It s dangerous to base conviction on the testimony of an accompolice. Unless circumstances are quite exceptional the court should refuse to convict on the uncorroborated evidence of an accomplice (44 DLR 478).

Even if one prosecution witness is fully reliable, the conviction fo the accused can be made upon it (44 DLR 217).

Where the only witness in the murder case did not mention the name of the assalant immediately after the occurrence the conviction was set aside (AIR 1979 SC 697, 698; 1979 CRLJ 640).

If there is no dispute that there was inimical strain in the relations between the two families and the witnesses are undoubtedly relations of the deceased, that by itself do not make their evidence unreliable. It only casts a duty upon the court to scrutinize their evidence with more than ordinary care and in order to ensure against ropin in of some innocent persons along with the guilty. Court will have to test the evidence in the light of the probabilities and seek some assurance of this evidence from the other evidence on reocrd qua each of the accused. Where all the accused are related with one another, in order to eliminate the chance of roping in of innocent men along with the guilty, it would be better, as a rule of cauton, to convict only those to whom overt acts have been, without any shred of inconsistency, ascribed by the injured witnesses whose presence at the scene of occurrence cannot eb gain said (1977 CrLJ 1465).

Enmity is double edged weapon. It can be a reason for false implication as well as a motive for the offence (1973 SCC (Cri) 195). When it is evident that witnesses have a gradge against the accused and there is motive also for implicating him, the evidence of such witnesses to be judged with great caution (AIR 1929 Pat 705; 31 CrLJ 468).

Since the very fact that the witnesses did not mention anything about the injuries foudn on the personof the accused makes it unsafe to rely on their evidence completely unless independent corroboration is available and there is no circumstantial or other reliable evidence which furnishes corroboration of their testimony and the fact that there were party factions in the doubt does subsist about the correctness of the presecution having being falsely implicated (AIR 1972 SC 2544 (2548).

The direct testimony of witnesses, whose evidence is otherwise consistent, shoudl not ordinarily be rejected on the ground that they are partisan witnesses unless the surrounding circumstances discredit their version. Ordinarily, close relatives of the deceased would not allow the real culprits to escape. The possibility of their implicating others with the real offenders must, however, be kept in mind. The acquittal recorded by the High court by brushing aside direct testimony without marshalling the evidence was improper (Anvaruddin Vs. Shakoor AIR 1990 SC 1242, 1243).

Mere relationship is no reason to disbelieve a witnesses; if he is otherwise found trustworthy (4 BSCD 97).

There is no doubt that when a criminal court has to appreciate evidence given by witnesses who are closely related to the decesed, it ahs to be very careful in evaluating such evidence but the mechanical rejection fo the evidence on the sole ground that it is interested would invariably lead to failure of justice (AIR 1991 SC 318).

If it is conceded that all these witnesses were partisan or interested and it was not safe to base conviction of the accused on their evidence unless some

corroboration was found in the other evidence or material on the record and it is pointed out that a bamboo stick was recovered at the pointing of the accused and that some clothes were taken into possession from his person containing washed stains of blood. The lathi bearing no bloodstain nor the clothes sent for chemical examination these cannot be pressed into serivce as corroborative piece of evidence. In view of what has been stated above there is no manner of doubt that the conviction of the accused cannot possibly be substained on the evidence produced by the prosecution if there is no other corroboration (AIR 1972 SC 1309 (1311). A conviction can be based and the verdict of ht ecourt can rest even on the testimony of a sale witness, if the court is fully satisfied that such witness is a truthful witness and his presence at the time of occurrence has been proved beyond reasonable doubt (1993 crLJ 3839 Para 10). When the case rests mainly on the sole testimony of a solitary witness, it shoudl be wholly reliable (193(crLJ 187 SC; 44 DLR 217).

It is well settled law that the conviction of an accused in a murder case can be based on the testimoney of a singly witness without corroboration provided that court comes to the conclusion that his evidence is honest, trustworthy and completely above board. Evidence has to be weighed and not counted. However, if the witness is not wholly reliable then the court had to look for corroboration in material particulars by reliable testimony, direct or circumstantial (AIR 1973 SC 944; 1973 CrLJ 687).

The fact that the witness is the father of the deceased is not sufficient to discredit histestimony. Normally a close relative of the deceased would be most reluctant to spare the real assailants and falsely mention the names of the other persons as those responsible for causing injuries to the deceased (AIR 1974 SC 2243 (2447). The mere fact of relationship far from being the foundation for criticism of the evidence is often a sure guarantee of truth (Hari Ram Vs. State of Punjab 1993 (2) Crimes 278 P&H).

Where prosecution witnesses of occurrence do not support the prosecution case and disown statements recorded by the police, the case is based on hearsay evidence and the accused cannot be convicted on it (1970 CrLJ 985). Where trial court in his order of conviction referred to contents of FIR recovery memos, pertaining to recovery from spot and also to recoveries from accused; alleged extra-judicial confession of accused before witnesses; post mortem report and also to report of police under section 173 Cr. P.C. It was held that all such documents having not duly been proved on record, should not have been referred to and relied upon by trial court. Entire trial, therefore, was illegal (PLD 1984 Lah 434).

When the incident took poalce on apublic road near the shop disenterested witness could have been examined circumstances in which Majid received the fatal injury ahs remained a mystery - there was no relation of the deceased to identify his body when inquest was held by the polcie - Names of appellants appear to ahve been collected at a much later stage out of suspicion. Glaring discrepancies inthe evidence of PWS have been overlooked by the both the courts below prosecution ahs therefore dismally failed to prove the charges against the appellants beyond reasonable doubt (1989 BLD (AD) 18). The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit worthy; consistency with the undisputed facts; the credit of the witness; their prfomance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation (AIR 1988 SC 2154).

"According to the prosecution, the occurrence took palce in a broad -day light and at the place of occurrence there were number of houses and shops. The

investigating officer did not choose to examine anv of the independent witnesses, particularly neighbours and there is absolutely no explanation for not examining them as witnesses in this case. Learned counsel for the appellant is perfectly justified in his submission that since those witnesses are not willing to depose fasely to support the version of the prosecution, they were not cited and eamined and certainly in the absence of any explanation for not citing and examining their witnesses, an adverse inference can be drawn. It is not the case of the adverse inference can be drawn. It is not the case of the prosecution that though they have witnessed the occurrence they were not willing to depose. It is the duty of the prosecution to examine those witnesses and to cite them as witnesses and if they are not able to examine them in court they should have given reasons for not examining them. In the instant case admitedly no attempt has been amde to examine any of these independent witnesses and cited and examine them before the court. Hence we are of the opinion that the non-examination of the independent witnesses is also fatal to the case of the prosecution besides the witnesses already examined, the evidence of PWs 1 to 3 is not reliable and acceptable"(1993 CrLJ 1259 (1270).

While considering a criminal case the court can not resort to a conjecture but must examine the legal matrial palced before it in roder to find that the offence with which the accused is charged has been made out by such material and then come to its own conclusion (1954 Madh BLJ (HCR) 1474 (1476, 1477); 1979 Raj crC 31 Raj).

In respecting the evidence against the accused the prime duty of a court is firstly to ensure that the evidence is legally admissible that the witnesses who speak to it are credible and have no interest in implicating him or have ulterior motive (AIR 1972 SC 975; 1972 CRLJ 606; 1980 CRLJ 9NOC) 100 DB Delhi). While appreciating the evidence in a prosecution for acceptance of tribe the background of the prosecution story should not be forgotten (AIR 1980 SC 1958 (1959); 1980 CRLJ 1096).

No hard and fast rule would be laid down about appreciation of evidence which after all, is a question of fact and each case has to be decided on facts as they stand in that particular case (AIR 1987 SC 1328). Justice must not only be done but also appear to be done (AIR 1957 SC 425). He who flees from justice can ot claim (AIR 1980 SC 785; 1980 CRLJ 426). Onus of proof is always on the prosecution to establish beyond reasonable doubt allthe ingredients of an offence with which a person accused thereof is charged (AIR 1979 SC 1012; 1979 CrlJ 890). It is the duty of the prosecution to prove the prisoner's guilt subject to all statutory exception (AIR 1957 SC 366).

Where there is no actual proof of guilt, the court cannot convict an accused on mere conjectures and surmises (PLD 1982 SC 429). The court cannot resort to conjectures but must examine the legal material placed before it in order to find that the offence with which the accused is charged ahs been made out by such material and then come to its own conclusions (1973 PCrLJ 212). Suspicion even though strong, cannot be accepted by itself as incriminating proof (1975 PCrLJ 209), particularly so when the entire case depends upon circumstantial evidence (AIR 1955 Raj 82). Where there are strong reasons for suspecting that evidence had been tampered with and there were grave reasons for suspecting that the accused was the man who committed the murder, but on the record, as it stood, it was impossible to say that his guilt had been proved beyond all reasonable doubt, conviction of the accused was not warranted by law (AIR 1937 Rang 431).

There can be no conviction unless the identity of the accused is estbalished (1985 SCMR 373). Evidence of identification is a weak type of evidence and chance

of an honest error could not be excluded even from an independent witness (1987 PCrLJ 643). It is not safe to accept statement of a witness about complicity of an accused in a crime if witness did not describe the accused by name or other particulars during investigation and was also not made to identify him out of a group (1982 SCMR 129). Where the other witnesses were not supporting the complainant on the question of identity of the appellant, it would not be expedient in the interest of justice to rely on the word fo the complainant alone without other corroboration. accused was acquitted on benefit of the doubt being given to him (1973 PCrLJ 105). Where the accused was not properly identified. Mere production of bloodstained weapon of offence was not sufficient for his conviction (1975 PCrLJ 1315). The fact that a murder was committed at accused's house raises a strong suspicion of guilt against him but any amount of suspicion cannot take the place of proof. Without reliable and convincing evidence that accused actually took part in the assault or was in any way responsible for it, he cannot be held liable for murder (AIR 1956 Pepsu 69). Evidence of identification based on personal impression should always be appreciated by court with considerable caution especially when whole case hinged upon such evidence. Chances of error in identification become greatly increased when the same is based upon a momentary glimpse in confusion even if there was sufficient light (1985 PCrLJ 2268). Evidence of witness who saw the incident from a distance of 200 yards at palce where there were several palm trees near about the palce of occurrence is difficult to be believed as it does not satisfy scientific test of identification from such a distance in a place surrounded by palm trees (Saudagar Nayak Vs. State of Orissa 1988 (1) Crimes 536 Ori).

When the brother of deceased admits enmity with the accused that fact would make the Court scrutinize his evidence more closely. If that evidence can stand that test, it can be acted upon in spite of his inimical relations with the accused (AIR 1973 SC 2695, 2698).

The accused and his wife were alone inside the room and she was found to have 7 incised wounds, five of which were on the neck. The ornaments on her person were intact. There was no sign of violence on the door or any part of the house. It was held that the assault took place while the deceased was asleep on her bed and since there was no sign of violence on the door or any part of the hosue by which it could be suggested that an outsider came inside the room, the accused alone had the exclusive opportunity to cause these injuries in a closed room resulting in her death (1978 CrL.R. 72, (78, 79).

Conviction under section 302, Penal Code, 1860 is not legally sustainable when there are gross improbabilities in the prosecution version, delayed FIR and patent cunflict between the medical evidence and the oral account (Lakhbir Sdingh and another vs. State of Punjab 1988 (3) Crimes 308 (P&H). Incident of murder taking place in a village by a large group of 14/15 persons at dead of night. No possibility of the villagers coming to the scene of offence before the assailants fled away. It was highly unlikely that the accused persons would continue to remain at the scene of offence after committing murders (State Vs. Jageshwar AIR 1983 SC 349).

Greatest possible care should be taken by the Court in convicting an accused who is presumed to be innocent till the contrary is clearly established which burden is always in the accusatory system, on the prosecution but at the same time it is not the doubt of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle scepticism. It does not mean that the evidence must be so strong as to exclude even a remote possibility that the accused could not have committed the offence (AIR 1972 SC 975, 981).

The fact that the evidence of certain witnesses has been found to be false with regard to the participation of one accused is certainly a very important factor to be taken into account to consider as to how far their testimony regarding the others can be safely accepted. Where there is justification to hold that the incident must have happened very late in the night, when the other witnesses, who claimed to have seen the occurrence, would not have been present, there is a reasonable doubt regarding the guilt of the accused (AIR 1973 SC 1258, 1260).

From the post mortem report it was evident that semi diggested food was in the stomach and till the time of death it had not fully passed on to the intestines. *Faecal* matter was also present in large interstines. Where the prosecution had not succeeded in proving beyond doubt that death had taken place at 8 A.M. the acquittal by the Trial Court was not interfered with in appeal (1974 U.P.. CR.C. (All) 68 (71).

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much 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 one (AIR 1976 SC 2263, 2269, 2270).

Apppreciation of oral evidence by a Court cannot conform to certain set formulate or be measured by the yardstick common to all cases. Ordinarily a Court should not convict an accused on the basis of evidence not accepted by it in connection with the other accused unless the evidence is corroborated otherwise, but this is not an inflexible rule of law but a rule of prudence for the appreciation of evidence and is not intended to prevent a Judge of fact from appreciating the evidence that is placed before him, having regard to the circumstances of each case (1973 PCrLJ 612). Where the circumstances so warrant even when the dying statement as well as the evidence of recoveries have not been relied on The Court may hold the ocular evidence to be sufficient and reliable to prove the charge of murder against the petitioners (1973 SCMR 571).

Merely because it was not certain as to which of the two accused used his weapon so far as effective shot was concerned cannot be a ground for holding that other accused who did not use the weapon was not present during the occurrence (1983 SCMR 1211). In a murder case when once it is found that the witnesses are not interested in any way with the deceased that there is absolutely no motive for them to depose falsely aginst the accused and that their explanation for their presence at the scene place is acceptable and natural, their evidence cannot be rejected on the scoure they are chance witnesses (Kuppuraj and others Vs. Union Territory of Pndicherry 1988 (3) crimes 387 Mad).

In considering a crime of violence, a Court is well advised to examine the circumstances of the case and its result, for the purpose of gauging natural probabilities (PLD 1964 SC 422). The events preceding and leading on the assault on the deceased have to be considered in aproaching the evidence led by the prosecution to prove the guilt of the accused (AIR 1934 Rang 44) Where entire evidence in juxtaposition with all averments and natural course of human conduct lead to the conclusion that the prosecution had failed to prove its case beyond reasonable doubt, the accused was given benefit of the doubt and acquitted (PLD 1981 BJ1). Therefore where the reason for the alleged murder was another murder for which the accused party was being tried and a person who was a PW. in the case was present at the spot but strangely enough was not even injured; the case against the accused became doubtful as it did not accord with the normal human conduct (PLD 1981 Kar 1). Similarly where one accused was 12/13 years old and the other

80 years old at the time of occurrence, they were given benefit of the doubt because their taking part in the offence was improbable and unbelievable at those ages (NLR 1981 Cr.LJ 465).

Accused is a favourite child of law and has been given a licence to tell lies. He cannot be punished for his falsehood (NLR 1985 AC 170) As a principle of law, a court has to accept or reject the statement of the accused as a whole and it cannot pick and choose and accept only the inculpatory portion and reject the exculpatory part as incredible or false (NLR 1981 Cr 125). A Court may accept part of the exculpatory part of the statement. Thus where the accused woman made a statement that the deceased was done to death by inhabitants of the locality when she apprised them that she had been criminally assaulted by the deceased and the circumstances of the case show the possibility of the presence of a person other than the accused to be remote; the statement that the deceased was done to death by inhabitants of the locality was disbelieved but rest of her statement that the deceased tried to criminally assault her, was not ruled out of consideration and killing of the deceased with an *adze* by the accused was held to be in self defence even if the accused was woman of lax morals (PLD 1968 Lah 841). When two views of the evidence are reasonably possible, one supporting the acquittal and the other indicating conviction, the High Court should not reverse the order of acquittal (Tara Singh Vs. State; 1981 SC Cri 375; State Vs. P. Ananeyulan, AIR 1982 SC 1558; 1983 CrLJ 153).

If, after an examination of the whole evidence, the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused might be true, it is clear that such a view reacts on the whole prosecution case, and the accused is entitled to the benefit of the doubt, not as a matter of grace, but as of right because the prosecution has not proved its case beyond reasonable doubt (1988 SCMR 494; AIR 1991 SCC 1842). It is then for the Court to estimate the total effect of the evidence of both sides in relation to two question, viz (1) Is the explanation of the accused satisfactorily established by the evidence and circumstances appearing in the case ? (2) If the answer of question (1) be in the negative, is there yet a reasonable possibility that his explanation might be true, so as to cast a reasonable doubt upon the prosecution (NLR 1981 AC 142).

Where injuries of accused were not explained by prosecution Defence version given by accused was plausible and prosecution case was doubtful, accused would be entitled to benefit of the doubt not as a matter of grace but as matter of right (1987 PCrLJ 1502).Where two possibilities, one of commission of crime and the other of innocence are reasonably possible, accused entitled to benefit of doubt (Sharad Birdhi Chand Sarka Vs. State of Maharashtra 1984 (4) SCC 116=AIR 1984 SC 1622). When any fact asserted by the prosecution turns doubtful, the benefit should go to the accused, not to the prosecution (Ibid). In a case of two versions of the occurrence both the versions have to be kept in juxtaposition and the one favourable to the defene is to be preferred, if the same gets some support from the admitted facts and circumstances of the case and appeals to common sense (Muhammad Younas Vs. State 1992 SCMR 1592).

If a prosecution witness says two things, one is favour of the prosecution and the other in favour of the accused, the one is favour of the accused should ordinarily be preferred to that deposed to in favour of the prosecution (1953 Raj LW 513) Where the prosecution witnesses in their examination-in-chief support the prosecution and say that the incident took place, but in their cross-examination support the defence plea by admitting the existence of circumstances which according to the accused caused him apprehension of death or grievous hurt without going back on their statements in examination-in-chief; it would be difficult to

determien which part of their evidence is true and which false, and there would be no justification in accepting only those portions which support the prosecution while discarding anything that supports the defence (AIR 1960 Ker 142) But where the contradictions in the evidence of a witness have been introduced deliberately to help the accused the prosecution case would not be affected by them (NLR 1985 AC 102).

Howsoever morally convinced a Judge may feel as to the truth of a particular fact, unless there is legal proof of its existence, he cannot take it as proved (PLD 1964 Pesh 59; PLD 1964 SC 81). If the Sessions Judge feels qualms about the case, he should give the accused benefit of the doubt, and acquit him (AIR 1935 Pat 19, 1969 SCMR 625).

Absconding is equally conistent with innocence and guilt, and therefore it is a proper matter to be considered along with other facts of the case whether they bear upon guilt or upon innocence (1984 PcrLJ 1237=NLR 1984 Cr 256) Mere abscondance of accused is not enough to sustain conviction of accused (1986 SCMR 823) A person who has been named as a murderer, whether rightly or wrongly, usually makes himself scarce, to avoid arrest and police torture. Therefore mere abscondence does not raise adverse presumption in such circumstances, and the fact of absconding cannot be made a ground for conviction (41 DLR 11;1985 PCrLJ 2638; PLD 1964 SC 26).

Where relations between complainant and accused were strained, the mere abscondence, of the accused after the murder is not of much significance, for possibility of false implication by the opposite party cannot be brushed aside (1969 PCrLJ 2638) Even if an adverse inference is drawn against the accused from the fact of their absconding, it is a very minor circumstance and cannot be regarded as material corroboration of the confession of the accused made subsequently (PLD 1964 Quetta 6). The fact of absconding is normally a somewhat weak link in the chain of circumstance for establishing the guilt of the acucsed (AIR 1971 SC 2156=1971 CrLJ 1468). Abscondence of an accused can not lead to a firm conclusion, and the prosecution can not derive any benefit from such merely suspicious circumstance (1991 CrLJ 1913; AIR 1981 SC 1160; AIR 1983 SCC 161).

Absconsion of an accused in a murder case cannot be taken into account in case it is not put to accused in their statements under section 342 Penal Code (NLR 1983 UC 505). Where an explanation for absconsion was given by accused in his statement under section 342, Cr. P.C but Trial Court rejected the same on the ground that accused did not produce any medical evidence in support of his alleged illness. It was held that it was not necessary for accused persons to produce positive evidence in support of their explanation if such explanation prima facie could be supported from evidence on record (1984 PCrLJ 632).

Injuries on the person of the accused are tell tale evidence of his implication in the commision of murder and it may corroborate other evidence against him (1984 PCrLJ 2708). Where the evidence of prosecution witnesses was corroborated by injuries on the person of the accused and recovery of blood stained shirt and lathi, conviction of the accused was upheld (1969 PCrLJ 1372). But where evidence is not reliable, mere injuries on the accused would not be sufficient for conviction of the accused (1969 PCrLJ 1204).

Prosecution should ordinarily explain injuries on the person of the accused. Where prosecution made no attempt to explain injuries sustained by accused persons during the occurrence nor did it show that injuries found on their persons were either self suffered or caused by friendly hand (1982 PCrLJ 732). or where there

was no explanation as to how the appellant sustained as many as 12 injuries out of which two were suspected fracture of nasal bone and suspected fracture of jaw bones, and two were incised, and, in the circumstances, one also does not know as to whether he was himself the victim of sustained assault, and in what circumstances the offence was committed, as the whole truth had not come on record from the mouth of any witness, the prosecution case becomes doubtful, but where the accused themselves persistently asserted that injuries on their persons were received otherwise than in an encounter with the deceased, the case of the prosecution was not prejudiced by their failure to provide an explanation for the injuries on persons of the accused (1969 SCMR 885).

Where the defence did not put any question to doctor about age of injuries on accused person The contention of the accused that they received the injuries prior to the incident could not be accepted (1984 PCrLJ 2708). Failure on part of deceased to explain injuries of accused in dying declaration would not affect adversely its veracity (PLD 1987 Lah 492). Before an adverse inference is drawn because of failure to explain injuries, it must be reasonably shown that in probability, the injuries were cause to him in the same occurrence or as part of the same transaction (AIR 1977 SC 2252=1977 CrLJ 1930).

Where the prosecution witness grappled with the accused and received injuries at the hands of the accused apart from the injuries which the accused caused to the deceased. It was held that he was the most competent witness to depose regarding the participation fo the accused in the occurrence both with respect to the injuries caused to him and to the deceased (1980 CrLJ 830).

Where there was a deliberate attempt to introduce the names of some accused persons, into the case at a later stage and the genuineness of the first information report was doubtful it was held that conviction could not be justified (AIR 1980 SC 1160).

Where there is no evidence to show that wife of the deceased had any previous ill -will or hostility against the accused persons or a motive to falsely implicate the accused persons and the medical evidence supports her testimony in regard to the nature of the weapons with which the fatal injuries were inflicted on the deceased persons it was held that the acquittal was not justified (1980 CrLJ 1301, 1307 (AP).

The deceased received as many as 12 incised wounds on the various parts of the body. It was held that this could not have been done by the appellant alone unless he was accompoanied by other friends. The prosecution failed to prove the case against the appellant beyond reasonable doubt. (1979 CrLR (SC) 715, 717).

Where the explanation of the sole prosecution witness for concealing the name of the assailant before the attending doctors and the witnesses who immediately after occurrence arrived there was that as the accused was his sister's husband, he did not want to implicate him and then only later he felt that he should tell the truth, it was held that it was unsafe to accept the testimony of that prosecution witness and conviction could not be justified on his testimony (1979 CrLJ 640, 641, 642). If the prosecution failed to clear all the mystries and suspicions it can not be aid that there was proper assessment of the evidence in convicting the accused (1987 BLD (AD) 93).

Suggestion made on behalf of an accused by his lawyer can not be construed as admission of guilty by the accused for the simple reason that the defence may take whatever pleas he likes, including inconsistent pleas, such as an accused when charged with an offence, may take the plea of alibi that at the time of commission of the offence he was not present in the locality and at the sometime he may take the

plea of private defence either of life or of property. The simple reason for allowing such contrary please is that the accused is not required by law to prove his innocence, but it is entirly for the prosecution to prove his guilt, failing which the accused shall be acquitted (1986 BLD (AD) 1(3)= BCR 1986 AD 231). It is well settled that a plea of alibi has got be proved to the satisfaction of the Court (1975 Bihar Cr.C. (SC) 133(144).

If the plea of alibi is not believed, it does not necessarily follow that the prisoner committed the murder. The prosecution is to prove the guilt of the accused. Failure on the part of the defence to substantiate any plea taken by it does not necessarily prove the guilt of the accused. According to the settled principle of law the burden to prove the guit of the accused is primarily upon the prosecution (1975) 27 DLR (AD) 1).

No criminal case is free from inconsistencies here and discrepancies there. The main thing to be seen is whether those inconsistencies etc. go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incogrities obtaining in the evidence. In the latter, however, no such benefit may be available to it. That is a salutarary method of appreciation of evidence in criminal cases (1981 CrLR 252 (255) SC).

Only one of the brothers would not have taken the risk of going alone to intercept a party of five coming on a tractor and commit the assault with the pistol. The story of the prosecution that there were two persons and those two were the accused person held true and true beyond doubt (1976 Bihar Cr. C. 193 (197) SC).

Where the eye witness in an unsophisticated *adiwasi* woman and discrepancies pointed out in her evidence are minor and nominal the Court is justified in accepting her evidence (1982 SC Cr. R 76,77).

In the present case, deceased had been given milk after he had been injured. The cause of death, according to the doctor, was shock due to pertionitis as a result of extravasation of stomach contents in the pertioneal cavity. He further opined that the injuries found on the person of the deceased were sufficient in the ordinary course of nature to cause death. In answer to the Court question, the witnesses stated that if milk and water had been given to the injured, that could have also caused the death, because the stomach contents had collected in the peritoneal cavity. It was held that peritonities was clearly the result of the stabbed wound and the feeding of milk to the injured did not contribute to the death of the deceased. Looking of the nature of the injuries which were sufficient in the ordinary course of nature to cause death the accused was convicted under section 302, Penal Code (1976 CrLJ 664, (665, 666, 667) (Raj).

It is now well settled that principle *falsus in uno falsus in omnibus* does not apply to criminal trials and it is the duty of the Court to disengage the truth from falsehood, to shift the grain from the chaff instead of taking an easy course of rejecting the prosecution case in its entirety merely on the basis of a few infirmities (AIR 1978 SC 1096 (1098).

While it is true that merely because a witness is declared hostile his evidence cannot be rejected on that ground alone, it is equally well settled that when once a prosecution witness is declared hostile the prosecution clearly exhibits, its intention not to rely on the evidence of such a witness. In these circumstances therefore, court is not at all justified in treating the version given by the hostile witness as the version fo the prosecution itself (AIR 1978 SC 1096, 1098= 1978 CrLJ 1089). It is no doubt true that a witness who resiles from his/her previous police statement with regard to integral part of the prosecution version cannot be considered as a reliable

witness and his version in Court cannot be accepted without sufficient corrboration. It is equally well settled that where a prosecution witness turns hostile that fact does not completely efface his evidence. His evidence still remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence (1958 (2) Crimes 90(92) Delhi).

In Mukhtiar Kaur Vs. State of Punjab (1980) 2 SCC 369), recovery of the golden ring belonging to t e deceased from trunk at the instance of the appellant was held to be not of any importance, in view of the friendly relations of the deceased with the appellant. No reliance was placed on the testimony of prosecution witnesses who did not appear to be witnesses of truth. There was absolutely no evidence to corroborate the evidence of the approver. Even motive alleged was not adequately proved. The Supreme Court found that the prosecution case was not proved.

The medical evidence supported the evidence of P.W. 1. The medical evidence was in trune with the first information report. The empty cartidges which were found at the scene of occurrence showed that they were shot from the pistol of the accused. The judgment of acquittal passed by the High Court was set aside by the Supreme Court and the accused were convicted (1980 Cr.L.R. (SC) 686(691).

Where all the witnesses enter into a conspiracy to implicate five innocent persons in a murder case, then the backbone of the prosecution is broken, and it would be difficult for the Court to rely on such evidence to convict a single accused, particularly when the prosecution does not give any explanation or the grievous and other serious injuries on the person of accused. This is a case where it is not possible to disengage the truth from falsehood, to shift the grain from the chaff. The truth and falsehood are so inextricably mixed together that it is difficult to separate them. Indeed if one tries to do so, it will amount to reconstructing a new case for the prosecution which cannot be done in a criminal case (AIR 1976 SC 2263 (2272).

Ex facie there was nothing to indicate that the accused shared the common intention to murder the deceased or took any active part in the murder. The confession of the accused was not a confession at all because the accused had not implicated herself in any way. The investigating officer found that the place where the deceased was killed contained lot of blood-stain, namely, on the floor, wall and the stool. It was held that by itself did not implicate the accused. In these circumstances, it was held that she could be convicted under section 201/34. Her conviction under section 302/34 was set aside (1980 SC Cr.R. 70(71,72).

27. **Reappraisal of evidece by Appellate Court.**- Ordinarily in the matter of assessment of evidence the Trial Court's view is given great weight and when its finding is accepted as correct on reassessment by the Appellate Court, then, the Appellate Division does not like to interfere. But when in accepting the evidence it is found that established principles of assesment of evidence have not been accepted as reliable without proper scrutiny and no consideration has been given to inherent absurd it or improbabilities of them, then the Appellate Courts finding cannot claim sanctity. Appellate Division whose duty it is to see that complete justice is done to all parties, cannot but interfere in such situations (Abu Taher Chowdhury and others V. The state (1991 BLD (AD) 2(20)= 42 DLR (AD) 253).In the said case (Supra) M.H. Rahman, J. observed : 'By practice this Division does not interfere with a finding of fact, more so with a concurrent finding of fact of the High Court Division and the trial Court. It would not normally reappraise or review evidence or enter into the credibility of the evidence with a view to substitute its own opinion for that of the High Court Division or even when it strongly feels that a different view is possible. Interference by the Appellate Division is exceptional and that is why the provision for special leave. For promoting the cause of justice, for doing complete justice and

for prevention of miscarriage of justice this court's power is very wide, overriding, and exceptional and is not incumbered by any technicality. It, however, exercises this power sparingly and only in furtherance of the cause of justice, and in this regard it is guided by its own practice and precedents.

According to the practice of this Division it interfers even with a concurrent finding where it is based on no evidence or it has been arried at in desregard of judicial process or well known principle of appreciation of evidence or it is the result of misreading of evidence or is so unreasonable or grossly unjust that no reasonable person would judicially arrive at that conclusion. In criminal matters this Division also interfers where the prosecution case seems incredible and fictionlike and where the lone witness belatedly discloses his knowledge of the commission of offence."

Standard and mode of appreciation of evidence in cases where acquittal was sought to be set aside was different than the appreciation in those cases where conviction was sought to be set aside (muhammed Aslam V. State PLD 1992 (SC) 254)When Supreme Court deals with appeal from aequittal in which Standard of appraisement in regidity would not be the same as in appeal from conviction (Habib V. Noor Ahmad PLD 1992 (SC) 863).

Evidence cannot be re-appraised by the Supreme Court unless there is some material illegality or even irregulaity going to the root of the case and if interrest of justice demands that the evidence be reconsidered (Sikandar Hayat V. Bahadur & Ors. 1990 Crimes 211 (SC) . It is well settle that where a finding of fact is based upon the credibility of evidence involving the appreciation of the demeanour of witness , the view of the trial Court is entitled to great weight and should not be lightly discarded (State V. M.M. Rafigul Hyder 45 DLR (1993) AD 13).

In Bhagwati & ors. V. The state of Uttar Predesh (1976 (3) S.C.. 235) it is held:

"Thus if the finding reached by the Trial Judge cannot be said to be unreasonable. The Appelate Court should not disturb it even if it were possible to reach a different conclsion on the basis of the material on the record. This has been held to be so because the Trial Judge has the advantage of seeing and hearing the witnesses and the initial presumption of innocence in favour of the accused is not weakened by his acquittal. The Appellate Court therefore should be slow in disturbing the finding of fact of the Trial Court, and if two views are reasonably possible of the evidence on the record, it is not expected to interfere simply because it feels that it would have taken a diffefrent view if the case had been tried by it".

In a matter of acquittal. the superior Court will interfere only if the judgement delivered by the Court of first instance is not only illegal but also perverse and if the inference drawn by the Court in coming to a finding of fact was reasonably possible, then only because the superior Court may differ with that, shall not call for any interference (Jabeda Khatun Vs. Ahdur Rahim (1991) 11 BLD 133).

Supreme Court, in criminal appeal, would not substitue in own opinion with that of High court with regard to the conclusion reached by the High Court about pelting of stones in the incident (Ahmad Khan V. Muammad Iqbal PLD 1992 (SC) 3360 1 (SC). It is hard to dismiss the appreciation of evidence of the trial Court based on observation of demeanour of the witnesses (Abu Taher V. State 1991 BLD (AD) 2 =(1990) 42 DLR (AD) 253).

In an appeal against acquittal if the main grounds on which the Court below has passed its order acquitting the accused are unreasonable and plausible and cannot be entirely and effectively dislodged or demolished, the Court should not

disturb the acquittal (State of Maharashtra V.Prahakar Ramkrishna Shiralkar, 1983 (3) Crimes 326 (Bom).

In an appeal against conviction under section 302, Penal Code when there exists no infirmity in the application of evidence, or assement of evidence or in approach of the Courts below to the relevant evidence, there is no reason to upturn the concurrent finding of the said Courts in this respect (Kannan & Ors. V. state of Tamil Nadu 1988 (3) Crimes 882 (SC).When ocular account of prosecution case of mruder by accused is supported by natural eye-witnesses's consistent testimony, prompt FIR, discovery of weapon of offence and medical evidence, the conviction recorded on it cannot be disturbed in appeal to Supreme Court (Bikkar Singh V. State of Punjab 1989 (2) Crimes 1 (SC).

When both the Trial Court and the Appelleate Court have assessed the evidence in the proper perspective and attached much importance to the evidence in regqard to the identification of the appellant finding him guilty of murer it is not for the Supreme Court to reassess the evidence unless exceptional grounds are established necessitating such a course (Ramdeo Rai Yadav V. state of Bihar 1990(2) Crimes 48 (SC).

Where Trial Court evaluated the evidence in the correct perspetive and ordered acquittal, the High Court cannot reverse it characterising the finding of Trial Court as pervers, which observation is not justified and warranted (Lalit Kumar sharma & ors. V. The superintendent & ors. 1989 (3) (193 (SC).

In an appeal against acquittal, if on appraisal of the evidence it is found that two views are possible. in such a situtation the rule of prudence should guide the High Court not to disturb the order of acquittal unless the conclusions of the Trial Court are found to be unreasonable, preverse and unsustainable (State of orissa V. Puma Chandra Dass; 1990 (1) Crimes 4 (Ori).

When there is nothing to show that there was any misreading or non-consideration of any material evidence by the Courts below, the Appellate Division refused to reassess the evidence afresh (Bellal and another Vs. The State; (1994) 14 BLD (AD) 163).

28. **Publicity through mews media not to be taken into consideration- It is irrelevant.-** A statement of fact contained in a newspaper is merely hearsay, secondary evidence, unless proved by evidence aliunde. The fact is inadmissible in evidence in the absence of the maker of the statement appearing in Court (Laxmi Raj Shetty and another. V. State of Tamil Nadu 1988 (2) Crimes 108(SC). It is the obligation of every Court to findout the truth and act according to law once the truth is discovered. In that search for truth obviously the Court has to function within the bounds set by law and act on the evidence placed before it. what happens outside the Court room when the Court is busy in its process of adjudication is indeed irrelevant and unless a proper caution is provided to keep the procedings within the Court room dissociated from the heat generated outside the Court room either through the news media or through flutter in the publice mind, the cause of justice is bound to suffer (state V. Laxman Kumar 1985 (2) Crimes 758 (775) (SC). A news paper is admissible in evidence without formal proof, but the paper *ifso facto* is not proof of its contents Nurul Islam V. state 40 DLR (1988) 122;AIR 1925 Lah 299; AIR 1961 Punjab 215; AIR 1951 SC 1376).

Newspaper report can not be treated as substantive evidence. It is no evidence of facts stated therein unless the correspondent who made the report is exmined (AIR 1961 Mys 106 (116); PLD 1961 (W.P) Kar 1 (DB).

It is true press reports are not to be accepted as proof of facts stated therein but where such reports were not contradicted by the concerned authority or person at the relevant time and are subsequently relied by either side in a case, these may be taken into consideration for forming an opinion generally as to the prevailing state of affairs at the relevant time (Muhammad Nawaz sharif V. President of Pakistan PLD 1993 SC 473 (548).

29. **Credibility of witness.**- The weight to be attached to the testimony of witness depends in a large measure upon various consideration, some of which are that on the face of it, his evidence should not be inconsistent with the probability of the case and consistant with material details of the case for the prosecution so as to carry conviction of truth to a prudent mind. In a word evidence of a witness is to be looked at from point of view of its credibility. It is quite unsafe to discard evidence of witness which otherwise appears reasonable and probable because some suggestions to show that he was not truthful were made to him without those suggestions being proved to be true. In fact appreciation of oral evidence depending as it does on such variable inconsistent factor as human nature can not be reduced to a set formula. There must be something in the statement of witness to entitle him to be believed. Ordinarily close relation will be the last person to screen real culprit and falsely implicate a person. So relationship far from being ground of criticism is often a sure guarantee of its truth (State Vs. Mizanul Islam; 40 DLR 58 (70).

The credit to be given to the statement of a witness is a matter not regulated by rule of procedure. The credibility of a witness depends upon his knowledge of fact to which he testifies, his disinterestedness, his intergrety and his varacity. Appreciation of oral evidence depends on such variable inconsistence which as a human nature cannot be reduced to a set formula (40 DLR 58). Statements of prosecution witness whose statement was not recorded under section 161, Criminal Procedure Code can not be outrightly rejected though evidentiary value of the same may lose some of its force (Lal Mohan Man and another Vs. State 1993 (1) Crimes 298 Cal).

Evidence of close relations of the victim cannot be discarded more particularly when close scrutiny does not impair the same (Subedar Vs. State of U.P. 1992 (1) Crimes 824 (825). Straight forward evidence given by witnesses who are related to deceased can not be rejected on sole ground that they are interested in prosecution (Sahadevan Rajan and others Vs. State of Kerala 1992(2) Crimes 256).

The question of credibility of a witness has primarily to be decided by referring to his evidence and finding out as to how the witness has fared in cross-examination and what impressions is created by his evidence taken in the context of the other facts of the case.

Decided case can be of help if there be a question of law like the admisibility of evidence. Likewise decided cases can be of help if the question be about the applicability of some general rule of evidence e.g. the weight to be attached to the evidence of an accomplice. This apart reference to decided cases is hardly opposite when a question before the Court is whether the evidence of a particular witness should or should not be accepted (AIR 1975 SC 246; 1974 CrLJ 1235; 1976 CrLJ 1310).

Court should not superimpose its personal knowledge about moral rectitude and credibility of the witness and if the Court rejects the testimony of witness by such superimposing the court commits grave error (1977 CrLJ (NOC) 103). Non-examination of disinterested neighbours residing near the place of occurrence is no ground for disbeliving eye witnesses even though they are related to, or interested in

the complainant when there is no evidence to show that any person other than the eye witnesses saw the occurrence (AIR 1973 SC 2221; 1973 CrLJ 1409). When there are independent witnesses in the case, their non-examination affects the credibility of the other witnesses (Raj Pal and another Vs. State of Haryana 1993 (1) Crimes 100 P&H).

Where a witness is shown to have made deliberately false statements, he is *prima facie* utterly unreliable and there is no guarantee of the truth of any statements made by such a witness (AIR 1980 SC 1382= 1980 CrLJ 965). The evidence of a witness cannot be disbelieved merely on the ground that there is only one witness on the point and other witness has been examined to support him, if there is nothing discredit him (AIR 1972 Pat 142; 1972 BL JR 97).

Merely because there are some complaints against a senior officer or that he used inappropriate language in describing his powers and functions, it cannot be said that he is not a very truthful witness, especially when no substance was found in the complaints by the higher authorities (AIR 1973 SC 2679= 1973 CrLJ 1812).

The credit to be given to the statement of witnesses is a matter not regulated by the rules of procedure (AIR 1954 Ori 163). The credibility of a witnes is a matter to be best judged on evidence and circumstances of each case (1984 PCrLJ 72). It depends on (1) his knowledge of the facts to which he testifies, (2) his disinterestedness; (3) his integrity; (4) his veracity; (5) his being bound to speak the truth by such an oath as he deems obligatory, or by such affirmation or declaration as may be law by substituted for an oath (1980 PCrLJ 898). Important consideration while asessing evidence would be (1) whether they were partisan witnesses, (2) had they any cause or reason to make false allegations, (3) whether any enmity existed between witnesses and accused, and (4) whether there was any special relationship or interest of witnesses with deceased or complainant party (1984 PCrLJ 3071). In order to judge the credibility of witnesses, the court is not confined only to the way in which the witnesses have deposed or to the demeanour of witneses; it is open to it to look into surrounding circumstances as well as probabilities, so that it may be able to form a correct idea of the trust worthiness of the witnesses (1969 PCrLJ 1573).

The weight which is to be attached to the testimony of a witness depends, in a large measure, upon various considerations some of which are that on the face of it his evidence should be in consonance with probabilities and consistent with other evidence, and should generally so fit in with material details of the case for the prosecution as to carry conviction of truth to a prudent mind. If these elements are wanting in the testimony of a witness, however independent he may appear to be, his evidence cannot be relied upon in the decision of criminal cases (1980 PCrLJ 286).

Mere admission of certain facts by P.W. 6 which went in favour of the defence cannot be a ground to disbelieve the said witness (41 DLR 274). Mere getting of something more favourable to defence case in the cross examination in addition what the defence got during the examination in chief can not be a ground to disbelieve the evidence of witness who was not declared hostile by the prosecution (41 DLR 274).

Evidence of a person can not be rejected on the ground of his conviction in a criminal case in the past (AIR 1977 SC 701). The Court has not to discard the whole evidence of the residing witnesses but to accept that version of it which talies circumstances of the case (PLD 1965 Dhaka 220 (DB). Credibility of witness is to be judged with reference to (a) his character; (b) extent and manner of interestedness; and (c) how he fared in cross examination (AIR 1958 SC 500).

To assess evidence (a) probabilities; (b) intrinsic worth of evidence; and (c) animus of the witness, are to be taken into account (AIR 1973 SC 2407 (2414); 1973 CrLJ 1989). Evidence of eye-witnesses had been disbelieved by trial Court so far as the two acquitted accused were concerned and the same evidence could not be relied upon to convict the accused in the absence of necessary corroboration of the same. Accused had also prima facie proved his innocence though plea of alibi. Accused was acquitted on benefit of doubt in circumstances (Habibullah Vs. State 1992 PCrLJ 2490).

The circumstance that a witness was examined after a very long time by the police shall have to be taken into account to consider whether the evidence given by him before the Court can be relied on (AIR 1974 SC 1901; 1974 CrLJ 1300). When the witness was himself injured during the course of occurrence, there can hardly be any doubt regarding his presence at the spot (AIR 1972 SC 2593=1973 CrLJ 44;=AIR 1973 SC 2407= 1973 CrLJ 1589).

When a person witness professes to know about a gravely incriminating circumstances against a person accused of the offence of murder but keeps silent for a considerable period regarding the said incriminating circumstances against the accused, his statement relating to the incrimininting circumstance, in the absence of any cogent reasons, is bound to lose most of its value (AIR 1973 SC 2773= 1973 CrLJ 1). A witness is not like a tape recorder. While deposing at about one year after the incident his memory may not serve him completely right (AIR 1973 SC 2751= 1973 CrLJ 1839).

Status of a person was no criterion to judge his credibility as it was the evidence of witness which was to be weighed and assessed and not his status (1988 PCrLJ 1101). The court repelled the contention that village Mueen being bound to be under influence of influential persons of village, her evidence may be condemned (PLD 1984 Lah 484). Prosecution dropped one witness on the ground that he was not a man of status. A sweeper, who earns his livelihood by doing honest labour, cannot be regarded as man of not status (Raghubir Vs. State AIR 1976 SC 91= 1976 CrLJ 179).

The mere respectability of a witness is not a deciding factor. The evidence of the witnes has to be looked at from the point of view of its credibility. No evidence can be rejected merely because the witness who gave it was not a respectable man, or had bad character (1984 PCrLJ 3071; PLD 1985 Lah 554). Thus the fact that the prosecution witness was once a history sheeter, whose history sheet had been closed 7 to 8 years before he had made the statement, or that the witness had appeared for police in one or two cases before apearing as a witness in the case or the fact that he admitted that he could not identify the men arrested on the spot, is not sufficient to reject his testimony (AIR 1959 All 559). Similarly it is incorrect that a person who had been convicted of an offence of theft or had remained under the surveillance of the police, or has both the above mentioned things against him, or the fact that the witness has appeared in another case as a witness, or that the witness was involved in two criminal cases but he had no direct enmity with accused nor was he related to the deceased. The witness also gave evidence in a case against the brother of the accused is not sufficient to discredit him (1984 PCrLJ 3071; 1981 PCrLJ 267; NLR 1979 Cr. 52). A witness who was once tried or convicted in a murder case is not incapable of telling the truth (1968 PCrLJ 1251). But his evidence may be accepted after careful scrutiny. Where it appears discrepant in some matter, the Court should rather reject it than accept it (PLJ 1979 SC 172=1985 PCrLJ 1137).

