a very low stratum of society. They are daily wage

earners. They are labourers and the dispute which resulted in the incident was a minor dispute relating to a “jhula”. The incident also happened at the spur of the moment. It is a case which comes under Exception 4 to Section 300 of IPC. Since it is not pre-meditated and happened in a sudden fight in the heat of passion upon a sudden quarrel and without the offender’s having taken undue advantage or acted in a cruel or unusual manner. Therefore, it is a case of “culpable homicide not amounting to murder”, and the accused/respondents are liable to be punished under Section 304 Part II of IPC.

24. Regarding the sentence, considering the fact that there was no pre-meditation in the murder and the fact that each of the accused have already remained in jail for about one year and six months, it would serve the ends of justice, if the accused are sentenced for the period already undergone by them in jail.

25. In view of the above observations, the appeal is allowed. The judgment and order dated 04.03.2013 passed by the Sessions Judge, Udham Singh Nagar as regarding the acquittal is hereby set aside. The sentence awarded by us is the period already undergone by the accused in jail. Meaning thereby that the accused persons have already completed their sentence.

26. Let a copy of this judgment along with the lower court records be sent back to the court concerned for onward compliance.

**(Alok Kumar Verma, J.)**                      **(Sudhanshu Dhulia, J.)**  
28.12.2020