Inquiry officer was generally regarded as most important witness both from prosecution and defence point of view. Failure of prosecution to examine

Investigating officer would result in causing serious prejudice to accused facing a capital charge (1984 PCrLJ 2950). Where no question was put to him to show that he was either biased against accused or favourably inclined to complainant party and no motive was attributed to him for engineering a false case; evidence of Investigating officer could not be doubted and his evidence was as good as that of any other witness (1984 PCrLJ 2690).

Ordinarily, if eye witnesses were named in FIR but investigating agency happened to record their statements after lapse of some time, this would not possibly make such eye witnesses unreliable (1988 SCMR 1455). But where investigating officer had recorded statements of other eye witness and had completed almost all important aspects of investigating on the very first day. No satisfactory explanation was forthcoming about non-recording of statement of some eye-witnesses on the first day. Inference that could be drawn was that those eye witnesses were not available on first day and had not witnesses the occurrence (1986 PCrLJ 1940).

Where some witnesses are found not reliable, conviction may be based on other evidence if found reliable (1976 SCMR 91). Where some prosecution witnesses have given false evidence but two of them have spoken in the truth and their evidence is supported by medical evidence and other circumstances, the accused may be convicted on the evidence of the latter (PLD 1979 Pesh 48). But where statements of witnesses are discrepant and contradictory to each other,witnessing of occurrence by such witnesses was held to be highly doubtful. Status of such witnesses was no better than that of chance witnesses (1984 PCrLJ 488). Where two prosecution witnesses give different versions and they have no hesitation to change their statements so as to reconcile them with the prosecution case, they cannot be relied upon (1985 PCrLJ 1040). Where the evidence given by a witness is not supported by the solitary eye witness of the murder, the witness cannot be relied upon (NLR 1979 Cr 179).

A statement by a prosecution witness which adversely affects an accused loses much of its importance, if such statement is made voluntarily (14 DLR 28 (DB). Where a witness comes to give evidence voluntarily on his own expenses without being called and stays with the party for whom he has to give evidence, his statement can not be relied upon implicitly (PLD 1964 SC 598; 17 DLR (SC) 111).

Statement of prosecution witness recorded by police, copy of statement not supplied to defence even though intervention of court. Evidence of such witness to be completely disregarded and excluded for consideration (PLD 1968 Lah 694). Material omissions in statement of witness before police as compared with his statement in Court. No reliance placed on such witness (PLD 1968 Lah 49).

Witnesses called to give evidence after a lapse of three years from occurrence are apt to forget insignificant deatials of incident and if they are subjected to lengthy and tiresome cross examination it is not expected of them to give description of occurrence with scientific precision(1984 PCrLJ 486). Where there are only minor discrepancies in the evidence of prosecution witneses and they have been properly explained, the Court should not disbelieve the evidence of those witnesses (PLD 1984 Lah 378). Due to lapse of time minor discrepanies and contradictions do creep in and unless such contradictions materially affect, credibility of prosecution witnesses or make their versions highly inconsistent, the contradiction could safely be ignored (PLD 1984 Lah 326). Where eye witnesses are natural witnesses their presence at place of occurrence could not be doubted. Testimony of such witnesses, could not be thrown overboard only on account of discrepancy regarding number of injuries inflicted by accused to decesed (1985 SCMR 625). An illiterate witness

could not be expected to have a mathematical and accurate idea of distances (PLD 1972 Pesh 22). The idea of time with illiterate village women is often very vague and on this evidence it is difficult to pinpoint the time of occurrence (1990 BLD (AD) 201).

Where a prosecution witness made false concessions in favour of accused, credibility of such witness was damaged and he was not to be taken on his own words and if he softened down or spoke in two voice, obvious inference would be that he was not a witness of truth (1987 PCrLJ 2244). When a marginal witness, who is produced for no other purpose, makes certain concession in favour of the accused unconnected with the matter of recovery, such concessions should not be seriously looked into and should not be taken to be helpful to the accused person (1980 PCrLJ 518). The fact that the witnesses are associated with the faction opposed to that of the accused by itself is no ground for discarding sworn testimony as partisanship by itself is no ground for discarding sworn testimony (State of U.P. Vs. Ram Swarup and others etc (1988 (1) Crimes 994 SC).

An eye witness who keeps silent after having seen the incident ought not to be relied upon (PLD 1984 (AJ&K) 30). Where a witness keeps quiet for many days after the occurrence and comes forward after the police have made a discovery, is not reliable (PLJ 1981 CrC 87 (DB). However, examination of witnesses on third day of occurrence and their belated appearance at police station was not fatal to prosecution in a case where conduct of investigating agency was highly unfair and every effort was made to put investigation on wrong lines for benefit of the accused named in FIR (NLR 1984 Cr 260). Where statement of alleged eye witness was recorded after delay of about one month and 20 days, or where witnesses came forward six months after the occurrence, their evidence was rejected (PLD 1962 Lah 91).

Where a witness was introduced for the first time by the father of the deceased at the trial stage by giving an affidavit that he was a witness of the crime. It was held that the witness was introduced to fill in the gap in the prosecution case, which is nothing short of fabricating evidence in a case of murder (1975 PCrLJ 609). The Trial Court should not call such witness as a court wintes. However where P. W.s have introduced A as an eye witness at the trial whereas before the police they did not mention him as one. This, in itself, is not a reason for throwing away their whole evidence (PLD 1971 Lah 708). If the witnesses had been examined only after a very long time by the police, that certainly is a circumstance that will have to be taken into account to consider whether the evidence given by them before the court can be relied on (AIR 1974 SC 1901; 1974 CrLJ 1300). Where the Superintendent of Police who wrote a letter to his superior was not examined and the defence was not given any opportunity to cross examine him it was held that the letter could not be relied on for seeking corroboration of oral evidence (AIR 1984 SC 911).

Improvements in earlier version made at trial does not mean that falsity of testimony in one material particular would ruin it from begining to end, the Court should shift the evidence with extraordinary caution (AIR 1980 SC 1322; 1980 CrLJ 958). The fact that a witness did not receive any injury while other witnesses did, could not be a valid ground for rejecting the entire testimony of the witness (AIR 1976 SC 2493= 1976 CrLJ 1895). Evidence o fprosecution witnesses can be believed even if they have suppressed facts regarding injuries sustained by accused person or they gave belated explanation about them (1974 All Cr R 215=AIR 1974 SC 21; 1974 CrLJ 145).

Where the prosecution witnesses are injured, it is fairly certain that they have seen the occurrence (1987 SCMR 793. There could be no better evidence than that

of such witnesses and it would be immaterial whether any independent witness was present at spot and was not examined(1986 PCrLJ 1121). In the absence of such circumstances great wieght may be attached to the evidence of injured witnesses(1985 SCMR 216). The testimony of such witnesses cannot be easily brushed aside, and conviction may be based on it if it rings true(PLD 1983 Lah 639; 1987 SCMR 793).

Where witnesses have received injuries and medical evidence as well as evidence of motive provided added strength to their version. Presence of such witnesses at spot and taking place of occurrence in manner as narrated by them was not doubtful(1985 PCrLJ 1394). An eye witness seriously injured by fire arm losing his forearm and escaping death by inches cannot be expecrted either to tell a lie or to substitute an innocent person for the real culprit(1984 PCrLJ 1163). Where ocular testimony of injured prosecution witness was fully corroborated by independent evidence, or where the evidence of the injured PW is corroborated by medical evidence, or where there is no enmity of the injured witness with the accused, conviction may be based on his evidence (1980 PCrLJ 482; 1973 PCrLJ 1250; 1987 SCMR 1888).

Where the witness names only one person who committed the murder and also caused injuries to him, he is not likely to substitute some one for the real culprit and therefore his evidence may be relied upon for convicting the accused (NLR 1979 Cr 91). Where the number and nature of injuries on the witness clearly establish his presence at the place of occurrence and he has nominated only the accused person as guilty; the evidence of injured witness is by itself sufficient to maintain conviction without looking for any corroboration. Non appearance of independent witnesses is immaterial as it is a well understood and recognised fact that people are reluctant to step in witness box for fear of reprisals as a consequence of appearance against the accused (NLR 1980 Cr 485).

Where the presence of injured witnesses at the place of occurrence is established and their testimony is reliable. The number of assailants is consistent with the nature of attack and injuries caused to the deceased. Guilt of the accused is established beyond reasonable doubt (NLR 1988 SCJ 437). The fact that there are minor discrepancies in the evidence of the injured witness, or that the prosecution does not explain injuries on the accused, does not discredit the evidence of the witness who has himself received injuries in the incident (1975 PCrLJ 1405; 1980 PCrLJ 531). The evidence of an injured person carries much weight since the injured person does not usually allow the real culprit to escape and falsely implicate an innocent person (43 DLR (AD) 87).

Injury received by witness is no guarantee whatever that the story they tell is true or that each of the accused they name was concerned in the incident (1988 PCrLJ 2189=NLR 1985 UC 9). Where ocular evidence is not supported by any confirmatory circumstance and statements of injured prosecution witnesses as to the identity of the real author of the injury is also self contradictory, no reliance can be placed on it (1981 PCrLJ 57). The evidence of an injured witness had to be scrutinized by Court to find out whether he had spoken the truth or not and such need became stronger and more pronounced when evidence of such witness had been disbelieved by trial Court in respect of acquittal accused and motive (1985 PCrLJ 2132).

Where the eye witnesses of prosecution deny knowlege about injuries suffered by accused in the same occurrence, it casts doubt on the varacity of those eye witnesses (State of Madhya Pradesh vs. Gopi and ten others 1992 (2) Crimes 304).

Where counter cases were filed between parties and witnesses of one case were accused in the other case, their evidence could not be relied upon unless corroborated in material particulars (1988 PCrLJ 746). Even injured persons who are involved as accused in a counter case should not be relied upon implictly without further corroboration from some independent source. Recovery of the weapon of offence was held sufficient for corroboration of evidence of such witnesses (1972 PCrLJ 1336).

Credibility of witness may be determined by his conduct at the time of occurrence. Where eye witness, father of deceased, on seeing his son being attacked by accused did not raise hue and cry nor did he inform his family members about occurrence, before leaving for police station for lodging report Conduct of father as a silent spectator was most unnatural. His evidence was not trustworthy and was not relied upon (1984 PCrLJ 263). Where father of deceased was allegedly present at the spot yet he made no efforts to rescue his son although some persons were with him while assailants were empty handed. Prosecution story was held to be ridiculous (1987 PCrLJ 2391). It may, however, be noted that normally unarmed persons even when closely related to deceased find it difficult to intervene in an attack of the kind where assailant after inflicting a single blow makes good his escape (1985 PCrLJ 2723). Where a witness, deliberately denied an admitted fact, his entire testimony was rendered compoletely untrusworthy (1986 PCrLJ 973 DB). A witness who was found to be selfcondemned liar was not a truthful witness and his statement was not entitled to any credence (1986 PCrLJ 315). Thus were the witnesses stated that they witnessed the occurrence from the outer gate of the house but from the sketch of the scene of occurrence they could not have seen anything from the outer gate; their evidence cannot be believed (NLR 1981 CrLJ 318; 1981 PCrLJ 898 DB). Where a witness states that all three eye-witnesses had witnessed the occurrence but the sessions Court found that none of such three witnesses had witnessed the occurrence. The finding of the Sessions Court in the circumstances, reacts against the witnesses varacity (1981 SCMR 208). Where eye-witnesses purposely suppressed injuries caused to accused and perjured themselves about motive. They were not at all witnesses of truth (1987 PCrLJ 659 DB). Trial Court acquitted one accused giving benefit of doubt. The same in any manner does not affect the evidence of the eye witnesses who are the most natural witnesses (1993 CrLJ 1056).

Where the evidence of a witness suffers from an enfirmity it does not become reliable simple because it has been corroborated by a number of witness (191 BLD (AD) 2 Para 33).

The mere fact that police had asked them to affix their finger impression on statement made by them at the inquest, does not cast any doubt on their reliability (AIR 1981 SC 631= 1981 CrLJ 34). Although defence witnesses are often untrustworthy, it is wrong to assume that they always lie and that prosecution witnesses are always trustworthy (AIR 1974 SC 329= 1974 CrLJ 358). Mere non-mention of names of certain eye-witnesses in dyding declaration will not diminish the value of their testimony (AIR 1977 SC 705=1977 CrLJ 347).

Evidence of a witness who is alleged to be the sole witness to the occurrence was disbelieved by Supreme Court on ground of his abnormal conduct after the occurrence (AIR 1971 SC 1554). Mere fact that the evidence of eye witnesses has not been believed by the Lower Courts as regards some accused, does not mean that their evidence as regards other accused must be rejected (AIR 1974 SC 1978; 1974 CrLJ 1378).

The fact that a witness is capable of giving two completely different versions of a transaction throws the gravest doubt on his credibility and reliability (AIR 1976 SC

363; 1976 CrLJ 168 Ker). Where names of the assailants were mentioned by complainant in FIR. Fact that the complainant stated at one place in course of his deposition that he did not know the appellants and stated at another place that he knew them for about two or three years, is not sufficient to hold that his evidence about the actual assault on him by appellants is not worthy of credence (AIR 1974 SC 1156; 1974 CrLJ 812).

Where eye witnesses are not able to give correct version as to when the deceased was given lathi blows and their evidence was seriously discrepant on important point, their evidence, to be viewed with suspicion (AIR 1972 SC 464; 1972 CrLJ 262). Eye witnesses who gave dramatic account of the incident with minute details of attack on each victim and themselves admitted in their cross examination that they were attacked simultaneously, cannot be relied on (AIR 1981 SC 123; 1081 CrLJ 736=43 DLR (AD) 140).

If a person has witnessed a murderous assault and has not disclosed the occurrence, he cannot be deemed to be an accomplice in the eye of law, but his evidence is to be very closely scrutinised. In Vemireddy Satyanarayan Reddy Vs. State of Hyderabad (AIR 1956 SC 379), the Supreme Court has held that the evidence of witnesses who claim to have seen a murder, but have not disclosed the occrrence soon thereafter and have not offered any reasonable explanation therefore should not be accepted (1986(1) Crimes 22(24) Orissa).

There is no rule that a boy of 14 years of age cannot give a proper account of the mruder of his brother if he has an occasion to witness the same and simply because the witness was a boy of 14 years it will not be proper to assume that he is likely to be tutored (Prakash and another vs. State of M.P. 1992(3) Crimes 530). It is true that the children can be easily taught a story and they love in the world of make believe. But this cannot be taken as a general rule. In the present case there is nothing to put the testimony of child witness at a discount. She has lost the entire family and would be the last person to lose her father by fabricating a false case agianst him. It may be pointed out that she was subjected to a lengthy, weary tortuous and grucling cross -examination but nothing could be elicited from her which may damage her testimmony. She withstood the test of cross-examination nicely and aquitted herself with success. It is impossible to say that she is not witness of truth and her testimony is not sufficient to safely seal the conviction of the accused (1985 CrLJ 602(611) Raj).

The evidence of a child witness is dangerous unless immediately available and before any possibility of coaching and tutoring. In the instant case, the evidence of PWs 2 and 6 close relations of the deceased, who, as noticed by the learned Sessions Judge were not independent witnesses, had not been immediately available before any possibility of coaching or tutoring. It would be extremely unsafe to rely on evidence of such witnesses (1985 CrLJ 645(648) Ori).

Evidence of a child witness cannot be acted upon unless it bears the stamp of naturalness and truth (Heeraman vs. State of MP 1991 (2) Crimes 202 (MP).Parrot-like testimony of P.Ws. can hardly be believed (Teja Ram and others vs. State of Rajashtan 1991 (2) Crimes 644 Raj).

The witnesses got attracted to the scene of occurrence per chance. Therefore, it may not be safe to place implicit reliance on their testimony for the conviction of the appellant without independent corroboration which is lacking in this case (1985) 1 crimes 326 (330) Delhi=(1993) 45 DLR (AD) 140).

Once a prosecution witness goes back on his earlier statement by filing an affidavit and if there is no proper and plusible explanation on the record for filing

subsequent affidavit, the evidence of such a witness is not worthy of reliance and the Court should not hesitate in disbelieving the evidence of such a witness who takes some result every now and then (1985 (1) Crimes 65 (69) All).

when oral evidence is inconsistent, and the medical evidence and the opinion of F. S.L. do not connect the recovered weapon with the crime, then the non-exaplanation of the prosecution for this inconsistency is sufficient to discard the entire case of the prosecution (Sardarila Vs. State of Rajasthan 1988 (2) Crimes 488 Raj). The evidence of a competent witness is not liable for rejection merely because of a relationship with the deceased. The evidence of such a witness is mere a guarantee for truth (Chaitan Gochhoyat vs. State 1988 (2) Crimes 497 Ori).

I is no doubt true that a witness who resiles from his/her previous police statement with regard to intergral part of the prosecution version cannot be considered as a reliable witness and his version in Court cannot be accepted without sufficient corroboration. It is equally well settled that where a prosecution witness turns hostile that fact does not completely efface his evidence. His evidence still remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence (1985 (2) Crimes 90(92) Delhi).

Statements of prosecution witness whose statement was not recorded under section 161 cr. P.C. can not be outrightly rejected though evidentiary value of the same may lose some of its force (Lal Mohan Man And another Vs. State 1993 (1) Crimes 298 cal). Evidence of a witness, tied down under section 164 Cr. P.C, is not just discardable on that point but all that is required is that testimony must be subjected to close scrutiny (Jagdish and others vs. State 1993 (1) Crimes 770 MP).

30. **Evidence of eye-witness**.- Direct testimony of witnesses, whose evidence is otherwise consistent should not ordinarily be rejected on the ground that they are partisan witnesses, unless the surrounding circumstances discredit their version (Anvaruddin & ors. V. Shakoor & ors. 1990 (20 Crimes 159 (SC). Discrepancies in the evidence of eye-witnesses regarding the details of the incident may occur but that do not be little their evidence. Eye witnesses can not be expected to enumerate photographic picturasation of on attack. In the absence of any evidence of enemity or of any motive, he may be treated as truthful witnesses (Ataur Rahman & others V. State (1994) 14 BLD 391(392). Once a motive is set up and is found to be false then the evidence of eye-witnesses is to be scrutinised with great care and caution (Habibullah V. State 1992 PCrLJ 2489).

When the evidence of eye-witnesses is inconsistentent with the medical evidence, it is unsafe to convict the acccused (1973 SCC (Cri) 642; 1987 Cri LJ 706 (SC) = AIR 1987 SC 826). If direct evidence of the witnesses to the occurrence is satisfactory and reliable, it cannot be rejected on hypothetical medical evidence. Unless medical evidence rules out the possibilities of the injuries in the manner deposed to by the prosecution witnesses the evidence of witnesses to the occurence is not to be discarded (1983 Cri LJ 822 (SC)= 1984 Cri LJ 921 (SC). Where the occular evidence is amply corroborated by circumstantial evidence (1981 Raj Cr 404). or medical evidence, (1981 Cr (Ma) 530), the offence under section 302 is proved.

The evidence of the eye-witnesses, if accepted, is sufficient to warrant conviction though in appropriate cases the Court may as a measure of caution seek some confirming cricumstances from other sources. But ordinarily the evidence of truthful eye -witness is sufficient without any thing more, to warrant a conviction and cannot, for instance, be made to depend for its acceptance of the truthfulness of other items of evidence such as recovery of weapons, etc. (1985 Cr .L.J. 1173 (1174)

(S.C.) A.I.R. 1985 S.C. 866). Evidence of eye witnesses can not be rejected only on the ground that their manes did not figure in the inquest report (Khejji @ Surendra Tiwari V. Stste of M. P. 1991 (3) Crimes 82).

Where evidence of eye -witnesses is reliable but there are minor contradictions which are found to be natural in such a situation these contradictions are to be ignored (Suresh Chaudhary & Ors. V. State of Bihar 1988 (1) Crimes 757 (Pat). Eye-witnesses no doubt were closely related to deceased but they could not be dubbed as 'interested witnesses' because they had no previous animosity agianst the opposite party. Excepting the testimony of one eye-witness which could be discarded as that of a chance witness, the evidence of two other eye-witnesses did not suffer from any legal infirmity whose presence alongwith the deceased at the time of occurrence was not improbable and who were found to have seen the occurrence. Conviction and sentence of accused were upheld in circumstances (Irshad alias Shada V. State 1992 PCrLJ 2274). Interested witness is one who has some motive to implicate another person falsely. Mere fact that prosecution witness happened to be the real brother of deceased by itself would not be sufficient to make him an interested witness (Ahmad Khan V. State 1991 PCrLJ 301).

Educated real brother of deceased, held, would not have any motive to leave out the real culprits and implicate the persons against whom he had no animosity, particuarly when the incident had taken place in broad daylight (Ahmad Khan V. State 1991 PCrLJ 301).

It is rare to come across the testimony of a witness in this country which does not have a fringe or an embroidery of untruth although the evidence might be true in the main aspect. It is the function of the Court to separate the grain from the chaff and to accept what appears to be true and reject the rest. Hence, the fact that some of the witnesses in a murder case did not attempt to explain or had expressed ignorance about certain collateral facts would hardly be a ground to reject the occular account (1982 Cr LJ 23 (SC); 1970Cri LJ 363 (SC).

Where all the eye-witnesses were maned as eye-witnesses in the first information report which was lodged without loss of time their evidence cannot be disbelieved merely because they are related to deceased (1977 Cr. L.J. 1578 (1581) SC).

It is true that the Courts must separate truth from falsehood in the testimony of witnesses, but where the two were so intermingled as to make it impossible to separate them, the ecidence must be rejected in its entirety (1970 Cri LJ 363 (SC); 1981 Cri LJ 23 (SC).

The mere fact that one of the prosecution witness (PW 2) had succeeded in escaping unhurt or that there were discrepancies in the statements of two prosecution witnesses (PW 2 and PW 3) as to whether they had gone to a place with the deceased on the very day of occurrence or a day earlier was held not ground for jumping to the conclusion that P W 2 was not in the company of the deceased or near about the scene of occurrence when deceased and PW 2 were shot dead. it was further held that discrepancies in regard to collateral or subsidiary facts or matters of detail occured even in the statement of truthful witnesses particularly when they were examined to depose to events which happened long before then examination and that such discrepancies were hardly ground to reject the evidence of the witnesses when there was general agreement and consistency in regard to the substratum of the prosecution case (AIR 1981 SC 697).

Every person who witnesses a murder recach in his own way. Some are stunned , become speechless and stand rooted to the spot. Some become hysteric

and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim. Every one reacts in his one special way. There is no set rule of natural reaction. To discard the evidence of witnesses on the ground that he did not react in any particular manner was to appreciate evidence in a wholly unrealistic and unimaginative way (AIR 1983 SC 680).

Normal errors of observation, normal errors of memory due to lapse of time and due to mental disposition such as shock and horror following the incident would not adversely affect the prosecution case (1981 CrLJ 1012 (SC).

Minor inconsistencies in the statements of winesses in the FIR in regard to the number of blows inflicted and the failure to state who injured whom, would not make the testimony of the witnesses unreliable, given the circumstancees of the case. On the contrary it would show that the witnesses were not tutored (1983 SCC(Cri) 176; 1971 Cr LJ 1463 SC; 1981 CrLJ 410 SC; 1985 SCC (Cri) 105). If on a proper evaluation of the various facts and circumstances of the case it transpires that the apparent inconsistencies in the case of prosecution were solely the result of remissness on the part of the investigating officer and not of the any improvement or prevarication on the part of the prosecution witnesses, there could be no justification for discarding the accusation (1974 CrLJ 309 SC).

Very convincing grounds would be required to discard the evidence of injured witnesses whose injuries would atleast lead to a reasonable inference that they were present at the time of occurrence. However, this was subject to the requirement that there must be evidence to show that those witnesses received injuries in the same affair (1985 SCC (Cri) 54; 1983 Cri. LJ 1457 SC; 1983 SCC (Cri) 681; AIR 1983 SC 957; 1980 CrLJ 1301 SC).

The witnesses could not be described as 'chance witnesses' merely because their presence at the scene was suspicious. "Murders are not committed with previous notice to witnesses, soliciting their presence. After a murder is committed in a dwelling house the inmates of the house are the natural witnesses. If a murder is committed in a brothel the prostitutes and their paramours are the natural witnesses. If a murder is committed in a street the hawkers and vendors and passersby will be the witnesses. Their evidence cannot be brushed aside with suspoicion. Every person who witnesses a murder reacts in his own way. Ther is no set rule of natural reaction. To discard the evidence of the witnesses on the ground that he did not react in any particular manner is to appreciate the evidence in a wholly unrealistic and unimaginative way." (1983 CrLJ 1272 SC).

In another case (1972 SCC (Cri) 237), the Supreme Court has observed : "When Courts purport to disbelieve an eye-witness by reference to his subsequent conduct they have to be careful not to substitute their own norms of behaviour in a given situation for the norms of behaviour of that witness. Secondly, people react to situations not always in a uniform way..... What is to be seen is whether the subsequent conduct of the witness is so incongruous with his evidence that it is impossible to believe that what he says is true. Therefore, subsequent conduct cannot be the sole test of the reliability of a witness."

The mere fact of relationship far from being the foundation for criticism of the evidence is often a sure guarantee of truth (Mahinder Singh and another Vs. State of Haryana 1992 (2) Crimes 347 (348). Even if the eye-witnesses of occurrence are the kith and kin of the deceased but when they are found to have given a truthful version of the whole incident there is no ground to reject their testimony (Krishna Ram and others vs. State of Rajasthan 1992 (3) Crimes 277). In a murder case it would be

wrong to reject the evidence of witnesses on the ground that they were all related to the deceased. Close relatives of the deceased would normally be most reluctant to spare the real assailants and falsely mention the names of other persons (1974 CrLJ 709 SC; 1973 CrLJ 1596 SC; 1977 CrLJ 273 SC). Though evidence of interested such as members of the family of affected persons, ordinarily requries independent corroboration, but in cases where there is obvious reason for non-availability of disinterested witnesses,the evidence of interested but competent witnesses may be relied upon (State Vs. Fazal (1987) 39 DLR (AD) 166). The mere fact that a witness was a classmate of the victim was not a sufficient ground to throw out his testimony particularly when he was a common friend of both the victim and the accused (1983 CrLJ 1638 SC). The mere interestedness of the witnesses owing to their relationship with the deceased or their antecedents of a questionable nature will not be a valid ground to reject their evidence. In such cases, all that is necessary is to scrutinise their evidence with more than ordinary care and circumspection with reference to the role assigned to each of the accused (1981 CrLJ 410 SC). Simply on the score that the deceased was related to be eye witnesses or previously there were some disputes between the appellant and the eye witnesses, their testimony cannot be discarded if the testimony is otherwise convincing and stood corroborated by other facts established by prosecution (Lakhwinder Singh Vs. State of Punjab 1992 (3) Crimes 536). Rule of prudence requires that there should be some independent corroboration of the evidence of interested witnesses so as to inspire confidence in the mind of the Court. This is more so when bitter enmity exists between the parties (Abdul Latif Vs. The State (1994) 14 BLD 94).

31. **Conviction on the evidence of solitary witness** Conviction can be based ont he sole testimony of a witness if it appears to be truthful (Biswambar Meher V. State of Orissa 1988 (2) Crimes 293 Cal). Acceptability of evidence and not numerological sufficiency of witnesses is material. Conviction can be maintained on basis of evidence of sole witness. Held, mere non-examination of some persons would not affect credibility of prosecution case (1993 CrLJ 378 Ori). It is settled law that corroboration is not a rule of law, but one of caution as an assurance. The conviction could be made on the basis of the testimony of a solitary witness. The occasion for the presence at the time of orrurrence, opportunity to witness the crime, the normal conduct of the witness after the incident, the nearness of the witness to the victim, his predisposition towards the accused, are some of the circumstances to be kept in view to weigh and accept the ocular evidence of a witness. It is not the quantum of the evidence but its quality and credibility of the witness that lends assurance to the Court for acceptance (Malkiat Singh and others. Vs. State of Punjab 1991(2) Crimes 191 SC). Conviction can be based on testimony of a single eye witness provided his testimony is found reliable and inspires confidence (Anil Phukan vs. State of assam 1993 (1) Crimes 1180 SC). Even on the solitary statement of a witness an order of conviction can be maintained but that statement must be above board free from any doubt (Kripa Shankar Mahto @ Jitu Mahto vs. State of Bihar 1988 (1) Crimes 32 pat).

As a general rule Court can and may act on the testimony of a single witness though uncorroborated, that unless corroborationis insisted upon by statute the Court should not insist upon corroboration except in cases where the nature of testimony of a single witness itself requries the same as a rule of prudence e.g. in the case of a child witness or a witness in a position analogous to that whether corroboration of a single witness is or is nOt necessary must depend upon the facts and circumstances of each case. There may be three classes of witnesses, viz. (a) wholly reliable, (b) wholly unreliable and (c) neither wholly reliable nor wholly unreliable. The question of corroboration arises only in case of the witnesses of the

last category in which the Court is called upon to be circumspect (1957 CrLJ 1000; AIR SC 614). Witness when is neither reliable nor unreliable, it needs corroboration. Conviction on the testimony of solitary witness is legal if he is whooly reliable (AIR 1973 SC 994; 1973 CrLJ 687).

Conviction can be safely be based on the solitary evidence of an eye-witness (Abdul Hai Sikdar Vs. State 43 (1991) DLR (AD) 95). Conviction can be based on the basis of the evidence of a single witness of quality believed by Court and found wholly reliable (1991 BLD 11; 38 DLR (AD) 311; 29 DLR (SC) 211).

It is true that it is the quality and not the quantity that has to be seen in the evidence. Even on the basis of the evidence of a single witness conviction of an accused can be maintained provided that single prosecution witness is to be wholly and fully reliable (1991 BLD 70; 29 DLR (SC) 211 and 1984 BCR (AD) 114 relied on).

Conviction can be based on the solitary testimony of an eye-witness provided it is of sterling worth and does not suffer from any infirmity (Ranveer and others vs. State of Rajasthan 1991 (2) Crimes 538 Raj). But it is not safe to convict an accused on the charges like murder upon the evidence of uncorrobroated testimony of the approver (Abdus satter vs. Union territory Chandigarh (1985 Suppl.) S.C.C. 599). Conviction under section 302, Penal Code cannot be based on the uncorrobroated solitary testimony of an eye witness particularly where such witness happens to be closely related to the deceased and has an interest adverse to that of the acucsed (Bibhison @ Mutru Mahanta Vs. State 1988 (2) Crimes 534 Ori; (1993) 45 DLR (AD) 140).

It is true that the Court can act on the testimony of a single witness, though uncorroborated, but the matter depends upon the circumstances of each case and the quality of the evidence of the single witness (Nagaji vs. State of Rajasthan 1988 (1) Crimes 371 raj).

Conviction under section 302, Penal Code, 1860 can be made on the testimony of a single witness if it is straight forward, cogent and trustworthy considering the facts and circumstances of the case (Vahula Bhushan @ Vahuna Krishan Vs. State of Tamil Nadu 1989 (1) Crimes 183 SC). Conviction can be based on the sole testimony of a witness if it appears to be truthful (Biswambar Meher vs. State of Orissa 1988 (2) Crimes 293 cal). Even if one prosecuton witness is fully reliable then conviction of an accused can be based upon his evidence (Shadat Ali vs The State 44 DLR 217).

In the case of Abdul Hai Sikder Vs. The state, 1992 BLD (AD) 180, the conviction was based on the solitary evidence of the informant who was an eye witness. In th ecase of Yusuf vs. Appellate Tribunal 29 DLR (SC) 211, conviction was based on the testimony of the complainant. Sole reliance had been placed by the special Tribunal as well as by the appellate Tribunal having been convinced with the veracity of the complainant and they had found the case proved and the Supreme Court upheld the sentence imposed under secton 392 penal Code.

Conviction can be safely based on the solitary evidence of eye witness, if his evidence is full, complete and self contained (43 DLR (AD) 95; 43 DLR (AD) 234; 1993 CrLJ 187 SC).

In a Rajasthan case the principle was stated that in murder case conviction on a single witness may be based. But where the murder took place in a dark night and the only witness, a pregnant woman was suffering from night blindness, the Court refused to convict him on such single witness evidence (1980 CrLJ NOC 112 Raj). In AIR 1983 SC 810, the victim and his wife had been staying in a hut and were keeping vigil over the water melons grown by them. In the evening the four accused

persons were alleged to hav entered the hut and axed the victim to death. There was no other living being in the vicinity except the wife of the victim who deposed about the occurrence. But, the prosecution suffered from two broad infirmities namely delay in lodging FIR, the cause of delay being sought to be explained by different witnesses differently, secondly, withholding of the first complaint to police. The Supreme Court refused to convict the accused on the solitary testimony of the victim's widow.

The Indian Supreme Court in another case held that in appreciating the evidence for prosecution in criminal case for the purpose of seeing if the prosecution stands or not the question in each case is whether the witness is truthful or not or whether there is any doubt as to his veracity in any particular matter he deposes. When the evidence of the witness is found to be partly truthful or to spring from tainted source, the Court is to ask for corroboration (AIR 1985 SC 1092; 1985 CrLJ 1357).

The Indian Supreme Court in another case declined to convict on the lone evidence of the uncle of the deceased Afgan who was stabbed to death by a creditor who was allegedly refused to be advance further loan. The uncle witness said in evidence that he knew the accused from before but in cross examination it transpired that he did not know where the accused lived and that he had never talked with the accused (AIR 1986 SC 313; 1985 CrLJ 1921).

The Indian Supreme Court reiterated that plurality of witness is not needed. But unless the lone eye witness is reliable Court should look for corroboration. But it is better to remember that corroboration is not needed in every case and even in murder case conviction may be based on the testimony of a single reliable witness (AIR 1957 SC 614; 1957 CrLJ 1000).

Court is not precluded from basing conviction on the evidence of sole witness. What is material is not quantity but quality, so when such evidence of the sole witness suffers from infirmaties corroboration is asked for (1973 CrLJ 481). Conviction on solitary eye witness unreliable is not permissible (1984 Raj LR 285). Evidence of a witness whose testimony suffers from infirmities does not become reliable by being corroborated (AIR 1976 SC 989; 1976 CrLJ 717).

It is well settled law that a conviction may be based only on the sole testimony of a single witness, if believed, and mere interestedness is no ground to reject the testimony of a witness, if otherwise the testimony is free from doubt. It is equally settled that when a conviction rests on the testimony of a single witness who is interested and partisan in nature, the Court, apart from requiring corroboration of the said testimony, as a rule, subjects the same to maximum closest scrutiny (Abu Taher Choudhury V State 1991 BLD (AD) 2=(1992) 42 DLR (AD) 253).

32. **Approver**.- The appreciation of an approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witnesses and that is a test which is common to all witnesses. If this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. This test is special to the cases of weak or tainted evidence like that of the approver (Sarwan singh V. State of Punjab, AIR 1957 SC 37 = (1957) 58 Cr LJ 1014; State of Bihar V, Srilal, AIR 1960 Pat 459= (1960) 61 Cr LJ 1360)

An approver is undoubtedly a competent witness under the Evidence Act. His evidence, however, cannot be acted upon as a rule of prudence unless it is corroborated in material particulars by other independent evidence. the reason for this caution is that the approver has participated in the commission of the offence himself. such imdependent corroboration need not cover the whole of the

prosecution story. It would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details. In such a case corroboration does not afford the necessary assurance for the conviction (PLD 1959 Kar 662).

Ordinarily an apporver's statement has to be corroborated in material particulars bridging closely the distance between the crime and the criminal. Certain clinching features of involvement disclosed directly to an accused, if reliable, by the touchstone of other independent reliable evidence, would give the needed assurance for acceptance of his testimony (AIR 1975 SC 856).

There can be no doubt that the very fact that the approver has participated in the commission of the offence introduces a serious taint in his evidence and Courts are naturally relevant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence. It would not however, be brought to expect that such independent corroboration should cover the whole of the prosecution case or even all the material particulars of the prosecution case. If such a view is adopted it will render the evidence of the accomplice wholly superflous. On the other hand, it will not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details because in such a case corroboration does not afford the necesssary assurance that the main story disclosed by the approver can be reasonable and safely accepted as true. It is well settled that the appreciation of approver's evidence has to satisfy a double test. His evidence must show that he is reliable witness and that is a test which is common to all the witnesses. If this test is satisfied, the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration (Piara Singh V. State of Punjab. (1969) 1 SC 379: 1969 Cr LJ 1435: 1969 SCD 919= (1969) 2 SCJ 378= (1969) 2 SCA 318= 1969 MLJ (Cr) 871=AIR 1969 SC 961).

It is not legally correct so say that before reliance can be placed upon the evidence of the approver it must appear that he is a penitent witness. Whether the evidence of the approver should in any given case be accepted or not will have to be determined by applying the usual tests such as the probability of the truth of what he had deposed to, the circumstances in which he had come to give evidence, whether he has made a full and complete disclosure, whether the evidence is merely self-exculpatory and so on and so forth. The Court, had in addition, to ascertain whether his evidence has been corroborated sufficiently in material particulars. what is nesseary to consider is whether applying all these tests the evidence of the approver should be acted upon (State of Andhra Pradesh V. cheemalapati Ganeswara Rao, A.I.R. 1963 A.C. 1850 (1872)= (1962) 2 Cr LJ 671.

It is a rule of practice, which has acquired the sanctity of a rule of law, that no conviction should be based on the testimony of an approver unless it is corroborated in material particulars by independent evidence connecting each culprits with commission of crime (22 DLR (SC) 106 = PLD 1970 SC 166; AIR 1934 Lah 346). The reason for the rule is obvisous. There is always danger of substitution of the guilty by the innocent in such cases and it is realised that it would be extremely risky to act upon the statement of a self- confessed criminal who while trying to save his own skin, might be unscrupulous enough to accept suggestions of others to inculpate a person unconnected with the crime in plea of his real accomplice for whom he may have a soft corner (22 DLR (SC) 106 = PLD 1970 SC 166: 20 DLR (SC) 49 = PLD 1967 SC 545).

In Lechhi Ram V. State of Punjab (1067) 1 SCR 143: AIR 1967 SC 792), It was said that the first test of reliability of approver and accomlice evidence was for the Court to be satisfied that there was nothing inherently improbable in evidence. After that conclusion is reached as to reliability, corrboration is required. The rule as to

corroboration is based on the reasoning that there must be sufficient corroborative evidence in material particulars to connect the accused with the crime (Seshanna Bhumanna V. State of Maharashtra., 1970 Cr LJ 1158: 1970 Ker LJ 669: AIR 1970 SC 1330).As to corroboration however the matter was explained in the case of Major E.G. Barsoy Vs. State (AIR 1961 SC 1762 (1780), and the Indian Supreme Court held that it is not at all meant that the evidene of an approver and the corroborating pieces of evidence should be treated in two different compartments, that is to say, the courts shall have first to consider the evidence of the approver de hors the corroborated pieces of evidence and reject it if it comes to the conclusion that his evidence is unreliable, but if it comes to the conclusion that it is reliable then it will have to consider whether that evidence is corroborated by any other evidence. The Supreme Court held that that would not be the correct way to appreciate the approver's evidence. In fact in most of the cases the said two aspects would be so interconnected that it would not be possible to give a separate treatment, for as often as not, the reliability of approver's evidence, though not exclusively, would mostly depend upon the corroborative support it derives from other unimpeachable pieces of evidence.

In state of Andhra Pradesh V. Ganeshwara Rao (AIR 1963 SC 1850 (1872)= (1963) 2 Cr LJ 671), it was held that there is no warrant for the view that before reliance can be placed upon the evidence of an approver it must appear that he is a penitent witnesses. This is not the correct legal position. Secion 306 (S. 337 in Bangladesh) Cr P. C. itself shows that the motivating factor for an approver to turn, what in England is called "king's evidence " is the hope of pardon and not any noble sentiment like contrition at the evil in which he has participated. Whether the evidence of the approver in any given case be accepted or not will have to be determined by applying the usual tests such as the probability of the truth of what deposed to, the circumstances in which he has come to give evidence, whether he has made a full and complete disclosure, whether his evidence is merely self-exculpatory and so on and so forth.The Court has in addition to ascertain whether his evidence has been corroborated sufficiently in material particulars.

33. **Delay in recording statements of witnesses-effect of-** In a murder case the investigating officer should record the statements of material eyes - witnesses promptly. Unjustified and unexplained delay in recording such statements may render their evidence unworthy of reliance (1971 Cr LJ (SC 670). Unusual delay in recording statement may cause suspicion when it is not explained (1971 Cr LJ 1610; 1973 SCC (Cri) 676).Delay in the examination of an eye-witness by the police renders his reliability doubtful (Khalid Zaman Vs. State 1992 PCrLJ 2289). If considerable delay occurs in recording statement of a witness under section 161, Cr.P.C. which is not satisfactorily explained then it would be open to adverse inference that delay was used to bring statement of that witness in line with prosecution case. Evidence of such witness cannot be given sanctity as is generally given to evidence of a witness whose statement is recorded promptly without delay (Bakhshal Vs. State 1990 PCrLJ 1).

The examination of prosecution witness under section 161 Cr.P.C. after a considerable lapse of time casts a serious doubt on the prosecution story (Moinulla V. state 40 DLR 443; relied on 1987 BLD (AD) 1). The delay in examining the material witness casts a doubt on the whole prosecution case (BCR 1986 AD 225). But delay in recording statement of eye-witnesses does not amount to serious infirmity unless it is deliberate (1993 CrLJ 1090). Whether she had slept in the hut in the relevant night, her claim of recognition of an assilant can not be relied upon in view of the broad fact that her statement which could have been recorded on the day following

the incident was recorded after 34 days (38 DLR (AD) 311) (326 Para 43) = BLD 1987 AD 1). Statements of witness recorded under section 161 Cr.P.C. after 11 days i.e. , after unusual and inordinate dely without any explanation and in such circumstances, the weight of evidence of the witness concerned is liable to be seriously affected and diminished (Haji Md. Zamaluddin vs State, 1994 BLD 33; 21 DLR (SC) 88; 1986 BLD 34(42) ; 1982 BCR 332; Zafar Vs. State, 1994 BLD 280).

Unexplained long delay on the part of the investigating officer in recording the statement of a material witness during the investigation of a murder will render the evidence of such witness unreliable (1973 Cr.L.J. 1301 (1306 (Mad).If prosecution witnesses available to the police are not examined for a long time, the defence has a legitimate argument to advance that these witness have been planted as eye-witnesses subsequently (1983) 2 Crimes 868). Precedence must be given to the examination of available eye-witnesses over the evidene of other witnesses (1982 Raj. Cr.C .54).

It has been observed in the case of Habibullah Vs. State reported in (21 DLR (SC) 88) that belated statement of a witness under section 161 Cr.P.C. should not be given any credit.

There was inordinate delay in recording the witness"s statement (on the basis of which the ' FIR" was registered) and further delay in recording the statements of the eye witnesses of the occurrence. It was held that the prosecution story was conceived and constructed after a good deal of deliberation and delay in a shady setting, highly redolent of doubt and suspicion (1978 Cr .L.R. 632 (642).

In the case of state Vs. Mokbul hussain (1986 BLD 34), the evidence of a witness was left out of considerstion because he was examined by the I. O. after $1\frac{1}{2}$ month of FIR. In1982 BCR 332, the statement under section 161 Cr.P.C. of the witness was recorded after 23 days and the Court excluded the evidence from consideration.

An unexplained delay in recording a witness statement under Section 161, criminal Procedure Code, may be fatal to the prosecution case (Shree Ran Sharama & ors. V. State of U.P. 1989 (3) Crimes 456 (All).

The Information about the murder was lodged earlier before the police. The first Information Report was against unknown. But the recovery of the dead body was there rather much earlier to the examination of P.W. 10. The police were moving in the village making enquires. But the disclosure of the incident came only through the mouth of P.W. 10 after six or seven days of the incident . This long delay of seven days creates reasonable doubt whether this witness really saw any incident or was promped to tell a tale on some consideration other than the truth. If the proper explanation of this long delay in disclosing the incident is not coming forth and if the reasons assigned for such a long silence are not convincing it would not normally be safe to accept the testimony of such a dubious witness. P.W. 10 appears to be a witness of that character (1946 Cr.L.J. 1226 (1227) (Pat.)

The evidence of two witnesses were rejected by the appellate Courts as they did not disclose the story to any body including the I.O. until after 20 days of the incident (State V. Abdur Rashid; 40 DLR (AD) 106) Witnesses were the victims who have suffered serious injuries.Their evidence found to be clear, cogent, convincing and truthful. delay in their examination by police would not affect their evidence (Paresh Kakyandas Bhashar V. Sadig Yakubbhai; AIR 1993 SC 1544). But where the witness disclosed the incident of murder to the police after seven days for which there was no explanation. His testimony can not be accepted (1986 Cr LJ 1226).

Solitery eye-witnesses was examined by the police 13 days after the incident and no reasonable explanation could be offered for this delay. No reliance can be placed upon the statement of this witness (AIR 1980 SC 1199= 1980 CLJ 921). when the witness was examined by the police 1 months after the incident. the delay has got to be explained (AIR 1980 SC 1750= 1980 Cr .LJ 1269).

The fact of delayed examination of the witness should be put to the investgating officer so as to enable him to explain the undue delay, if any, in examining the witness. The question of delay in examining a witness during investigation is material only if it is indicative and suggestive of some unfair practice by the investigatiing agency for the purpose of introducing a witness to falsely support the prosecution case. It is, therefore, essential, that the investigating oficer should be asked specifically about the delay and the reasons therefor (A.I.R. 1973 S.C. 1409)(1412) = 1973 Cr. L.J.1120).

Delay by itself in recording the statements cannot be a sole criteria to disbelieve all such eye- witness if reasonable explanations have been given for not appearing before the police or for not recording their statement (State of Bihar V Nepal Mahto and others 1988 (1) Crimes 565 (Pat).

Ordinarily, if eye-witnesses were named in F.I.R. investigating agency happened to record their statements after lapse of some time, this would not possibly make such eye-witnesses unreliable (1988 SCMR 39). But where investigating officer had recorded statements of other eye-witness and had completed almost all important aspects of investigating on the very first day. No satisfactory explanation was forth coming about non-recording of statement of some eye-witnesses on the first day. Inference that could be drawn was that those eye-witnesses were not available on first day and had not witnessed the occurence (1986 P Cr. LJ 1940).

It is not in dispute that the eye witness should be examined at the earliest but delay of few hours, simpliciter , in recording the statements of eye witness may not by itself, amount to a serious infirmity. Furthermore, unless the I.O is asked specifically about the delay and reasons for delay and not recording statement of witness , the F.I.R. and the evidence of a witness can not be brushd aside merely on the ground of delay (1993 CrLJ 2413 (Raj). Witness victims who have suffered serious injuries their evidence found to be clear, cogent, convincing and truthful, delay in their examination by police would not affeet their evidence (1993 Cr LJ 1857 (SC).

Evidence of witnesses of dying declaration can not be rejected on the ground of delay when they were frantically busy to save the life of deceased (1993 Cr LJ 984 (Orissa). The mere delay in recording the statement of prosecution witnesses which is undoubtedly a lapse on the part of the investigating officer will not render out right rejection of the prosecution evidence (AIR 1988 SC 912= 1988 CrLJ 936 (938). Where the witnesses were victims and have suffered serious injuries and their evidence found to be clear, cogent, convincing and truthful. Delay in their examination by police did not affect their evidence (1993 CrLJ 1857 SC).

An eye-witness who keeps silent after having seen the incident ought not to be relied upon (PLD 1984 (AJ & K) 30· 1974. PCrLJ 400). However, examination of witnesses on third day of occurrence and their belated appearance at police station was not fatal to prosecution in a case where conduct of investigating agency was highly unfair and every effort was made to put investigation on wrong lines for benefit of the accused named in FIR (NLR 1984 Cr 260). The mere delay in

recording the statement of prosecution witness which is undoubtedly a lapse on the part of the investigation officer will not render outright rejection of the prosecution evidence (1988 CrLJ 936(938) (SC) = AIR 1988 SC 912).

A witness should not be presumed to be false merely because he was examined by the investigating officer some days after the occurrence (1957 CrLJ 240(241) (1984) 2 Crimes 854 (P&H).

Evidence of witness does not become untrustworthy merely because he was examined after delay by the investigating officer (AIR 1973 SC 1409 = 1973 CrLJ 1120). Where the identity of the accused was not known, the mere fact that there was a delay of one day in the recording of evidence of the witnesses would not throw any doubt on the fact of their presence at the place of occurrence (1968 SCMR 161).

It cannot laid down as rule of general application that whenever there is delay in examination of a witness it becomes vulnerable but Court looks for plausible explanation for such delay (Mandei Kalla V. state 1992 (3) Crimes 261).

Delay of a few hours in recording statements of eye-witnesses may not amount to a serious infirmity but inordinate delay cast a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story (Ganesh bhavan, AIR 1979 SC 135; Atmaduddin, AIR 1974 SC 1901). But the delay of a few hours by itself in recording the statements of the informant does not amount to serious infirmity unless there are material to suggest or indicate that investigating agencey had delibrately delayed in recording the statements to afford an opportunity to the maker to set up a case of his own choice (1993 Cr LJ 1090; AIR 1973 SC 1409 = 1973 Cr LJ 1120 Foll).

The examination of prosecutin witness under section 161 Cr. P.C. after a considerable lapse of time casts a serious doubt on the prosecution story (40 DLR 443 (relied on 1937 BLD (AD) 1).

The delay in examining the material witness cast a doubt on the whole prosecution case (BCR 1986 AD 225). In the case of Muslim Uddin Vs. State (38 DLR (AD) 311 (325) = BLD 1987 AD1), P.W 3 married daughter of the deceased claimed to have stayed in the hut of occurrence in the relevant night and recognised accused Muslimuddin. Her evidence was excluded from consideration on the ground of belated examination. The Supreme Court held, "whether she had slept in the hut in the relevant night, her claim of recognition of an ossailant cannot be relied upon in view of the broad fact that her statement which could have been recorded on the day following the incident was recorded after 34 days"

It is not in dispute that the eye-witness should be examined at the earliest but delay of a few hours simpliciter, in recording the statements of eye-witnesses may not by itself, amount to a serious infirmity. Therefore, it cannot be said that the delay was caused deliberately with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced. Further more, it has not been put to the I. O. during his cross-examination. As such, the contention of the counsel form the apellants has not substance and he cannot derive any benefit out of the case cited by him (Aidan Vs. State of Rajasthan, 1993, Cr Lj 2413 (Raj).

There could not be any hard and fast rule as to the time limit during which the Investigating officer should record the statement of material eye-witnesses. Each case, would depend upon its own facts and circumstances (Joha Khoda Rabari V. State of Gujarat, 1992 Cr LJ 3298 (3343) (Guj).

34. **Belated disclosure.**— There is a large number of authorities laying down the principle that if an eye witness to a murder does not voluntarily disclose the fact for

a long time and keeps mum until his statement is recorded by the police and he does not offer satisfactory explanation for his silence, his evidence should be viewed with suspicion (Rayulappalli Kodaiah and others V. State of Andhra Pradesh AIR 1975 SC 216; Bhagwan and another V. State of Madhya Pradesh AIR 1980 SC 1750; Sonia Behera V.State of Orissa 56 (1984) CLT 311; Chudiamal Jain and another V. State of Orissa 57 (1984) CLT 81, State of Orissa V. Brahmananda Nanda AIR 1976 SC 1488).

Eye-withness when do not disclose to any one the name of the author of the crime, but disclose it belatedly during investigation, it is held that they are to be disbelived (1984 Cr LJ 772 Ori). But in cases rural witness., a night guard found the accused person at 2.30 a.m. with the chopper, the murder-weapon in the hand of one of the accused person who exchanged some conversation with the witness who however did not disclose this fact till he was interrogated by the police, Kerala High Court held that rustic witnesses do not always have the civic sense to report all natters that came to their notice, and the Court refused to discard his evidence as untrustworthy (1985 Cr LJ 114).

Where eye witnesses did not disclose about the details of the occurrence before the Investigating officer and for the first time they disclosed about the facts in their statements under section 164 of the Cr. P.C. after long time. It would be unsafe to place reliance on the evidence of all these witnesses (Ganesh Behara V. State of Orissa; 1990 (1) Crimes 565 (Ori.)

Where the witnesses remained quiet for about six months on the plea that they were threatened by the acused, held, it is unsafe to base conviction on such evidence (AIR 1980 S.C. 102= 1980 Cr.L.J 189).Where the witness did not disclose the incident for 4 months in spite of being questioned by the police many times, his evidence is not worthy of credence (AIR 1980 S.C. 873 = 1980 Cr.L.J. 564).

The fact of a prosecution eye- witness not disclosing the information at the earliest opporunity and remaining silent for two days creates doubt in the prosecution case (State of Karanataks V. Venkatesh & ors. 1992 (1) Crimes 625). A witness professing to know incrimiating circumatances against a person, who is accused of a serious offence like murder, remained silent for about two months regarding it . His statement relating to the incriminating circumstances, in the absence of cogent reason, is bound to lose most of its value (AIR 1973 S.C. 2262= 1973 Cr LJ 1783). Witnesses disclosed assailants name at belated stage. Conviction based on his testimony, held, not proper (AIR 1975 S.C. 856 (862, 863) = 1979 Cr LJ 640). In the state of Orissa V. Brahmananda, AIR 1976 SC 2488 (2489), the non-disclosure of the name of assailant for a day and a half after incident was regarded as a serious infirmity destroying the credibility of the eye-witness.

In Panda Nana V. State of Maharashtra, AIR 1979 SC 697 the explanation of sole eye-witness for his concealing the name of the assilant before the two doctors and the brother of the victim was that as the accused was his sister's husband, he did not want to implicate him and then only later he felt that he should tell the truth. The suprem Court agreed with the trial Court's view 'that even if this version is true the evidence of the witness cannot be acted upon"

For the belated disclosure of the knowledge of the commission of offence if fear or threat is easily accepted as an explanation, particularly in a case punishable by death, then it will endanger administration of criminal justice by opening up opportunities for concoctions and false implications (Abu Taher Chowdhury and others V. The State (1991 BLD (AD) 2 (23)= (1990) 42 DLR (AD) 253).

If an eye-witness to a murder does not voluntarily disclose the fact for a long time and keeps mum until his statement is recorded by the police, the Court should

consider his status, the society in which he lives and the remoteness of the place he comes from, while relying upon his testimony (Biswambar Meher V. State of Orissa 1988(2) Crimes 290 (Ori). In Biswambar meher V. State (Supra) Orissa High Court. Observed;

"In view of this principle , in usual course the evidence of P.W. 2 cannot straight way be accepted without probing into the matter as to why he did not disclose the ghastly incident. It will appear from his own evidence that he had been threatened with dire consequences by the appellant. Seeing the ghastly incident of a brother committing the murder of his younger borther he lost his balance of mind. It was but nature that he was dazed on seeing the murder and the instict of self-preservation for not exposing himself to the danger of being killed by the appellant by announcing the murder immediately after its commission must have been aroused in him. The above apart, the status of P.W. 2 the society in which he lived and the remoteness of the place he comes from have to be considered. He was an illiterate or semi-illiterate wage earner belonging to a small village in a hill area of a backward district of Orissa. It was, therefore, not unnatural on his part to keep quiet and lie low for some time. But he did not keep quiet for long. The occurrence took place on 26. 12. 1981 and he disclosed the incident on 4. 1. 1982 only when he found that even if he disclosed the incident to the I.O. there was no danger to his life. If the area was enlightened, P.W. 2 educated and belonged to the same vilage as P.W.1 some doubt would have been entertained on the aforesaid fact of his evidence. But here, it seems to be a genuine case of fear on account of which it was not possible for P.W.2 to disclose the incident for about eight days. On account of these factors, it would not be legal to view the evidence of p. W. 2 with suspicion and discard it".

Ordinarily, it is always insisted upon that a witness must come forward without any reasonable delay to inform the State agencies of the crime noticed by him. Such an urgency and necessity is considered as a safeguard, in the interest of justice, against any possibility of fabrication, concoction or improvement to rope in any innocent person in the crime. But this rule is not absolute, inflexible and universal, not subject to any exception. This is so, as keeping in view the human conduct in ordinary life, each case has to be considered in the light of its own peculiar facts. The real test for acceptance of the testimony of a witness, irrespective of his rendering information to the police at its earliest or after some delay, rests on its true account. When delay in making statement before the police is accompanied by a satisfactory explanation, it is seldom deemed prudent to reject the testimony merely on account of delay in making statement before the police (State Vs. Noor Ahmad 1991 PCrLJ 2007).

35. **Post mortem examination.**— In order to prove the offence of murder a post mortem examination on the dead body is not absolutely necessary if it can otherwise be proved by credible evidence, even in the absence of the dead body (1973 CrLJ 526).

A post mortem report is not evidence and can only be used by the witness who conducted the post mortem enquiry as an aid to memory (AIR 1935 Mad 349).

The certificate of medical man is, of course, not *per se* admissible, being hearsay evidence. To make it admissible in evidence the author of the certificate must be examined and tendered for cross examination (AIR 1923 Bom 183).

The evidence of a medical expert, particularly of a doctor who had conducted a post mortem examination is a very important piece of evidence in a criminal trial and medical officers who are entrusted with this work should vizualize that it is not a mere formal duty to give evidence in the Courts of law, but the real purpose is that a

doctor should give correct opinion to enable a Court to arrive at a correct decision (1 DLR (WP) 5 DB; PLD 1968 Lah 1344).

Medical evidence of the doctor who held post mortem examination being corroborative of the other incriminating evidence relating to cause of death of deceased.the Court is at liberty to come to a finding regarding the cause of death on the basis of such other evidence (1985 BLD 202). Merely doctor's mentioning the injuries to be incised wounds and not stab wounds does not rule out of their having been caused by a knife (Munawar Hussain Vs. State 1989 PCrLJ 1792). If direct evidence is satisfactory and reliable the same cannot be rejected on hypothetical medical evidence (1984 (1) Crimes 859(860) (SC). The value of medical evidene is really of a corroborative nature which only shows that the injuries could have been caused in the manner as alleged by the eye witness (Abu Taher Chowdhury Vs. State 1991 BLD (AD) 2 = (1990) 42 DLR (AD) 153).

The opinion of a doctor about the time of death by examining the food in the stomach of the deceased, is reliable evidence when it is not in conflict with other evidence in the case (PLD 1969 Kar 33 (DB). But if there is a conflict of evidence, it is impossible to dogmatise about the number of hours which an individual person will take to digest food. This will depend upon various factors, some of which may not be known to the medical man. It is common knowledge that, if food is taken at midnight or thereafter, it is not so easily digested as food taken in the early part of the night. It is also common knowledge that if one is in a perturbed state of mind, one's digestion is disturbed (12 DLR 537); 1991 BLD (AD) 2 = (1990) 42 DLR (AD) 253).

Opinion of a doctor about time of occurrence, is never certain but gnerally conjectural specially when doctor himself used the word 'about' while giving time of occurrence (1983 PCrLJ 2462). The age of an injury cannot be ascertained with any certainty and the error of a few hours is possible eithr way (1972 PCrLJ 107 (DB) Kar; 1980 SCMR 889). But it is difficult to believe that a competent doctor would be wrong in his estainate of probable time of death by seven or eight hours (1980 SCMR 990).

A medical evidence in respect of time of death in a murder case can not be regarded as conclusive. The possibility of error in time factor cannot be eliminated. The time of death can not be pinpointed with mathematical precision, more so after the onset of decomposition and putrefaction (1982 CrLJ 2123 (Delhi);1991 BLD (AD) 2 = (1990) 42 DLR (AD) 253).

Post mortem can reveal the approximate time of death. Non (a) extent of digestion of food in stomach (b) contents of stomach (c) state of food in stomach etc. But they are not reliable tests in determining the time of death (AIR 1975 SC 246; 1974 CrLJ 1257; 1977 SC 1307; 1977 CrLJ 817).

Court should elicit necessary facts from medical witness particular by regarding cause of death and type and nature of injuries (1979 CrLJ (NOC) 49 Punj). Where a particular weapon is stated to be responsible for any particular injury the Court should specifically call upon the medical witness to explain whether or not the alleged weapon caused such injury (AIR 1976 SC 2433; 1979 CrLJ 1883). Where the doctor on oath says that injuries to the victim could not be caused by the weapons produced in the Court and alleged to have been used by the accused, benefit of doubt ought to be given to the accused (1978 CrLJ (NOC) 18 Knt).

In order to prove the offence of mruder a post mortem examination on the dead body is not absolutely necessary if it can otherwise be proved by credible evidence, even in the absence of the dead body (1973 CrLJ 526; 37 (1985) DLR

156).Contention that neither any blood was found at place where deceased was allegedly fired at and done to death nor clothes worne by accused at time of post-mortem examination bore any corresponding cuts of the missile of shot. Held, absence of any cut marks in clothes of deceased would not in any way prove that deceased was not done to death by a fire-arm. Direction of injury sustained by deceased was from upward to below and there was a conflict between investigation and medical evidence. Held, it was possible that missile after entering body might have been deflected by striking with a bone. Such questions being of a trival nature were not of any serious consideration (Fayyaz Ahmad Vs. State 1989 PCrLJ 784).

It is necessary that the chemical examiner should furnish the grounds of his opinion in his report. But if the report has been admitted as the trial without any objection and without any request for his examination in Court, it cannot be ruled out on objection in appeal (1952 R.L.W. 269, 1934 All 873).

In a case of murder by poisoning there should be evidence of identification of every article that is suspected to contain any poison. The evidence should be complete as to the history of such articles, and it should be shown that they were kept in proper custody throughout if they are to be relied on as supporting a conviction, and there should be no possibility of any question being raised as to the identity of any such article (7 Bom. L.R. 640).

In a case of arsenic poisoning it is impossible to take the mere evidence that arsenic was detected as sufficient to prove conclusively death from arsenic poisoning. There ought to be a careful examination of the viscera of the body and an analysis by a competent analyser, as there are common diseases in this country whose symptoms are almost indistinguishable from that of arsenic poisoning. Mere examination of vomit or night-soil is totally insufficient and it would be extremely dangerous to rely upon some traces of arsenic found in either of these two things (AIR 1990 All 532, (533, 534); 1993 ALJ 1405, 31 CrLJ 862).

A post mortem report is no evidence. The doctor may use it to refresh his memory while giving his evidence (AIR 1936 Mad 426; 1979 CrLJ (NOC)49). But if the doctor is dead or cannot be found, section 32(2) of the Evidence Act applied and the report becomes relevant (AIR 1925 All 413; AIR 1953 All 520). The deposition of a medical officer in Court and not his report is evidence. as such a post mortem report is no evidence and no fact can be taken from it straight was in evidence. However, the autopsy surgeon can use it to refresh his memory (6 CWN 98).

The post mortem report speaks of death caused by 'aspohyxia due to throtling' and the autopsy surgeon supported this opinion on oath. Under such circumstances the High Court, in appeal, was not justified in drawing on its own medical knowledge that asphyxia is also possible due to poisoning and that possibilty had not been completely eliminated by the medical evidence including the post-mortem report (AIR 1972 SC 1979; 1972 CrLJ 570). Post-mortem report or injury report, when its genuiness is not disputed becomes evidence without its author being examined (1981 CrLJ 379).

Examination of Medical Expert.— Under section 509A Cr. P.C. the report of the post mortem examination may be used as evidence in the following conditions :- (1) if the medical officer who made the report is dead or (2) if he is incapable of giving evidence or (3) if he is beyond the limits of Bangladesh and his attendance can not be procured without an amount of delay, expense or inconvenience, which, under the circumstances of the case would be unreasonable (37 DLR 156; 1986 BLD 34; 1984 BCR 204).

A doctor, like investiating officr, is also a material witness, as he performs the post mortem examination or examines the injuries of the victims of assault in the

occurrence and so his evidence is also an important one in appreciating the evidence of the eye witnesses. The evidence of the medical men, who during the course of post mortem examination or examination of the injuries of an injured on touching the injuries is a corroborative one. It gives out, on touching the injuires, about the nature of the injuries caused, how caused and by which weapon, time of injuries and duration of injuries, cause of death and such other details which help the Court in appreciating the ocular account of the occurrence or circumstances under which the injuries fatal or otherwise, have been caused. Doctors observatons are opinion of the expert in this branch on that subject. These reports help the investigating officer in the investigation about the cause of death, the nature of injuries, how they were caused, and who might have cause the same. The injury report and post mortem report from part of the police papers and are produced before the Court by the police along with the report of investigation for or against an accused. The value of the report, whether post mortem report injury report, is only corroborative and it only shows as to how the injury was cuased. The accused can use the same to show that the injuries could not have been caused in the manner as alleged by the prosecution. The post mortem report/injury report, can be best judged when the author of the report, i.e. doctor, who has occasion to examine the deceased/injured and prepare his report of opinion, is examined in Court (1993 CrLJ 772 (805). In the instant case the post mortem report (Ext.2) has been brought on record by the Head clerk (P.W.8), the doctor is said to have died and so the report is admissible under section 32 of the Evidence Act. It fully supports and corroborated the ocular testimony. No prejudice or discrepancy or contradiction is there. As such non-examination of the doctor conducting post mortem report was beyond the control of the prosecution and further no demonstrable prejudice is there, so it has no effect upon the prosecution case (1993 CrLJ 772(812).

Where the medical witness is not available his report can not be admitted in evidence without examining the process server (PLD 1972 Lah 661 DB). If after such examination his non-availability is proved the entries made by a doctor can be proved by calling a person who is acquinted with the handwriting of the doctor. If the report is provd to be in the handwriting of the doctor, the Magistrate can, unless he finds anything to discredit the doctor, act on the entries in the doctor's medico-legal reports. The reports of the doctor brought on the record as evidence in this fashion can not be treated as the statement of the doctor for the purpose of section 509. Where the evidence of the doctor was read over in open Court and admitted in evidence, and transferred to sessions file under section 509 Cr. P.C. without any objection from the defence counsel or nay rquest from him to summon the doctor, even in appeal before the High Court no objection was taken to such admission of the doctor's evidence, the objection was not entertained when taken before the Supreme Court for the first time (1971 SCMR 482).

Section 509A has been inserted in the Code of Criminal Procedure by secton 31 of Ordinance No. XXIV of 1982. From reading section 509A of the Cr. P.C. it becomes clear that post mortem report is an admissible evidence only when the following requirments are satisfied i.e. to say (i) if the medical officer who made the report is dead (ii) or he is incapable of giving evidence (iii) or if he is beyond the limits of Bangladesh and his attendance can not be procured without any amount of delay, expense or inconvenience which under the circumstances of the case, would be unreasonable (40 DLR 177; 1988 BCR 174 relied on 37 DLR 156).

A mere application on behalf of prosecution was filed that whereabouts of the doctor could not be traced out but no evidence was led to support that contention. The report can not be used as evidence wthout proper proof that the attendance of the doctor can not be procured (1985 BLD 2020).

In State Vs. Mokbul Hussain, the Assistant Public Prosecutor filed an application to the effect that the doctor, who held post mortem examination, was not available and on being satisfied the leanred Additional Sessions Judge admitted the P.M. report. It was held that the application of the Assistant Public Prosecutor could not be a substitute for legal evidence. This information does not fulfil any of the three conditions laid down in section 509A of the Cr. P.C. (37 DLR 156; 1986 BLD 34; 1984 BCR 204).

In Md. Ali Haider and others. Vs. State the Trial Court admitted the post mortem report on record and marked it Ext. 13 without examining the doctor who held, "the post mortem examination on the dead body. The High Court Division held that the post mortem report has been admitted into evidence in utter violation of the mandatory provision contained in section 509A, Cr. P.C. It is a new section. Its provision is in the nature of exception and the onus of establishing circumstances that could bring the post mortem report within any of exceptions contemplated by this section lies squarely on the prosecution. It is obligatory on the part of prosecution to prove affirmatively that maker of the report is dead, or that he can not be found within Bangladesh or that he can not be called and produced as a witness without unreasonable delay or expense. In a murder case application of this section must be confined within narrowest limit. The Court must insist on strict proof of condition requisite for admitting post mortem report in evidence. Since the doctor who held post mortem is a natural witness and as such all efforts ought to have been made to examine doctor during trial. Provision of this section should be resorted to in cases of delay and excuses. In the instant case no evidence has been led by prosecution to prove that the doctor who held post mortem examination on five dead bodies is dead or incapable of giving evidence and that his evidence can not be procured without delay or expense. In other words none of the condition requisite for admitting post mortem report into evidence has been proved and as such post mortem report ought not to have been admitted into evidence and marked Ext. 13 by the Trial Court" (40 DLR 97 (104).

Under section 510 Cr. P.C. the report of any chemical examiner, any serologist, handwriting expert,finger print expert or fire arm may be used as evidence in any inquiry, trial or other proceeding under the Code of Criminal Procedure without calling the expert as a witness (AIR 1954 SC 1; 1954 SCJ 612).

The report of the post mortem examination was neither produced by the doctor who had held the post mortem examination nor the doctor was examined as a witness in the trial. While producing the report PW 7, an investigating officer, had shown no cause explaining the circumstances under which the doctor could not be produced in Court. The doctor's presence could be dispensed with only when he is reported to be dead or incapable of giving evidence or is beyond the limits of the country and his attendance cannot be proccured without an amount of delay, expense or inconvenience. In that view the post mortem report has been used as evidence illegally and the same must be excluded from consideration (Tariq Habibullah Vs. The State 43 DLR (1991) 440).

In view of the decisions reported in 40 DLR 93; 37 DLR 157 and the settled principles on the question of admission of a post mortem report in evidence without examining the doctor who made the same, here, of course Dr. Sunil Kumar sarker who admittedly held the post mortem report examination and was very well within this country and serving at the Brahmanbaria Hospital at the relevant time, without fulfilling the conditions as required under section 509A, Cr. P.C. the post mortem report produced in this case appears to be inadmissible in evidence and as such the Trial Court committed an error of law in considering and relying upon the same

while assessing the prosecution case and passing the impugned order of conviction and sentence (1991 BLD 240(254) para 53). Post mortem report although excluded from consideration while dealing with the prosecution case due to its having been brought on record without compliance of the provision of section 509A, the defence could very well use and refer to any portion of the report for its own purpose and for assisting the Court in reaching its decision (Tariq Habibullah Vs. The state 43 DLR (1991) 440).

36. **Ballistic expert's evidence.**— It is possible for experts in the science ballistics to trace a bullet or cartridge to the particular weapon from it was fired. Evidence of the ballistic expart that cartridge could not have been fired through any other firearm because every firing pin, firing pin scrape, and breech. face mark had its own individuality, could be relied upon (AIR 1977 SC 349).

There is no general proposition that in every case where firearm is alleged to have been used by the accused, in addition to the direct evidence, the prosecution must lead evidence of a ballistic expart, however good the direct evidence may be and though on the record there may be no reason to doubt the said direct evidence. Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused with gun and the *prima facie* appear to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or cases the examination of a ballistic expert is essential for the proof of the prosecution case, must naturally depend upon the circumstances of each case (AIR 1963 SC 340= (1963) 1 CrLJ 323). Where in spite of the proseuciton case that the accused shot the victim with a gun, but it seems more likely that the injuries were caused by a rifle and that too by more than one person, and there was other infirmities in the evidence, the evidence of a ballistic expert is necessary to settle the controversy (AIR 1953 SC 415).

Though the evidence of ballistic expert has corroborative value, it alone cannot be made the basis of conviction (PLD 1964 (WP) Pesh 59; PLR 1964 (2) WP 968 (DB). Where expert evidence showed that the guns recovered from the accused were the same from which cartidges found at the place of occurrence were fired. It was held that the mere recovery of a gun from which some of the empty cartidge cases found at the spot appeared to have been fired, does not prove that the accused had fired the shots (NLR 1979 Cr. 27 DB; PLD 1954 Lah 179; PLR 1954 Lah 243). But where the ballistic expert stated that empties recovered from the scene of the crime matched the gun of the accused. The statement was sufficient corroboration of ocular evidence (1974 SCMR 209).

The practice of the prosecution of sending crime shells to the ballistice expert and then withholding his report, is to be strongly deprecated in that it is the duty of the prosecution to produce all the material evidence of an independent nature, like that of the ballistic expert (PLD 1962 (WP) Lah 380(DB). Where that was done evidence of recoveries was of no consequence and was rejected (NLR 1984 CR. 173; 1984 PCrLJ 3231 (DB). Where the gun and pellets and cartridges used in the commission of the offence were all sent to the expert but the expert was not examined; it was still have been the duty of the prosecution to place his evidence before the Court. On the other hand, if the report of the expert was in favour fo the prosecution, the prosecution had gravely prejudiced their case by not examining him, and the appeal of the accused against his conviction was accepted (1968 PCrLJ 321).

Ballistic Expert on microscopic examination found similarties between crimes empty and test empty on as many as ten counts. Mere fact that no photographs were

not taken by him of either is of no significance (1970 PCRLJ 987; 1970 SCMR 450). Evidence of fire Arms Expert finding crime empty fired from pistol exhibitted, ever if convincing, not by itself sufficient to warrant conviction of accused on murder charge unless corroborated by other evidence (1975 PCRLJ 787).

Where the victims were killed by gun shot wounds but the prosecution case was not that the wounds were caused by the revolver which was recovered held; that there was no need to examine any ballistic expert (AIR 1963 SC 612).

In these days the technique of firearm identification has greatly advanced and the experts can use sophisticated equipments in their laboratories. accordingly, a heavy responsibility falls on the shoulders of the ballistic experts in the matter of assisting the CCourt by providing corroborative evidence by matching the crime bullets, cartridge etc, with the weapons allegedly used in the commission of the crime. He has to discharge this onerous duty not merely by a report in either way but has to effectively demonstrate in a convenient manner the reasons on which his opinion is based. As a part of his demonstration the modern expert takes the assistance of pohotographs to highlight the important aspects of his opinion by properly enlarged and juxtaposed photographs and charts (1977 CrLJ (NOC) 57).

The report of a ballistic expert is after all an opinion which can be fallible and is not immune from judicial scrutiny (1985 PCrLJ 2217). It is reliable only if all necessary precautions have been taken before reliable Mashirs. Crime empties are sealed and not tampered with or substituted by police and sent to ballistic expert in the same condition in which they were secured (1984 PCrLJ 2343 DB). Where report of ballistic expert was highly defective inasmuch as it was not written on prescribed form, and did neither show as to when crime empty and crime weapon were received in his office, nor contained reasons for his opinion. The report must be kept out of consideration by the Court (1985 PCrLJ 2217).

Where the gun and empties were sent together to the Forensic Science Laboratory, the report of ballistic expert has no evidentiary value (KLR 1987 Cr. C. 373; PLJ 1987 Cr.C. 457; PLD 1987 Lah 505; 1986 PCrLJ 2007 DB; NLR 1984 UC 560; 1984 PCrLJ 2523 DB; 1974 PCrLJ 586 (DB). It would need super-human ability to come to a conclusion about injury caused by a gun fire without seeing the injury but by merely looking at the description of the injuries or even the photographs given by the doctors (AIR 1975 SC 2161). Unless there are rifling marks in the bullets and which were not defaced by the entry in the bodies of the victim, no expert can ordinarily and generally give any opinion (AIR 1976 SC 2474).

Ballistic expert when states he compared the land and groove markings on the bullets under a comparison miscroscope, his evidence cannot be rejected simply because he thought it unnecessary to take photographs (AIR 1978 SC 1204; 1978 CrLJ 1137). In a gunshot injury, the exit wound would be smaller than entry wound (AIR 1979 SC 391; 1979 CrLJ 323). Forensic report when is made over to Court two days after commencement of trial indicating that the accused could not have fired the shot that caused death, it is held that the accused must be acquitted (1981 CrLJ 466 (SC).

The opinion of the ballistic expert has only a corroborative value and a conviction cannot be based solely on such evidence (1969 PCrLJ 588 DB; PLD 1964 Pesh 59). This was particularly so where expert evidence showed that the guns recovered from the accused were the same from which cartidges found at the place of occurrence were fired, but there was no proof of the fact that the person from whose possession they were recovered took part in the dacoity, because the mere recovery of a gun, from which some of the empty cartidge cases found at the spot

appeared to have been fired, does not prove that he had taken part in the dacoity and fired the shots (PLD 1954 Lah 179).

The weapon of offence should be sealed and sent to the ballistic expert at the earliest possible time. When the crime empties and guns were sent to the ballistic expert after a considerable time, the Court refused to rely on the report of the ballistic expert (PLD 1963 Kar 891 (DB). Where the difference of opinions between a medical witnesses and a ballistic expert is on the distance from which the firearm was fired, the matter being in the sphere of the ballistic expert, the opinion of the ballistic expert should be preferred, particularly so if it is supported by text books on the subject (PLD 1968 Lah 437 (DB).

Delay in sending weapon to expert.— Where the crime weapon was sent to the expert after a long delay and there was no explanation coming from the side of the prosecuton as to why those parcels were sent about four months after the empty cartridges had been secured from the place of occurrence. Nor was there any explanation as to the place where and the manner in which those two parcels were kept during this long period. In those circumstances the evidence of the ballistic expert that one of the empties matched with the appellant's gun cannot be taken to be so strong a place of evidence as to warrant the conviction of the appellant (1986 PCrLJ 102 (DB).

Where an empty has been recovered after two months and the parcels were not sealed as per statements of the mashirs by the police at the time of recovery, the instrument of offence cannot be connected with the appellants as having been used by them (1972 PCrLJ 284 (DB) (Kar). But that does not mean that crime weapon sent to Chemical Examiner three days after is recovery (PLD 1985 Lah 656), or merely because the crime empties remained with the police until the recovery of the guns or because there was a delay of two weeks in sending them to the laboratory at Lahore, the entire effect of the recovery and the report of Forensic Expert, in spite of the presumption in favour of official acts should be brushed aside (1981 PCrLJ 199 (SC) (AJ&K).

There was inordiante delay in sending the empty cartridge case recovred from the scene of occurrence and the rifle recovered from the house of the accused, for ballistic expert opinion. This inordiante delay raises much suspicion (AIR 1956 SC 526 = 1956 CrLJ 930).

Delay simpliciter in despatching empties and crime weapons to Arms Expert would not be fatal unless attended by circumstances casting doubts on genuineness of recoveries or indicating tampering with sealed parcels (1987 PCr LJ 1773 DB). Where in spite of the fact that there was a delay of 70 days in sending the weapon of offence to the ballistic expert, the investigating officer was not questioned in cross examination regarding any suspicious feature resulting from such delay and no doubtful features were brought out on the record, the contention that substitution of empty cartridges for the original ones was possible was not accepted. Delay by itself cannot lead to such inference (1970 PCrLJ 546 (DB).

Where there was a delay of two months in sending the weapon of offence to the ballistic expert, it was held that inordinate delay in the despatch of crime weapons would detract from value of evidence provided by such weapons, but as in Baluchistan there are difficulties of communication and transport and long distances are involved; the evidence of expert was admitted into evidence in spite of delay in sending the weapon to him (PLD 1972 Kar 77 (DB).

The weapon of offence should be sealed and sent to the ballistic expert at the earliest possible time. When the crime empties and guns were sent to the ballistic

expert after a considerable time the Court refused to rely on the report of the ballistic expert (PLD 1968 Lah 464 (DB); PLD 1963 Kar 891 (DB).

Examination of ballistic expert.— Where fate of case hinged on evidentiary value of corroboratory evidence, Prosecution failed to produce fire-arm expert to support his opinion and trial Court did not care to call expert as a witness to obtain reasons for his opinion or to provide opportunity to accused to cross examination him. The case was sent back to trial Court for examination of fire arm expert as a witness and for proceding according to law (1985 PCrLJ 2217).

37. **Report of Imperial ser ologist and chemical examiner.**— Evidence of the chemical examiner is of little value unless there is clear proof of the identity of the matters examined by him., Prosecution must lead clear evidence to show the indentity of the matters meant for chemical examiner so that there may not be any scope to doubt the indetity of the matters meant for chemical examiner so that there may not be any scope to doubt the indetity of the matter at any stage. It is of the greatest importance in case of poisoning that the substace found by the chemical examiner must be connected with or traced back to the articles removed or taken from the deadbody of person in the case (Monoruddin v. State (1978) 30 DLR 282).

Delay by the serologist in analiysing the blood stains test to him has resulted in the loss of evidence of most important nature. If the analysis had been made promptly, the prosecution might well have had in their possession valuable evidence . The absence of such proof may lead to serious failure of justice in case where blood has been shed, which are generally cases of murder .It is of the utmost importance that the serologists Department should exercise the greatest care to see that not a day delay unnecessary occurs in subjecting exhibits blood mark sent to them for analysis (Sardar Ali v. State (1967) 19 DLR (SC) 113).

Delay in sending sealed parcels to the laboratory in itself is not sufficient to discard the evidence unless there is allegation of tampering with sealed parcels and dishonest investigation and Investigating officer is cross examined on the point of delay to give his explanation (Habib v. Noor Ahmed PLD 1992 (SC) 863).

Chemical examiner must state in his report the grounds of his opinion, so that the report may take the place of his viva-voice testimony in Court (1933 All 394). Evidence of the Chemical Examiner is of little value unless there is clear proof of the identify of the matters examined by him. Prosecution must lead clear evidence to show the indentity of the matters meant for chemical examination so that there may not be any scope to doubt the indentity of the matters at any stage (Monoruddin v. State (1978) 30 DLR 282).

Where in chemical examiner report blood was shown to have disintegrated on the clothes and the hatched secured from the accused it was held that the report despite absence of positive finding, could be used as corroboration evidence (PLD 1966 kar 67). When blood stains on any article become disintergated, their origin of blood group cannot be determined (Mohammed Ismail v. State of Rajasthan 1989 (2) Crimes 710 (Raj).

Almost in all criminal cases in blood stained earth found at the place of occurrence is invarilably sent for chemical analysis . If this procedure is departed from, that can strengthen the defence (AIR 1976 SC 2263). But chemical exaimner's negative report regarding absence of trace of blood in the earth leaves and grass taken from the alleged place of occurrence will not displace strong direct evidence of the place of certain murder (AIR 1924 Cal 625=26 Cr LJ 5).In a murder case where factum of murder is itself under challenge since body of deceased was untraceable, non-examination of blood found at place of occurrence by chemical

examiner is fatal to prosecution case (Devendra Choudhary & ors v. State of Bihar 1988 (1) Crimes 747 (Pat).

A failure of the police to send the blood recovered from the place of occurrence for chemical examination in a serious case of murder is to be deprecated. In such cases, the place of occurrence is often disputed, However, such an ommission need not jeopardise the success of the prosecution case where there is other reliable evidence to fix the scene of occurrence (A. I.R. 1974 S.C. 463 (468)`.

In ordinary circumstances there would be nothing worng in taking reports of chemical examiner and imperial sereologist on record without examining these persons as witnesses, as permitted by the Criminal Procedure Code but if the two reports contradict eact other, the prosecution should explain the difference and mere production of the report proves nothing (AIR 1954 SC 1= 1954 SCJ 612).

In Nimal Munnu v.State (1981 S.C. C. (Cr). 622), while discussin chemical examiner's report the Indian supreme Court said :

"The Chemical examiner's report about the blood stains is slovenly and perfunctory and we have noticed with regret the same slovenliness in the reports of other chemical examiners in some other case that have recently come before us. The chemical examiner's duty is to indicate the number of blood stains found by him on each exhibit and the extent of each stains unless they are too minute or too numberous to be described in detail.

Merely to say that blood was detected on exhibit as this report states, is not enough. It may well lead to a miscarriage of justice compelling judges to acquit when they would have convicted had the report been more revealing . We trust these observations will be brought to the notice of all chemical examiner in the country. Not that they all act like this. Many give full and detailed reports as they should."

As held in Sile Singh v. State Delhi Administaration, 1981 S.C.C. (Cr). 622, the finding of bloodstains on the clothes of the accused of the same blood group as that of the deceased would be an important circumstances to corroborate other evidence . In the instant case, the clothes of the deceased had not been sent for chemical examination and there was no other acceptable material from the side of the prosecution which could be corroborated by the finding of stains of human blood in M. Os. II and III. These two articles were sent in a sealed packet for chemical examination by a forwarding letter (Ext.10) of the sub-divisional judicial Magistrate, Haripada, on 26th August, 1980, nearly one year after the seizures. This gross inordinated delay had not been explained . What a highly unsatisfactory state of affairs it was ? Such articles containing stains of blood should invariably be sent for chemical examination immediately after their seizures and not as had been done in the instant case (1985 (1) Crimes 593 (569-97) (Orissa).

Where there is no reliable evidence with regard to recoveries, report of chemical Examiner is of no help to prosecution (1984 P.Cr. L. J. 1985) The evidence of a chemical Examiner as to the presence of human bloodstains on the clothes of the accused at the time of his arrest is of little value when there is delay in despaching the clothes to the chemical examiner and there is absence of evidence that the articels were sealed and despatched in the presence of the accused and respectable witnesses (NLR 1985 Cr. 766= PLD 1985 SC 361)

Delay in sending article to chemical examiner .— Delay simpliciter in sending the recovered articles to the Chemical Examiner in not alwasys destructive of the evidentiary value of the incriminating material and in the absence of any evidence doubting the indentity of the articles recovered from the spot and those which were

sent to the expert, the point is of no substance (1980 SCMR 649), Particularly so where no question was put to Investigating officer offording him an oppertunity to explain dealy (PLD 1985 Kar . 595 (DB).

The time gap between the post mortem examination and the receipt of the articless by the chemical examiner and the time taken between the receipt of the article by the Chemical Examiner and the submission of his report were so unduly long that it is likely to arouse suspicion in any reasonable mind, particularly in the absene of any explanation whatsoever either of the inordinate delay or any evidence about the custody of those articles during the said period (Monoruddin V. state (1978) 30 DLR 282).

Delay in sending articles to chemical analyser was no group for not relying on recoveries (1984 P. Cr. L. J 1111; 1982 SCMR 531) Where blood stained articles were sent to Chemical Examiner after 22 days,the contention that blood could not have stayed on such articles during 22 days had no force. Blood could not disappear/disentegrate in 22 days . Explanation for sending articles late being plausible and reasonable. Articles recovered immediately after the occurrence . provide very strong corroboration of statement of prosecution witness (1984 P. Cr. L. 1703)

Examination of Cheminal Examiner.— In ordinary circumstances there would be nothing wrong in taking reports of chemical examiner and imperial seriologist without examining these persons as witneses, as permitted by section 510 Cr.P.C. But if the two reports contradict each other, the prosecution should explain the difference and mere production of the report proves nothig (AIR 1954 SC 1= 1954 SCJ 612).

It is true that the report of the Chemical Examiner is a piece of evidence that does not require any formal proof but it must be tendered in evidence and used as such to enable the accused to have an opportunity of assailing it, if he can .When the guilt or innoccence of the accused rests solely on the opinion of the expert, namely the Chemical Examiner , it is not only desirable but also necessary to examine the Chemical Examiner in Court to enable the accused to cross-examine the expert (Monoruddin v . State (1978) 30 DLR 282).Report of Serologist was placed on the file of trial Court but was not properly tendered in evidence. Held, such report could be taken into consideration even in absence of its proper tender and formal proof in the manner of testimony of the Serologist (State Vs. Noor Ahmad @ Thola 1991 PCrLJ 2007).

38. **Alibi**.— Plea of alibi has got to be proved to the satisfaction of the Court (AIR 1975 SC 1453=1975 Cr LJ 1201).When he accused plea alibi the burben is on him to prove it under section 103 of the Evidence Act (AIR 1981 SC 1021=1981 Cr LJ 714; AIR 1972 SC 109; AIR 1956 SC 460 =1956 Cr LJ 827). If the plea of alibi is not believed , it does not necessarily follow that the prisoner committed the murder . The prosecution is to prove the guilt of the accused. Failure on the part of defence to substantiate any plea taken by it does not necessarily prove the guilt of the accused . According to the settled principle of law the burden to prove the guilt of the accused is primarily upon the prosecution (1975) 27 DLR (AD) 1).A false plea of alibi is also an incriminating cricumstance giving inference of guilt even in a case based purely on circumstantial evidence (Debar Dundu RamaKrishna Rao v. State of West Bengal 1988 (1) Crimes 654 (Cal). Bat Binder Singh v. Satate of Punjab 1987 Cr LJ 25 (SC) relied on).

Alibi, plea of such plea, if taken as a defence require strict and positive proof in order to brush aside incriminating material as adduced by prosecution (1987 P.Cr.LJ

1990). Court can made tentative assessment of material produced before it including plea of alibi at bail stage (1987 PCr LJ 1856; PLD 1974 SC 83; PLD 1978 SC 256).

The plea of alibi involves a question of fact . The plea can succeed only if it be shown that at the relevant time the accused was so far away that he could not be present at the scence of occurrence (AIR 1954 SC 30=1954 Cr LJ 260 ; AIR 1981 SC 911=1981 Cr LJ 618).The prosecution must bring home the guilt of the accused irrespeective of whether or not the accused has made out a plausible defence and has discharged the onus of alibi (AIR 1956 SC 460 = 1956 Cr LJ 827).Burden of proving the plea of alibi under the law initially lies on the accused although said burden shall not be judged on the same criteria as applicable in the case of prosecution to prove its own case against the accused (State Vs. Saifur Badshah 1990 PCrLJ 1669).

When a defence of alibi and defence of complusion are set up in the alternative, the Court must consider both the defences and if any of them is proved its benefit should go to the accused (8 DLR (SC) 25). It is true that the burden of proving a plea of alibi or any other plea specifically set up by an accused husband for absolving him of criminal liability lies on him. But this burden is somewhat lighter than that of the prosecution. The accused could be considered to have discharged his burden if he succeed in creating a reasonable belief in the existence of circumstances that would absolve him of criminal liability, but the prosecution is to discharge its burden by establishing the guilt of the accused.An accused's burden is lighter, because the court is to consider his plea only after, and not before , the prosecution leads evidence for sustaining a conviction. when the prosecution failed to prove that the husband was in his house where his wife was murdered, he cannot be saddled with any onus to prove his innocence (State vs. Mafazzal Hussain Pramanik . 43 DLR (AD) 65=1991 BLD (AD) 302).The defence of alibi comes into play only when the prosecution establishes the guilt of the culprit. (Ram chandra & anr. v. State of Rajasthan 1989 (3) Crimes 461(Raj).

Plea of alibi should be raised at the earliest and must be supported by strong evidence (1987 PCr LJ 1373). The burden of proving plea of alibi is on the person putting up the plea (1983 PCrLJ 1319 (DB). Such plea requires strict and positive proof in order to brush aside incriminating material adduced by prosecution (1987 Pr LJ 1989 (DB). Where no evidence was produced in support of the plea. the Court set aside acquittal of accused and ordered his retrial (1986 LJ 2007 (DB).

Where plea of alibi raised by accused was not acceptable as no conclusive proof was avilable to exclude poossibility of doubt that accused was not person in Pakistan during the days of occurrence and the accused also did not discharge burden of proof as to his plea of alibi. conviction was maintained (1983 Per LJ 1105). But it is to be noted that under the law, it is incumbent on the proseution to prove its case beyond doubt and no such duty devolves on an accused. In the case of an accused, what is required to be seen is as to whether the plea raised by him in view of the evidence on record and other surrounding circumstances appears to be provable .Where it is so, benefit of doubt should be given to the accused (1984 PCrLJ 2923 (DB).

Where the case against accused was not free from doubt on account of plea of alibi raised before trial Court and established by statments of defence witnesses as well as on account of the fact that no gun was recovered from them and their licensed revolver was not connected by Ballistic Report with crime. He was acquitted (1983 PCr LJ 2127).The plea of alibi would have not been relevant if the prosecution proved its case. In that eventuality, the false plea of alibi would have been an

additional factor reinforcing the conclusion of guilt (1989 (3) Crimes 460 (467) Raj. Where the defence evidence in support of plea of alibi was not strong but it was ot challenged by the prosecution, the Court gave benefit of the doubt to the accused (PLD 1969 SC 293= (1969) 21 DLR (SC) 194).

39. **Falsity of defence case - effect.**— It is cardinal principle of law that the accused is not called upon the disclose the true facts of the case. An accused person does not by giving false answers to questions put to him in his examination render himself liable to punishment. Resort to false defence will affect the credit to be attached to his case and raise an inference against him though the Court is not relieved of the task of attempting to arrive at a sound conclusion from the whole evidence. The nature of the defence plea is to be ascertained not only from the satement of the accused but from the trend of cross-examination of prosecution witnesses and from the argument of the accuseds counsel at the close of the trial (1986 PCrLJ 1443 DB). Prosecution is to establish his own case beyond doubt. Falsity of defence is immaterial (AIR 1974 SC 155=1974 CrLJ 303). Defence can take inconsistent pleas and that too from time to time but this does not absolve the prosecution from the duty to prove the prosecution case beyond reasonable doubt (1984 CrLJ (NOC) 149 (Mad). If the evidence justifies a finding in favour of the accused, the accused is entitled to acquittal, no matter whether the accused has taken the specific defence or not (AIR 1970 Cal 120 = 1970 CrLJ 340).

Falsity of the defence does not relieve the prosecution from proving its case beyond reasonable doubt. The burden of proving guilt is always on the prosecution except in certain cases (AIR 1966 All 570 (584) DB; 1962 Supp (3) SCR 334 (345). Where the prosecution case rests merely on circumstantial evidence, the facts established should be consistent only with the hypothesis of the guilt of accused and only then a Court can use a false explanation or false defence of an accused as an additional link to lend an assurance to the Court (Harendra Narain Singh etc. Vs. The State of Bihar 1991(3) Crimes 298 (SC).

The prosecution must stand or fall on its own legs, and no infirmity or lacuna can be cured or supplied by a false defence or a plea rejected by a Court (S.D. Soni V. State of Gujarat 1991 (2) Crimes 4 (SC).

It is incumbent upon the prosecution to bring home the guilt of the accused to the hilt even if the truthfulness of the defence version is discarded (Munni Lal V. State of U.P. 1989 (2) Crimes 444 (All).

Defence proved false, but that by elself would not strengthen the prosecution case (1980 SC 436 = 1980 SC Cri 491). Defence witnesses, though often untrustworthy, can not always be assumed to lie (AIR 1974 SC 329).

Burden of prove the prosecution case is on the prosecution alone which never shifts. If prosecution fails in this accused gets acquittal. Even if the defence fails to establish its version (38 DLR (AD) 75). Falsity of defence can not take the place of proof of facts which the prosecution is required to establish (AIR 1981 SC 765). But false suggestion from the side of the accused may appropriately be taken into account as a circumstance against the accused provided there is other convincing evidence on record (1982 CrLJ 431=AIR 1981 SC 1579 = 1981 CrLJ 1000).

It is true as held in Shared Birdhi Chand Sarda V. State of Maharashtra, (AIR 1984 SC 1622), that the Court can use a false explanation or a false defence as an additional link to lend as assurance to the court if only various links in the chain of evidence led by the prosecution have been satisfactorily proved (1985 (1) Crimes 957 (692) (Orissa).

Falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. It can at best be considered as an additional circumstance if other circumstances point unfailingly to the guilt of the accused (Sepneswar Dehuri & orthers V. State of Orissa 1988 (2) Crimes 260 (Ori).

Suggestion made on behalf on an accused by his lawyer can not be construed as admission of guilt by the accused for the simple reason that the defence may take what ever pleas he likes including inconsistent pleas, such as an accused, when charged with an offence, may take the plea of alibi that at the time of commission of the offence he was not present in the locality and at the same time he may take the plea of private defence either of life or property. The simple reason allowing such contrary plea is that the accused is not required by law to prove his innocence, but it is entirely for the prosecution to prove his guilt, failling which the accused shall be acquited (Md. Khaliluddin Vs. State, 1986 BLD (AD) 1(3).

In a case where a specific defence has been taken, the defence evidence also forms a part of the record of the case. There is no bar to find corroboration of the prosecution case even in the defence evidence (1969 All Cr R 565). Similarly when defence witness tries to absolve the guilt of the accused, even then Court may find the accused guilty. Thus, in a Delhi case a child of 7.50, a resident of an orphanage deposed to the effect that the accused revished her. But as a defence witness her mother deposed to the effect that the injury on the private parts of the victim was caused by a danda blow by a care taker of the orphanage. But the Court noticed that the wearing apparel of the victim contained human semen. The defence witness was disbelleved and the accused convicted (1986) 30 Del LT 3 (S N).

Because the defence version is false, it does not follow that the prosecution version is true. Burden never shifts from the prosecution to prove the guilt of an accused person (PLD 1956 Kar 273).

Where the accused falsely denies several relevant facts which have been conclusively established, the court is justified in drawing adverse inference from this against the accused (Nagaraju V. State of Karnataka 1991 (2) Crimes 74 (Karnat).

Falsity of defence plea may be a link in the chain of circumstantial evidence to make it complete. False plea put forward by accused goes against him (1979 CrLJ (NOC) 209). Falsity of the plea put forward in defence may be taken into consideration in deciding if the charge has been brought home to the accused (AIR 1974 SC 1144 = 1974 CrLJ 800). The falsity of the defence case can not establish the prosecution case. If the other circumstances point unfaillingly to the guilt of the accused it can be considered as an additional link (1982 CrLJ 214= 1984 CrLJ (NOC) 203 (All). Falsity of defence plea cannot prove the guilt of the accused. It may however be considered as an additional circumstances against the accused (1981 CrLJ 325 = 1981 SCC (Cri) 315). Where in a murder case the accused falsely denied certain relevant facts which could be established conclusively, the Court under such circumstances can very well draw an adverse inference against the accused (AIR 1957 SC 211= 1957 CrLJ 328). If prosecution proves facts and circumstances which are incriminating, the failure of accused to explain those facts and circumstances or his giving a false statement, would give rise to an adverse inference against him (1971 CrLJ 1804).

Plea in defence, rebuttal of.— If defence plea that death was caused by negligence of treatment and not by the injury suffered and the prosecution does not produce the Doctor who had treated the deceased, an inference that death may be due to negligence in treatment may be drawn (PLD 1976 SC 377).

Plea of defence liable to be rejected if not taken during the trial but argued subsequently (42 DLR (AD) 176).

The explanation for absence of the deceased in the house as given by the appellant to P.Ws. 4 and 5 shortly after the occurrence was palpably false. As held by the Supreme Court in Golam Mojibuddin and another V. State of West Bengal (1972 CrLJ 1342), the evidence of false explanation is not only relevant under section 8 of the Evidence Act but is of considerable importance when it was given soon after the alleged occurrence and was apparently designed to give the facts an appearance favourable to the accused. In the peculiar facts of the case, the false explanation given by the accused soon after the occurrence that the deceased went to Calcutta in a taxi along with some unknown person is highly, incriminating (Guruprassed @ Gurupada V. State 1988 (3) Crimes 573 (578) Cal).

40. **Examination of accused under section 342 Cr. P.C.**— When question as regards evidentiary material against accused was not put to him at the time of examining him under section 342 Cr. P.C. trial does not vitiate merely on the ground (1993 CrLJ 397 Kant).

In AIR 1949 All 692 = 51 CrLJ 199 it was held that an appeal continues till the judgment is delivered. Even though at one stage the evidence of the parties is concluded and arguments have been heard, the Court before delivering judgment is intitled in the interest of justice to examine of its own motion any witness, provided, of course, the interest of the accused are not prejudiced thereby. If the Court decides to take such evidence, it would be proper for the Court to re-examine the accused with reference to the new evidence recorded and to give an opportunity to the accused to give such further evidence in defence as he may be advised to do.

Failure to put to accused in his examination under section 313 (in Bangladesh section 342) Cr. P.C. a material circumstance appearing in evidence against him is a serious irregularity and vitiates the trial, if such failure has caused prejudice to him (A. Palant V. State 1988 (2) Crimes 57 (Bom).

In Amir Hussain Vs. State (1989) 41 DLR 32, While examining the accused under section 342 Cr. P.C. the learned Sessions Judge failed to draw the attention of the accused to his confessional statement. Held, that the Ld. Sessions Judge was wrong in relying upon the confessional statement of the accused.

When the evidence was taken under section 311 Cr. P.C. (340 in Bangladesh) Cr. P.C. some new circumstances has found out which imlicated the accused and for this the accused was not given any opportunity to explain himself. Held, that the accused was deprived of the opportunity to be examined under section 313 Cr.P.C.(342 in Bangladesh) which is a mandatory provision and non-compliance of that mandatory provision seriously prejudiced the accused and the trial vitiated (1993 CrLJ 3704; AIR 1954 SC 692 = 1954 CrLJ 1742 Rel. on).

Clear prejudice must be shown to entitle the accused to acquittal because of his inadequate examination under section 313 Cr.P.C. (section 342 Old) Criminal Procedure Code, 1973 (D. V. Danny Mao V. State of Nagaland 1988 (3) Crimes 351 (Gau).

Examination of accused under section 313 (Section 342 in Bangladesh) is mandatory in warrant cases. Order of examination of lawyer of accused after dispensing with personal attendance and examination of accused would not be sufficient compliance with mandate of said provision (1993 CrLJ 2669 (SC).

In the examination of accused under section 313 (section 342 in Bangladesh) Criminal Procedure Code, 1973, it is imperative that questions should be put

individually to all accused no matter such questions are uniform (Nicolsu Almeida and others V. State and others 1988 (2) Crimes 774 (Bom).

Court can act on the admission or confession made by the accused in the course of the trial or in his statement recorded under section 313 (section 342 in Bangladesh) Criminal Procedure Code (Upendra Nahak V. State 1992 (3) Crimes 363 (364).

The view that omission to examine the accused under section 342 of the Code of Criminal Procedure is curable under section 537 is not sustainable in law. After the proseccution closes its evidence the Court shall examine the accused and ask them whether they will adduce any evidene in defence. Omission to do so vitiates the conviction if such omission has prejudiced the accused in their defence (A. Gafur @ Haji Abdul Gafur and others Vs. Jogesh Chandra Roy @ Ano. (1991) 11 BLD 108 (AD).

The statement of an accused recorded under section 342, Cr. P.C. may be taken into consideration but the Court as not select out of the statement the passage which goes against the accused, such statement must be accepted or rejected as a whole (Sultan Khan V. Sher Khan PLD 1991 SC 520).

If the conviction of the accused is to be based solely on his statement in Court this statement should be taken into consideration in its entirety. The statement of an accused should be taken into consideration in its entirety and not merely the inculpatory part of it to the exclusion of the exculpatory part unless there is other reliable evidence which supplements the prosecution case. In such a condition, the exculpatory part if proved to be false may be excluded (Sultan Khan Vs. Sher Khan PLD (1991) 520 (SC).

In the present case, the accused in his statement under section 342, Cr. P.C. had given his version of the incident and stated that he had caused injury by means of blunt weapon in exercise of his right of private defence. There was no other circumstances, direct or indirect, connecting the accused with the commission of the offence. As such, the exculpatory, part of the statement of the accused could not be excluded. The statement was to be taken into consideration as a whole and the plea advanced by the accused was to be accepted (Sultan Khan V. Sher Khan PLD 1991 SC 520).

Written statement by accused at the time of his examination under section 342 Cr. P.C.— The accused is not entitled as a matter of right to put in a written statement in lieu of any answer he may give to questions put to him under section 313 (old 342) Cr. P.C. (AIR 1958 SC 143; 1929 CrLJ 114(119). The object of section 342 is to elicit answers from the accused in regard to certain matters, and since written statements are generally drawn up by the legal advisers or friends of the accused and not by the accused themselves, the practice of making such written statements will defeat the object of this section (50 Cal 518 (524); AIR 1961 Punj 215).

Section 342 contemplates an oral examination (AIR 1956 SC 238). The Court must itself put certain questions and elicit answers thereon, without giving a warning as to those question. A written statement by the accused can not be deemed to be a substitute for examination under section 342. A written statement in the nature of an argument prepared by the accused with or without the assistance of the counsel cannot take the place of a free and frank statement from the accused as contemplated under section 342 (PLD 1967 Dhaka 503). The practice of filing

written statements by the accused at the time of examination under section 342 Cr. P.C. has been strongly discountenanced and severally condemned as pernicious by the courts. The written statement is evolved out the brains of the counsel helped by the friends of the accused, therefore, the practice has been uniformly deprecated (AIR 1956 SC 238 = 1956 CrLJ 441; AIR 1961 Punj 215; AIR 1916 Cal 633; AIR 1948 Oudh 99).

The Code of Criminal Procedure does not contain any provision for filing written statement (1953 CrLJ 808). Though the accused states that he would file his written statement and Courts sometimes by way of courtesy receive them, nevertheless all relevant questions must be put to the accused (1950 All 639).

Where the accused has refused to answer questions and puts forward a written statement, it would be useless for the Magistrate to go on questioning him, and the Magistrate should accept the written statement, specially where such statement meets all the points of the prosecution (26 CrLJ 932 (937). Though written statements can be put in and accepted by the Court, still they cannot be allowed to take the place of the examination of the accused as required by section 342 Cr. P.C. 50 CrLJ 469 (Cal); 1949 Cal 238).

Written statement filed by an accused - Value to be attached to.— Section 342 Cr. P.C. does no doubt contemplate an examination of the accused by the Court (AIR 1956 SC 238 (241), there being no clear provision that as part of his statement under this section an accused may file a written statement. It has consequently been held in some cases that though an accused may file a written statement it cannot take the place of evidence nor of such examination as is required to be made under this section (AIR 1948 Oudh 99 (101); AIR 1936 Oudh 404 (405). Even the Supreme Court observed in Tilkeshwar Singh V. Bihar State (AIR 1956 SC 238 (241), that the practice of filing written statements by the accused is to be deprecated, though it may not be a ground for interference, unless prejudice is caused.

The aforesaid observations have, however, been qualified by the Supreme Court in a later case (AIR 1966 SC 97= (1965) 2 SCA 413 = 1966 CrLJ 82). "It would not be possible to lay down a general rule that the written statement filed by an accused person should not receive the attention of the Court because it is likely to have been influenced by legal advice. Such a distrust of legal advice would be entirely injustified".

Statement of accused is not evidence, but this is immaterial because it is taken into consideration as a matter and not as evidence. Any answer that the accused gives, provided it is believed, can be given same weight as any piece of evidence and can form the basis of conviction as much as any piece of evidence (AIR 1956 All 341 (346).

The statement of the accused also may be considered in deciding whether the cause which lay upon him has been discharged by him (AIR 1965 Ker 161 (164). An answer given by the accused under section 342 Cr. P.C. can be used for proving his guilt as much as evidence given by a prosecution witness. But a conviction based solely upon the statement made by an accused person will not be allowed to stand unless there are very strong circumstances, and each case must depend upon its own circumstances (AIR 1953 SC 468; 1963 Ker LT 969; 1964 MLJ (Cr) 247).

41. Disclosure statement by accused.— Accused pointed out the place where the deadbody was thrown. This was the only incriminating evidence against the accused. Of course, this is not conclusive circumstance against the accused though undoubtedly it raises a strong suspicion against him. Even if he was not a party, to the murder, the said accused could have come to know the place where the dead body of the deceased was thrown (AIR 1971 SC 2016= 1971 Cr LJ 1452).

Dead body recoved from a well. Authorship of concealment has not been disclosed in the disclosure statement. Conduct of the 3rd appellant in disclosing the place of concealment and subsequent production of the spades from the place of concealment is an adimissible item of evidence coming under section 8 of the Evidence Act (Sasi V. State of Kerala; 1990 (1) Crimes 113 (Kerala).

Where there are more than one accused, it is obligatory upon the Investigating Officer to state and record who gave the information and what words were used by that informant accused so that recovery pursuant to the information received may be connected to the person giving the information (AIR 1983 SC 367= 1983 Cr LJ 689). For the applicability of section 27 of the Evidence Act two conditions must, fulfil: (1) the information must be such as has caused discovery of the fact; and (2) the information must relate distinctly to the fact (AIR 1983 SC 446= 1983 Cr. L.J. 846). Discovery must be of some fact which the police had not previously learnt from any other source (AIR 1970 SC 1934= 1970 Cr LJ 1659). Once a fact is discovered from other sources there can be no fresh discovery even if relevant information is extracted later on from an accused (AIR 1971 SC 1871= 1971 CrLJ 1314; AIR 1956 SC 217= 1956 Cr LJ 426). Accused state before the police that he would show the weapon with which he killed the deceased and borught out that weapon. The statement that he killed the decesed is a confessional statement before the police and as such is not admissible. The recovery is not substantive evidence (AIR 1979 SC 1042= 1979 Cr LJ 908= 1979 SC Cri 743).

Gun recovered in pursuant to the statement of the accused from one sunder. But sunder was not produced. Accordingly, there is no legal evidence on record to connect the accused with the gun (AIR 1983 SC 349). The expresion "fact discovered" includes not only the physical object prduced. but also the place from which it is produced and the knowledge of the of the accused to this (AIR 1976 SC 483= 1976 CrLJ 481= 1976 SC. 199).

The accused made a statement before the police that he had buried the gold ear- rings near a pipal tree and the carrings were recovered from the place pointed out by the accused the statement that he buried the gold ear-rings was held admissible under section 27 (AIR 1957 SC 216= 1957 Cr LJ 481).

Accused made a statement in presence of the witnesses that he had thrown the gandasa in the tank. The gandasa was thereafter recovered. The statement was held admissible (AIR 1960 SC 1125= 1960 Cr LJ 1504). The stolen property was recovered at the instance of the accused who informed that he would show the place where he had hidden the ornament. Thereafer the accused led the police and dug out the ornanment from a garden the recovery was held admissible and the possession of the stolen property was of the accused (AIR 1962 SC 1788= 1963 Cr LJ 8).

Only so much of the information as distinctly related to the discovery of facts is admissible; other statement relating to his own conduct, Which could not be objectively proved or discovered, are not admissible (1986 Cr LJ 220; AIR 1947 PC 67 and AIR 1076 SC 483= 1976 Cr LJ 481 relied on). The discovery under section 27 is as regards the authorship of concealment and not of guns and daggers used in

crime. Conduct and concealment are incriminating circumstance and their discovery becomes relevant and admissible under section 27 of the Evidence Act (AIR 1983 SC 349).

42. **Explanation given by the accused.**- If the accused gives a reasonable and proper explanation, it is for the prosecution to prove affirmatively that the explanation is false. In a criminal trial, it is not at all obligatory on the accused to produce evidence in support of his defence and for the purpose of proving his version he can rely on the admissions made by the prosecution witnesses or on the documents filed by the prosecution (1979 Cr LJ 1176 (1179).

In a murder case the evidence of false explanation is not only relevant u/s 8 of the Evidence Act but is of considerable importance when given by the accused, soon after the alleged ocurrence and was apparently designed to give the facts an appearance favourable to the accused (Gururassad @ Gurupada Mishra V. State 1988 (3) Crimes 573 (Cal); Golam Majifuddin V. state of west Bengal 1972 Cr LJ 1342 relied on).

On the night of occurrence the appellant and the deceased were alone in the house of the deceased and that soon after the occurrence the appellant gave a false explanation that some unknown persons had taken the deceased in a taxi to Calcutta, though as a matter of fact the deceased had already been murdered in his house and the deadbody had been removed and thrown into the river. The false explanation given by the accused soon after the occurrence is highly incriminating and relevant under section 8 of the Evidence Act (Guruprassad @ Gurupada V. State 1988 (3) Crimes 573 (Cal)

43. **First Information Report**.- First Information Report though not a substantive piece of evidence can be used to corroborate or contradict statement of maker thereof and also to judge trustworthiness of prosecution story (1993 Cr LJ 1525 Delhi). The first informatio report was lodged promptly with no time to manipulate the prosecution story. This, again adds to the credibility of the prosecution story and the eye-witnesses. The evidence of the eye-witnesses could be accepted as true and reliable, The accused was rightly convicted. No interference is called for (1985 R.L.W. 281 (289, 290).

A quick F.I.R. soon after the occurrence has very great corroborative value in a criminal case (Virendra Singh & ors. State of U.P. 1988 (2) Crimes 721 (All). FIR is not a substantive piece of evidence. Credibility is to be judged from evidence adduced in Court (1993 Cr LJ 1584 M.P.).

Omission of some details in FIR by informing such as fact of reloading of gun by accused as to cartridges were recovered from spot thogh according to prosecution only one was fired at by accused can not be ground for disccarding prosecution story (1993 Cr LJ 1343)(P &H). It is not necessary that minutest details should find place in the first information report and it is sufficient if a broad picture is presented and revealed in the first information report. No exception can be taken if the first information report merely contains the broad features of the crime (1993 Cr LJ 2954 (All); 1975 SCC (Cri) 427= 1975 Cr LJ 1062).F.I.R. is not expected to contain all the details (Jagtar Singh V. State of Punjab & ors. 1988(1) Crimes 822 (SC).

FIR can be used to discredit the testimony of the maker of the report and the prosecution case can not be thrown out merely on the ground that entirely different version is given therein by its maker (1993 Cr LJ 2954; AIR 1973 SC 476= 1973 Cr LJ 680 (SC).

Where person lodging the F.I.R. died after prosecution filed, the version of FIR cannot be lost sight of. in the absence of informant, since it gives earliest version of

occurrence which is importat for a criminal trial (Fehan bind and others V. State of Bihar 1988 (1) Crimes 740 (Pat). F.I.R. can not encroach upon the periphery of the evidence tendered by other witness regarding incident (Sahasevan Rajan & ors. state of Kerala 1992 92) Crimes 256).

First Information report is not a substantive piece of evidence and it has value only for the purpose of corroborating or contradicting the maker (Surjit Singh & Gurmit Singh V. State of Punjab 1992 (2) Crimes 282 (283). Where there were found contradictions in the FIR it was held that only maker thereof can be required to explain how the same came to be mentioned in FIR and not the other witnesses (Nannu V. State of U.P 1991 Cr LJ1051 (All).

A first Information Report is not supposed to be a detailed document. The FIR is a document which sets the criminal law into motion and it has to be appreciated keeping in mind the facts and circumstance of each individual case (Jodha Khoda Rabari V. state of Gujarat, (1992 Cr LJ 3298 (3329) (Guj.).

The FIR in a criminal case is an extremely vital and valuable piece of evidence for the purpos of corroborating the oral evidence adduced at the trial. The importance of the report can hardly be overemhasised from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commisssion of an offences is to obtain prior informtion regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. Delay in lodging the FIR often results in embellishment which is the creature of an after thought. On account of delay the report only gets bereft and the advantage of spontaineity danger creeps in and the introduction of coloured version exaggerated account or connected story as a result of deliberation and consulation. It is, therefore, essential that the delay in the lodging of the FIR should be satisfactorily accounted for (Meghaji Godaadji Thakore V. State of Gijarat. 1993 Cr LJ 730 (736) (Gul).

The first Informant report is not a substantive piece of evidence but, being the first available version of the prosecution, case, it is extermely important for the purpose of cntradiction or corroboration (Jamil V. State, (1993) 3 CCR 2043(2044) (ALL). FIR is not an encyclopaedia of the entire case and is even not a substantive piece of evidence (surjit singh V. state of Punjab (1992 Cr LJ 1952 (1955) (SC). As the first information report is not an encylopaedia of facts, the omission of name of prosecution witness therein will not make the witness unreliable (Amar pal V. state of U.P.1993 JIC 478 (482,483).

An FIR recorded without any loss of time is likely to be free from embroideries, exaggerations and without anybody intermedding with it and pollution and adulterating the same with lies. The purpose of FIR is to obtain the earliest count of a cognizable offence, before there is an opportunity for the circumstances to be forgotten and embellished. It is well settled that FIR is not a substantive piece of evidence and can be used to corroborate or contradict the statement of the maker thereof. It is also equally established that trustworthiness of the prosecution story can also be judged from the FIR. Besides, first information report is relevant as it may be a part of the resgestae (Gulshan Kumar V. state, 1993 Cr LJ 1525 (1530) (Del) =(1993)2 Crimes 234; (1993) 2 CC Cases 8).The omission of details in the First Information Report which was reccorded most promptly within about three hours of the occurrence and had reached the Ilaqa Magistrate without loss of time would not tell on prosecution case or statements of the eye-witnesses with regard to the participation of the appellant in the crime (Tam Narin V state of Haryana, 1993 Cr LJ 1343 (1349) (P &H).

It is not necessary that minutest details should find place in the first information report and it is sufficient if a broad picture is presented and revealed in the first information report. No exception can be taken if the first information report merely contains the broad features of the crime. Moreover the first information report can be used to discredit the testimony of the maker of the report and the prosecution case cannot be thrown out merely on the ground that entirely diferent version is given therein by its maker (Barkau V. state of U.P. 1993 Cr LJ 2954 (1961) (All).

As the first information statemet can be used only for the purpose of corroborating or contradicting the maker of the statement, the whole prosecution case cannot be thrown out on the basis of any statement.A case where the evidence of the eye- witnesses including the injured witness is totally acceptable, the attempt to demolish it on the ground that some other person who has witnessed the occurence has not been examined is only an exercise in futility. The first information report cannot be utilised for contradicting or discrediting the testinony of other witnesses who speak about the occurrence. As the first information report cannot be considered as substantive evidence, it cannot encroach upon the periphery of the evidence tendered by other witnesses with regard to the incident (Sahadevan Rajn V. state of Kerala, 1992 Cr LJ 2049 (2052) (2052) (Ker).In the first information report, elaborate assaults were not indicated. and there was omission to state about the injuries sustained by accused "B' and 'P'. Non-specification of the assaults, cannot be considered material and fatal unless the omission is vital and relates to material aspects. Merely because other acts have not been categorically attributed. that is not sufficient to discard the prosecution evidence. The statements before the investigating orricer are meant to be brief statements (Markanda Naik V. state, 1993 Cr LJ 3328 (3333) (Ori)(DB).

If the FIR is not duly proved merely for that reason testimony of eye-winess should not be rejected if the same is otherwise reliable (Benudhar Routra V. Raula alias Maheshwar Saha, 1991 Cr LJ 220 (Ori).

Whether a particu;ar piece of information should be treated as FIR or mot depends upon the facts and circumstances of each case. Where an information was passed on by the doctor to the police constable on duty at hospital without ascertaining facts relating to the incidence was held not to be attached undue importance (State of Gujarat V. Panubhai, 1991 Cri LJ 2226 (Guj).

44. **Vague or cryptic information, if F.I.R.** .— Mere information without description can not be treated to be Fist information Report because FIR at least should suggest some description to treat it as such. In the instant case an information was given that a murder had taken place in the village in question but in that report neither any indication was given as to who was murder, nor any other facts circumstances leading to that murder was given. Therefore, it was just an information and as such, it can not be treated as FIR (1993 Cr LJ 1090 (Pat). Where message are transmitted between Police officers *inter se*, if the message sent was cryptic because the object was merely to seek instructions from higher police officers or because the object was to send direction for the police force to reach the place of occurrence immediately, the message would not be F.I.R. (The State of M.P. V. Jagdish and ors. 1991 (3) Crimes 553(M.P.).

In this connection two decision- one reported in AIR 1951 Madras 812= 1951 (52) Cri LJ 857 (Gurusami Naidu's case) and the other AIR 1967 Cal 478= (1967 Cri LJ 1272) (Manna Lal's case)may be seen wherein, it has been held that an information of commission or suspected commission of a cognizable offence, if given by a person having personal knowledge to a officer of the police station, the same is

admissible as an information under S. 154 of the Code of Criminal procedure. In the instant case both the earlier informations had not been given by any person, who had some personal information about the commmssion of a cognizable offence, Rather, just by way of an information the police was informed of a murder and nothing beyound it. So far as the statement of chandeswar is concerned, neither he has stated that about the source of his knowledge, nor he had given details of himself in order to locate him in the event of necessity. As a matter of fact, as the record shows the prosecution, in spite of its best efforts could not produce him since his identity was not established. Apart from that, even if it is assumed that the information given by Chandeswar was a First Information Report, the defence cannot take advantage of it by saying that since the name/ names of the killers of the deceased being absent there, the appellants cannot be held to be responsible for that. One Chandeshwar might have got some information from any source (s) about the murder of a person and thought it necessary to report it to the police to enquire into. But by no stretch of imagination that information can be treated as a First Information Report as has been sought to be made out, In the circumstances. non-examination of Chandeswar or the person, who reported the thana cannot be fatal to the prosecution. In this connection, a decision of the Supreme Court reported in AIR 1988 SC 696= 1988 Cri LJ 848) Appa Bahi V. state of Gujarat) may be seen wherein, it has been observed that the prosecution case cannot be thrown out on the ground of non -examination of some witnesses (1993 Cr LJ 1090 Pat). Vague information given to police without description of commission of offence cannot be treated as FIR (Raj Mandal Thakur V. state of Bihar, 1993 Cr LJ 1090 (Raj).

Cryptic and anonymous telephone message received by a police officer or a person in the police station, which not in terms clearly specify the cognizable offence and therefore can not be treated as F.I.R. as defined under section 154 of the Cr. P.C. Subsequent written complaint by eye-witness to sub-Inspector of police in police station is not hit by section 162 Cr. P.C. and which amounts to F.I.R. (1993 Cr LJ 1594) (1971) 1 SCR 599; (1976) 1 SCJ 157 Rel on)

In the case of Soma Bhai Vs. State of Gujrat 1975 Cr LJ 1201=(1976) 1 SCJ 157 it was held: "under Section 154 of the Cr .P.C. the First Information is the earliest report made to the police officer with a view to his taking action in the matter. In the instant case. the complaint had made the report regarding the occurrence having taken place to P. S. Patel, Who however, before reducing it into writing, by way of abundant caution tried to seek further instruction from the main police station at Surat and that was why he had booked a call to sursat. The message given to the Surat police stqaation was too cryptic to constitute a First Information Report within the meaning of section 154 of the Code and was meant to be only for the purpose of getting further instructions. Furthermore, the facts marrated to P.S.I. Patel which were reduced to writing a few minutes later undoubtedly constituted the First Information Report in point of time made to the police in which necessary facts were given. In the circumstances, the telephone message to the police station at surat can not constitute First Information Report".

In Tapindar Sing v. State of Punjab 1970 Cr LJ 1415=(1971) 1 SCR 599, it was held;

"the telephoneic message rocorded in the daily diary of the police station was a cryptic and anonymous oral message which did not in terms clearly specify a cognizable offence and could not, therefore, be treated as first information report. The mere fact that this information was the first in point of time could not by itself clothe it with the character of first information report. The question whether or not a particular document constiutes a first information report has to be determined in each case"

In AIR 1993 SC 1544= 1993 Cr LJ 1857, Vague information about riots already with police. FIR about murder lodged by information after wards. It was observed that even if entry to that effect is made, the question is whether investigation commenced in the strict sence. Even if FIR lodged afterwards is held to be hit by section 162 Cr .P.C statement can also be used to corraborate ecidence of other eye-witnesses.

Mere information without description cannot be treated to be a First Information Report because FIR at least should suggest some description to treat it as such. In the instant case an information was given that a murder had taken place in the village in question but in that report neither any indication was given as to who was murdered, nor any other fact/ circumstrances leading to that murder was given . Therefore, it was just an information and as such, it cannot be treated as FIR(1993 Cr . L.J. 1090).

Since the information on which a police officer is expected to act must be authentic, telegrams and telephonic messages have been held to be in no better position than village gossip in respect of authenticity, since any arrest based upon such unauthenticated information would be in excess of the police officers duty. But if authencity of the telegram or of the telephonic message is subsequently confirmed, by themselves may then amount to authentic information in certain circustances and come within the purview of this section (AIR 1954 Mad 442; AIR 1934 Lah 413). Since it is not possible to take the signature of the nformant it is not to accept such information received by phone or telegram as the First Information Report (1953 T.C. 175, (279), 1963 N.L.J. 345; 39 Mys. L.J. 823) A telegram is not a signed document, and there is no guarantee as to its genuiness, and reliance on it cannot be placed, and investigation commenced under Section 157, unless and until,it is verified that the person alleged to have sent it, really sent it and meant to made that report. It follows that on such verification steps will have to be taken to have a proper report under section 154 Cr. P.C. (1959 Tripura 11 (13). Cryptic and anonynons telephonic message of a cognizable offence cannot be treated as F.I.R. (A.I.R. 1984 S.C. 1523). An oficer in charge of a police station is not bound to treat any anonymous information without the requisite details or authenticity as the first information. He is justified in verifying and ascertaining the authencity and details before registering a case and investigation (1986 K.L.T. 598: 1987 Cr .L.J. 180 (Kerala).

Whether a telephonic message can be treated as an F.I.R. or not would depend upon the facts and circumstances of each case. No hard and fast rule can be laid down in this connection. If the telephonic message has been given to officer- in-charge of a police station, the person giving the message is an ascertained one or is capable of being ascertained, the information has been reduced into writing as required by section 154, Cr .P.C. and it is a faithful record of such information and the information discloses commission of a cognizable offence and is not cryptic one or incomplete in essential details, it should consitute an F.I.R. An anoymous information, or information which is vague or cryptic and lacks in essential details or an information which has not been faithfully recorded, would not constitute an F.I.R. Section 154 Cr .P.C. requires that the oral infromation given to the officer-in-charge of a police station shall be reduced into writing and shall be read over to the first information is mandatory; it should be reduced into writing by the officer-in-charge of a police station or by any person under his directon. It should be a true and failthful record of the information given to the officer-in-charge by the informant. Whether it has been read over to him or not or whether it has been signed by him or not would be mere matters of form and not of substance. The ideas behind reading

over the information reduced into writing and obtaining signatures of the first informant thereon are intended to ensure that what has been reduced into writing is a true and faithful version of the information given to the officer-in -charge of the police station (1989 Cri . L.J. 1350 (1359, 1360) (Raj)

The only information given on phone was that there was firing. The informant did not disclose his name even. Held: it could not be treated as F.I.R. (A.I.R. 1970 S.C. 1566) .

Where the telephonic message is cryptic and does not disclose particulars from which it can be inferred that a cognizable offence has been committed it cannot be treated as F. I.R. (A.I.R. 1975 S.C. 1453: 1975 Cr L.J. 1201: 1980 Cr .L.R. (Guj.) 37: 1980 G.LR. 533: (1984) 4 S.C.C. 83 (86, 87) Though a telephonic message cannot be signed by the person giving the message, if it disclosed the identity of the caller and also the necessary facts to make out a cognizable offence it can be treated as F.I.R. (1976 Cr . L.J. 132 (Goa).

45. **Delay in lodging the report.**— In case of delay in loding the F.I.R. without proper explanation for the delay it losses its corroborative value (1989 All. Cr. R. 219 (222) : (1989) 1 Cr .L.C. 242). The importance of first information report made promptly cannot be minimised. The object in securing the same is to obtain early information of alleged criminal activity, to record the circumatances before there is time or them to be embellisment which is a creature of after thought. Because of delay, the F.I.R. not only gets benefit of the advantage of spontaneity, danger also creeps in of the introduction of coloured version (1973 Cr L.J. 185: A.I.R. 1973 S.C. 1: A.I.R. 1973 S.C. 501). Delay creates, in the absence of a satisfactory explanation a great deal of suspicion as to its authentity (A.I.R. 1966 Mys. 142= (1966) 1 Maus. L.J. 476= 1966 Cr. L.J. 672). Unexplained delay introduces serious infirmity in the prosecution case against accused (1983 1. Cr .R. 390 (S.C).. 1984 Cr (Mah.) 67(69)= 1982 Mah. L.R. 71= (1984) 2 Cr.L.R. 294(Karn) = (1984) 1 Kar. L.J. 242).

Delay in lodging F.I.R. itself is not fatal to prosecution case if it is duly explained (Jasbir singh. V. State of Punjab, 1992 (3) Crimes 483 (484). FIR is deemed as the corner stone of prosecution case and is expected to immediately follow the event. Delayed report is looked with suspicion as police invariable records. FIR after making preliminary investigation which tampers with is sanctity (Sheroo Khan Vs. Kaloo Khan 1992 PCrLJ 110).

Where there was extreme delay in lodging FIR which was occasioend due to the informant obtaining legal advice, the prosecution evidence was rejected (State of U.P. V. Raj Sahadur, 1993 Cr LJ 86(All) (DB).

Unexplained delay in making a petition of complaint or in lodging the first informaion report is certainly a suspicious feature to be taken into consideration while judging the bona fides of the prosecution as delay in making a commplaint or in lodging the first information report may bring in coloured version, embelishment and concoction (1983 Cr. L.R. (S.C.) 388 (392)= 1983 S.C.C. (Cr.) 784).The delay of a few hours by itself in recording the statements of the informant does not amount to serious infirmity unless there is/are material to suggest or indicate that Investigating agency had deliberately delayed in recording the statements to afford an opportunity to the maker to set up a case of his own choice. (1993 Cri. L.J. 1090).

In the course of the cross- examination of witnesses, suggestions should be put and material brought on record if the defence desires to assail the F.I.R. on any ground such as delay, later preparation etc. In the absence of any such suggestion, F.I.R. may be taken as genuine (A.I.R. 1988 S.C. 747: 1988 Cr.L.J. 909).

Delay in lodging F.I.R. may not be fatal to the prosecution case but where circumstances indicate that there was likelihood of exaggeration being introduced or false accusation being thought of, then onus lies on the prosecution to explain the delay satisfactorily (Sandanada Das V. State of Orissa 1991 (2) Crimes 344 (Ori.). In absence of any explanation for delay in FIR the version of the prosecution is weakened. Delayed FIR does not help the prosecution. Mere delay is not fatal in every case is an extremely vital and valuable piece of evidence for the purposes of corroborating the oral evidence adduced at the trial. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offences is to obtain prior information regarding the circumstances in which the crime was committed the names of the actual culprits and the part played by them as well as the names of eye-witnesses present at the scence of occurrence. Dely in the creature of an aften results in embellishment which is the creature of an after thought. On account of delay the report only gets benefit and the advantage of spontaineity danger creeps in and the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is therefore, essential that the delay in the loding of the FIR should be satisfactorily accounted for (1993 Cri :L.J. 730).

Delay in filing a complaint may be a circumstance to be taken into consideration but by itself it affords no ground for dismissing the complaint (AIR 1970 SC 962= 1970 CrLJ 885; AIR 1971 SS 66= 1971 CrlJ 20). Delay in lodging F.I.R. if satisfactorily explained, cannot be fatal to the prosecution case (Radhey Sham V. state of Haryana 1992(3) Crimes 3).

The first information report in a criminal case is an extremely vital and valuable piece of evidence for the purposes of corroborating the oral evidence adduced at the trial. The importance of the above report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the mames of the actual culprits and the part played by them as well as the mames of the eye -witnesses present at the sence of occurrence. Delay in lodging the first information report quite often results in embellishment account of concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the ,lodging of the first information report should be satisfactorily explained (AIR 1973 SC 501 = 1972 CrLJ 1269; 1982 CrlJ 493 (495); AIR 1936 Pesh 106= 37 CrLJ 619)

Making of first information report with great promptitude, held give rise to conclusion that its maker must have been present on spot and witnessed the affair (1988 P.CrLJ 56). Undue or unreasonable delay in lodging the first information report inevitably gives rise to suspicion which puts the Court on guard to look for the possible motive. When the first information report concerning the alleged murder was filed more than a day after the occurrence and no explanation was offered for such an inordinate delay, the defence criticism that it hads been made after due deliberation would be legitimate (1986 CrlJ 433 Ori) . It is very useful if the first information report is recorded before there is time and opportunity to embellish or before the informant's memory fades (AIR 1973 SC 1= 1973 CrlJ 185).

Delay in filing first information report not explained in statement under section 161 Cr. P.C. Names of actual assailants not known. Extreme delay caused due to informant obtaining legal advice. Prosecution evidence was rejected (1993 CrLJ 86 All).

Under law the F.I.R. is to be sent to the Magistrate without delay bit mere delay in despatch of the F.I.R. is not a circumstance which can throw out the prosecution case in its entirely (AIR 1976 SC 2304= 1976 Crl 1757; 1993 Cr LJ 397 Knt). But

unless delay in despatching the F.I.R. is explained, it is a circumstance against the prosecution (AIR 1976 SC 951 : AIR 1971 SC 1221).

Delay of 12 hours in loding the F.I.R. is undoubtedly an important factor but when reasonably explained, the delay is of no consequence (AIR 1974 SC 2118= 1974 CrLJ 1393 ; AIR 1978 SC 1142= 1978 CrLJ 1122; 1904 BLD 94). The in ordinate delay in reqistering the F.I.R. and further daly in recording the statement or the material witnesses, caste a cloud of suspicion on the credibility of the entire wrap and woof the prosecution story (AIR 1979 SC 135= 1979 Cr LJ 51).

Prosection is required to explain delay. failure to do so is a circumstance of importance speaking against the prosecution case (AIR 1971 SC 66= 1971 CrLJ 20). Delay of 20 hours in lodging the complaint when the place of occurrence is only two miles from the police station makes the F.I.R. doubtful (AIR 1973 SC501 1972 CrLJ 1296). Where computing the time taken by the imformant in lodging the report, the Court must give consideration to human factors and other circumstances (AIR 1981 SC 2073= 981 CLJ 1701, F.I.R. was lodged three days after the incident although the victim was conscious. It cast doubt (AIR 1982 SC 1216).

One thing must not be lost sight of where there is no cross-examination on the reason explained for delaly in loding the F.I.R. The defence can not urge that no reliance should be placed on it (AIR 1980 Sc 1269= 1980 C LJ 928).

As to what constitutes dalay in lodging F.I.R. is a question of fact depending upon the peculiar circumstances of each case. No hard and fast rule can be laid down to determine as to which information is prompt and report is delayed. Distance between a police station and scene of occurrence is not the only factor to be considered in determining the question. There are a variety of circumstances which a Court has to keep in mind in order to decide on the question of promptness or otherwise as to the lodging of the first report, viz. the condition of the injured, distance between the police station and the place of occurrence, means of communication, ignorance on account of rustic simplicity, fear of miscreants, etc. In a case reported in 1957 Cr LJ page 1200: AIR 1957 All 755, F.I.R. was lodged after 6 hours of the occurrence when the police station was only 4 miles. Their Lordships of the Allahabad high Court held the report to he prompt , considering the serious condition of the injured necessitating his being carried from one place to another slowly and carefully and the fact that at that hour of the night it took time to arrange for a conveyance. Similarly a first report lodged after two days of the occurrence was not thrown out as a suspicious document because from the facts of the case it appeared that the victim of the assault never intended to report the matter to the police station and he was obliged to do so when his condition started worsening and there was fear of his death (1955 Cr LJ 1014: AIR 1955 SC 439). Their Lordships held that a first report lodged after six and a half hours of the occurrence is a prompt information considering that a murderous assault had taken place twelve miles away from the police station and the first thoughts of the informant who was closely related to the victims of assault would have been to tend to the victims. When an injured person is not in a position to give early information on account of his injuries and want of communication with others, there is no question of F.I.R. being delayed. In this case the occurrence took place at midnight and the report was lodged at 2 P.M. the next day though the police station was only 4 miles away from the scene of occurrence (49 Cr LJ 140 (All)). The delay of two days in giving information to the police is not remarkable in the case of iliterate witnesses with no money and no friends at the place of occurence (43 Cr LJ 529= AIR 1942 Bom 71 (FB)).

Where the occurrence took place late in the evening and when one of the witnesses proceeded to the police station along with two others for lodging the report they saw the appellants waiting in the jungle and so returned to the village on account of fear (1985 SCC (Cri) 470; 1973 Cr LJ 185 (SC) or where the night was dark and the road was rough and the complainants went to the police station only the next morning (1974 SCC (Cri 881) or the mere fact that there was delay in despatching the copy of the F.I.R. to the Magistrate or some delay before necessary enquiries where made would not be fatal to the prosecution case (1985 SCC (Cri) 464).

The delay in making the F.I.R. is not sufficient to make a murder case doubtful when there are eye-witnesses whose statements are not vitiated by material contradictions or improbabilities, and particularly when sufficient motive has been established and the appellant absconded imediately after the occurrence to find refuge in a foreign country for not less than 3 years (AIR 1936 Pesh 106 = 37 CrLJ 619).

Delay held, satisfactorily explained.-Immediately after the incident was narrated to the mother and other ladies, a decision was taken to await the return of the father before deciding on the course of action. On the arrival of the father the sarpanch was contacted, who advised that the police should be informed about the incident. The sarpanch, however, stated that he would accompany them next morning since it was already dark. The girl was taken on the palampur police station on the next morning and the F.I.R. was lodged. Held there was no delay in lodging the FIR (A.I.R. 1989 S.C. 702 (705): 1989 All. Cr. R. 175). When a case of murder has taken place in the night and the informant both in his F.I.R. and evidence states that he could not proceed to police station in the night due to fear of the assailant, the explanation was believable. Delay in lodging F.I.R. Was satisfactorily explained (1989 All. Cr. C. 9 (12, 13).

So far as the delay in lodging the FIR is concerned, the Court found that the explanation offered was congent and plausible . It had been explained that a meeting was convened in the village to amicably settle the matter and when no progress was made, the FIR was lodged. It is not unnatural that an attempt was made to protect the dignity of a woman and not to bring the incident to limelight. In a tradition bound orthodox society , it would not be normal for a rustice woman shedding her inhibitions to come to court to falsely implicate a co-villager against whom she has even no remote animostity (Panchu Parida v. State of Orissa, 1993 Cr LJ 953 (955) (Ori); See slso Thyagarajan v. State . 1993 Cr LJ 1993 (Mad) ; Madrusingh v State of M.P. 1993 Cr LJ 1584(MP).

Where there was delay of 6 hours in lodging the F.I.R. but it was revealed that the said FIR are lodged after the police party raided and bomb was hurled and so this delay was held not to affect the prosecution case (Erram Santosh Reddy v. State of A.P., 1991 Cri LJ 2189 (SC).

So far as the delay in giving the report is concerned the High Court accepted the evidence of the compliainant that he was made to wait at the police station till the P. S.I. came and held that the delay has been properly explained, Even otherwise, the delay was not inordinate. The occurrence took place around 12 noon and the police station was at a distane of three miles and the report was recorded at about 5.30 p.m. The High Court ,therefore, has rightly held that this delay, if any, remain explained. Even otherwise the same does no affect the prosecution case (Thokore Dolji vanvirji v. State of Gujarat, (1993) 2 C.C Cases 122 (125) (SC).

No doubt , there is a delay of about two hours in lodging of the FIR in the police station but this delay stands satisfactorily explained on the record. It is to be

observed here that the eye-witnesses are close relations of the deceased. As such, they were not expected to act mechanically to think of going to the police station immediately. They were seeing the deceased, who was their close relation dying at the spot. They must have consumed sometime at the spot before proceeding further in the matter. It has also come in evidence that after the occurrence , they had contacted a Member panchayat and it was in his company that P the prosecution witness ieft for the police station to lodge the report. In this background , it cannot be said that the delay of about two hours in lodging the FIR is fatal and there is no room to view this delay with suspicion (Gurde v. Sigh v. State of Punjad (1993) 2 C.C Case 131 (135) (DB).

It is evidence of P.W. 4 that he was intimated about the death of his daughter by committing suicide, by the maternal uncle of Satpal singh, son-in - law on june 25, 1983 at about 5.30 P.M. He immediately rushed to the hospital with members of his family where his daughter was brought. It is also in his evidence that he stayed there the whole night with his wife and other memberes of his family near the deadbody of his deceased daughter and also on the next day till the dead body was handed over to him after the completion of post-mortem in the afternoon. The Assistant sub-Inspector of Ploce of Ajnala Police station reached SGTB Hospital on the next day i.e., on june 26, 1983 and got his statement recorded there. In the circumstances it cannot be said that there has been any delay in reporting the matter to the police (Gurbachan Singh v. Satpal Singh, AIR 1990 SC 209 (218).

It is true that time factor has an important role in context with lodging of first information report . But if the prosecution explains the delay satisfactorily, the Court is not expected to reject the whole prosecution case merely on that ground . In the instant case two sons of informant were travelling on motor cycle. One of them was fatally knocked down by accused with his car. Eye-witness (Rohan) brother of deceased was in shock and unconscious for whole night. Informant who was then at Delhi reached home at 4.00 A.M. in the morning. At about 9.00 a.m in the morning he tried to know the full details from his injured son Rahan and them he lodged the FIR on the basis of the facts narrated by his son Rahan. It was held that the agony of the mother of the deceased and other members of the family at Rahtak in absence of the father of the victim who was then at Delhi can be well appreciated and as such no adverse inference can be drawn in the facts and circumstances of the case, because Rahan or any one did not lodge the first information report during night itself (1993 Cr LJ 3839 (3834)SC).

Ordinarily when a first information report is lodged soon after the occurrence leaving no scope for consultation and fabrication, the presumption is that it is a truthful account eliminating the possibility of substitution or false implication. On other hand, the Courts have always viewed first information with grave suspicion when there has been unexplained delay in giving it and under this situation it can be presumed that the delay in the registration of FIR was used for the purpose of manipulation of the prosecution story (1994 BLD 94). The FIR which was submitted with delay and there being no proper explanation for the said delay loses its corroborative value. (1980) 3 Crimes 456 (459) all).

One thing must not be lost sight of where there is no cross examination on the reasons explained for delay in lodging the FIR the defence can not urge that no reliance should be palced on it. (AIR 1980 SC 1269 = 1980 CrLJ 928).

In the instant case, although the FIR was given to the police officer available in the village, it was recorded at the wrong police station thereby resulting in some

delay owing to the fact that it had to be properly lodged at another police station and so it could not be said that there was any delay in furnishing the FIR (1974 CrLJ 1300 (SC).

The occurrence took place around 12 noon and the police station was at a distance ot three miles and the report was recorded at about 5.30 p. m. The High Court, therefore, had rightly held that this delay, if any, remains explained, even otherwise the same does not affect the prosecution case (Thakore Dolji Vanvirji v. State of Gujarat, 1992 Cr LJ 3953 (3955) (SC).

Motive is clear that mere delay in sending the first information report to the Court from the police station, though promptly lodged and registered and thereby set the law in motion to investigate the particular crime in a given case, it could be deemed in the context of such delay that it would affect the very fabric of the prosecution case. This would however, in Court's view not mean the how much of the delay happened can be allowed to remain on evidence without any explanation and in such cases, the prosecution is duty bound to explain the delay in sending the report to the Court with a view to avoid any bereft of embellishments (Swaminathan v . State 1993 Cr LJ 2379 (2369) (Mad).

The prosecution must explain delay in taking the F.I.R. When explanation for delay in giving the First Information Report is satisfactory , the delay is not of material significance (PLD 1984 Lah 326 (DB). Where complainant, father of deceased girl, finding his daughter murdered within his sight became completely upset by shock so as to slow down his actionary power with an impact upon his movement. It takes time for such person to regain his active self. Delay, if any, in lodging report in such a situation by the father, would not visit case with suspicion when facts as to actual occurrence were otherwise established (1985 P. Cr. L. J. 2232 (DB). Where the murder was committed at 10-00 A.M. evidence on record showed that all adult family members were away and the wife, in a fix due to her husbands death,kept waiting for male members and then proceeded to police station about 12 miles away, accupaying the male members next morning before dawn and that reason of delay was mentioned also in the F.I.R. it was held that the explanation was, immaterial (1969 P.Cr.L.J. 491 (DB) =20 DLR 839.).

Where complainant gave an explanation as to delay that after occurrence he had to travel on foot to cover a distance of fifteen miles to come to metalled road where at he boarded a truck and then reached police station. Delay in lodging First Information Report, was satisfactorily explained (1985 P.Cr.L.J. 2232(DB). The fact that the injured man was first taken to a hospital, was sufficient explanation for delay (1968 SCMR 325; 1978 P.Cr. L.J. 216 (DB) ; 1972 P.Cr.L.J. 1012 (DB) .

Where injured were rushed to hospital from place of occurrence; Exploratory surgery was done under anaesthesia. Investigation Officer receiving information of occurrecne, rushed to place of occurrence, then to the hospital and recorded statement of injured complainant in the hospital. Delay in lodging F.I.R. was sufficiently explained (1987 P.Cr. L.J. 90 (DB).Where delay in lodging F.I.R. was explained by stating that the doctor in the first Hospital referred them to another Hospital . But the Doctor denied that allegation. The Court accepted the explanation as sufficient to counter the effect of the delay (PLD 1976 SC 44= PLJ 1976 SC 234).

Where matter was reported to police after about 14 ours of occurrence. Statment of eye-witness (complainant) did not contain any explanation delay in lodging of F.I.R. but during cross- examination it was stated by him that "accused soon after the fire threatened that if any one sent to report the matter to police he shall be murdered". Eye-witnesses being without any weapon, it was natural for them

not to proceed to police station immediately after occurrence on account of fear of accused who was armed with a rifle . Explanation for delay in lodging of report, was quite plausible and whould not affect merits of case (PLD 1978 Lah . 149 = PLJ 1987 Cr. C. 226). But where there is no satisfactory explanation for delay , it is fatal to the prosecution case (1974 P. Cr. L. J. 416 (DB). Where the explanation given for delay was not found to be plausible and there was no confirmatory or corroborating evidence in support of the charge that the accused gave a fatal blow to the deceased, the accused was given benefit of the doubt (1969 P.Cr. L.J. 251).

Prosecution is required to explain delay in lodging FIR. Failure to do so is a circumstance of importance speaking against the prosecution case (AIR 1971 SC 66=1971 Cr LJ 20) . Delay in filing a complaint may be a circumstance to be taken into consideration but by itself it affords no ground for dismissing the complaint (AIR 1970 SC 962 =1970 Cr LJ 885).While computing the time taken by the information in lodging the report, the Court must give consideration to human factors and other circumstances (AIR 1981 SC 2073=1981 CrLJ 1701). FIR lodged after about five and a half hours of occurrence. Police station at a distance of 3 miles. Delay , if any, remained explained and was also not inordinate (AIR 1993 SC 209 ; 1993 Cr LJ 533 (Raj).

Delay in making F.I.R.should not be applied like a rule of limitation in civil cases. It is at worst a suspicious circumstance in the case of prosecution and not in itself necessarily fatal to the prosecutin in very case (1980 P. Cr. L.J. 251 (Lah). Mere delay cannot by itself, be held to be a reason of rejecting evidence which is otherwise fully entitled to credit . It is only a circumstance which puts the Court on its guard (1986 P. Cr. L.J. 2900(DB); 1986 SCMR 502=1986 P. Cr.L.J. 962; AIR 1924 Cal. 975 (DB). Delay was not material when time and place of occurrence was admitted defence (PLD 1987 Lah. 401= PLJ 1987 Cr. C. 398 (DB); 1985 P. Cr. L.J. 2630(DB).

F.I.R. had been lodged at a distance of about 1^ miles from the place of occurrence at night within eight hours was held not inordinate delay in the facts of the case (AIR 1993 SC 87). When the police station is only 200 to 300 cubits away from the house of the informant, FIR lodged ater 12 hours, makes the prosecution case suspicious (1994 BLD 4).

Prosecution is required to explain delay in lodging F.I.R. Failure to do so is a circumstance of importance speaking against the prosecution case (AIR 1971 S.C. 66=1971 Cr.L.J. 20) . Delay in filing a complaint may be circumstance to be taken into consideration but by itself it affords no ground for dismissing the complaint (AIR 1970 S.C. 962=1970 Cr. L. J. 885). While computing the time taken by the informant in lodging the report, the Court must give consideration to human factors and other circumstances (AIR 1981 S.C. 2073 =1981 Cr. L.R. 1701).

The delay in making the F.I.R. is not sufficient to make a murder case doubtful when there are eye-witnesses whose statements are not vitiated by material contradictions or improbabilities, and particularly when sufficient motive has been established and the accused absconded immediately after the occurrence to find refuge in a foreign country for not less than a years (AIR 1936 Pesh 106=37 Cr LJ 619). Victim of offence under section 354 Penal Code is a rustice woman . No progress made by village committe convenced to settle matter amicably. FIR lodged thereafter.Attempt made to protect dignity of women and not to bring incident to limelight. Explanation offered for delay can be said to be cogent and plausible (1993 Cr LJ 953 (Orssia).

The investigating officer having not been cross- examined on the question of delay in recording the statement under section 161 Cr. P.C. there is no substance in

the contention that the delay should have been taken as a factor to question the veracity of the witness concerned (44 DLR 217; 1993 Cr LJ 2413 (Raj). Where the investigating officer had gone to the village of occurrence where there was no electricity in the night on the basis of some vague information of violence having broken out there, has categorically denied having questioned the witnesses or recorded their statements, the F.I.R. recorded in the police station, after reaching there, could not be said to be hit by section 162 on ground of its being not earliest statement recorded. Having gone on vague information the officer could not have gone to the village prepared to record any statement of to do any investigation (AIR 1989 S.C. 2004; AIR 1975 S.C. 1453).

The telephone message was received by Hari Singh A.S.I. police station, city Kotwali at 5.35 P.M. on September 8, 1969. The person conveying the information did not disclose his identity , nor did he give any other particulars and all that is said to have been conveyed was that firing had taken place at the taxi stand, Ludhiana. This was, of course, recorded in the daily diary of the police station by the police officer responding to the telephone call. But prima facie this cryptic and anonymous oral message which did not in terms clearly specify a cognizable offence cannot be treated as F.I.R. The mere fact that this information was the first in point of time does not itself clothe it with the character of F.I.R. (AIR 1970 S.C. 1566 ;AIR 1975 S.C. 1453).

Informant dead if F.I.R. could be used in evidence.- Though in absence of the evidence of the informant, statements made in the first information report cannot be used and the first information report has been brought on the record by the prosecution. Therefore, the first information report cannot be lost sight of, which contains the earliest version has its own importance for just decision of the case (1988)1 Crimes 740 (742) (Pat)

First information-need not necessarily be first in point of time. - It was never meant to be laid down that any sort of information would fall under section 154 so long as it was the first in point of time. First it must be an information, and secondly, it must relate to a cognizable offence on the face of it, and not merely in the light of subsequent events. The fact of the officer starting an investigation is not the sole criterion of a first information, for under chapter XII, Cr.P.C. the officer may investigate a non-cognizable offence divulged by the informationn and prior statements made to the police officer are not excluded from the evidence under section 162 (L.L.R. 58 1312).

Where as a result of some encounter by the police a short cryptic report was sent to the police station for securing more police force, the subsequent report lodged with fulll facts would be the F.I.R. and not the earlier one (1965) 1 Cr. L.J. 160= A.I.R. 1966 Cal. 89).

Where on receipt of vague information about a murder the police officer reached the place of occurrence and recorded the F.I.R., held: the vague information received at the police station could not be treated as the F.I.R. and that the report recorded on the spot was the First Information Report (28 Cut. L.T. 460= (1963) 2 Cr. L. J. 470= A.I.R. 1970 S.C. 1566).

Where two persons give information about the same occurrence to two different police officers at different places, the one which was little later in point of time, need not be excluded on the ground that it was made during investigation, but must be regarded as an independent first information report (A.I.R. 1936 Pat. 11= 36 Cr.L.J. 235; A.I.R. 1957 All. 755; 1957 Cr.L.J. 1200). But where an informant gave two statements at the police station at different times, the subsequent statement cannot

be accepted as the first information report as contemplated by section 154 Cr. P.C. (1961 Pat . L.R. 60). List of stolen property is not covered by section 162 and is a part of the first information report and is admissible (1955 All. L.J. 492). But if given after commencement of investigation section 162 will be attracted (A.I.R. 1959J. & K. 105 (106).

F.I.R. vis-a-vis the bar under section 162 Cr.P.C.- Non-registration of the F.I.R., on receiving the information regarding the commission of a cognizable offence, by the police may at best be an irregularity. It would not vitiate the steps taken by the police pursuant to such information. Statements made by witnesses to the police prior to the formal registration of the F.I.R. would be hit by section 162. Whether any miscarriage of justice has been occasioned by such irregularity is a matter to be decided during trial and in the light of evidence . Such an investigation, without the recording of the F.I.R., cannot be quashed under section 482, Cr. P.C. (1987 Cr. L.J. 200(Kerala) (F.B.).

Investigation commences against an accused on the basis of a complaint and in that the complainant has not made any referecne to his having committed an offence. While that ivestigation is proceeding, the accused files a report under section 154,Cr. P.C. against that complainant; the latter complaint is not hit by section 162 (1979) 20 Guj. L. R. 477).

Value and importance of first information.- A first information report is most immediate and first version of the incident and has great value in ascertaining the truth, and where it comes from a person who was not only present on the scene but actually took part in the incident it has the greatest value (1955 Bhopal 9(11). It is not a piece of substantive evidence, but is nevertheless of importance as it gives the earliest information regarding the occurrence (AIR1954 Cal. 258(269)= AIR 1960 S.C. 391= 1960 Cr.L.J. 532). FIR in itself is not a substantive piece of evidence and omission of certain details in FIR would not reflect on testimony of complainant if it otherwise does not suffer from infirmities and contradictions. FIR need not contain each and every detail of the facts (Wahid Bux and others Vs. State 1992 PCrLJ 187).

The First information statement is inadmissible for the purpose of proving the truth or falsity of the facts mentioned and omitted to be mentioned in it. The only use to which it can be put is corroboration under section 157 or contradiction under section 145 of the Evidence Act. For those purposes it can be used only for or against the witness who gave that statement because it is a prior statement only so far as he is concerned. It cannot be used against other witnesses (1974 Ker.L.T. 328 (421). The accused is entitled to make use of it to protect his own interest by cross examining the prosecution witnesses with reference to additions and alterations in the story which might subsequently be made in evidence (AIR1955 All. 328 (331). Promptness in making the report may justify the inference that it is not a concocted story (AIR 1944 Sind 94 (97).

Omission to name the accused in the F.I.R.- Omission to mention the names of the assailants does not result in the negation of the character of the document as F.I.R. (1969 L.W. (Cr) 124), and will not by itself be sufficient proof of their innocence (AIR 1958 A.P. 225).When names of some accused are mentioned in the F.I.R. and of other accused are not mentioned , it is a circumstance which the prosecution has to explain though no rule of law stipulates that an accused whose name is not mentioned in the F.I.R. is entitled to an acquittal (A.I.R. 1983 S.C. 554: 1983 Cr.L.J. 989=1983 S.C. Cr. R. 224 =1983 S.C.C. (Cr) 523). In a case where two persons have been murdered at dead of night, it is but nature to inform the police first about the occurrence and as such non-mentioning of any name in the FIR rings a truth in the FIR (Shahjahan Sarder And others Vs. The State, (1993) 13 BLD (AD) 58).

When all minute details are given in a lengthy F.I.R. there is no reason to accept that the informant was confused about the identity of the person who tried to put him up (1983) 2 Crimes 868). On the ground that three out of the five assailants were mentioned in the F.I.R. as not known to the informant, they were given benefit of doubt (1984)1 Crimes 484). Omission to state the names of the assailants in a telegram sent by an alleged eye-witness immediately after the incident is a matter which must be considered when weighing the prosecution case (AIR 1953 S.C. 122 (124)= 1953 Cr. L.J. 662). The omission of the name of the accused in the F.I.R. is normally very material, but it is not when the informant is not an eye-witness of the occurrence (A.I.R. 1954 S.C. 30 (31) = 1954 Cr. L.J. 261; A.I.R. 1955 S.C. 216: 1955 Cr. L.J. 572= 1961 Ker. L.J. 58).

Non-mention of the names of accused in the F.I.R. would certainly affect the bona fides of the prosecution case (A.I.R. 1988 S.C. 345 : 1988 Cr.L.J. 422). The mere fact that the name of the accused is not mentioned in the F.I.R. is not enough to hold him not guilty. Whether or not he is guilty depends on the evidence against him at the trial (A.I.R. 1987 S.C. 923 : 1987 Cr.L.J. 838 (S.C.).

F.I.R. being an earliest record of the case it has got must importance and it enables the Court to see what was the prosecution case at the initial stage and to check up subsequent embellishment or departure therefore as the case proceeds through different stages. If the names of the accused persons are omitted from the F.I.R. and during trial their names are introduced by the informant it should not be believed; specially when informant asserts himself to be a eye witness and having seen the offenders omits the name of the persons who are later on placed on trial such omission will be a circumstance in favour of the accused (Md. Ali Haider Vs State, 40 DLR 97).

It appears that Fazlur Rahman was not an eye witness of the occurrence and there is evidence on record that the occurrence took place in midnight and in the early morning he sent to the police station, which is 10 miles away from the place of occurrence, to lodge the F.I.R. and brought the police officer at 4 P.M. in the afternoon. Thus no grievance can be made for non-mentioning of any name of the accused persons in the F.I.R. It is also on record that the material witnesses were unconsicious and there was no evidence on record that he had any opportunity to discusses with any of the eye witneses before lodging the F.I.R. and hence non-mentioning of the names of the accused persons in the F.I.R. is not at all material in the facts and circumstances of the case. In a case of this nature where two persons have been murdered at dead of night, it is but natural to inform the police first about the occurrence and as such non-mentioning of any name in the F. I.R. rings a truth in the F.I.R. (1993 BLD (AD) 56 (62).

46. **Examination of Investigating officer**.- Investigating officer is generaly regarded as most important witness both from prosecution and defence point of view. Failure of prosecution to examine Investigating officer would result in causing serious prejudice to accused facing a capital charge (1984 PCr LJ 2950).Non-examination of Investigation officer in a criminal trial causes serious lacuna in prosecution case and prejuduce to accused. The tendency of I.O. is to keep away from Court is not good (Rajawa Kebat @ Rajendra mandal v. State of Bihar 1988 (1) Crimes 709 (Pat).

An adverse inference against the prosecution for withholding investigating officer can not be drawn when the defence could not draw the attention of any P.W. to any contradiction between their statement under section 161 Cr.P.C. and their evidence in Court (Bhagabn Chandra v. State 38 DLR (1986).

Failure by the prosecution to examine the investigating officer is a serious defect which can not be cured by a direction to the jury that presumption against the prosecution should be drawn on account of this omission (9 DLR 594).

In a criminal trial particularly in the trial of a murder case it is of utmost importance that the prosecution should examine the investigating officer as the absence of such officer from the witness box would place the accused in a very great disadvantage as he may not bring out many facts on record which may be cases where the examination of the investigating officer may not be very material and in a particular case the non-examination of such officer may not cause any prejudice to the accused (1963) 29 Cut LT 557 (569).

Non-examination of Investigation officer is a vital defect in prosecution case entitling the accused to acquittal. Here one P.W. was confronted by his omission to state before I.O. about an extra-judicial confession. The witness said he did so state, but, the I.O. was not examined to prove the vital omission amounting to confession. This non-examination of I.O. entitled accused to acquittal (1986) 1 Crimes 299). But non-examination of I.O. leads to deprivation of opportunity to bring out contradictions in the statements of the witness and it is a vital infirmity (1986) 1 Crimes 299). But in a case the Magistarate refused to rely on a witness as because of absence of I.O., certain vital omissions in the statement of the witness before the police could not be brought into evidence . It was held simply because of this, her substantive evidence cannot be disbelieved (1986) 1 Crimes 723 (727).

In the case of Sk. Rashid v. State of Bihar (1987 BBCJ (HC) 151) it was said at page 155 (para 6):

"True, non-examiation of investigating officer is not fatal to the prosecution. A Court has to see whether the evidence of the investigating officer is essential for the case of the prosecution to succeed or not. The Court has to see at the same time that the accused is not unnecessarily harassed and unless it sees that for inevitable reasons the prosecution fails to produce the investigating officer, it may pronounce the judgment without the evidence of the investigating officer. The court, if it is satisfied that the evidence of the investigating officer is essential must take coercive measures to compel his attendence as a witness" (1993 CrLJ 772). If the police officer who submitted charge sheet does not attend the Court on sumons warrant of arrest might be issued to inforce attendence (34 DLR 73).

In the case of Brahmdeo Hajra vs. Horundra Prashad, 1988 Cr LJ 734 it was held:

"Non-examination of the ivestigating officer is a serious lapse on the part of the prosecuting agency which we find in this case. The obscurity appearing in the case remained unexplained. We could not get what were the objective findings noted by the police officer which would have been helpful in appreciating the correctness or otherwise of the prosecution version. We have seen some important contradictions elucidated in the statements of the witnesses made earlier before the police under S. 161 of the Code of criminal procedure and remained on the record of the deposition of those witnesses without clarification to great prejudice to the accused . Not only that the investigating officer was not examined, even the police diary was not put in evidence or proved to enable the Court to consider the admissible part of the record to analyse and appreciate and to test the credibility of the oral testimony of the witnesses" (1993 Cr L.J. 772). But non-examination of the Investigation Officer at the trial does not vitate a trial to lead to verdict of acquittal when there is no contradiction between the Court evidence and the statement recorded during investigation (1985 Cr LJ 1406). When a police officer who assisted the I.O. (here D.S.P.) is not examined in chief but he is only offered for cross-examination,the

defence is not justified in commenting upon the need of the officer to be examined-in-chief (1985 Cr LJ 1357=AIR 1985 SC 1092). In substance the law is that when contradictions are vital for non-examination of I.O. the prosecution case suffers fatally. But contradictions or omissions when are not material , non-examination of I.O. is not fatal to the prosecution case (1986) 1 Cimes 496). Non -examination of investigating officer does not prejudice the defence when the defence did not and could not draw the attention of any of the witnesses examined to any contradiction to have been made by them between their depositions in Court and their statementls recorded under section 161 of the Code of Criminal Procedure ((1986) 38 DLR 347 =1987 BLD 351).

Non-examination of the I.O. is a serious lacuna (1988 CrLJ 1288). Non-examination on Investigation officer is a vital defect in prosecution case entitling the accused to acquittal. Here one P.W. was confronted by his omission to state before I.O. about an extra-judicial confession. The witness said he did so state. But, the I.O., was not examined to prove the vital omission amounting to confession. This non-examination entitled accused to aquittal (1986) 1 Crimes 299). Non-examination of I.O. leads to deprivation of the opportunity to bring out contradictions in the statements of the witness and it is a vital infirmity (1986) 1 Crimes 299).But in a case the Migistrate refused to rely on a witness as because of absence of I.O. certain vital omissions in the statement of the witness before the police could bot be brought into evidence . It was held simply because of this, her substantive evidence cannot be disbelieved (1986) 1 Crimes 723 (727).

The incident was alleged to have taken place at 2.30 P.M. and according to prosecution witness-H, the police arrived within two hours but the first information report had been recorded on the next day at 11.30 a.m. i.e. after 22 hours. Even if it is assumed that the report was taken down at 6.30 p.m., it his section 162 of the Cr. P.C. as it was during the course of investigation that it had been taken down. In the light of the statement of himself, according to whose statement police had started an enquiry about the incident in the school at 4.30 p.m. or 5.00 p.m. It is in this background that it was essential to have examined the I.O. in the case, who has not been produced for the reasons best known which in High Court's opinion has caused serious prejudice to the case of the accused. By prepondering probability, there appears to be some truth for what was the case set-up in the cross-examination that the accused was given beating and in order to save their own skin , a report had been lodged in the police station , as a defence. Be that as it may, the prosecution has failed to prove the case beyond all manners of reasonable doubt and the benefit of doubt is extended to the accused appellant (Satypat v. State of Rajastahan, (1993) 3 Crimes 70(72) (Raj).

47. Improper investigation.-Where it is established that the investigating officer had not faithfully recorded the statements of the witnesses and his conduct is unreliable, the Court has to weigh the evidence of the peosecution witnesses given in the Court without attaching any importance to the statements recorded in the case diary. The investigation in such a case cannot be held to be conducted properly. The prosecution story in a case of the nature may be thrown out (Gouranga Naik Mahesvar vs. State 1985 (1) Crimes 235 (238 (Ori).

Satement of witnesses before the police being the earliest statements are valuable of testing veracity. But if the police record becomes suspect or unreliable because it was deliberately perfunctory or dishonest. it loses much of its value (Baladin AIR 1956 SC 181).

Investigation tainted with suspicion is always fatal to the prosecution case (State of U.P. v. Delaer Singh & 20 ors. 1991 (3) Crimes 420(All).Non-seizure of blood

stained clothes, pillow, quilt and earth renders the prosecution story implicating the accused doubtful (Kiddis Ali vs. State 41 DLR (1989) 26)

It in a case it is found that the FIR was recorded without delay and the investigation stared on that FIR then however inproper or objectionable the delayed receipt of the report by the Magistrate concerned that can not by itself justify the conclusion that the investigation was tainted and the prosecution insupportable (1993 Cr LJ 1584).Faulty investigation against the third co-accused cannot be made the basis for acquittal of the remaining two accused when there is evidence on record against the two accused coming from the injured eye-witnesses, duly corroborated by the expert medical opinion (Ram Parashad and another V. State of Haryana 1992 (1) Crimes 917 (918).

Conviction under sections 302/34 Penal Code is not susbatinable where the investigation is not fair and the prosecution case regarding the participation of the accused in the incident is not worthy of credence (Bias Chander v. State 1988 (1) Crimes 921(Del).

When the police officer who is an eye witness to the offence becomes an investigating officer of the case there is no assurance that what the eye witness have stated was true (AIR 1980 All Cri R 152= 1980 All W.C. 197 (198).

Failure of prosecution to produce information as witness does not weaken prosecution case especially when information is recorded in general diary (AIR 1971 S.C. 708 (701, 711)=1971 Cr LJ 642). Failure to seize some alamats by the investigating officer was due to negligence on his part and which did not discredit or shade that prosecution case in any way (1983 BLD 304).Law does not require that the investigating officer must make a clear statment about the details of the complicity of the accused in the crime under investigation (BSCD (1978-79) 69).

The investigating officer is not required to record the statement of witness in minute details . It is not expected that the witnesses will be asked by the G.O. to give mirnor details . Therefore such mirnor omissions do not materially affect the merit of the prosecution case (1985 BLD 202).An omission of a fact from the statement is only of value if it is of such importace that the witness would have almost certainly made it and the police officer would have certainly recorded it, had it been made (22 DLR (1970) 621).

It is right that the benefit of a highly defective" investigation cannot go to the prosecution. If it were to appear that the story narrated by complainant immediately after the incident was in material particulars different form the evidence of the eye-witnesses, the benefit of such an infirmity would have gone to the accused.. But if on a proper evaluation of the various facts and circumstaces it transpires that the apparent inconsistencies in the case of the prosecution are sloley the result of remissness on the part of the investigating officer and not of any improvement of prevarication on the part of the prosecution witnesses, there would be no justification for discarding the accusation (AIR 1974 SC 220 (221, 222) = 1974 CrLJ 309).

In murder case the investigating officer should record the statements of material eye witnesses promtly. Unjustified and unexplained delay in recording such statements may render their evidence unworthy of reliacne (1971 Cr LJ (SC) 670). Unusual delay in recording statement may cause suspicion when it is not explained (1971 Cr LJ 1610=1973 SCC (Cri) 676). Statements of witnesses recorded under section 162 Cr.P.C. by the invwstigating officer being the earliest statements are valuable of testing veracity. But if the police record becomes suspect or unreliable because it was deliberately perfunctory or dshonest, it loses of its value and in that

event, the evidence given in Court has to be considered (AIR 1956 SC 181 =1956 Cr LJ 435).

Contradiction brough out by proof of omission an account of perfunctory investigation of police officer would rather discredit the statement recorded by police than cast reflection on the probity of the witness (AIR 1969 Cri 172). If the police record is perfunctory or dishonest ,it loses its value and in that event the evidence given in court has to be considered (AIR 1965 SC 181).Record made by the police investigating officer has to be considered by the Court only with a view to weighing the evidence actually adduced in Court . If the record is suspect or unreliable . it loses much of its value and the court in judging the case of a particular accused has to weigh the evidence given against him in court keeping in view the fact that earlier statements of witnesses as recorded by the police is tainted record and has not as great a value as it otherwise would have in weighing all the material on the record as against each individual accused (AIR 16 SC 181 =1965 Cr LJ 345). Indian Supreme Court observed in Kishore Chand v. Stae of Himachal pradesh 1990 (3) Crimes 341, that weaker the person accused of an offence, greater the caution and higher the responsibility of the law enforcement agencies. Before accusing an innocent person of the commission of a grave crime like the one punishable under section 302, Penal Code an honest sincere and dispassinate investigation has to be made and to feel sure that the person suspected of the crime alone was responsible to commit the offence. Indulging in free fabrication of the record is a deplorable conduct on the part of an investigating officer which undermines the public confidence reposed in the investigating agency.Therefore, gareater care and circumspection are needed by the investigating agency in this regard. It is time that the investigating agencies, evolve new and scientific investigating methods, taking aid of rapid scientific development in the field of investigation. It is also the duty of the Government to organise periodical refresher courses for the investigating officers to keep them abreast of the latest scietific development in the art of investigation and the march of law so that the real offender would be brought to book and the innocent would not be exposed to prosecution.

Where the husband killed his wife and the police officer did not make any observation Mahazar prepared in that effect, blood -stained cloth found on the dead body were not sent for chemical examination and stick which was allegedly used for killing was also not sent for chemical examination, it was held that the investigation offcers had examination, handled the case in a callous manner (Murugan v. State 1991 Cr LJ 1680 (1960) (Mad).

It is necessary and desirable that the ploice officer recovering articles with suspected stains of blood should immediately take steps to seal them and evidence should be produced that the seals were not tampered with till the articles were sent to the chemical examiner for analysis. If such precautions are not taken, the court may not place the same reliacne on the discovery of blood-stains, on the seized articles as it would have done if necessary precautions had been taken (Binder Munda v. State, 1992 Cr. LJ 3508 (3511) (Ori).

What is the duty of the Investigating officer when there is a case and a counter case. It is found that the instructions are not followed by the police on the quasi-totality of cases. The learned public prosecutor would do well in bringing the instructions to the notice of the investigating officer in Tamil language in a clear manner; so that the investigating machinery is not making a perfunctory investigation, when faces with the investigation of a case and a counter case . In the result, the appeal is allowed, the conviction and sentence on the accused 1 and 2 are

set aside and they are acqutted (Drishnamoorthy v. State, 1989 (2) Crimes 353 (359) (Mad).

48. **Inquest report.**- The statements containued in the inquest report are not substantive evidence (AIR 1957 Ori 216 (218). But where the Investigating officer makes mention of injuries in the inquest report, a fact which he saw with his own eyes-it can not be said that it should not read in corroboration of the evidence of the eye witnesses (AIR 1957 Raj 331 (35); AIR 1978 S.C. 1558). Inquest report though can not be treated as evidence but can be looked to test veracity of witness (AIR 1992 SC 1944).

The police officer holding an inquest is not an expert on the nature of injuries .(AIR 1976 SC 2263 =1976 Cr LJ 1336). Statements of persons said to be acquinted with the facts and circumstaces are to be written sperately. The statements can be referred to for contradicting the makers while they depose by invoking the provision of section 162 Cr. P.C. Code and section 145 Evidence Act (1970 Cr LJ 1681 AP).

An inquest report is not substantive evidence but may be used under section 145, Evidence Act, for cross-examination (1955) 1 SCR 1083). Where the number of FIR and names of eye-witnesses are not mentioned in the inquest report it would be reasonable to infer that it was drawn up earlier than FIR was written (PLJ 1973 Lah 475).

Inquest reports , seizure lists, site plans consist of two parts, one part is admissible as it is based on actual observation of the witness at the spot and as such, direct evidence under section 69 of the Evidence Act. Whereas the other part is inadmissible except for the limited purpose mentioned in section 162Cr.P.C. Code as it is based either on information given to the police officer or on the statement recorded by him in course of investigation (AIR 1978 SC 1558 :AIR 1981 SC 897=1981 Cr LJ 23).

Inquest is done dy the police officer under section 174Cr.P.C. and the scope of the said report, which is popularly known as inquest report, is to ascertain whether a person had died under circumstaces which were doubtful or an unnatural death. As such , the quesions regarding the details, as to how the deceased was assaulted by whom under what circumstaces he was assaulted, are beyond the scope of the inquest report. Accordingly, its vaule can neither be commented upon nor the evidence of the prosecution witnesses disbelieved on the ground of these extraneous particulars (1976 Cr LJ 776; AIR 1975 SC 1252 =1975 Cr LJ 1062).

The accused had a right to use the inquest report to see whether it was in keeping with the prosecution version of the case (1990 BLD (AD) 25).

49. Conviction based on confession.- Confessional statement whether retracted or not, if found to be true and voluntary can form the basis of conviction of the maker (42 DLR 177;1990 BLD 38; 12 DLR (SC)156; 16 DLR (SC) 598;19 DLR 818; 31 DLR 316; 32 DLR 227; 1981 BCR 105). Confession before the Magistrate was retracted in the sessions Court. If the sessions Court is satisfied that confession is not only ture but also voluntary, it can impose senctence of death on the uncorroborated confessional statement (31 DLR (1979) 312 ; 21 DLR (1969) 303; 38 DLR (1986) 374).

The confessional statement whether retracted or not if found to be true and voluntary can from the basis of conviction (42DLR (1990) 397). Conviction can be based solely on confession if found voluntary and true, though retracted subsequently. For ascertaining as to whether the confession is true and voluntary the Court has to

examine the confession itself and consider the same in the light of the materials on record and broad probalilities of the case (42 DLR (1990) 177).

Accused made a confessional statement after being kept in police custody for 3 days . such a confession is hihgly suspicious (36 DLR 185). Prolonged custody preceeding the making of confession is sufficient to stamp it as involuntary (1967 Cr LJ 1023).

Where the accused had been in the coustody of the police for long over 34 hours and subsequent to his remand after the recording of his confessional statment he continued in the *defacto* custody of the police, for about 10 to 12 days. In his statement under set in 342 of the Code or Criminal Procedure he complained that he had been tortured by the police in the lock-up as a result of which he made the confessional statement. The Court refused to rely on the confession (16 DLR 147 (DB). Ordinarily (in the case of) a person remaining in police custody for long is not unlikely that a confession could be extracted from him, and upon barest suspicion a confession should be discredited (1985 BCR 96).

Exculpatory part of the confession can be rejected and inculpatory part can be accepted (1969) 1 SCC (Cri) 347; AIR 1969 SC 422; AIR1958 SC 66=1958 Cr LJ 2378). Court can consider the inculpartory part of the confessional statement which is partly inculpstory and partly exculpatory (1984 BLD 22;39 DLR 1987 (AD) 177 per Shahabuddin.J). The confession is inculpatory but corroboration is necessary because of the retraction (AIR 1956 SC 9).

"Appellant Hazrat Ali having made some untrue statement in his confessional statement ext. 3, the part which implicates him with the offence and which finds support from the confession of the co-accused can very well be considered and in that basis conviction can be maintained . The conviction of Hazrat Ali under section 302/34 of the Penal Code is altered to a conviction under section 302/34 of the Penal Code and he is sentenced to imprisonment for life and convction of Abdul Khaleque under section 302/109 of the Penal code is maintained but his sentenced of seath is commuted to imprisonment for life"(Hazart Ali vs. State 44 DLR 1992 (AD)) 51).

When confessional statement of an accused is found to be voluntary and partly exculpatory and retracted, the exculpatory part being improbable, contrary to reasonss and ordinary human conduct and as such false, is laible to be rejected. Inculpatory part can be relied upon even if subsequently retracted and it can also be used against the other co-accused jointly tried for same offence (1990 BLD 309=40 DLR 378:39 DLR (AD) 117=1987 BLD (AD)212 Rel. On).

The S upreme Court of India has held that the whole of the condession or admission as mady by the accused must be received in evidence . It is open to the Court to rely on one part of the confession or admission taking into account the other evidence in the case and reject the other part. If there is no evidence other than the confession or admission by the accused, then it is not open to the Court to accept one part of it and reject the other. In such cases the confession or admission must be accepted as a whole or rejected as a whole (A.I.R. 1969 S.C., 422 : 1969 Cr.L.J. 671)

When the confessional statement of accused runs counter to the main prosecution case which raises doubt as to the truth of the prosecution case and the benefit of such doubt can never go to the prosecution (41 DLR 1989 (AD)157 (163).

A confession is true if it adds to the knowledge of the investigating officer(AIR 1931 Oudh 166=32 Cr LJ 854). But much of the force of the confessional statement

is taken away if what is stated in the confession was already known to the police before the confession was recorded (AIR 1957 Mys 50=1957Cr LJ 521).

The confissional statement being not corroborated on material particular it is unsafe to maintain conviction.(43 DLR 1991 AD 203). It is not necessary that each and every circumstace in respect of the involvment of the maker of confession must be corroborated but it will be suffice if the genral trend of confession is substaniated (1990 BLD 38). If a confession is found to be true and voluntary conviction may be based on it even if it is retracted. Without any material to support retruction no inference can be drawn that the confession was not voluntary. Prolonged pilice custody of the accused preceeding confession sufficient to find confession to be involuntary (1990 BLD 38). A convcition of the confessing accused based on a retracted confession even if uncorrtorated is not illegal if the Court believes that it is valuntary and there (1(DLR (SC) 271).

In the case of sarwan sing Rattan Singh vs state of punjab (AIR 1957 SC 637), it was abserved by the Supreme Court of India, "it is, however, true that sarwan singh has made a confesssion and in law it would be open to the Court to convict him on this confession itself though he has retaracted his confession at a later stage."

In Joygun Bibe vs The state 12 DLR (SC)157, it was observed " the retraction of a confession was a circumstance which had no bearing whatsoever upon the question whether in the first instance is valuntarily made, and whether it was true. The fact that the maker of the confession later does not adhere to it can not be itself have any effect upon the findings reached as to whether the confession was voluntary, and if so, whether it was true the retraction if the confession was wholly immaterial one of it is found that it was voluntary as well as true"

Confession made by an accused even if retarated can form the sole bassis of conviction of its maker if the confession is found to be voluntary and true(36 DLR (1984) 275; 38 DLR (1986) 374).

The Court has to examine facts of the case as a whole in order to arrive at a conclustion as to whether as confession was voluntary or not (1984 P.Cr.L.J. 1979 (DB). Where a Magistrate recording confession was informed by accused in reply to a question that he was beaten by police and Magistrate did not ask from him as to why he was making confession. Confession did not find support from prosecution evidence and was contradicted in material facts, it was not considered by the Court (1988 P.Cr.L.J. 19(DB). The onus of proving that a confession is the result of inducement, threat or promise is in the first instance on the prisoner. The inference may be suggested by the confession itself or by evidence adduced by the accuseed or by surrounding circumstaces which a Court is always bound to take into consideration, but the conclusion cannot be based on surmise or conjcture, whether or not a confession is admissible in evidence is a matter which is to be decided after a full consideration of the evidence and the particular circumstances of the case (PLD 1962 Pesh. 91 (DB) .

A confession which not only confesses a crime but builds up the entire prosecution case against the accused and introduces facts not within his knowledge or paves the way for corroborative evidence already in possession of the police . is always suspect (AIR 1952 Pepsu 94 (DB).

An extra-judicial conession made to one who is not a person in authority and which is free from any suspicion as to its voluntary character and has also a ring of truth in it is admissible in evidence against the accused and desreves to be acted upon (AIR 1971 SC 1871 =1971 Cr LJ 1314).

Conviction under section 302 of the Penal Code can be based on the evidence of confession before a private person when such an evidence inspires confidence of Court (Annop Singh v. State of Punjab 1989 (3) Crimes 627 (P&H). Extra-judicial confession can be relied upon even if it is not recorded in actual words (1985 Cr LJ 1416 (1421)Raj. An extra-judicial confession is generally made to a person in whom the accused confides. The a confession was alleged to have been made to the real maternal nucle of the deceased which was improbable and hence incredible (1986 Cr LJ 306 Raj)Any person who may have committed a ghastly crime would not reveal such commission even to his best friend because such friend may become his enemy any day (Qayum alias Ramesh Vs. State of UP 1989 (3) Crimes 424 (All). It can not be imaginined that the acused would come to a stranger to made extra-judicial confession of his guilt (Jagir Singh V. State of Punjab 1992 (3) Crimes 369).

In order to be acted upon, a retracted extra-judicial confession must be shown to be perfectly voluntary and true and trustworthy. While as a proposition of law., it is not necessary that it must receive corroboration in order to be the basis of an order of conviction, as a rule of practice and prudence, there should be some general corroboration,especialy in a case of the present type where an aboriginal lady is alleged to have killed her husband without any apparent motive (1986 Cr LJ 513 (515).Extra-judicial confession made to a doctor when asking for the services of ambulance, not corroborated by other evidence held, conviction not proper on this evidence alone (1983 Cr LJ 1978 Gau).

It must be remembered that the evidence furnished by the extra-judicial confession made by the accused to witnesses cannot be termed to be a tainted evidence and if corrbboration is required it is only by way of abundant caution (1975 Cr LJ 1102=1975 SC Cr 479=(1975) 4 SCC 234). Before an extra-judicial confession is acted upon, the court shall consider the circumstaces under which the confession is made, the manner in which it is made, the person to whom it is made along with two rules of caution: First whether the evidence of confession is reliable: and secondly, whether it finds corroboration (1972 SC Cr 9= (1971) 1 Scc 778). Accrdingly, an extra judicial confession, when satisfactorily proved to have been voluntarily made , may be the basis for the conviction even without any corroboration (1963) 1 Cr LJ 645; 1981 Cr LJ 852).

Extra judicial confession is a weak piece of evidence and Court would normaly expect sufficient and reliable corrobration to such type of evidence . In the present case, the prosecution witness himself asked the accused as to why he killed his father and the accused replied to that question by saying that he did it because his father used to quarrel. It is, therefore, clear that the accused had replied the question asked by the prosecution witness and he assumed that the accused had killed his father and on the said assumption he asked the question. By no stretch of imagination this can be considered to be an extra judicial confession made by the accused(1993 Cr LJ 3364 (Bom).

Extra judicial confession by accused to a person is whom they have no occasion to repose confidence is highly unnatural, especially for a heinous crime like murder (Salig Ram v. The State of Haryana 1988 (3) Crimes 766(P&H).

Where no question regarding the extra-judicial confession was put to the accused in his examination under section 342 Cr.P.C. the confession can not be relied upon (51 Cr LJ 1265 (FB); 41 DLR 32).

Extra-judicial confession can form a basis for conviction if found vluntary and true (39 DLR (AD) 194; PLD 1960 Lah 572). Oral confession of accused can be proved only by reproducing exact words used by him (1968 P Cr LJ 632). Extra -judicial

confession corroborated by oral evidence of unimpeachable character is not inadmissible but forms basis of conviction (1968 P Cr LJ 859).

It is an admitted position that an extra-judicial confession is a weak type of evidence, but if it is of sterling worth conviction can be based on it. Where it is provided that near by the time of the incident the accused was found entering into the bars of the father of the deceased and he was also found washing hands and feet after the incident and he had made extra judicial confession and scientific evidence is that the blood of the deceased was recovered from his dhoti and the dhoti containing the blood-stains was recovered from his possession and at his instance it was held that there was cogent evidence in support of the prosecution and the conviction was justified (Kana vs.State of Rajsthan 1985 Cr L R (Raj) 212 (217).Where an extra -judicial confession was substantially corroborated by overwhelming evidence and circumstaces and there was nothing on record to take the contrary view, it was in circumstaces, held voluntary and true. Confession whether judicial, retracted or not retracted, if proved voluntary and true, can lead to conviction of accused on its sole basis (1986 P.Cr LJ 53; P:D 1964 SC 813).

Extra-judicial confession cannot be called a weak evidence if it withstands the following tests:

(1) is the witness proving the confession generally credible;

(2) is his relation with the accused such that the latter could confide in him;

(3) is there any motive for the witness to implicate the accused falsely the witness might be trying to save himself or someone else by laying the blame on the accused;

(4)is the confessional statement consistent with other facts and circumstaces brought on record (74 Bom LJ 299; AIR 1966 SC 40;AIR 1957 SC 381:AIR 1956 SC 18: AIR 1971SC 1871). Extra-judicial confession made to a person not in authority, if free from suspiction and having a ring of truth may be acted upon (1970) 2 SCC 105 =AIR 1971 SC 1871).

An extra-judicial confession if voluntary and true and made in a fit state of mind can be relied upon by the court along with other evidence in convicting the accused (1960 All WR (HC) 18=AIR 1955 SC 902=1959 Cr LJ 697).

Law does not require that evidence of an extra-judicial confession whould in all cases be corroborated (A.I.R. 1977 S.C. 2274). What is involved is only a rule of prudence and caution. When the extra-judicial confession is proved by a independent and trustworthy witness who bore no animus against the accused it could normally be accepted and made the basis of conviction even without corroboration. It can be made by an accused to an independent witness other than one in authority and could be accepted(A.I.R. 1975 S.C. 898). Only thing is it should be free from infirmity and made under circumstaces which are found to be reliable (1989 (3) Crimes 261 (264) (Ker).

Confession when proved against confessing accused can be taken into consideration against co-accused in same offence(39 DLR (AD) 194). Confession by co-accused is no confession in the eye of law as it was a testimony against the other accused without the maker having involved himself (40 DLR (AD) 216).

"It is now well-settled that the confession of a co-accused is no evidence against the other accused persons.Section 30 of the Evidence Act contemplates that confession made by a co-accused in a joint trial for the same offence affecting himself and others may be taken into consideration. In other words, the confession of a co-accused may lend assurance to the other evidence on record. In the present case the

evidence of PW 1 and 5 being unreliable and insufficient to endependently support the conviction of the appellants, the confession of the co-accused cannot lend any additional assunace to the substantive evidence.Since, we have carlier held that the substantive evidence is unreliable and there being no other evidence the confession cannot be considered against the appellants in the present case" (44 DLR (AD) 10 (13) =1991 BLD (AD) 256 (259). "The confession of a co-accused certainly can be used as against other co-accused but for a limited purpose and that is only to lend assurance to any other evidence against them. But, that cannot, in any view of the matter, be the sole basis for conviction of their co-accused. Now, in the instant case we have already observed that except applicant Rahim,the other 3 appellants have not made any confessional statement and there is also no reliable evidence oral or documentary or circumstantial involving them in the commission of the alleged crime of murder of the victim or concealment of the dead body of the deceased victim or concealment of the dead body of the deceased and it appears that they have been convicted and sentenced only on the basis of the confessional statement of the co-accused Rahim which is illegal and therefore liable to be set aside (Abdul Khayer & other Vs. State (1994) 46 DLR 212 (para 14); Abul Hussain Vs. State (1994) 46 DLR 77).

Statement of a co-accused is not a evidence because it is not made on oath and also not subjected to cross-examination.Confessional statement of a co-accused can not be basis of conviction of another accused (37 DLR 1; 1984 BLD (AD) 193) Conviction founded solely in the confession of a co-accused cannot be sustained (1989 Cr LJ NOC 4(Cal) . 1991 BLD (AD) 256 (259) =44 DLR (AD) 10 (13).

Confessional statement of co-accused implicating other co-accused is not admissible for latter conviction (37 DLR (AD) 139). If there was no other evidence against J (accused) except the confession of a co-acused, then the confession by itself being merely a matter to be taken into consideration, and not having the quallity of evidence against J. It could rightly be held in law that her conviction could not be sustained on the confession alone (PLD 1960 SC 313=12 DLR (SC) 156).

In the case of a retracted confession, if it had been voluntary and had substantialy implicated the maker it can be used against the co-accused.but even then it should be corroborated by other good evidence (1968 PCrLJ 927). Thus the confession of a co-accused implicating another accused can be taken into consideration as against the latter accused even though the confession was retracted before the committing Magistrate but was again accepted in the sections Court (PLD 1969 118: 21 DLR (SC) (1969). A retracted confession by an accused may form the basis of a conviction of that accused if it receives some general corroboration from other independent souces. It cannot , however, be the basis for convicting co-accused though it may be taken into consideration against co-accused also. It is entirely wrong to think that a confession can lead nowhere AIR 1985 SC 86=1985 Cr LJ 1173).

Confession of a co-accused is not a substantive evidence as against another non-confessing accused and can not be used for conviction of the latter (1984 BLD (AD) 193; 1985 BLD 96). Confessional statement of co-accused can be used only in support of other evidence for corroboration but it can not be made foundation for conviction if there is no other reliable evidence (1987 BLD (AD) 212). It is not confession but testimony whend the maker does not involve himself in any part of the commission of alleged offence and can not be used against the co-accused (1987 BLD (AD) 248).

'A confession of co-accused can be used to corroborate' other evidence. It might assist the Court in coming to the conclusion that the other evidence is true and,

therefore, an accused is guilty . The conviction must be based on other evidence . The confession can only be used to help to satsify a Court that the other evidence is true (AIR 1952 Cal 618 : 1971 Cr LJ 38=1971 UJ (SC) 387).A self-inculpartory confession implicating a co-accused may be relied on to convict the co-accused when it is corroborated by other evidence (Nand Kishors Singh & Anr. v. State of Bihar 1991 (3) Crimes 405(Pat).

The confession of an accused person is not evidence in the ordinary sense of the term as defined in section 3 of the Evidence Act. It cannot be made foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshal the evidence against the accused, excluding the confession altogether from the consideration and see that if it is believed,conviction should safely be based on it, If it is capable of belief indepndently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction . In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence , and thus fortify himself in beliveing what without the aid of the confession he would not be prepared to accept (AIR 1952 SC159).

Such confession is not a substantive evidence; it can be pressed into service only when the Court is inclined to accept the other evidence and feels the necessity of seeking for an assurance in support of his conclusion deducible from other evidence (AIR 1964 SC 1184)

Section 30 of the Evidence Act provides for consideration that a confession made by one of such persons affecting himself and some other of such persons being jointly tried and the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. But such evidence can only lend assurance to other evidence if there be any on record and the same by itself can not form the basis of a conviction of a co-accused (41 DLR 62 (66); 39 DLR (AD) 117).

Court can act on the admission or confession mady by the accused in the course of the trial or in his statement recorded u/s 31 3 (See 342, Bangladesh, Criminal Procedure Code (Upendra Nahak Vs. State 1992 (3) Crimes 363 (364).

50. **Conviction based on dying declaration** .- The Court is entiled to convict on the sole basis of a dying declaration if it is such that in the circumstances of the case it can be regarded as truthful (Wasapally Venkanna V. state of A. P. 1992(3) Crimes 716). There can be conviction on the basis of dying declaration alone if the same is truthful and not Vitiated in any manner (Rafiq Ahmad v. State of U.P. 1991 (3) Crimes 331 (All)

There is no legal bar for entering a conviction solely on the basis of a dying declaration if it is complete, categoric and reliable. It is now settled law that a Court is entitled to convict an accused on the sole basis of a dying declaration , if it is found to be true and reliable. A dying declaration, cannot be equated with the evidence of an accomplice which requires corroboration, as a rule of prudence. It stands on the same footing as any other piece of evidence and has to be judged in the light of the surrounding circumstances and with reference to the principles governing the weighing of evidence. In order to pass the test of reliability a dying declaration has to be subjected to the strictest scrutiny and the closest circumspection. If a Court of fact is satisfied that the declarant was in a fit state of mind to make a statement, that he had sufficient opportunity to observe and identify his assailant and that he had made the statement at the earliest opportunity without any influence or as a result of

tutoring and that the dying declaration is a truthful version as to his assailant and without insisting on corroboration and without any hesitation, a conviction can be entered on the sole basis of a dying declaration. On the other hand, if the Court, after subjecting the dying declaration to the test of reliability and examining the same in all its aspects, comes to the conclusion that the dying declaration is not reliable by itself and that it suffers from an infirmity, then the Court has to insist on corroboration, as without corroboration such a dying declaration cannot be made the basis of a conviction. the value of a dying declaratin depends upon the circumstances under which it is made (1981 Cr. L.J. 1165 (1167- 68) (Ker) ; 1979 Cr L.R. 633 (635) (S.C)

It is well settled that, as a matter of law, a dying dclaration can be acted upon without corroboration (1985 S.C.R 552; 1962 supp. 1.S. C.R. 104; 1972 (3) S. C.C. 268). There is not even a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. The primary effort of the Court has to be to find out whether the dying declaration is true. If the circumstances surrounding the dying declaration are not clear or convincing that the Court may, for its assurance look for corroboration to the dying declafration (1985 (1) Crimes 344 (347, 348) (S.C).

A trustworthy dying declaration corroborated by surrounding circumstances is sufficient to support a conviction for murder (1974 SCC (Cri) 859; 1980 CrLJ 314 (SC) . If the dying declaration was acceptable as truthfull, then even in the absence of other corroboration it would be open to the Court to act upon the dying declaration and convict the appellant stated therein to be the offender. An accusation in a dying declaration comes from the victim himself and if it was worthy of acceptance, then in view of its source the 'Court could safely act upon (1970 Cr LJ 1415 SC).

Where, there was a dying declaration of the deceased immedialty after the occurrence in the presence of the eye-witnesses in which he had implicated the accused appellants as his assailants, it was held that the opinion of the doctor that owing to the shock of injuries the deceased might not have been in a position to speak could not be regarded as conclusive on the question of the ability of the accused to speak (1979 Cr LJ 1358 (SC).

In the instant case (1980 Cr LJ 392 (SC), the dying declaration of the deceased had named the four appellants as the assillants and the only challenge to the declaration was that it was produced for the first time at the trial. However, in view of the fact that the doctor had forgotten to send the dying declaration to the police since it got mixed up in his papers and the doctor appeared at the time of trial and proved its contents, and the thumb impression found in the dying declaration was more or less conceded by the defence to be that of the deceased, it was held that under the circumstances it could not be ignored.

The law is now well settled that there can be conviction on the basis of dying declaration and it is not at all necessary to have a corroboration provided the Court is satisfied that the dying declaration is a truthful dying declaration and not vitiated in any other manner(1962) 3 SCR 869 = AIR 1962 SC 1252; AIR 1972 SC 1776; 1983 Cr LJ 426=AIR 1983 SC 274). Dying declaration from a conscious victim with normal nervous system giving an accurate and faithful acount is reliable and trustworthy (1977 Cr LR (SC) 460)

A dying declaration which is not recorded by a Magistrate, has to be scrutinised closely, yet if the Court is satisfied that on a close scrutiny of the dying declaration that it is truthful, it is open to the Court to convict the accused on its basis without ay independent corroboration (1986 (1) Crimes 278 (283, 284).

Dying declaration made before police officer. Declaration corroborative by evidence of witnesses. No ill feeling against accused. Held, High Court rightly upheld conviction (1983 Cr LR (SC) 160= AIR 1983 SC 164; 1983 SCC (Cr) 169; 1983 Cr LJ 221 (SC); 1983 Bih Cr Cas (SC) 59).

Deceased dying declaration duly recorded by a doctor in presence of two other doctors stating that she was burnt by her mother -in law and husband. Motive, namely failure to bring dowry, duly established -Second dying declaration recorded by one person attested by sarpanch supporting that dceased committed suicide introduced by police inspector in his cross-examination. Second dying declaration not proved by competent witness, cannot be relied upon. Accused's conviction under sections 302/34, Penal Code, based on dying declaration reccorded by doctor Sustained (1993 Cr L.J 75 (SC) = AIR 1993 SC 19).

A policeman was complained against for demanding bribe as a result of which the complainant was done to death by the police-man, his two companions and SHO of the police station. In the dying declaration, the deceased before a Magistrate, it was recorded that the daroga and the constables of the police station had beaten him. The accused person initially convicted were accquitted in appeal by the High Court. State filed S.L.P. in Supreme Court that confirmed the judgment of the trial Court. It was held that the dying declaration could be acted upon with out corroppration. Death occurred while the deceased was in police custody. It was suggested that the law should be amended to prevent such an offence (1985 1 Cr LC 397 (SC)= 1985 SCC (Cr) 227).

If the dying declaration can be accepted as true and reliable, it may form the sole basis of conviction without corroboration from any independent source. the law on this point has been succinctly laid down in Khaushal Rao V. state of Bombay (A. I. R. 1958 S. C. 22), as follows:

"(1) It cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of cinviction unless it is corroborated, (2) that each case must be determined on its own facts keeping in view the circumustances in which the dying declaration was made , (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other piecs of evidence, (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence, (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and ,as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony and human character and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the oportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night, whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it, and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties" (1989 Cal. Cr. L.R. 90 (94, 95) (Cal.).

It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subjected to cross-examination, there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is

corroborated. Thus Court must not look out for corroboration unless it comes to the conclusion that a dying declaration suffered from any infirmity by reason of which it was necessary to look out for corroboration (1989 (3) Crimes 514 (518) (Raj).

According to the dying declaration made by the deceased in the instant case the two appellants appear to have forcibly administered lethal dose of endrine poison which ultimately resulted in the death of the deceased. The oral dying declaration is fully supported by prosecution witnesses who stated in their evidence that the deceased had clearly mentioned that endrine poison was forcibly administered to her. The deceaded was taken to the hospital, but as she was not fully conscious, no statement could be recorded at the hospital. The doctor who examnined the deceased and performed post-mortem examination sent the viscera for chemical analysis and according to the report, the viscera did contain endrine poison. The dying declaration received intrinsic support from the number of injuries found on the person of the deceased which show that both the appellants used force The conviction was upheld (A.I.R. 1979 S.C. 1497)

FIR lodged by father of deceased son, after admitting him to hospital, mentioning about dying declaration and giving necessary details -Possibility of false implication ruled out. Inability of deceased to give dying declaration, not categorically stated by doctor in his evidence. Accused conviction under S. 302, Penal Code was upheld (1993 Cr L.J 304 (SC).

The dying declaration which is not recorded by a Magistrate has to be scrutinised closely, but it is well settled that if the Court is satisfied on a close scrutiny of the dying declafration that it is truthful, it is open to the Court to convict the accused on its basis without any independent corroboration (1958 S.C.R. 552= A.I.R. 1958S.C. 22; A.I.R. 1979 S.C. 190 (192). It is well settled by a catena of decisions if after searching scrutiny the Court is satisfied that the dying declaration represents a truthful version of the occurrence in which the dceased received injuries which led to his death then even in the absence of any independent corroborating a conviction can be founded there on (1979 Cr. L.R. (S.C.) 633(635); A.I.R. 1983 S.C. 164).

It is now well-settled that conviction can be based on the uncorroborated dying declaration of the deceased, if the dying declaration is found to be truthful. When a portion of the dying declaration sufffers from an infirmity, necessity of corroborating of dying declaration arises. It may be stated in this, connection,that a dying declaration is not to be believed merely because no possible reason can be given for accusing the accused falsely. It can only be believed if there are no grounds for doubting it at all (A.I.R. 1962 S.C. 130).

The dying declaration is undoubtedly admissible under Sec. 32 of the Evidence Act, and not being a statement on oath so that its truth could be tested by cross-examination, the Courts have to apply the strictest scrutiny and the closest cricumspection to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate innocent person, yet the Court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination, the Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assilants and that he was making the statement without any influence or rancour (1989(3) Crimes 583 (585) (All). To base conviction on the dying declaration, the Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he

was making the statement without any influence or rancor (Surinder KumarV. state 1991 (3) Crimes 709 (Del.).

Dying declaration in a case where husband had caused burns to his wife by hurling a burning lamp was recovered by a police officer in teh hospital in a narrative form. It did not bear her signature or thumb impression since the doctor of the primary Health Center was on leave. No objection could, however, be taken to its being a narrative nor could it be said that it was not recorded by a Magiatrate since he could be had from a distance of 74 km. Held, the dying declaration was good (1985 Cr LJ 1988). Dying declarations recorded by doctor, then by police and also by executive Magistrate attested by doctor. No infirmity in any of declarations. Fact that third dying declaration not recorded in question and answer from is not material (1993 Cr LJ 298 (SC).

A dying declaration recorded by a police official is admissible under Section 32 of the Evidence Act but under sub-section (2) of section 162 it should be left out of consideration unless Court is satisfied why it could not be recorded by a Magistrate or a doctor. It was held that such a declaration does not come from a tainted source nor is such a victim an accomplice and it would require no corroboration. High Court would not interfere with a finding of a trial court when the view taken is a reasonable and possible one (1968) Cr LC 94). When there is evidence on record stating that the deceased was in a fit state of mind and there is no infirmity in the dying declaration, conviction can be based on such dying declaration recorded by Investigating officer (Jai Ram Prasad Singh @ Jairam Mandal V. state of Bihar 1990 (3) Crimes 169 (Pat).

Dying declaration has to be scrutinised carefully. Conviction can be founded on uncorroboated dying declaration if Court is satisfied that it is true and free (1980 Cr LR (SC) 210= AIR 1980 SC 559= (1980) 2 SCC 207= 1980 Cr LJ 408). A dying declaration should satisfy all the necessary tests and one such important test is that if there are more than one dying declaration they should be consistent partiuclarly in material particulars. In the instant case four dying declaration were made by the deceased revcaling glaring inconsistency vis-a vis naming the culprit. One of daying declarations imdicaling the incidence as an accident. conviction under section 302 Penal Code based on one of the dying declaration was set aside (1993 Cr LJ 68 (SC) ; 1958 Cr LJ 106 Rel.on).

Conviction under Scection 302 Penal Code, cannot be based on a dying declaration recorded by Investigating officer when there is no explanation as to why it was not recorded by a Magistrate or a Doctor and it is not made in question and answer form (The state of Assam V. Ramdeo Singh @ Prabhu singh 1990 (3) Crimes 242 (Gauhati). Dying declarations no doubt are important pices of evidence as they are made under a dense of impending death concerning circumstance with regard to which the deceaased is not likely to be mistaken. A dying person would invariabley tell the name or names of the actual culprits if he knows them. When only one person is pointed out by the dying person to have caused his death the statement will ordinarily be entitled to great weight unless of course there are circumstances which cast doubt on the same (AIR 1958 Andh pra 571). A dying declaration is not of much value if it is silent as to the indentity of the accused persons (PLD 1961 Lah 221 (DB).

Where the dying declaration is to be found in the first information report lodged by the deceased himself stating that he had been struck by means of a knife by the accused person and the other dying declaration was recorded by an Executive Magistrate and that was also to the same effect and the statments of the dceased with regaard to the cause of his death were consistent through out and the

declaration was further corroborated by the testimony of the eye-witnesses, it was held that the dying declaration was reliable and truthful and conviction could be justified (Prabhusingh VS atate of M.P. 1985 Cr L.R. 16 (18) (M.P.)

A Court should not attach much importance to minor omissions in the statement because under the stress of his wounds and the feelling of mminence of death a man may not be able to give all the details which a normal andhealthy man can furnish (PLD 1961 SC 230= 13 DLR (SC) 147). It follows that no argument can be built upon what he has not said in his declaration (AIR 1952 All 289=1952 Cr LJ 600 DB)

It is not proudent to base conviction on adying declaration made to an investigation officer, particularly when it is not signed by the declarant or the witnesses (1974 Cr LJ 1486 (SC). Where the deceased was in the midst of friends and admirers right from the time of the incident until the dying declaration was recorded by a Magiistrate, it was highly likely that the names of opponents might have been freely banded about thereby naturally influencing the dying declaration and have no credence could be attached to the same (1974 Cr LJ 1486 (SC).

To convict the accused only on a dying declaration without considering the surrounding circumstances would be totally inconsistent with the safe dispensation of justice. To accept it on consideration of expressions of opinion regarding simillar declarations in precedent cases, even if those pinciple of law, is no less dangerous. Only after the most careful scrutiny, applied to all the physical circumstances as they appear from the evidence, is it possible to decide whether it can be said, with the degree of certainty which is made obligatory for reaching a conclusion of guilt, that the account given by deceased of the manner in which he met his death is worthy of belief (PLD 1965 SC 151= 17 DLR (SC) 1). This rule applies with extra force in a case where there is no crroboration of dying declaration, verbal testimony of the witnesses remains unsupported by any circumstances or probability. In such circumstances, it is unsafe to base a conviction on the dying declaration, even assuming that the deceased made such a statement (PLD 1982 Dhaka 400 (DB); AIR 1965 SC 393). Therefore to rely upon the dying declaration alone for conviction of persons who were admittedly enemies of the deceased, would not be consistent with the safe dispensation of justice (PLD 1965 SC 151= 17 DLR (SC) 1).

When the doctor found that life was ebbing fast in the patient and that there was no time to call the police or a Magistrate the doctor was justified rather duty bound to record the dying declaration of the decceased. He is the best person to opine about the fitness of the deceased to make statement (AIR 1976 SC 1782= 1976 Cr LJ 1382). One of the important facts of the reliability of the dying declaration is that the person who recorded it, must be satisfied that the deceased was in a fit state of mind (AIR 1978 SC 1994= 1976 CrLJ 1548).

The fact that the pulse was not palpable and blood pressure unrecordable and the patient was in a gasping condition would not necessarily show that the patient's condition was such that no dying declaration could be recorded (AIR 1978 SC1530= 1978 Cr LJ 1603)

A dying declaration can be challenged on any ground on which the evidence of a witness can be challenged (PLD 1977 SC 162). Conviction may be based on oral dying declaration if found true (22 DLR 681 (DB). Dying declaration need not be in writting, or signed by deceased or by investigating officer (PLD 1974 SC 87).

Dying declaration falsely implicating two accused, may still be relied upon against third accused if properly corroborated (NLR 1978 Cr 799 SC). Dying declaration can not be ignored when crucial facts are found in it (AIR 1981 SC 671).

The law is now well settled that there can be conviction on the basis of dying declaration and it is not at all neeessary to have a corroboration provided the Court is satisfied that the dying declaration is a truthful dying declaration and not vitiated in any other manner (AIR 1983 SC 274). A dying declaration can be acted upon without corroboration (AIR 1958 SC 22) . There is not even a rule of prudence which has hardened into a rule of law that a law that a dying declaration can not be acted upon unless it is corroborated. The primary effort of the Court has to be find out whether the dying declaration is true. If it is so, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clearly convincing that the Court may, for its assurance, seek corroboration (AIR 1958 SC 416 (419).

Omission to mention in the dying declaration the name one of that three withnesses due to serious physical condition is not much significance (13 DLR (SC) 147). A dying statement duly proved and admitted into evidence under section 32 of the Evidence Act stands on the same footing as any other evidence as to its value and credibility and it can safely be the basis for conviction in a case (1971 P Cr LJ 275).

A verbal dying declaration must be consistent and it should not suffer from serious discrepancies in relation to the evidence of dying declaration. The statement must show the exact words uttered by the deceased without which no reliance can be placed on verbal statement of witnesses including such oral declarations made by a deceased (AIR 1953 SC 420= 1954 Cr LJ 1772).

The dying declaration which is not recorded by the Magistrate has to be scrutinised closely, but if the Court is satisfied on close scrutiny of the dying declaraton that it is truthful, it is open to the Court to convict the accused on its basis, without any independent corroboration (AIR 1979 SC 190=1978 CrLJ 1809; AIR 1978 SC 519).

Conviction cannot be sustained solely on the dying declaration made to the I.O .Where it was not signed either by the declarant or the eye-witness (1974 Cr LH 1485).

A dying declaration contained suspicious features and infirmities in the evidence as established at the trial stage. It was considered hazardous and unsafe to accept it (1985 Cr LJ 148)

Where a dying declaration recorded by a Magistrate was lost, presumption of its correctness is governed by Sections 32 and 114 of the Evidence Act. An interrogation by an I.O. at night following the day of occurrence can be treated as dying declaration (1985) 1 Cr LR 192 (All).

Deceased from place of incident till the hospital, never left alone-His well-wishers, relatives, instrumental in launching prosecution having opportunity to tutor and brain wash deceased. NO reliance could be placed on such dying declaration (1993 Cr LJ. 86 (ALL).

51. **Circumstantial evidence**.- It has been well settled that when a case rests on circumstancial evidence, such evidence must satisfy, 3 tests :-

(i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.

(ii) those circumstances should be of a definite tendency unerriingly pointing towards the guilt of the accused.

(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within the human probability, the

crime was committed by the accused and none else. The circumstantial evidence, in order to sustain conviction, must be complete chain and incapable of explanation of any other hypothesis than that of the guilt of the accused. It must be qualitatively such that on every reasonable hypothesis, the conclusion must be that the accused is guilty not on fantastic possibilities nor fresk interences but rational deductions which reasonable minds make from the probative force of facts and circumstances (Shafiullah @ Kala Mia Vs. State, 1985 BLD 129 (para 21); AIR 1952 SC 343; AIR 1976 SC 917; AIR 1979 SC 190 & 826; AIR 1984 SC 1622; 1994 BLD 33; Gombhir Vs. State AIR 1982 SC 1157).

Where all the evidence is circumstantial, it is necessary that cumulatively its effect should be to exclude any reasonable hypothesis of the innocence of the accused (Keshab Chandra Mistry Vs. State, 1985 BLD (AD) 301). To base conviction upon circumstantial evidence it must be incompatible with the innocence of the accused and it must exclude all reasonable hypothesis of his innocence (1994 BLD 33; 1985 BLD (AD) 301 Relied on).

In the case of Sharad Birdhichand Sardar Vs. State of Moharasthra, reported in AIR 1984 SC 1622, the conditions preceedent for conviction of an accused on the basis of circumstantial evidence have been elaborately narrated as follows :-

(i)d the circumstances from which the conclusion of guilt is to be drawn should be fully establihsed. The circumstances concerned must or should and not may be established.

(ii) the facts so established should be consistent only with the hypoothesis of the guilt of the accused, that is to say, they should ot be explaninable on any other hypoothesis except that the accused is guilty.

(iii) the circumstances should be of a conclusive nature and tendency.

(iv) they should exclude every possible hypothesis except that one to be proved.

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."(See also Shafiqullah @ Kala Mia Vs State1985 BLD 129).

It has also been held in AIR 1984 SC 1622, that the onus is on the prosecution to prove that the chain is complete. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strngth from the weakness of the defence. Where varius links in a chain are in themselves compolete then a false plea or a false defnece may be claled into aid only to lend assurrance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or plea which is not accepted by the court (State Vs. Badshah Molla, 41 DLR (1989) 11 (Para 26).

Where the chain of circumstances established agianst an accused person, raises a strong probability that he is guilty of the offence charged, thus constituting a strong case which may be placed before a jury (in jury trial), it s not sufficient for the accused to suggest a mere hypothesis or a remote possibility in order to rebut that case. In order to gain a favourable virdict, it will be necessary for the accused to set up facts upon which he may rely as exculpatory circumstances (e.g. to prove an alibi) sufficient to cast a reasonable doubt over the prosecution case (11 DLR (1959) SC 38).

In a case based on circumstantial evidence, the prosecution is under an obligation to establish fully each of the circumstances which they want to rely upon

(Dilipkumar Tarachand Gandhi and another Vs. State of Maharashtra 1992 (2) Crimes 585, 586).

In a case of circumstantial evidence, all the circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established. All the facts so established should be consistent only with the hypothesis of the guilt of the accused. The proved circumstances should be of a conclusive nature and definite tendency, unerrignly pointing towards the guilt of the accused. They should be such as to exclude every hypothesis but the one proposed to be proved. The circumstances must be satisfactorily established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt. It is not necessary that each circumstance by itself be conclusive but cumulatively must form unbroken chain of events leading to the proof of the guilt of the accused. If those circumstances or some of them can be explained by any of the reasonable hypothesis then the accused must have the benefit of that hypothesis. In assessing the evidence imaginary possibilities have no role to play. What is to be considered are ordinary human probabilities. In other words when there is no direct witness to the commission of murder and the case rests entirely on circumstantial evidence, the circumstances relied on must be fully established. The chain of events furnished by the circumstances should be so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused. If any of the circumstances proved in a case are consistent with innocence of the accused or the chain of the continuity of the circumstances is broken, the accused is entitled to the benefit of doubt. In assessing the evidence to find these principles, it is necessary to distinguish between facts which may be called primary or basic facts on one hand and inference of facts to be drawn from them, on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way and in appreciation of the evidence in proof of those basic facts or primary facts, there is no scope for the application of the doctrine of benefit of doubt. The Court has to consider the evidence and decide whether the evidence proves a particular fact or not. Whether that fact leads to the inference of the guilt of the accused or not is another aspect and in dealing with this aspect of the problem, the doctrine of benefit would apply and an inference of guilt can be drawn only if the proved facts are inconsistent with the innocence of the accused and are consistent only with his guilt. There is a long distance between may be true and must be true. The prosecution has to travel all the way to establish fully all the chain of events which should be consistent only with hypoothesis of the guilt of the accused and those circumstances should be of conclusive nature and tendency and they should be such as to exclude all hypothesis but the one proposed to be proved by the prosecution. In other words, there must be a chain of evidence so far consistent and complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all probability the act must have been done by the accused and the accused alone (Kishore Chand Vs. State of H.P. AIR 1990 SC 2141).

When a case rests upon circumstantial evidence such evidence must satisfy the following tests :

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances, taken cumulatively, shold form a chain so comoplete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation on any other hypothesis than that of the guilt of the accused and such evidence should not be consistent with the guilt of the accused but should be inconsistent with his innocence (1982 (2) SCC 351; AIR 1982 SC 1157; 1989 CrLJ 2124, 2129 SC; AIR 1989 SC 1980). Accused widow of deceased residing with him at time of occurrence. Presence in house admitted. Witnesses attracted to spot on her cries. Accused found present with her co-accused in room. Accused not opening door probably under direction of co-accused. Recovery of blood-stained shalwar not proved. Conduct of accused, held, raised strong suspicion against her but suspicion however strong, it might be, could not be taken as substitute of legal evidence. Acquittal ordered in circumstances (Muhammad Sarwar Vs. State 1989 PC CrLJ 1088).

The law in respect of the circumstantial evidence is well settled. circumstantial evidence can only be acted upon if each and every circumstance is individually and conclusively proved and the circumstances so proved must collectively lead to the only conclusion that the accused persons are guilty of the crime. The proved circumstances must form a chain so complete by itself that they should result in the only conclusion of being consistent with the guilt of the accused (1989 (2) Crimes 240 (244) Delhi; (1985)37 DLR (AD) 87).

The rule as regards sufficiency circumstantial evidence to be the basis for conviction is that the facts proved must be incompatible with the innocence of the accused and incapable of explanation by any other reasonable hypothesis than that of his guilt ((1991)43 DLR 512;Most Saira Vs. State, (1970) 22 DLR 35).

Where charge of murder is based on purely circumstantial evidence such evidence must point conclusively to the guilt of the accused and practically exclude the possibility of mruder being committed by other person. Circumstantial evidence to be sufficient for conviction must be combination of facts creating a network through which there is no escape for the accused because facts taken as a whole do not admit any inference but only various links in the chain of evidence to be clearly established but the completed chain should be such as to rule out a reasonable likelihood of innocence of the accused. If the link in the chain so running proved to be false it will react on the entire linkage and it will not be worthwhile to act upon other link however strong it might be (Ibid).

When some material is brought on record consistent with innocence of the accused, which may reasonably be true, even though it is not positively proved to be true, the accused is entitled to acquittal (Ibid).

The rule of circumstantial evidence is that each chain of circumstances must be knitted together closely so as to lead to an irregistable conclusion that the accused alone had committed the offence. The chain of events must be such that the possibility of innocence of the accused alone had committed the offence by excluding the possibility that any other person might have committed the offence. One chain of events must be such that the pssibility of innocence of the accused is wholly excluded and such facts are incapable of explanation on any reasonable hypothesis other than the guilt of the accused. If the circumstances do not provide any conclusive proof of the guilt of the accused, he can not be convicted merely on the ground that such circumstances provide a strong ground for suspicion against the accused. If the theory of guilt and theory of innocence are equally probable, then also the theory that favours the accused must be accepted (1991 BLD 158).

The circumstantial evidence in order to sustain conviction must satisfy three conditions; (i) the circumstances from which an inference of guilt is sought to be

drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerriingly pointing towards the guilt of the accused; (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human porobability the crime was committed by the accused and none else, and it should also be incpable of explanation on any other hypothesis than that of the guilt of the accused. Further in cases depending largely upon circumstantial evidence there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion however so strong cannot be allowed to take the place of proof. The Court has to be watchful and ensure that conjectures and suspicions do not take the place of legal proof. The court must satisfy itself that the varous circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused (AIR 1991 SC 1388; AIR 1952 SC 343;AIR 1975 SC 241 and AIR 1974 SC 1545 rel. on).

Where the circumstances that was relied on by prosecution namely that the accused and the deceased were last seen together was not proved beyond doudbt nor was it mentioned in the inquest report, the recovry of dead body at the instance of accused was also not proved nor it was mentioned in the inquest report as to how the body was discovered and there was no panchnama made under section 27 of Evidence Act of the recovery of body, the doctor who examined accused stated that there was no sign of recent sexual intercourse or such intercourse within one hour of his examination, the accused was entitled to acquittal on benefit of doubt (AIR 1991 SC 1388).

Circumstantial evidence in order to sustain a criminal charge, must stand the test of five golden principles termed so aptly he panchshil by the Supreme Court of India in Sharad Birdhichand Sarda Vs. State of Maharashtra (AIR 1984 SC 1622), and in order to sustain a criminal charge,-

(i) circumstances from which the conclusion of guilt is to be drawn should be fully established;

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused and should not be explanable on any other hypothesis except that the accused is guilty;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) they should exclude every possible hypothesis except the one to be proved; and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability, the act must have been done by the accused.

These five principles constitute the panchshil of the proof of a case based on circumstantial evidence as observed and held therein. Judged in the light of these principles, the circumstantial evidence on which reliance was placed by the prosecution was far short of the mark and the evidence with regard to the extra judicial confession could not be accepted (Nimal Munnu Vs. State 1985 (1) Crimes 593(597) Ori).

In the case of state Vs. Kalu Bepari the High Court Division relied on circumstantial evidence coupled with confessional statement and upheld the conviction. It was observed :

"As to the responsibility for cauisng the murder there is however, no direct evidence of the occurrence. The prosecution sought to prove the charge on certain

circumstantial facts as well as the confessional statement of the condemend prisoner marked Ext. 1. Admittedly the condemned prisoner and the victim Momtaj Begum were husband and wife. The evidence of P.W.s 5 and 9 discloses that both were in the house at the relevant time. The death of the wife being caused by strangulation as already found by us, it was quite natural for the husband to send an information to the police station. He did not make any effort in that regard. As both of them were living together he was also under an obligation to explain how his wife had met her death. He offered no explanation. On the other hand it appears from the evidence of P.W. 5 that when he went to his house in the following morning of the occurrence he took a false plea that the victim had died of sudden pain in the chest. It further transpires from the evidence of P.W. 5 that the condemned prisoner and his relations were hurriedly preparing for the burial of the victim and for that purpose had already dug the grave. Ordinarily an accused has no obligation to account for the death for which he is placed on trial. The murder having taken place while the condemned prisoner was living with the victim who was his wife in the same house he was under an obligation to explain how his wife had met her death. In the absence of any explanation coming from his side it seems none other than the husband was responsible for causing the death of Momtaj Begum" (1990 BLD 373 (379). In cases where the evidence is of circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established and all the facts so established should be consistent only with the hypothesis of guilt of the accused. Again the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one poroposed to be proved. In other words, there must be a chain of evidence so far compolete as not to leave any reasonable ground for a conclusion consistent with innocence of the accused and it must be such also to show that within all human probability, the act must have been done by the accused (Mostain Mollah Vs. The State (1991) 44 BLD 552).

In evaluating circumstances, the Court must see whether the circumstances proved by the prosecution lead to the sole and certain inference of accused's guilt, whether they are consistent with the innocence of the accused and whether the inference from the totality of circumstances precludes all reasonable possibility of accused being innocent (Mostain Mollah Vs. The State (1991) 11 BLD 552).

Implication in murder case on the basis of confessional statement of co-accused cannot take place in the absence of existence of independent evidence direct or circumstantial to connect the accused with murder nor such confessional statement can be taken into consideration in the absence of such circumstances. The circumstances must have proximate relation to the actual occurrence (1972) 22 DLR (AD) 44; (1975) 27 DLR (AD) 29).

In Hanumant Vs. State of Madhya Pradesh, (1952) 3 SCR 1091= AIR 1952 SC 343) the Court laid down fundamental and basic principles for appreciating the circumstantial evidence. Mahajan J., speaking for the Court observed (at pp. 345-46 of AIR).

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. again the circumstances should be of a conclsive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be

such as to show that within all human probability the act must have been done by the accused" (AIR 1991 SC 1842).

These principles were reiterated by the Indian Supreme Court in shivaji Sabed Rao Bodde Vs. State o Maharashtra (1973) 2 SCC 793= AIR 1973 SC 2622) wherein it was emphasised that where the prosecution rests merely on circumstantial evidence, the facts established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explanable on any other hypothesis except that the accused is guilty. The Court further observed that the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every possible hypothesis except the one to be proved and the chain of evidence should be so complete as to rule out any reasonable ground for the conclusion consistent with the innocence of the accused and the circumstances must show that in all human probability the act must have been done by the accused (AIR 1991 SC 1872).

It is well-settled principle of criminal jurisprudence that "circumstantial evidence must be consistent and consistent only with the guilt of the accused and that if the evidence is consistent with any other rational explanation, then there is an element of doubt of which the accused must be given the benefit." It has been repeatedly laid down by the Supreme Court of India and by the other High Courts in many cases that a conviction can safely be based on circumstantial evidence, provided the several circumstances relied upon by the prosecution are established beyond doubt that the incriminative facts are such as to be incompatible with the innocence of the accused and incapable of explanation on any reasonable hypothesis other than that of the accused's guilt. (AIR 1952 SC 343; AIR 1953 SC 404; AIR 1954 SC 720).

The law regarding circumstantial evidence is well settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests : (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstnces, taken cumulatively, should form a chain so compolete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence (1982 CrLJ 1243 (1245) Bom; AIR 1982 SC 1157).

"It is a well established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an acucsed persons's conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent with the innocence of the accused and is consistent only with his guilt. If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. There is no doubt or dispute about this position. But in applying this principle, it is necessary to distinguish between facts which may be called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts the Court has to judge the evidence. In respect of the proof of these basic or primary facts there is no scope for the application of the doctrine of benefit of doubt. The Court considers whether that evidence proves a particular fact or not. When it is held that a certain fact is proved, the question arises whether that fact leads to the inference of guilt of the accused

person or not and in dealing with this aspect of the problem, the doctrine of benefit of doubt would apply and an inference of guilt can be drawn only if the proved fact is wholly inconsistent with the innocence of the accused and is consistent only with this guilt" (1972) 2 SC CWR 838 (843).

In the absence of direct evidence accused can be convicted if prosecution succeeds in proving his guilt through circumstantial evidence (1983 PCrLJ 1562). But in case of a conspiracy to commit murder, if the prosectuion has been able to lay it hands on, and actually relied on the direct and express evidence of the approver, constituting the conspiracy, then to fall back upon circumstantial evidence would be impermissible, unless, of course, the same would be complementary and not derogatory to the said express agreement (PLD 1979 SC 53).

In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always a danger that conjecture or suspicion may take the place of legal proof (AIR 1952 SC 343). Therefore where evidence of extra judicial confession, motive, recovery of bones, and last seen evidence was found not reliable and convincing. Accused was not convicted (PLJ 1968 CrC 201). In Ali Ahemd vs. state (43 DLR 401) circumstantial evidence on which trial court relied is that appellants (Accuseds) were found moving near about the place of occurrence but such evidence do not directly and conclusively point to the guilt of the appellant. Mere movement of appellants near about the place of occurrence before occurrence does not implicate them with offence with which they stood charged. It may raise a suspicion which however strong, cannot be the basis of conviction.

The indisputable rule as regards sufficiency of circumstantial evidence to be the basis for conviction is, that the facts proved must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt (1985 SCMR 1455; PLD 1970 SC 56). The evidence must point conclusively to guilt of the accused, and must practically exclude the possibility of the murder having been committed by other persons. It must be such as to show that in all human probability that act must have been done by the accused. Circumstances of strong suspicion, without more conclusive evidence are not sufficient to justify conviction, even though no explanation of them is forthcoming (AIR 1922 Lah 263). Where circumstantial evidence created no more than a suspicion against the accused, he cannot be convicted (1975 SCMR 142).

The chain of evidence fuurnished by these circumstances should be so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. In a case of cricumstantial evidence not only should the various links in the chain of evidence be clearly established, but the completed chain must be such as to rule out a reasonable likelihood of innocence of the accused (PLD 1983 Lah 122). If a link in the chain so running is proved as false it will react upon entire linkage and it will not be worthwhile to act upon other links howsoever strongly knit these may be (1983 PCrLJ 844).

Where circumstantial evidence found support from medical evidence and was fully corroborated by recovery of articles. Arrest of accused was proved by statement of independent and disinterested persons. It was held that circumstances, lead to the conclusion beyond reasonable doubt that accused committed murder of deceased persons (1983 PCrLJ 2326). The cumulative effect of the circumstances must be such as to negative the innocence of the accused and to bring the offence home to him beyond any reasonable doubt (PLD 1982 Lah 593). It follows that to prove guilt by circumstantial evidence four things are essential, (1) that the circumstances from which the conclusion is drawn must be fully established, (2) that all the facts

should be consistent with the hypothesis, (3) that the circumstances should be of conclusive nature and tendency, (4) that the circumstances should be a moral certainty, actually exclude very hypothesis but the one to be proved (AIR 1960 SC 29). Thus where the accused running away from the scene of occurrence, was pursued and shortly afterwards arrested by police. Dying declaration and statement of prosecution witness fully implicated the accused and sufficiently showed that he ahd a motive to kill the deceased and crime weapons and garments of accused stained with human blood were recovered from him immediately after the occurrence, he was convicted of the offence (KLR 1985 Cr.C 164;1985 PCrLJ 451).

Where nobody had seen the actual firing but all the chains of incuplatory circumstances, lead to the inescapable conclusion, that the deceased died at the hands of the appellant. There were no facts set up by the appellant to rely as exculpatory circumstances, sufficient to east a doubt over the prosecution case. The conviction of the accused was upheld (PLD 1972 Kar 77). Where evidence against wife of deceased and her paramour consisted of motive; pointing out of place where dead body was buried; production of crime weapons and dubious silence over disappearance of deceased for about 8 months. No enmity was alleged against mashirs and other witnesses. Conviction and sentence of death were maintained (1984 PCrLJ 2011). It is well settled that where the inference of guilt of an acused person is to be drawn from circumstantial evidence only, those circumstances must, in the first place be cogently established. Further, those circumstances should be of a definite tendency pointing towards the guilt of the accused, and in their totality, must unerringly lead to the conclusion that within all human probability, the offence was committed by the accused and none else (1981 CrLJ 298 (303, 306) (SC).

In a case where the charge against the accused is one for murder, in the normal course it is not safe to convict the acused on circumstantial evidence alone without adducing direct evidence that can be given by the eye-witnesses. In the case of a conviction on the basis of the circumstantial evidence alone it goes without saying that all the circumstances brought out should be consistent and consistent only with the guilt of the accused. If some of the circumstances are not incompatible with the innocence of the accused it is not a conviction and it is an acquittal that should follow. In other words, if any of the circumstances brought out makes it probable that somebody else might hae committed the crime, then there will be an element of doubt the benefit of which, no doubt, must go to the accused (AIR 1983 SC 295; 1983 CrLJ 441).

In Naresh Kumar Vs. State of Maharashtra (AIR 1980 SC 1168, (1169), the deceased had been raped by more than one person and then thrown into the well. The post mortem report showed that although no external injuries were found by the doctor on the person of the deceased but there were bruises and other kinds of injuries on her private parts. The evidence of P.W.'s merely showed that the appellant had assisted the other accused in dragging away the deceased and also perhaps in assisting the other accused in committing the rape on her. There was, however, no evidence to indicate the complicity of the appellant in the actual act of mruder. The High Court in fact realized this fact and found that the idea of murdering the deceased did not occur to the accused at the time when the deceased was dragged but it may have developed and executed later. It was held that this was a pure surmise and the appellants could not be convicted on mere speculation. From the mere fact that accused was a party to the dragging of the deceased, he cannot be presumed to have committed the murder. In the case of circumstantial evidence no such presumption can be drawn unless the circumstances proved are completely incompatible with the innocence of the accused. The appellant, therefore, could not be convicted of murder.

Accused seen coming from side of his house with blood-stained chhuri in his hand and deceased found stabbed in the house immediately thereafter. Inference attaining degree of positive knowledge, held, was a complete presumption proof which could be made a ground of judgment (Nisar Ahamd Vs. State 1989 PCrLJ 1445).

Accused cannot be convicted on mere speculation. It is not correct to say that since the accused was a party to the dragging of the deceased, he must be presumed to have committed the murder. In the case of circumstantial evidence no such presumption can be drawn unless the circumstances proved are completely incompatible with the innocence of the accused (AIR 1980 SC 1168, (1169). The accused charged with murder running away and absconding for 4 months does not mean that he was guilty of the offence of murder. Where a question arises as to the who among of the two accused caused the fatal injury and it was doubtful on evidence to decide this matter, both of them were entitled to an aquittal (AIR 1957 Mad 505; 1957 CrLJ 863).

In the undernoted case, the following circumstances against the accused have been clearly established :

(i) in regard to the motive for the incident, there was pre-existing animosity between the accused and the deceased which had been lit up by the quarrel on the previous day. Witness has categorically spoken about such relationship.

(ii) the accused was seen nearabout the place of occurrence in the courtyard, coming out of the house and standing under the jackfruit tree with blood smeared on his hand and feet and with the knife in hand.

(iii) witness saw the deceased in a pool of blood.

(iv) the knife was seen with the accused.

(v) the doctor's evidence clearly supports that the knife can cause the injuires.

(vi) the accused while in custody gave information leading to the discovery of the knife.

(vii) the conduct of the accused in becoming completely inactive even though he definitely knew that deceased had been murdered.

It was held that the prosecution has established its case beyond reasonable doubt (1977 CrLJ 192(195,196), Ori.)

It is well settled that in a case dependent wholly on circumstantial evidence, the Court before recording a conviction on the basis therefor must be firmly satisfied

(a) that the circumstances from which the inference of guilt is to be drawn have been fully established by unimpeachable evidence beyond a shadow of doubt;

(b) that the circumstances are of a determinative tendency unerringly pointing towards the guilt of the accused; and

(c) that the circumstances, taken collectively, are incapable of explanation of any reasonable hypothesis save that of the guilt to be proved against him (AIR 1976 SC 69, (71,72). Circumstantial evidence in order to furnish a basis for conviction requires a high degree of probability, that is, so sufficiently high that a prudent man, considering all the facts and realizing that the life or liberty of the accused depends upon the decision, fells justified in holding that the accused committed the crime (1975 CrLJ 282 SC; 1982 SCC (Cri) 240).

Circumstantial evidence must be consistent and consistent only with the guilt of the accused; if the evidence is consistent with any other ratonal explanation, then

there is an element of doubt of which the accused must be given the benefit (1986 CrLJ 1917 Ori; (1987) 2 SCC 197).

Where the evidence against the accused is circumstantial, in order to justify the inferenence of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt (1978 CrLJ 489 SC; 1985 CrLJ 114 Ker).

The mere absconding of the appellant soon after the FIR was lodged, though relevant piece of evidence, could not be held as a determing link in completing the chain of circumstantial evidence unless the same admitted of no other reasonable hypothesis than the guilt of the accused (1971 CrLJ 913 SC).

It is unsafe to convict a person of murder on circumstantial evidence, where the separate pieces of circumstantial evidence relating to the movements of the accused and which converge on their guilt bear palpable signs of concoction and do not fit in with the conduct of rational person (1978 CrLJ 1869(SC).

No single circumstance can ever prove the guilt of an accused person beyond the possibility of doubt; there must be at least two circumtances, one being the failure of the accused to explain the incriminating fact proved against him (PLJ 1980 CrC 108). In other words one of the circumstances, which has to be taken into account when deciding about the guilt of the accused is the fact that the accused has offered no explanation or has offered a particular explanation, but it ust be borne in mind that the accused cannot go into the witness box and is not bound to give any explanation at all. The fact that he does not open his mouth cannot be used against him. It is clear duty of a counsel in defending the accused to point out that the evidence is quite consistent with an explanation which fits in with the accused's innocence and the Judge is bound to ask himself whether there is any rational explanation of the evidence which is consistent with the innocence of the accused, and if there is, he is not justified in convicting him. A reasonable explanation of the evidence should not be rejected because it is not offered by the accused. The court is competent to invent all possible explanations and theories which fit in with the evidence and are consistent with the innocence of the accused when the accused's statement does not explain the evidence against him (AIR 1941 Bom 139). Even where there are facts specially within the knowledge of the accused, which could throw light upon his guilt or innocence as the case may be, the accused is not bound to allege them or to prove them. But where the accused throws no light at all upon facts which ought to be especially within his knowledge, and which could support any theory or hypothesis compatible with his innocence, the court can also consider his failure to adduce any explanation as an addtiional link which completes the chain (AIR 1955 SC 801).

In a case where the various links have been satisfactorily made out and the circumstances point to the accused as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation and he offers no explanation, which if accepted though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain (AIR 1956 SC 801). When there is strong evidence pointing towards the guilt of the accused and the accused has not given any explanation of the circumstances appearing against him, the crime may be taken to have been proved

(AIR 1937 Lah 127). Where the deceased wore jewellery, went in the direction of a well in the company of the accused and her dead body was found in the well without the jewellery and there was the additional fact that the two accused persons were last seen in the company of the deceased; it was held that the accused could be held guilty of murder in default of any reasonable explanation (AIR 1954 Sau 129).

If an acccused person offers a reasonable explanation of his conduct, then, even though he cannot prove his assertions they should ordinarily be accepted unless circumstances indicate that they are false (AIR 1956 SC 217). If the accused gives an explanation and the prosecution does not counter it from the evidence on the record, the accused cannot be convicted (21 Cut L Tim 451). Where suspicion is not very strong; though the accused is found with a gun near the open place where the deceased had been shot dead a little while earlier, and there is no motive for murder and the possibility of someone else having committed the murder cannot be excluded, the accused cannot be convicted merely because he did not name the murderer (1955 Raj LW 39).

The appellant and her lover H were tried for offence of murdering appelant's husband. There were disputes about land between deceased and H. The trial Court by giving benefit of doubt to H acquitted him. But appellant was convicted under section 302 and was sentenced to life imprisonment. The High Court dismissed appeal and maintained conviction and sentence. The extra judicial confessions made by appellant were ruled out of consideration. The prosecution examined witnesses to prove that appellant had illicit reason with H. The witnesses also deposed that the deceased resented the same. The High Court primarily relied on circumstances that dead body was recovered from inside the house where the appellant along with her daughters were present and kept the dead body for two days till some villagers came there and discovered the dead body.

Held, that the appellant had stated that after the murder, H left the house saying that he would bring some more persons to take away the body. Being a woman she must have been terrified and by doing what she was asked to do by H. The confessional statements having been ruled out the remaining circumstantial evidence makes it clear that H was having an eye on the property of the deceased and was also having illicit relations with his wife. H was not on good terms with deceased because of the property in dispute. H had strong motive to commit the murder because by eliminating deceased he could have got the property and the woman. There is no doubt that appellant was in complicity with H but the fact remains that the main accused who committed the crime was H. The nature of injuries on the person of deceased were such which could not have ordinarily been inflicted by the trial hands of a woman. Keeping in view the totality of the circumstances in this case it can be held that the main accused having been acquitted, there is no justification to maintain the conviction and sentence of the appellant (AIR 1991 SC 342).

In the instant case, the case, of the prosecution was that the appellant came to his house at about mid-night and knocked at the door whereupon the deceased let him in. The appellant was alleged to have committed the murder of his brother sometime during the night and to have left the house thereafter by locking the rear entrance from outside. There was strong and cogent evidence showing that the relations between the appellant and the deceased were highly starined. Held, that it is clear that the appellant was aware all along that his youngest brother who was living with him was murdered in his own house. And yet the appellant neither made inquiries about the circumstances leading to the tragedy nor did he indeed go to his house to find out for himsel as to what was the real truth. In this background and appellant's refusal to participate in the identification parade or to give specimens of

his foot-prints is not difficult to gauge. Apart from the two brothers, no one else was in the hosue and the mysterious disappearance of the appellant after the murder shows that it is he who committed the murder (1974 CrLJ 1171(1172,1173, 1174, 1175) SC).

Where it was clearly established that deceased was alone in her room and the accused armed with weapons entered the room and chained it from inside and witnesses heard a gurging noise from the room and short while later the accused ran away from the room and the witnesses found the deceased lying dead, it was held that there could be no doubt that it was the appellant who killed the deceased (1979 CrLJ 1322, 1323).

In the undernoted case, the accused was seen sitting on a stone in a state of excitement. After sitting there for about an hour, the accused met another man and shortly thereafter he went to his house. Thereafter the accused with blood stains on his clothes was seen running towards the police station. The prosecution alleged that the accused.was not on speaking terms with his father-in-law and did not allow the deceased to visit her father's house and maltreated her. The Supreme Court held that the facts do not warrant the conclusion that the accused was alone with the deceased at the time of the present occurrence and there is nothing unnatural or improbable in the conduct of the accused when after coming to his house he found his wife with a number of injuries on her neck and he tired to make her sit in order to find out whether she was alive or not. No motive on the part of the accused to mruder the deceased can be held to have been proved, so the Supreme Court accepted the appeal and acquitted the accused (AIR 1972 SC 922, (923, 925, 926).

Where the wife of the accused met with her death by an unnatural cause, for instance, breaking of her several ribs, the husband was held to be not guilty of murdering her simply on suppositions, as there was nothing very strong circumstance connecting him with causing her death intentionally. The mere fact of his trying, with the help of others, to burn the body secretly or taking it in a bundle instead of as usual, on a bed or litter, though suspicious, was considered by the Court to be not sufficint evidence of his guilt. An effort to dispose of the body of a dead person in an unusual way is sometimes due to fright of a weak minded person which can be based on several grounds. But no person can be convicted of an offence on pure circumstantial evidence so long as it is compatible with his innocence (1971 CrLJ 1452 SC; 1972 CrLJ 860 SC).

Where the entire prosecution case depended on the circumstances of the accused being seen by the prosecution witness coming out of the deceased's house with blood stained clothes and dragging a locked cycle and upon being questioned by the witness the accused gave false explanations regarding the same, it was held that the chain of circumstances connecting the accused with the crime was complete and that they were rightly convicted under section 302/34 (1972 CrLJ 1342 SC).

Where the deceased was last seen with the appellant a short time before his disappearance, and the appellant had a motive to do away with the deceased as he had developoed close intimacy with the wife of the deceased, and the extra judicial confession made by the accused-appellant to his nephew was reliable, and so far as the question of identity was concerned there could hardly be any doubt that the skeletion discovered was that of the deceased, and the medical evidence convincingly established that the deceased was a victim of grievous assault as a result of which he died, the appeal against conviction under sections 302 and 201 was dismissed (1970 SCC (Cri) 320).

The appellant was prosecuted for the murder of his wife, Smt. Malti. In tne undernoted case, the accused was addicted to drinking. Malti, his wife, used to protest and object against this conduct of her husband. She wanted him to give up this obnoxious habit. The accused did not desist from drinking and his relations with the deceased had become unhappy. At or about the time of Malti's death no third person excepting the accused and the deceased, was present in the house. Doctor opined that death of Malti was due to asphyxia as a result of throttling. It was held that in all human probability, it was the acused and none else, who had murdered the deceased by stragulating her to death (AIR 1982 SC 1217 (1217,1221)= (1982) 1 SCC 426(433);1993 BLD 563).

Where the deceased woman was alleged to have been done to death by the appellant with an axe in the morning of the occurrence because she had sought to revoke a gift deed executed by her in favour of the appellant's father and the circumstances of the case including the recovery of a blood stained axe at the instance of the appellant and his blood stained clothes at the time of arrest corroborated the testimony of a single eye-witness who had seen him leaving the scene of occurrnece, it was held that his conviction under section 302 must be upheld (1972 CrLJ 744 (SC). The accused alone was with deceased in the house when she was murdered there with the khokhri. The relations of the accused with the deceased were strained, the dead body of the deceased was thereafter discovered lying in the house of the accused. Held, that it was the accused and none else who caused injuries to Chri (AIR 1972 SC 2077, (2082).

The legal position with respect to the sufficiency of the circumstantial evidence for sustaining criminal conviction is well settled. The circumstances established on the record according to the law of evidence must be consistent only with the guilt of the accused and wholly inconsistent with his innocence. The chain of evidence furnished by those circumstances must be complete and leave no reasonable ground for a conclusion consistent with his innocence (AIR 1973 SC 264, 267; 1977 CrLJ 950 (SC).

It is trite law that when the evidence against an accused person, particularly when he is charged with a grave offence like murder, if it consists of only circumstances and not direct oral evidence, it must be qualitatively such that on every reasonable hypothesis the conclusion must be that the accused is guilty; not fantastic possibilities nor fresk inferences but rational deductions which reasonable minds make from the probative force facts and circumstances. It is not illegal to take into consideration the falsity of the plea that he put forward if there are other compelling materials bringing home the guilt to the accused (AIR 1974 SC 1144, (1145,1146); AIR 1976 SC 2055; 1976 CrLR 1985 (SC).

Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused, and it must be such as to show that within all human probability the act must have been done by the accused (AIR 1952 SC 243, (245, 246); 1953 CrLJ 129). But in a case where the various links have been satisfactorily made out and the circumstances point to the appellant as the probable assailant with reasonable definiteness and in proximity to the deceased as regards time and situation, and he offers no explanation, which, if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be on additional link which completes the chain (AIR 1955 SC 801, (806,807); (1985) 2 S.R. 570= 1955

SCI 41). Where the appellant was seen with the deceased and there were contradictory statements regarding the whereabout of the deceased and the recovery of bank was made at the instance of the accused, it was held that those circumstantial evidences were sufficient to prove the guilt of the appellant (AIR 1978 SC 1544, (1547, 1548).

There in a case the important circumstance agianst the accused was the recovery of the deceased's watch at the accused's instance and the other vital circumstance that a writing made by the accused was left on the deceased's table, it was held that the conviction was justified in the absence of any acceptable explanation (1983 CrLJ 396(402); AIR 1980 SC 531).

Recent and unexplained possession of stolen articles can well be taken to be presumptive evidence of the charge of murder as well. Where the prosecution has succeeded in proving beyond any doubt that the commission of the murders and the robbery formed part of one transaction the recent and unexplained possession of the stolen property by the appellant justified the presumption that it was he, and no one else, who had committed the murders and the robbery (1978) 26 BLJR 54, (59,60) (SC).

That the deceased was last seen with the petitioner, that the petitioner had exclusive knowledge of the place where the body was lying buried; that the slippers of the deceased were recovered from the well at his instance and that human blood was present on the clothes that were secured from his person. Therefore charge of murder stood proved against the accused (1968 PCrLJ 1762).The circumstance that the appellant and deceased were seen together at Jagraata upto 3 A.M. and other circumstances unerringly pointed to the conclusion that within human probability the murder of the deceased was committed by the appellant and none else. Conviction and sentence of the accused were upheld (1980) Supp. S.C.C. 469(470) (SC).

Where two accused were charged with murder and the information given by one leading to the discovery of the murder weapon was capable of two constructions, namely (i) that he was the person who concealed the weapon, or (ii) that he had the knowledge of the place wherein the weapon was hidden, the one beneficial to the accused must be adopted. The Court further observed that ordinarily when a person was accused of committing the murder of another the fact that the accused and the deceased were last seen alive in the compoany of each other and the failure of the accused to satisfactorily account for the disappearance of the deceased would be considered as a circumstance of an incriminating character. But where two accused were last seen with the deceased, they both should explain the disappearane of the deceased and one of them was acquitted of the charge of murder and no appeal against his acquittal was filed, the very circumstance that the deceased was last seen with them would then cease to be one of an incriminating character and the other accused could not alone be convicted on the basis of such a circumstance. The recovery of the murder weapon and small blood stains on the dhoti of the appellant, were also of a doubtful nature and were held to be inconclusive in arriving at the guilt of the appellant. Hence, the appeal was allowed and the conviction of the appellant under section 302 was set aside (1979 CrLJ 1310 (SC).

Where the accused had a motive as well as an opportunity for committing the crime and the accused were last seen in the company of the deceased prior to his murder, and the accused were found moving about together after the incident and they had tell-tale injuries on their persons with blood stained clothes at the time of the arrest, and the wrist watch of the deceased was discovered at the instance of third accused and the gold ring worn by the deceased was discovered at the instance

of the first accused, it was held that the circumstances were sufficiently incriminating as to justify the conviction of the accused under section 302/34 as found by the trial Court (Narayan Shankar Gaikwad 1974 CrLJ 601 (SC).

In a number of case where the deceased dies as a result of poisoning, it is difficult to successfuly isolate the poison and recognize it. Lack of positive evidence in this respect would not result in throwing out the entire prosecution case if the other circumstances clearly point to the guilt of the accused. Reference in this context may be made to the books on medical jurisprudence by different authors wherein it has been stated that the pathologist's part in the diagnosis of poisoning is secondary and that several poisons particularly of the synthetic hyponotics and vegetable alkaloids groups do not leave any characteristic sings which can be noticed on post-mortem examination (AIR 1972 SC 1331, (1340).

As rats had become a nuisance in the hosue of the accused there was nothing wrong in the appellant trying to secure rat poison for killing the rats. The necessity of securing poison to kill the rats was both real and genuine and could not be dismissed as a mere excuse for securing poison to kill the deceased. Further more the mere fact that there were no holes in the house could not exclude the possiblity of the rats being there. For these reasons, therefore, this circumstance does not either singly or cumulatively raise an inference of guilt against the accused. It merely shows that the accused had secured parathion which is meant for killing rats and which was present in the house at the time when the deceased died. This is the only inference that can be drawn from this part of the evidence and it is not possible to go further than that (1977 CrL.R. 173 (177,178) (SC).

Where the relations between the two beings were strained and husband was aggrieved against his wife on account of the non-fulfilment of his demand for more dowry and he suspected her fidelity on account of the seizure of the letter addressed to her by some other person, it was held that the husband was the person who was instrumental in committing the murder of his wife by putting her on fire or in any other manner (1980 CrLJ 71 (77) Punj).

52. **Deceased last seen alive with accused.**- It is well settled law that last seen together is a weak type of circumstantial evidence on which to have a conviction, where evidence is necessary to find a link between the accused and the murder. As for example incrimination recoveres, motive, the proximity of time when both seen together and time of murder (The State Vs. Sree Ranjit Kumar Pramanik (1992) 12 BLD (AD) 289).

Where there is no direct evidence to connect the accused with crime. No enmity between accused and deceased. Sole circumstnace that deceased was last seen in company of accused is not sufficient to convict the accused (AIR 1991 SC 1674). The factum of the accused grazing his cattle near the Nalla, and the deceased passing through that area is by itself, not sufficient to hold that they were last seen together when none of the witnesses actually saw the accused and the decdased together (Chandu @ Chandrahas Vs. State of Madhya Pradesh 1992 (3) Crimes 303).

The hypothesis of 'last seen together' in a criminal case of mruder is a circumstance which is only a link in the chain and would be a material piece of evidence in the process of finding out as to who is the guilty person but that evidence alone would not be sufficient (Ashiq and others vs. State of U.P. 1992 (3) Crimes 833 (834). The mere fact that the deceased was last seen in the company of the accused sometime prior to the occurrence by itself is not such a circumstance as may irresistibly lead to a conclusion that the accused remained in the deceased's company up to the time of the occurrence (Mohammad Ismail vs. State of Rajasthan 1989 (2) Crimes 710 (Raj).

The mere fact that the accused was last seen together with the deceased does not by itself conclusively prove the offence of murder (AIR 1979 SC 1620). Where evidence that the acucsed forcibly took away the deceased at night followed by discovery of his deadbody next morning is not enough for conviction under section 302/34 (33 (1981) DLR 402).

But there is no reason to disbelieve the circumstantial evidence of murder when the son and wife testified asto the calling away of the deceased after which he was not found till recovery of his dead body in the absence of any reasonable explanation as to the departure of the deceased from the company of the accused (1986 BLD (AD) 79).

The evidence of the deceased having been last seen alive in the company of the accused is regarded as a weak type of circumstantial evidence to base a conviction on (PLD 1978 SC 21). Last seen evidence cannot result in conviction if it failed to exclude hypothesis of innocence of accused (1987 PCrLJ 676). It is not by itself sufficient to sustain the charge of murder. Further evidence is required to link the accused with the murder of his companion; such as incriminating recoveries at the instance of the accused,a strong motive or promixity of the time when they were last seen together and the time when the deceased was killed. Only then would the accused be called upon to give an explanation of the demise of the person who was last seen alive in his company (PLD 1977 SC 515).

Where the deceased was last seen with the accused but the accused was not asked any question to explain that fact and there was neither any motive nor any other evidence implicating the accused in the murder, the accused was not convicted (KLR 1988 CrC 247). Even assuming that the accused or any of them had been last seen with the deceased prior to her death, this circumstances, in the absence of other evidence, woud not establish guilt (1985 CrLJ 868; AIR 1974 SC 1620; 33 DLR 320; (1977) 29 DLR (SC) 320; (1977) 29 DLR (SC) 1). In the absence of any eye witness to the murder and in the absence of any positive evidence that appellant Malai was found whom followed the deceased Siddique Ali with sharp cutting weapons in hand and in the absence of any overt act on the part of the deceased it cannot be said with reasonable certainty that appellant Malai was responsible for the murder of the deceased Siddique Aoi (1993 BLD 277, 278).

This is a case in which a minor boy, the victim of murder, was called away by and seen in the company of the two young accused for the last time before disappearance and then some time thereafter the body of the victim was found out. The fact of calling away of victim Khairul by accused Khasru and satisfactorily established as the first circumstance in support of the prosecution and witnesses have also satisfactorily proved that the victim travelled with the two accused from their village Noapara to a distant place called Takerhat by bus and got down there at 4.00/4.30 PM on 4.1.79. This is second circumstance proved against the accused. From this point onward upto the time of recovery of the body of Khairul at about 3.00/3.30 PM on the following day the accused were alleged to have been seen along with the deceased, the third circumstance in the absence of ocular evidence of murder, by PWs 11 and 12. The High Court Division rejected their evidence due to apparent contradiction between their evidence and the statement made by them before the police and also for the reason that their identification of the accused in the T.I. Parade had lost all significance in view of the fact that they had chance to see the accused. There has been no violation of any norm or procedure in assessing the evidence of the said two witnesses for which the finding of fact made by the High Court Division could be disturbed. The prosecution, therefore, comes to this that the third circumstance, that of, seeing the three boys together near the bank of the river

where the victim's body was found was not satisfactorily establihsed. The circumstances of the case can never be said to be conclusive as to the guilt of accused Khasru and his brother Nowab. The High Court Division has correctly applied the rule as to circumstial evidence in the facts of the present case (The State Vs. Khasru @ Syed Mostafa Hossain 1991 (43) DLR (AD) (182).

The fact that the accused was the last person with whom deceased was seen and dead body was recovered on pointing out by accused and other objects belonging to deceased produced by petitioner from his house, medical evidence and motive was sufficient for his conviction for murder (1988 SCMR 299). But where the accused was one of the two persons with whom the deceased was last seen alive, and the fact that he pointed out the spot where the dead body was ultimately found, were not sufficient to draw the inference that the accused was one of the actual murderers. No doubt grave suspicion attacked to him in this connection, but grave suspicion was not sufficient for conviction (AIR 1927 Lah 541). Where in such a case dead body was not recovered at the instance of accused and there was no other evidence of murder by accused, benefit of doubt was given to the accused (1977 SCMR 20). Where the accused and deceased went to a forest together. The deceased was later on found murdered. Evidence of PWs was discrepant. The accused was acquitted (1972 PCrLJ 933).

In the following cases the accused who had been last seen with the deceased were held guilty of murder :

Where the prosecution established beyond reasonable doubt that the deceased and the accused were last seen together proceeding towards a village and thereafter the accused was found missing, while the accused were found the next day at another village and were also found to have sold away the ornaments, belonging to the deceased and the accused came out with a story of total denial saying that they were all throughout in their own village, the only inference that could be drawn was that the accused having induced the deceased to accompany them committed his murder and then took out the ornaments which were on his body and then threw away the dead body as well and on the next day sold away the ornaments to a goldsmith at another village and thereby committed offences under sections 302, 201 and 404, all read with section 34 (1954 CrLJ 1257 (SC).

The accused was seen with the girl in the same field on the day when the girl was done to death. He pointed out the place from where the dead body was recovered. There was no evidence upon record to show that the dead body was seen by any person prior to the accused leading the witnesses to that place. The accused while explaining to the court the evidence regarding the pointing out of the dead body, beyond denying that he never led the witnesses to that place, did not say as to how did he come to know that the dead body was lying in that particular place. He then pointed out a place from where a sickle was recovered, which was the alleged weapon of offence but which was not found to be bloodstrained. Sexual intercourse had been committed on the girl and the accused was found to be wearing a lion cloth which had semen stains on it. Moreover the accused had injuries on his person which clearly showed that he sustained them while committing murder and indulging in sexual intercourse (PLD 1970 Lah 739; 12 DLR (WP)34).

Where the evidence against the accused is that the deceased was last seen alive in his company and that the accused disappeared immediately after the murder and the accused set up a palpably false defence that he did not know the deceased and was never in her company (AIR 1930 Lah 265).

Where the accused was the person last seen with the deceased boy when he was alive and was observed walking with the deceased boy with an axe under his arm

and was seen at the actual place where the body was discovered, and it appeared that he dug up, in the presence of trustworthy witnesses, ornaments identified as belonging to the deceased (AIR 1934 All 132).

Where the deceased woman was last seen in the house of the accused, and nobody else was present in the house. The body of the deceased was recovered onthe pointing out of the accused. The ornamental chain which the woman wore was recovered from the possession of the accused (AIR 1957 Ker 65).

Where the deceased child was las seen with the accused, and was missing for 24 hours during which time the accused was also missing. The dead body was recovered at the instance of the accused, and ornaments worn by the child were recovered from another person at the instance of the accused, who had sold them to him (AIR 1955 Hyd 200).

At the time when the murder must have been committed, the accused and the deceased were together at the place of the murder and they were alone there. The gate had been fastened from within by the accused and, soon after the murder,the accused came out with a false story that the deceased had gone out (ILR 1959 Ker 319;1993 CrLJ 3151).

Where the accused was seen by two ladies proceeding with the deceased in the direction of the scene of occurrence, the accused came home without the deceased in her company in the evening of the same day in hurried steps and with her clothes lifted up; the clothes were on examination, found to be stained with human blood and that the two Naulis of the deceased which were seen on her person up to her going towards the scene of the murder had been discovered at the accused's instance from the thatch of her hut (AIR 1954 SC 279).

Where the accused and the deceased were last seen together and soon after the accused went and pledged one of the ornaments worn by the deceased with a person and sold another ornament to a goldsmith the next morning, and they were both recovered on his pointing out (AIR 1954 SC 28).

The deceased girl aged six years, and her mother lived at the house of the accused who was the girl's uncle. There was some quarrel between the girl's mother and the wife of the accused as a result of which the mother had been cooking separately. One morning after the mother had left home for her field, the accused took the girl from the house on a false pretext and returned without her. On being questioned he first said that the girl had been run over by a car but later on he stated in the presence of the mother and other relatives that he had killed her and put her in a pond. The dead body of the girl was subsequently found in a pond. A number of witnesses spoke of seeing the accused and this little girl on that morning together in various places in the vicinity and not far from the pond in which the body was found (AIR 1941 Mad 120).

The accused was the person last seen with the deceased. His conduct in running away when challenged by rakshakas of the railway police force, his hiding underneath the bogie, his wearing clothes which were blood stained, the recovery of a knife from his pocket, his disclosure of the rakshakas that he had stabbed his friend to death and the discovery of the body of the deceased at his instance by the police, were held to be overwhelmingly for the inference of guilt of the accused and incompatible with his innocence. Hence, his conviction under section 302 was confirmed (1974 CrLJ 1800 (SC).

The accused and the deceased were seen together near a canal by one witness and after that the deceased was never seen alive again. The medical examination was not decisive as to the cause of death because putrefication was too far advanced. The

accused's shoes were found near the canal bridge hidden in some reeds. The accused subsequently pointed out the ornaments which the deceased was wearing (AIR 1924 Lah 109).

Where the deceased was last seen with he accused and watch and attache case of the deceased was recovered from his possession (PLD 1963 Kar 242).

Where the deceased was last seen alive with the accused and some of the goods belonging to him were found in possession of the deceased (PLD 1966 Kar 365).

Where a child was last seen alive in the company of the accused, and he had exclusive knowledge of the place where its remains were eventually found. He gave no explanation as to how the child met its death (PLD 1964 SC 167).

Where the accused and the deceased were last seen together and there was evidence of unnatural offence having been committed on the deceased, semenal fluid was also found on the accused's langota and the accused made a confessional statement which was consistent with the evidence in the case, but he retracted the confession subsequently (AIR 1955 NUC 4997).

Where (i) deceased was last seen with accused; (ii) accused had exclusive knowledge of place where the body lay buried; (iii) recovery of articles of deceased were made at the instance of the accused; and clothes secured from person of the accused were stained with blood (1968 SCMR 378).

Where the deceased was last seen with the two accused and, the Registration card of one of them was recovered from under the dead body and blood stained clothes of the accused and a blood stained knife were recovered at his instance from his attache case lying in his residential quarter. A wrist watch belonging to the deceased was recovered at the instance of the accused. It was also found that the accused was absent from duty on the day of occurrence, and there were injuries on the person of the accused. It was held that the accused was guilty (1980 SCMR 649).

Husband and wife last seen together before occurrence : The mere fact that the wife was last seen alive with her husband who suspected her of unfaithfulness would not be sufficient to convict him of murder, because she being his wife would normally be expected to go around with him (PLD 1961 Kar 720). Where the accused and the deceased were living as husband and wife. He and the deceased were seen moving together on the day of occurrence. He had reason to suspect faithfulness of the deceased to him, and after the commission of murder he made himself scarce in the neighbourhood until he surrendered to the police after five days of the occurrence; it was held that these circumstances were insufficient to sustain conviction of the accused for the offence of murder (AIR 1957 AP 213).

If it is proved beyond doubt that the deceased is seen last alive in the company of the accused, he is liable to offer satisfactory explanation as to cause of death of the deceased at least as to his company with the deceased (41990)2 DLR 440; relied on 37 DLR (AD) 139; 16 DLR (SC) 261). Ordinarily an accused has no obligation to account for the death for which he is placed on trial. The murder having taken place while the accused husband was living with his wife in the same house he was under an obligation to explain how his wife had met with her death. In the absence of any explanation coming from his side it seems none other than the husband was responsible for causing death of his wife (State Vs. Kalu Bepari (1991) 43 DLR 249; 1990 BLD 375; 1991 BLD (AD) 302).

Where the deceased was seen with the accused last together and held it does not necessarily lead a judge to donclude that the accused had committed his murder (1983 CrLJ 1854; 1979 crLJ 1217; 1980 (Supp) SCC 716).

In a case the accused alone was present with the deceased at the time of occurrence. The irresistable conclusion that can be reached is that he alone committed the murder (1983 KLT 571 Ker).

Accused and the deceased alone were in the house when the death occured. Inference of offence was drawn from this circumstances in conjunction with other circumstances (982) 1 SCC 426=1982 CrLJ 1572= 1982 SCC (Cr) 240; AIR 1982 SC 1217= (1982) 2 SCJ 159). Conduct of accused in buying box, packing dead body of his wife into that box and throwing it from running train left no doubt that he committed her murder. The story of suicide by hanging by wife when her husband and 2 years old child were present in the home was incredible particularly when no rope was found in the house and medical evidence also did not show that deceased hanged herself. In view of illicit relationship of accused with nurse, the motive was proved. The conviction for murder was upheld (AIR 1984 SC 49=1983 CrLJ 1731=1983 CrLR (SC) 641).

The accused who was last seen together with the acucsed but it was explained by him and was explainable. Evidence of the witness in the case was unreliable. Held, the conviction based on the theory of recovery from the accused and last seen together cannot be sustained (1983 Raj Cr. Cas 137; 1983 CrLR (Raj) 182).

53. **Circumstantial evidence in wife killing case.**- In a wife killing case, from its very nature, there could be no eye-witness of the occurrence, apart from the inmates of the house who may refuse to tell the truth, the neighbours may not also come forward to depose. The prosecution is, therefore, necessarily to rely on circumstantial evidence. In a case of this nature, like any other case of circumstantial evidence, one normally starts looking for the motive and the opportunity to commit the crime (State Vs. Shafiqul Islam, 1991 BLD (AD) 121 (124); 43 DLR (1991) AD 92). In a case of murder of wife, conviction can be based on circumstantial evidence even in the absence of proof of motive when facts on record are clear implicating the accused (Mulakh Raj etc. Vs. Satish Kumar and others (1992) 2 crimes 130, 131).

Where it is proved that the wife died of assault in the house of her husband, there would be strong suspicion against the husband that at his hands the wife died. To make the husband liable, the minimum fact that must be brought on record, either by direct or circumstantial evidence is that he was in the house at the relevant time (State vs. Shafiqul Islam, 1991 BLD (AD) 121, 124= 43 DLR (1991) AD 92 (94).

The accused and his wife were alone inside the room and she was found to have 7 incised wounds, five of which were on the neck. The ornaments on her person were intact. There was no sign of violence on the door or any part of the house. It was held that the assault took place while the deceased was asleep on her bed and since there was no sign of violence on the door or any part of the house by which it could be suggested that an outsider came inside the room, the accused alone had the exclusive opportunity to cause these injuries in a closed room resulting in her death (1978 Cr. L.R. 72 (78, 79).

Ordinarily an accused has no obligation to account for the death for which he is placed on trail. The murder having taken place while the condemned prisoner was living with his wife in the same house he was under an obligation to explain how his wife had met with her death. In the absence of any explanation coming from his side it seems none other than the husband was respoonsible for causing death in question (State Vs. Kalu Bepari 43 DLR 1991 (249); 1990 BLD 375; Dipak K. Sarker Vs. State 40 DLR (1988) AD 139).

The accused alone was with deceased in the house when she was murdered there with the khakhri. The relations of the accused with the deceased were

strained. The dead body of the deceased was thereafter discovered lying in the house of the accused. Held, that it was the acucsed and none else who caused injuries to Chri (AIR 1972 SC 2077, (2082); Debar Kundu Rama Krishna Rao vs. State of West Bengal 1988 (1) Crimes 654 Cal). Even in the case of circumstantial evidence, absence of motive which may be one of the strongerst links to connect the chain would not necessarily become fatal, provided the other circumstances would complete the chain and connect the accused with the commission of the offence (Ganeshlal Vs. State of Maharashtra 1992 (2) Crimes 161 (162).

When the death had occurred in the custody of her husband and in-laws, the inmates of the house are under an obligation to give a plausible explanation for the cause of her death and their failure to do so is consistent with the hypothesis that the inmates are the accused in the commission of gruesome murder of the deceased girl (Ganeshlal Vs. State of Maharashtra 1992 (2)Crimes 161,162). Evidence of having last seen the deceased (wife of the accused) in the company of accused inspired confidence. Discovery of dead body on the pointation of accused was a very important piece of evidence against him. Relations between accused and his deceased wife had remained strained and she having stayed in her father's house for about two years had returned to her husband's house a few months prior to the occurrence. Explanation offered by accused about the death of deceased (wife) was not reasonable and his conduct after the occurrence was dubious. Death of deceased, thus, was not explainable on any hypothesis other than the guilt of accused. Conviction of accused was maintained in circumstances (Muhammad Yusuf Vs. State 1992 PCrLJ 1426).

In cases where the allegations had been that a husband had murdered his wife and then absoconded, the husband in such a situation had a duty to explain how his wife was murdered and by whom she was murdered and in case of non explanation by the husband or his silence in the matter or be having absconded immediately after the murder, would be considered to be good ground for a finding that the husband is guilty of murder of his wife if, however, there is no suggestion or circumstances to show to the contrary that other immates of the house also used to best her and killing her in the process (1993 BLD 99(100).

Husband and wife were the only occupants of the house in the night. It was later discovered that the wife had been murdered. At the time of her death no one other than the husband was in the house. Held, it will inescapably lead to the conclusion that in all human probability, it was the accused appellant and none else who had murdered the deceased by by strangulating her to death (1982 CrLJ 1572; AIR 1982 SC 1217= (1982) 1 SCC 426= 1982 SCC (Cr) 240).

When admittedly a wife sleeps at night with the husband ina room or hut which is not approachable by others and there is no probable circumstance explaining the cause of death of the wife and she is found to have been killed by in abrutal manner by strangulation, the husband is rightly convicted under section 302 of the Penal Code on the basis of inderbitable evidence on record against him (1993 BLD 563;AIR 1972 SC 2077 (2082).

In the undernoted case, the accused was seen sitting on a stone in a state of excitement. After sitting there for about an hour, the accused met another man and shortly thereafter he went to his house. Thereafter the accused with blood-stains on his clothes was seen running towards the police station. The prosecution alleged that the accused was not on speaking terms with his father-in-law and did not allow the deceased to visit her father's house and maltreated her. The Supreme Court held that the facts do not warrant the conclusion that the accused was alone with the deceased at the time of the present occurrence and there is nothing unnatural or

improbable in the conduct of the accused when after coming to his house he found his wife with a number of injuries on her neck and he tied to make her sit in order to find out whether she was alive or not. No motive on the part of the accused to murder the deceased can be held to have been proved, so the Supreme Court accepted the appeal and acquitted the accused (AIR 1972 SC 922 (923, 925, 926).

It was established from the evidence that the deceased and her husband alone used to live in the room where the deceased was found. Plea of alibi of accused husband was not proved. The medical evidnece establishes that it was not a case of illness, but a death due to the effects of mannual strangulation, associated with the strangulation by ligature ante mortem and homicidal in nature. The conduct of the husband accused was inconsistent with his innocence. Conviction under section 302 was upheld (Debar Kundu Rama Krishna Vs. State of West Bengal 1988 (1) Crimes 654 (Cal). The conduct of the accused also provides ample corroboration to the fact that he had himself killed his wife. The fact that his wife was admittedly sleeping with him immediately before her disappearance, the evidence of PW 2 that the appellant had told him on query that his wife had run away in the night and the evidence that the appellant made no attempt to look for his wife since she was missing are all confirmatory of the culpable conduct of the appellant. The deceased was admittedly living with the appellant at the relevant time and thus he was obliged to give an explanation as to how his wife had met with her death although normally an accused is under no obligation to account for the death for which he is on trial. The consideration is bound to be different in a case like this. The fact that false information as to the disappearance of Laxmi Rani was supplied makes the case worse for the accused and it only entrenches belief in the confession made by him so soon after the occurrence (Dipok K. Sarkar Vs. State. (1988) 40 DLR (AD) (139).

Where it was found that (i) the accused was alone with the deceased in his quarter at about 10.30 a.m. on the day of occurrence; (ii) shrieks were heard at that time from inside the quarter of the accused; (iii) both the front and back doors of the quarter of the accused were found to be bolted from inside and they were not opened in spite of shouting and knocing, (iv) the accused soon thereafter jumped over the rear wall into the back lane and wanted to run away but was secured by the witnesses; (v) immediately, thereafter, the witnesses went inside the quarter and found the wife of the accused lying dead on a cot; (vi) according to medical evidence, the deceased had been throttled to death at about 10.30 a.m on that day; and (vii) the accused had an animus against the deceased because he was forced to marry her inspite of the fact that he did not like her. It was held that these circumstances, clearly pointed to the conclusion that the accused was the murderer of the deceased (1972 SCC (Cri) 275).

Where, in a bride burning case after 10 months of marriage the oral and the written dying declaration were accepted as truthful and the defence version that death was accidental by bursting of stove was rejected, it was held that the recovery of the stove with its lid removed and burnt match stiks from the kitchen of the appellant's house clearly showed that kerosene in the stove had been poured and then lighted match sticks had been applied to her and the appellant was rightly convicted under section 302 (1987 CrLJ 537 SC; (1987) 1 SCJ 471; (1987) 1 SCC 467).

Where on a reappraisal of the evidence on record in a bride burning case it was clear : (1) that the relationship of the deceased woman with the members of her husband's family had become strained and she had been subjected to physical as well as mental torture for some time prior to the incidence. The physical torture being the outcome of indifference to her health and the mental torture being on account

of the demand for more dowry; (2) that the deceased woman ahd not lighted the kerosene stove on the fateful night and her wearing apparel had not caught fire accidentally but that kerosene lid been sprinkled on her clothes and she had been brought into the open space in the courtyard where fire was lit to her clothes; (3) that her death was thus not an outcome of accidental fire but on account of a designed move on the part fo the members of the family of the accused persons to put an end to her life; and (4) that the deceased woman's husband and mother-in-law were responsible for her murder by setting her on fire, the acquittal in regard to the first two accused respondents was set aside by the Supreme Court but the death sentence passed by the Trial Court was altered to one of imprisonment for life (1986 SCC (Cri) 2=1986 Cr LJ 155 SC= (1987) 2 SCC 631).

It was established fromthe evidence that the deceased and the husband alone were living in the upstairs room. The circumstances that the death took place in the bed room of the spouse and the attempt to destroy the evidence of murder by burning the dead body; the unnatural conduct of husband, immediately after the occurrence; the false pleas of suicide and absence from house are material relevant circumstances which would complete the chain of circumstantial evidence leading to only one conclusion that the husband alone committed the ghastly offence of murder of his wife. Therefore, he would be liable to be convicted under sections 302 and 201 (AIR 1992 SC 1175).

In delivering th edissenting judgment Latifur Rahman J. observed in the State vs. Mofazzal Hussain Pramanik (1991 BLD (AD) 302), that if the respondent was present in his house in the night of occurrence, then certainly he was to explain as to how his wife died in his own house in the night of occurrence. But if he was absent and if his plea of alibi is accepted as reasonably true, then of course, he is not to explain about the death of his wife. In normal circumstance a duty is cast upon the husband respondent to show how wife Halima died in the night of occurrence as the husband and wife are supposed to live in the night of occurrence in their own house without any contrary evidence by the defence.

That Halima died on assault in the house of the respondent (husband) is proved.No doubt, strongest suspicion will be against the respondent that at his hands Halima died. But to make him liable, the minimum fact that must be brought on record, either by direct or circumstantial evidence, that he (husband) was in the house at the relevant time or night (1991 BLD (AD) 302 (306); 43 DLR-(AD) 65). Deceased was living with the accused as his wife in the house where she was found dead. Such factor, however, by itself was not sufficient to prove that the accused and none else was the author of the crime. Conviction of accused can never be based on such evidence alone (Muhammad Rafique V. State 1992 PcrLJ 2120).

The conduct of the husband indicates that he was suppressing the truth and was taking contradictory defence.. The accused failed to give any satisfactory explanation as to how his wife died on the night of occurrence in his house. Accused held guilty (38 DLR 289, 295). In the instant case, the accused started beating his wife with various weapons right from 3.30 a.m. and stopped only after she was completely silenced. Another important fact was the fact of the hurried cremation without informing their near relations and without performing the necessary ceremonies. Besides that, in the death register, a false entry was made at the instance of accused that his wife had died due to sickness. Held, that a consideration of these circumstances therefore, unmistakbly leads to the conclusion that accused had undoubtedly beaten his wife to death and the only inference that could be drawn from his act was that he deliberately intenteded the murder of the deceased (1977 CrLJ 829(832-33) SC).

All the witnesses of the house in which the incident took place being close relations of the accused there was good reason to suppress the truth, but truth came out from the attending circumstances and the evidence of P.W. 1 who rushed to the spot immediately after the incident, heard about the incident from the wife of the deceased and lodged FIR within the shortest possible time. The proximity of time left hardly any scope for concoction or embelishment. Decision of H.C. was set aside and accused were convicted (BCR 1987 AD 87).

"It is in evidence that the father of the respondent (Since acquitted) also used to assault the deceased and it is in his house that the respondent and his wife has been living. Prosecution choose to make not only the respondents an accused but his father, uncles and others were also made accused who have, however, been acquitted by the trial court. There can be little doubt that the girl died at the hands of some inmate or inmates of the house of Moyez Mondal but in view of the vague nature of the evidence brought on record by the prosecution (very likely due to inexperience) against a number of persons, it becomes plainly unsafe to fix up the respondent along"(1990 BLD (AD) 228). Accused husband causing death of his wife by inflicting injuries with axe. Evidence of witness to whom accused made confession was cogent and convincing. Evidence also showing that accused was last seen in company with deceased. Blood stained clothes of accused and weapon recovered. Serological report showing that group of blood found on clothes of accused similar to that of deceased. Chain of circumstances, established. Conviction of accused for murder was proper (AIR 1993 SC 2480).

54. **Absconding.**- Mere abscondence for some time without any guilty mind cannot be an incriminating circumstance against the accused to be relied upon for basing his conviction (Shahjahan Vs. State (1994) 46 DLR 575; Sultan Mahamad V. State 1991 PCrLJ 56). Conviction on a capital charge cannot be based merely on the evidence of abscondence even if the same is supported by documents, i.e. warrants of arrest of absconding accused and issuance of proclamations (Fateh Khan V. State 1990 PCrLJ 1585). Absconding of the accused is in itself no circumstance to convict an accused for murder. Sometimes innocent people, out of timidity or fear run away from their house (1980 Raj Cr. C 127 (129).Absconding is equally consistent with the innocence and guilt, and therefore, it is a proper matter to be considered along with other facts of the case whether they bear upon guilt or upon innocence (1984 PCrLJ 1237; 1955 CrlJ 485). Mere absconding of accused is not enough for sustaining conviction of accucsed (1986 SCMR 823, 1986 PCrLJ 177). Mere abscondence can not always be a circumstance which should lead to an inference of guilt of the accused. Sometimes out of fear and self respect and to avoid unnecessary harrasment even an innocent person remains absconding for sometime (State Vs. Badsha Mulla 41 DLR 11). Mere absconding may lead weight to the other evidence tending to show the guilt of the accused, but by itself, it is hardly any evidence of guilt (AIR 1963 SC 74=1963 CrLJ 70).

Testimony of eye-witnesses not only unimpeachable but confidence inspiring witnesses fully corroborated prosecution version in all respects. Investigating officer corroborated prosecution in respect of time and place of occurrence. Chemical examiner's report also corroborated prosecution. Absconsion of accused was a further circumstantial evidence to support prosecution story-cumulative effect of prosecution evidence, held, that accused was guilty of offence (1987 PCr LJ 1689 (1700). Abscondence is not a substantive piece of evidence and is always used in corroboration of other substantive evidence. If prosecution did not succsed to bring home charge to the accused on the strength of ocular evidence, abscondance by itself could not be employed for the proof of the charge (1988 PCrLJ 444(446).

There mere fact that an accused is found untraceable for sometime after the crime does not necessarily show that he had become untraceable on account of the consciousness of guilt. Not all men have got enough courage to stand a trial when they find themselves falsely involved in a serious criminal case and there is no wonder that the accused having come to know the next day that he had been named as the perpetrator of the crime could not have the courage to stay and therefore became untraceable for some time. The false defence given by him may also be due to the fact that he might have thought that if he admitted any little thing given by the prosecution be might be considered to be perpetrator of the crime (1956 Raj LW 35 (40, 41) DB; 1975 Mah LJ 431 (442). Becuase of instinct of self-preservation even innocent persons may, when suspected of grave crime, be tempted to evade arrest. True, abscondence of an accused is a conduct relevant under section 8 of the Evidence Act and might be indicative to some extent of guilty mind but much significance can not be attached to this conduct of the accused (AIR 1971 SC 1871=1971 CrLJ 1314). Abscondence of accused is a relevant fact. Unless accused explains his conduct, abscondence may indicate guilt of accused (1982 BLD 286; 33 DLR 274).

The act of absconding is normally a somewhat weak link in the chain of circumstance for establishing the guilt of the accused (AIR 1971 SC 2156=1971 CrLJ 1468). Abscondence of an accused can not lead to a firm conclusion, and the prosecution can not derive any benefit from such merely suspecious circumstance (AIR 1971=1971 Cr LJ 1913; AIR 1974 SC 1193=1974 Cr LJ 908; AIR 1976 SC 76; AIR 1976 SC 557; AIR 1981 SC 1160; AIR 1983 SC 161).In the case of Rahman Vs. State of U.P. AIR 1972 SC 110, it was held that abscondence by itself was not conclusive either of guilt or guilty conscience. It must be backed by direct or circumstantial evidence of the occurrence.

A person who has been named as murderer whether rightly or wrongly, usually makes himself scaree (PLD 1964 SC 26 (36). In the absence of any other incriminating evidence, the circumstance of the accused absconding alone cannot be made the basis for conviction (Girdhari Lal Vs. State of Rajasthan (1989(3) Crimes 703 Raj).

The conduct of a person in absconding after the commission of the offence is evidence to show that he was concerned in the offence (PLD 1965 lah 656). If after the commission of a crime, a person whose name is mentioned as participator in the crime absconds, his conduct shows that he is concerned in the crime. Therefore, anything which tends to explain his conduct and furnishes a motive other than a guilty conscience will be relevant under section 9, Evidence Act (62 I.C. 545=22 Cr LJ 529).Accused, absconded immediately after occurrence and remained out of reach of hand of law for more than four years without showing any convincing reason for his absence for such a long time. Abscondence per se though not a pointer towards guilt of a person yet coupled with other circumstances, it would be an important factor going against absconder accused. Fact that accused absconder after commission of offence, had avoided his arrest, could also be one of proofs of guilt (Fayyaz Ahmad V. State 1989 PCrLJ 784).

Mere abscondence cannot always be a circumstance which should lead to an inference of guilt of the accused. Sometimes out of fear and self respect and to avoid unnecessary harrasment even an innocent person remains absconding for sometime (1989 BLD 257 (270)=41 DLR 11). Failure to explain reason for absconding after occurrence favours prosecution (39 DLR 437). Abscondence of accused is a relevant fact. Unless accused explains his conduct, abscondence may indicate guilt of acucsed (1981 BLD 286; 33 DLR 274). Mere abscondence of an accused cannot be considered

sufficient for his conviction and the same can only be taken as a corroborative piece of evidence. People charged with offences punishable with death generally abscond not because they are guilty but to avoid torture of investigation and on account of immediate danger to their lives due to vengeance of opposite party (Abdul Karim Vs. State 1989 PCrLJ 2100). Duty of the court to sift evidence and to do justice even in the case of that accused who had absconded after close of trial but before announcement of judgment if after perusal and appreciation of evidence his case called for interference and he was not to be condemned simply for the reason that he had absconded (Mushtaq Vs. State 1989 PCrLJ 2336).

Absconson by itself is not an incremінating matter, for, even an innocent person, if implicated in the ejahar for a serious crime, sometimes abseconds to avaoid harassment during investigation by the police. But in some cases a person with guilty knowledge also absconds. It is the facts and circumstances of the case which decide whether the absconsion is due to any guilty knowledge or to any intention to avoid police harassment (39 DLR (AD) 117). Where no search is made to find out the accused and accused's explanation of his not being found out is plausible his abscondence cannot be regarded as an incriminating circumstance (1972 PCrLJ 228).Where the accused after being named in the FIR absconds or remains away from the village and the proceedings under sections 82 and 83 CrP.C. were started against him and he appeared thereafter only it is a circumstance against the accused if no plausible explanation is given for such absence (1988) Crimes 367=1989 CrLJ 88;1993 CrLJ 2954(2962).

When the accused at his trial was never questioned about his absconding either at close of inquiry before Magistrate or at close of his trial the alleged absconding could not be relied upon in convicting the accused (PLD 1972 Lah. 129(141). Abscondence of accused is a piece of evidence to be taken note of in considering the guilt of an accused person in the given circumstances of a case and can be used as a piece of corroborative evidence of his guilt. While it is not unusual that a person accused of a murder, whether rightly or wrongly, mades himself scarce because of fear, it is equally not unusual that when rightly accused he runs away to escape the clutches of law to avoid answering his guilt and his prolonged abscondence in spite of the legal proceedings against him would be a pointer to his guilt (PLD 1966 Pesh 232).

Where the accused, a coolie was arrested after the incident from a lawn other than where he worked, it was held that this would not lead to the conclusion that he had tried to abscond, particularly when he was not questioned on this aspect of the case (PLD 1974 Kar 91).

A person who has been named as a murderer, whether rightly or wrongly, usually makes himself scarce, and therfore the fact of absconding can not be made a ground for conviction (PLD 1964 SC 26=16 DLR (SC) 9). Even if an adverse inference is drawn against the accused from the fact of their absconding, it is a very minor circumstances and can not be regarded as material corroboration of the confession of the accused made subsequently (PLD 1964 WP Quetta 6 =PLR 1965 (2) WP 49 (DB). But absconding of the accused may corroborate other evidence against the accused (PLD 1966 Pesh 255 (DB).

Where the accused absconded after the offence and subsequently when he was arrested his bloodstained pant and articles belonging to the deceased were recovered at his pointing out, it was held, that in the absence of any explanation, this circumstantial evidence added to the evidence of absconding was sufficient for the conviction of the accused (PLD 1964 (WP) Kar 530 (DB).

Circumstances of abscondence gives reflection of guilty mind and also is equally consistent with innocence. Since different persons are differerntly constituted and some accused persons, though innocent, deliberately abscond rather than face ordeal of a criminal trial, therefore, it can not be said that this circumstance is incapable of explanation upon any reasonable hypothesis other than that of guilt (1985 PCrLJ 2638).

Accused being arrested only 8 days after occurrence - whether accused appeared of his own or any coercive process was issued against him, not known - proof of search and search warrant, not proceduced - Accused categorically denying absconsion - Absconsion, held, not a corroborative piece of evidence in circumstances (1985 PCr LJ 2000).

In Ali and others Vs. Crown 6 DLR (1954) W.P. 52, it was held :

"Before abscondence be used against an accused person it must be established that he absconded not because, though innocent, he was afraid of being arrested but because he had a guilty conscience and cases are not uncommon in which innocent persons when convinced that they are going to be arrested have absconded."

55. **Recovery of dead body and property of decesed.-** Recovery of articles proved to belong to the deceased from the possession of accused after a very long delay is not sufficient to raise a presumption that the accused had committed the murders while committing robbery (1973 Raj. LW 58 (61). In prosecution for the offence under sections 302 and 380, Penal Code, the recovery of the stolen property belonging to the deceased out of the possession of the accused and the bite injuries found on the fingers of the accused immediately after the death of the deceased are important and sufficient circumstances to connect the accused with the death of the deceased (Kylash Potlia @ shvaji and Anr. V. The State 1992 (1) Crimes 931).

Where there was noting to connect the accused with the murder of th deceased or even with any assault the accused would have committed on the deceased or having robbed her of her ornaments, mere recovery of the ornaments of the deceased from the accused would not justify a conviction under section 320 or 394 Penal Code (1981 CrLJ 160, 161 (SC). There is a good deal of difference between a person being in possession of incriminating articles and a person being aware of their being in a particular place. A mere knowledge of facts such as the place where blood stained articles are lying or the place where the deadbody is lying, does not conclusively establish that the person to whom such knowledge is attributed is guilty of murder and cannot be the basis for conviction unless there is other evidence to justify the same (1969 PCr LJ 1458; ILR 1954 Mys 27 (DB) (AIR 1947 SC 67 Foll). Therefore the recovery of the deadbody and the clothes of the deceased at the instance of the accused would not prove that he committed the murder, and he can at the most be convicted under section 201 Penal Code (1984 PCr LJ 2511; 1968 PCr LJ (SC) 221).

It is well settled that in cases where robbery and murder are so connected as to form parts of one transaction the recent and unexplained possession of the stolen property would not only be presumptive evidence against the accused on the charge of robbery but also on the charge of murder (AIR 1978 SC 522, 526). In another case, a brutal murder was committed at night. Early next morning the accused, who had a strong motive to commit the murder, disapeared from his house, but was soon arrested by a constable. He was then wearing a blood-stained dhoti. On being interrogated he took the police to his house and brought from a room in it some ornaments belonging to the deceased and a gandasa, all blood-stained, and delivered

them to the police. It was held that the evidence, though circumstantial, was sufficient to convict the accused of murder (AIR 1954 SC 704, (706).

The mere fact that the dead body was pointed out by the appellant or was discovered as a result of a statement made by him would necessarily lead to the conclusion of a offence of murder. But there may be other circumstance, which can be taken into consideration. The discovery of the buttons with blood-stains at the instance of the appellant is a circumstance which may raise the presumption of the participation of the appellant in the murder (AIR 1966 SC 821 (823). In Wasim Khan Vs. State of Uttar Pradesh (AIR 1956 SC 400 (405=1956 CrLJ 790=1956 SCR 191), it was held that the recent and unexplained possession of the stolen property would be presumptive evidence against a prisoner on a charge of robbery as also of a charge of murder.

Where the accused assisted in burying the body of a murdered man but gave no explanation whatever of this damning fact, it was held that the mere absence of explanation, of course, cannot prove the crime of murder, but the fact that a criminal does not explain very suspicious circumstances against him is certainly circumstantial evidence which may be taken into consideration against him (AIR 1937 PC 179; 64 IA 134; 38 CrLJ 472 (PC).

Where two articles belonging to the deceased were produced by the accused about a fortnight after the murder and there was no other circumstance to connect the accused with the murder, the conviction of the accused under section 302 was set aside (AIR 1954 SC 704, 705). But where certain ornaments were established to be the ornaments worn by the deceased and the accused was not in a position to give any satisfactory explanation as to how he came to be in possession of the same on the very same day on which the alleged murder was committed, the circumstantial evidence was sufficient to hold the accused responsible for the murder (AIR 1954 SC 28, (30).

It has been held that the presumption of being the murderer is invoked if the Court is satisfied that the possession of the property could not have been transferred from the deceased to the accused except by former being murdered. The presumption would be particularly applicable when there is a satisfactory proof that the ornaments were actually worn by the deceased immediately before the murder (AIR 1965 Ori. 33).

In the rajasthan case of State Vs. Mohan Lal (AIR 1958 Raj 338), soon after the murder a huge quantity of jwewllery belonging to the deceased was found in the possession of the accused and the Court's view was that the accused in the circumstances must explain how he came by the property of the deceased and since the explanation furnished by the accused was found to be palpably false the Court held that in view of the surrounding circumstances of the case correct conclusion could only be that not merely the accused was guilty of receiving the stolen property but that he was the murder.

The evidence of the recovery of certain incriminating items from his house, which bear stains of blood, of human origin, does not, by itself, prove the offence of murder against the accused. These recoveries could at best furnish corroborative evidence but as there is no substantive evidence of murder which these recoveries can corroborate, therefore the accused cannot be convicted for murder (1971 SCMR 756). Some ornaments were recovered at the instance of accused. Deceased was last seen wearing those ornaments. Held, inference that accused must have murdered the deceased cannot be drawn in absence of any evidence to connect him with

murder. The accused was liable to be convicted under section 411 and not udner section 302 or section 394 (AIR 1980 SC 1753; 1980 CrLJ 1270).

Where the recoveries made from the accused were the severed head of the deceased, blood stained clothes worn by the accused, key of room where accused resided, blood stained chhuri and kassi from a room, the lock of which opened with the key recovered from the accused, blood stained earth inside the room as well as outside its door, blood stained articles of bedding and blood stained charpai from inside the room, and blood stained chappal allegedly belonging to the deceased. The accused was convicted even when there is no ocular evidence against him (1980 SCMR 172). Where upon information and confession of accused deadbody of a woman was found buried in his house inference should be raised against the accused though he denied the guilt subsequently (1975 WLN 80).

Where articles belonging to the deceased are recovered from the accused and this evidence corroborates ocular evidence, the accused may be convicted (1973 SCMR 591); 1973 SCMR 551). Where the clothes of the deceased were recovered from the possession of the accused eight hours after the murder and the clothes of the accused were found to be blood stained (AIR 1955 NUC (SC) 5807), or where deceased was last seen alive with the accused and some of the goods belonging to him were found in possession of the accused. The accused were held guilty of murder (PLD 1966 Kar 365 DB). Property of the deceased or a person in respect of whose articles dacoity was committed was recovered from the accused soon after the occurrence. Held, a presumption regarding involvement in the crime can be raised against the accused and an inference of participation in it as well he justified. In the instant case of dacoity accompanied with murder the victim died on the spot. Injuries inflicted were in the ordinary course of nature were sufficient to cause his death. An intention to do so can be inferred. (1985 CrLJ 1973).

If ornaments or things of the deceased are found in possession of a person soon after the mdurder, a presumption of guilt may be permitted. But if several months expire in the interval, the presumpotion may not be permitted to be drawn, having regard to the circumstances of the case (AIR 1954 SC 1; 1954 CrLJ 225). Thus where the accused was found in possession of the property of the deceased ten days after the murder;l it was held that there was no presumption that the accused had committed the murder (1986 PCrLJ 1760).

The fact of the property of dead bodies at the instance of the accused together with the possession of property belonging to deceased immediately after murder give rise to presumption under illustration (a) of section 114, Evidence Act and is sufficient to establish murder (1958 Raj 338; 1959 CrLJ 1540). Murder taking place at night. Early next morning accused disappearing from his house. After his arrest accused producing articles, which were removed from body of deceased from his house. Inquests made shortly after dawn and not made in day. Accused held was not merely receiver of stolen property but murderer (1954 SC 704;1954 CrLJ 1755).

Where a large part of the ornaments was taken away by the accused and some of the ornaments were still recovered from the deadbody when it was taken out of the well, it could not be said that the conviction was not justified as he did not choose to take the risk of taking all the ornaments and threw the deceased in the well before he could be detected (1980 CrLJ 1408(1409) MP). Confession leading to the recovery of dead body implied ample corroboration from independent circumstantial evidence for conviction (42 DLR 177). Deadbody exhumed from spot as per information given by accused to police as to spot where he buried deadbody. Such discovery is important factor and lends support to prosecution case regarding *corpus delicti* (1993 CrLJ 3151).

The evidence of mruder of wife by the accused was the recovery of broken bangles and pair of cuffinks from the room of the deceased. Earlier the accused stayed at a hotel under a false name on return from his house of the sister. deceased had written letters showing his callousness and cruelty towards her. He used to neglect, tease and abuse and beat her. all thus happened in six months times of his marriage. Held, the irreistable conclusion was that the accused had murdered his wife (1985 Cr. LR (SC) 444; 1985 CrLJ 1865; AIR 1985 SC 1892; 1985 SCC (Cr) 415).

The deceased's watch was recovered at the instance of accused. Writing made by the accused was left on deceased's table on the night of murder. It was held that in the absence of acceptable explanation accused could be held guilty of mruder (AIR 1980 SC 531; 1980 CrLJ 196, 197). Murder and robbery integral part of one and same transaction. Sufficient evidence to connect accused with crime. Held, acused committed murder as well as robbery (1983 CrLR (SC) 268; AIR 1983 SC 446; 1983 CrLJ 846 (SC).

A constable stated that on coming home after evening show on night of occurrence but he found the dead body of his wife in his house. He remained all along calm and composed which was inconsistent with the conduct of an innocent person. His daughter had raised an alarm that husband was beating her mother and there was no response when she asked him to open the door. Evidence was of his blood stained jersy brass vessel containing blood mixed water and the dead body recovered at his pointing out. Held, circumstances pointed to an unerring conclusion of his guilt i.e. none other than accused had committed this murder. Conviction despite absence of motive held competent (1948 CrLJ 209 (Bom).

Property of the deceased or a person in respect of whose articles dacoity was committed was recovered from the accused soon after the occurrence. Held, a presumption regarding involvement in the crime can be raised against the accused and an inference of aprticipation in it as well be justified. In the instant case of dacoity accompanied with murder the victim died on the spot. Injuries inflicted were in the ordinary course of nature were sufficient to cause his death. An intention to do so can be inferred (1985 CrLJ 1973). Gun of the deceased was recovered from the accused. Held, commission of crime by the accused appears doubtful. Conviction under section 302/34, Penal Code was set aside and benefit of doubt was given to the accused (1983 CrLR (SC) 327; 1983 UJ (SC) 591; 1983 CrLJ 973 (SC); AIR 1983 SC 748; 1983 SCC (Cr) 578).

Prosecution case based on circumstantial evidence of recovery of ornaments at instance of accused.No evidence to connect accused with murder. Held, accused can be convicted under section 411 as receiver of stolen property (1981 UJ (SC) 344; 1981 CrLR (SC) 160).Recovery of incriminating articles from the persons, possession or his house, even if blood stained, is no ground to reasonably conclude that the crime was authorised by the accused. It can only lend its support to the other evidence directed at the accused charged of mruder (1986) 1 Crimes 321 Ori; 1986 CrLJ 513; 1985 Cut LT 346). A murder is not proved from the mere fact that the dead body was recovered as a result of statement of the accused who pointed out the spot (1986) 1 Crimes 321 Ori; 1986 CrlJ 513= (1985) Cut LT 346).

The police officer effecting recovery of bloodstained articles should immediately seal them. He should produce the evidence that their seal were not tempered till their despatch to the chemical examiner for analysis (1986) 1 Crimes 321 Ori; 1986 CrLJ 513; (1985) 60 Cut LT 346).

The accused lead the police to recover dead body from a place in his exclusive knowledge. The dimension of injuries, recovery of two spent bullets from skull of

deceased and three empties from place of occurrence established that shots had been fired from pistol recovered at pointation of accused from his house. Accused was convicted (1985 PCrLJ 437).

Where remains of deadbody were thrown at a place which was at a considerable distance from the place of occurrence in a jungle. It was held that it was not possible for Investigating officer to find witnesses of locality to witness such recovery proceedings. Remains of dead body having been recovered at the instance of accused statment of prosecution witnesses though not resident of the area of recovery were held to be trustworthy (PLD 1984 SC (AJ&K) 82).

Recovery of incriminating articles at his instance provide strong corroboration against the accused (PLD 1979 Lah 521). The evidence of the recovery of certain incriminating items from his house, which bear stains of blood, which were found to be of human origin, does not; by itself, prove the offence of murder against the accused. These recoveries could at best furnish corroborative evidence but as there is no substantive evidence of murder which these recoveries can corroborate, therefore the accused cannot be convicted for murder (1971) SCMR 756; 1972 SCMR 278).

The recovery of deadbody at the instances of the the accused together with the possession of property belonging to the deceased immediately after murder is sufficient to hold the accused guilty of murder (AIR 1958 Raj 338). Where the clothes of the deceased were recovered from the possession of the accused eight hourse after the murder and the clothes of the accused were found to be blood stained (AIR 1955 NUC (SC) 5807), or where the deceased was last seen alive with the accused and some of the goods belonging to him were found in possession ofthe accused. The accused were held guilty of murder (PLD 1966 Kar 365 DB). Where sotas which were alleged to be weapons of offence were on pointing out by the accused the trial court was completely wrong in taking the view that because the origin of blood on those sotas could not be ascertained the recovery was useless (1971 SCMR 326).

The possession of the deceased's jewels by the accused is not evidence of murder, unless it is shown that the deceased had them with his person at the time of the murder and the accused can not explain how they came into his possession (14 Cr LJ 49 (DB). Where there was such evidence and the accused was found in possession of the jewels of the murdered woman, the accused were held guilty of murder (AIR 1954 SC I; AIR 1954 SC 28).

Where the deceased was last seen together with the accused and soon after that the accused disposed of the ornaments which the deceased was wearing at the time of her death (AIR 1954 SC 28), or where the two accused were seen following the deceased boy on the morning of murder a few days later ornaments which the boy had been wearing were found in the possession of the accused, the facts in default of any reasonable explanation, would lead inevitably to the conclusion that the accused were guilty of murder (1985 SCMR 479).

The facts clearly established in a case were : (1) that the jewel belonged to the deceased; (2) that she had them with her on the night of the murder; (3) that the accused was found to be in possession of the same the norning following the murder, and (4) that the accused were unable to explain how they came by the jewels. In the circumstances, it was held that the hypothesis most favourable to the accused was that under illustration (a) to section 114 of the Evidence Act, 1872, they either stole them or received them knowing them to be stolen (ILR 1956 Andh 538). The case for the prosecution against Motia is that he was in possession of these ornaments belonging to deceased's wife and daughter within a few days of the murder, and that

these ornaments were found stained with human blood. The prosecution failed to show that these ornaments were with deceased and his wife up to the night of the occurrence and were stolen only that night. Nor was there any evidence that deceased's wife was wearing any of the ornaments on the date of occurrence. Held, the mere possession of articles belonging to the murdered person, even supposing that they were blood-stained would not be sufficient to prove a case of murder against the accused beyond all reasonable doubt (AIR 1955 Raj 82(83, 84); 1955 CrLJ 835).

Recovery of deadbody is not necessary for convicting an accused person of murder, because if a Court comes to the conclusion that it is established that the victim was killed by the accused, non-recovery of the dead body can be of no importance (PLD 1961 Lah 561).

56. **Recovery of weapon of offence.**- Recoveries of weapons from the accused at their instance should be proved by examining witnesses who had witnessed the search. That by itself does not connect the accused with the crime. It is at the best only a corroborative piece of evidence (1976 Bihar Cr. C 248 (259) SC). Where there is no other direct or circumstantial evidence to connect the accused with the crime the mere fact that the weapon of offence was recovered from the possession of the accused, would not by itself be sufficient to prove the guilt of the accused (1979 SCMR 557).

The recovery of incriminating article in pursuance of the accused's information was an important piece of evidence against him. It was held that the circumstantial evidence against him was sufficient to justify the trial Court's finding that he was guilty of the offence under section 302 and the offence of robbery under section 302, read with section 397 (AIR 1978 SC 1183 (1186).

Recoveries of weapons from the accused at their instance should be proved by examining witnesses who had witnessed the search. That by itself does not connect the accused with the crime. It is at the best only a corroborative piece of evidence (1976 Bihar Cr. C 248 (259) SC). Recovery of crime weapon at the instance of accused cannot be used against him without connecting the same with crime either by the report of serologist or eye witnesses and without proving that the accused was the author of concealment of the same (Yash Pal Vs. State of U.P. 1988 (1) Crimes 55(All); Phoolya Motya Valvi vs. State of Maharashtra AIR 1979 SC 1949 relied on).

What the accused had done was merely to take out the axe from beneath his cot. There was nothing to show that the accused had concealed it at a place which was known to him alone and no one else other than the accused had knowledge of it. In these circumstances, it was held that the mere production has not been able to prove the case against the appellant beyond reasonable doubt. The conviction and sentence imposed on the appellant were set aside (1979) 4 SCC 346, (348). The mere recovery of blood-stained weapons without any other reliable evidence, can not be made the basis of conviction (1984 PCrLJ 2558 (DB); 1969 SCMR 647).

In a murder case based mainly on the recovery of weapon of offence alleged to have been used in the murder and the blood stained clothes, allegedly worn by the accused, the investigating officer besides the recovery of arms, is required to connect the accused with the offence of murder, also (Ashok Kumar And another Vs. State 1988 (2) Crimes 390 Del). Where prosecution case was otherwise proved on the basis of convincing evidence, mere defective recoveries would not be sufficicent to destroy the prosecution case and conviction could still be recorded if other evidence was found to be of convincing quality and of the nature on which reliance could safely be placed (1983 PCrLJ SC(AJ & K) 898).

Where the recoveries including a knife were to be stained with human blood and the recoveries were made from an uninhabited dark-room at the instance of the accused it was held that the testimony of the approver in the case recived enough corroboration (PLD 1970 SC 166 = 2(1970)2 DLR (SC) 106). There mere fact that the weapon of offence discovered on the pointing out of the accused is found to be blood-stained is not sufficient for conviction of the accused (PLD 1964 Kar 275 DB). Such discovery may only prove knowledge on his part that the weapon was there; it would not prove in the absence of other evidence that the accused person has personally used that weapon in the crime (PLD 1957 (WP) Kar 253 DB). However it corroborates other direct evidence. Where the recoveries including a knife were found to be stained with human blood and the recoveries were made from an uninhabited dark-room at the instance of the accused; it was held that the testimony of the approver in the case received enough corroboration (PLD 1970 SC 166= 22 DLR (SC) 106= 1970 SCMR 307).

The weapon of offence should be sealed and sent to the ballistic expert at the earliest possible time. When the crime empties and guns were sent to the ballistic expert after a considerable time the Court refused to rely on the report of the ballistic expert (PLD 1968 Lah 464 DB); PLD 1963 Kar 891 DB).

Two shots allegedly fired from single- barrel gun but no empty recovered from spot so as to be matched with it- gun neither examined nor matched to an empty, cannot be said to have been used in occurrence-mere possession of licensed gun, held, could not be corroborative piece of evidence supproting participation of accused (1985 PCrLJ 2000).

Blood-stained hatchet recovered from accused after nine days of occurrence-Held, it was not credible that a culprit should keep blood -stained hatchet in house so as to present same as souvenir to police after his arrest -Recovery found to be fake affair in circumstances (1985 PCrLJ 2958). Place of recovery accessible to every one and jointly owned by family members of accused- Recovery disbelieved (1985 P CrLJ 2958).

Recovery witness residing twenty miles away from place of occurrence- such witness although not related to complainant, but stating that he went himslf to the police station after coming to know about the murder- statement of such witness as such not inspiring confidence- such recovery witness found to be chance witness-Accused although was allegedly arrested at police station where there was no derth of respectable persons of locality, no respectable person of locality made to join recovery proceedings- Recoveries rightly disbelieved (1985 PCr LJ 1938 DB). Evidence of recovery of crime weapons furnished by an intersted witness who was ralated to complainant and on inimical terms with accused- Recovery, held, not proved (1985 PCrLJ 2298).

The evidence of the recovery of certain incriminating items from his house, which bear stains of blood, of human origin, does not, by itself, prove the offence of murder against the accused. These recoveries could at best furnish corroborative evidence but as there is no substantive evidence of murder which these recoveries can corroborate, therefore the accused cannot be convicted for murder (1971 SCMR 756).

Immediately after the occurrence the accused remained admitted in a hospital and thereafter was placed under Magistrate custody. The weapon with which the murder was committed was discovered next day after he was given in police custody. There was a delay of 36 days. Held, evidence could not be discarded (1985 CrLJ 664). In criminal prosecution conduct of an acccused in producing the blood stained

weapon of offence at the police station immediately after the occurrence is a telling circumstances against him and thus relevant under section 8 of the Evidence Act ((Bijaya Ananda and others Vs. State of Orissa 1992 (2) Crimes 624 (625). The recovery of a chopper stained with human blood at the instance of the appellant is poroved. The possession of the weapon and its concealment by the appellant are the necessary inference and in the absence of plausible expalnation such possession and conealment would be, incriminating circumstances pointing to the guilt of the appellant (1985 CrLJ 114 (118) Ker).

Where there is no other direct or circumstantial evidence to connect the accused with the crime the mere fact that the weapon of offence was recovered from the possession of the accused, would not by itself be sufficient to prove the guilt of the accused (1979 SCMR 557= 1971 PCrLJ 95 DB). The mere recovery of blood stained weapon without any other reliable evidence, cannot be made the basis of conviction (1984 PCrLJ 2558 DB; 1974 PCrLJ 400 DB)d.

Where there was recovery of blood stained incriminating articles, crime pistol and empties under unusual circumstances. Such incriminating articles, involved unexplained delay of 15 months in despatching them to the experts and submission of reports by them. It was unsafe to rely upoon the recoveries as evidence for corroboration purposes (1981. PCrLJ 434 DB (Kar). Where crime weapon was recovered from the accused but wife of the deceased exonerated the accused, and other P.W. were not reliable; conviction cannot be based on the recovery only (1977 PCrLJ 403).

The value of evidence of recoveries is very great when it is used to corroborate other evidence (NLR 1980 AC 454; NLR 1980 Cr. 646). Where ocular testimony of there witnesses was corroborated by recovery of incriminating weapons (Kassi, dang and hatchets) founds to be stained with blood, the fact that such implements were found concealed, and they do not ordinarily bear stains of blood unmistakably connected the accused with crime (PLD 1970 SC 491; 1979 PCrLJ 473).

Knife stained with human blood was recovered from the person of the accused. Witness corroborated the discovery - conviction could be said to be justified (1985 C.A.R 15 SC). Recovery comes forth after five days of murder and it took place from the bed of the river which was accessible to every one- Conviction could be set aside (1985 U.P. Cr. R 155(156).

Delay in sending blood stained articles to chemical analyser by itself is no ground to reject recovery (1985 PCrLJ 1402 DB; 1985 PCrLJ 372). Delay is relevant when something is brought on record to indicate that either recovery was factually tampered with or that there was possibility of its being tempered before its despatch (1985 PCrLJ 372; NLR 1985 Cr. 89 DB).

In the undernoted case the prosecution has been able to recover weapons of the crime from the accused. The recovery of the weapons has been made at the instance of the accused. It also lends reassurance by way of corroboration to the evidence of the approver. All these evidences, if taken together, give no scope to doubt the prosecuton version. The appellants have been rightly convicted for the mruders in question (1988 CrLJ 845(847) SC=AIR 1988 SC 672).

The question, whether blood stained knife or an object thrown in a drain would retain traces of blood would depend on the facts namely, after how many days from date of throwing the same it was recovered, what was depth of drain and what was quantity of water and what was speed of flow of water, etc. Recovery, if made immediately within a few hours or in a day or two from a drain not having rapid flow of water and having not much depth, may still have traces of blood on it (PLD 1985 Kar 229 (DB).

The recovered articles were sent to chemical examiner after about more than two months. The recoveries cannot be relied upon (NLR 1981 CrLJ 318(1981) PCrLJ 898 DB (Kar). But mere delay in despatch of recovered articles which was not inordiante and inexpliable could not be made a ground for rejecting their value and worth (1987 SCMR 960; PLJ 1987 SC 624; 1986 SCMR 1906). Therefore nine days' delay in despatch of crime empties where investigating officer was busy in investigating the case at spot in arresting accused and effecting appropriate recoveries from them was not inordinate or inexpliable and would not by itself be a reason for rejection of such recoveries (1987 SCMR 970; PLJ 1987 SC 624).

Recovery of weapon of offence would have no evidentiary value, where it was left at spot and was not recovred from exclusive possession of accused so as to connect him with commission of offence (1984 SCMR 560; 1983 PCrLJ 1714 DB).

The fact that recovery of weapons of offence (Gandasa) was effected after about nine days of occurrence would not justify a conclusion that recovery was fake or fabircated (1988 PCrLJ 1252; NLR 1987 Cr. 142).

Recovery of a weapon of offence has evidentiary value only when the recovery is duly proved. Where it is not duly proved, no reliance can be placed on it (PLD 1980 Pesh 25). Where recovery memo of crime weapon was not proved on record. Crime weapon was also not produced in Court during trial. Reports of chemical examiner and that of serologist, were of no avail to prosecution (PLD 1987 Lah 162).

Where the recoveries made from the accused were the severed head of the deceased, blood-strained clothes worn by the accused, key of room where accused resided, blood-strained chhuri and kassi from a room, the lock of which opened with the key recovered from the accused, blood-strained earth inside the room as well as outside its door, blood-strained articles of bedding and blood-strained charpai from inside the room, and blood-strained chappal allegedly belonging to the deceased. The accused was convicted even when there is no ocular evidence against him (1980 SCMR 172).

Knife recovered not stained with blood-Recovery, held, of no consequence (1985 PCrLJ 1705). Where the Mashirnamas were prepared at the police staion and the articles were sealed and packed not at the place and time of recovery but at the police station such recovery was held doubtful (1972 P CrLJ 478).

Delay in sending blood-stained articles to chemical analyser by itself no ground to reject recovery -Delay relevent when something brought on record to indicate that either recovery was factually tampered or that there was possibility of it being tampered before its despatch (1985 PCr LJ 375 (DB) ; 1982 SC MR 531 relied on). The value of evidence of recoveries is very great when it is used to corroborate other eviednce (AIR 1980 AC 454; 1968 SCMR 756).

Mere recovery of a gun on the behest of the accused, in the absence of its matching the crime empty would not connect the accused with the offence (PLD 1983 Lah 18 (DB). However, non recovery of empty by itself does not negative the fact of occurrence having taken place at the spot shown in the site plan proved by ocular evidence and recovery of blood (1983 PCr LJ 2462).

Where investigating officer was the only witness of recovery and evidence on record showed conduct of such Investigating officer being not above board. Testimony of such witness without further independent support could not be relied upon for accepting recovery of crime weapons from the accused (1985 SCMR 453).

Recovery of weapon of offence would have no evidentiary vaule, where it was left at spot and was not recovered from exclusive possession of accused so as to connect

him with commission of offence (1984 SCMR 560). Recovery of crime weapons in the absence and at the back of accused is not admissible (1972 PCr LJ 416 (421).

57. **Blood -stained clothes of accused.-** Non-seizure of blood-stained clothes, pillow, quilt and earth renders the prosecution story implicating the accused doubtful (Siddik V. State, (1989) 41 DLR 26). The find of human blood on the weapon and the pant of the accused lends corroboration to the testimony of a witness who states that he had seen the accused inflicting a knife blow on the deceased. The accused has not explained the presence of human blood on these two articles. It was held that the argument that in the absence of determination of blood group the find of human blood on the weapon or garment of the accused is of no consequence is without any substance (Khujji @ Surrendra Tiwari Vs. State of M.P. AIR 1991 SC 1853). Wearing of blood-stained clothes for 5 days and keeping of blood- stained weapon in folds of shalwar, held, ran counter to natural probabilities- such recoveries excluded from consideration (1985 PCr LJ 970).

Merely from the production of blood stained articles by the accused one can not come to the conclusion that it was he who committed the murder (Prabhoo Vs. State AIR 1963 SC 1113 = (1963) 2 CrLJ 182). Mere recovery of blood stained wearing apparel, say, dhoti, in the absence of other evidence is no corroboration or proof of prior concert or that of participation in the crime (AIR 1956 SC 51= 1956 CrLJ 147); recovery of blood stained clothes is not a sufficient circumstance by itself but it is to be considered along with other evidence on record (State Vs. Ranji AIR 1977 SC 1085; 1977 CrLJ 705).

The find of human blood on the weapon and the part of the accused lends corroboration to the testimony of a witness who states that he had seen the accused inflicting a knife blow on the deceased. The accused has not explained the presence of human blood on these two articles. It was held that the argument that in the absence of determination of blood group the find of human blood on the weapon or garment of the accused is of no consequence is without any substance (AIR 1991 SC 1853). The circumstances that the accused's clothes were blood stained at the time of arrest may be taken into account along with other evidence in determining the guilt of the accused, but that by itself would be insufficient to support a conviction (AIR 1938 Nag 52; 1955 CrLJ 835).

Where in a case apart from the blood stained clothes of the deceased, a lungi, a spear and a stone stained with blood were recovered by the police in the presence of panchas and the accused was all alone staying in the said house where the body of the deceased girl was found and the accused was a bachelor of 28 years, it was held that the circumstances were sufficient for the conviction of the appellant (1979 CrLJ 655 (657). Accused seen running away from scene of murder with blood stained clothes and a knife in his hand along with subsequent conduct held sufficient to prove his guilt (1979 CrLR (SC) 86; AIR 1974 SC 691=1974 UJ (SC) 34 (NS); (1974) 3 SCC 668; 1974 CrLJ 617).

Blood stains on the dhoti of an agriculturist would hardly provide any incriminating evidence. In the instant case, the only thing said against the accused was that when the accused was detained by the investigating officer he had put on a dhati which had some scattered stains of human blood. Discovery of blood stained spear alleged to have been used in causing injuries to the deceased, on the information given by the accused being found to be unconvincing, the only circumstance proved is one of propoerty of a blood stained dhoti of the accused. Applying the test of circumstantial evidence this is wholly insufficient to bring home the charge (1970 CrLJ 1310 (1314); 1980 Cr. LR (SC) 186).

Where the accused had injuries on his person when he appeared before the investigating officer. One of the injuries was on the chest, and it was therefore poossible that the blood found on his shirt was his own blood, and not that of the deceased. The origin of the blood not having been determined, the recovery of the shirt was not sufficient to connect him with the crime (PLD 1972 Lah 511). Where the ocular evidence is considered unreliable, the mere recovery of blood stained clothes is insufficient to support a conviction for mruder, for in such case the possibility of the clothes having become blood stained in an innocent manner or in an incident not connected with he case which the appellant is facing cannot be excluded (1977 PCrLJ 980). But where there is reliable ocular evidence which corroborates the recovery of blood stained clothes and knifes, the accused may be convicted on it (1974 SCMR 1; 1976 PCrLJ 660). where bloodstains have disintegrated and their origin is not traceable because of the time that has elapsed, the recovered articles on which the stains were found do not lose their evidentiary value, and such recoveries may support direct evidence inthe case (PLD 1965 SC 363).

The recovery of blood stained clothes from the accused may corrobroate other evidene so as to pave the way for his conviction (1981 SCMR 618). Conviction of the accused may rest on his retracted confession together with circumstantial evidence that the knife and shirt recovered from the accused were found stained with blood (1969 PCrLJ Jour 898; 1968 SCMR 349). The accused may be convicted were ocular evidence of eye-witnesses is sufficiently supported by circumstantial evidence as to recovery of blood stained loin clith from the person of the accused, and blood stained crime weapon at his instance 91969 PCRLJ 1241 (DB) Kar), or from the clothes recovered from the accused when the accused does not give any explanation for the offence 91979 SCMR 225 DB). The fact that the accused was arrested with blood stained clothes, when he was running away from his house after the occurrence points amply to the guilt of the accused (AIR 1958 Pat 190; 1958 CrLJ 548 DB).

Mere recovery of clothes of accused does not establish the guilt of the acucsed when there is no other clinching evidence particulary about his presence in the house of the deceased when the occurrence took place (Babuda Vs. State of Rajasthan 1992 (3) Crimes 341 (342).

Where the presence of the accused was established by the recovery of blood stained clothes on the following morning after the incident, and there was no explanation except a bare denial by the accused, his conviction was upheld (1969 PCrLJ 1296; 1969 SCMR 668). Presence of human blood on clothes which accused was wearing at the time of arrest which was a few hours after occurrence, and recovery of a weapon which accorded with kind of weapon used in crime, for which recoveries accused had no explanation except fora bland denial would, go to dispect any doubt in regard to culpability of accused (1985 SCMR 1455).

Where accused admitted rcovery of shirt by denying that it was bloodstained and the report of serologist was positive. Recovery, of shirt lent corroboration to ocular account (1986 PCrLJ 2102DB). But wher the prosecution does not prove its case the mere presence of blood stains on the clothes of the accused and hatcher recovered from him does not prove the case against him, and he need not give any explanation for them. The burden of proof does not in any case shift on the accused to prove his innocence (NLR 1980 AC 276).

Where blood stained clothes of the accused were not seized and sent to the chemical examiner, the mere fact that they were seen by a witness and that he washed them in the river is not sufficient to convict the accused (PLD 1969 Dhaka 504 DB). Mere recovery of a blood stained article is not enough as it can corroborate

other evidence, but can not by itself sustain a charge of murder (Nimai Munnu Vs. State 1985 (1) Crimes 593(596) Ori). In absence of examination of the blood-stained articles by the chemical examiner, the prosecution fails to connect the blood in the articles with the human blood to connect it with the murder of the victim (Siddik Ali Vs. State (1989) 41 DLR 26).

Where the accused absconded after the offence and subsequently when he was arrested his blood- stained pant and articles belonging to the deceased were recovered at his painting out; it was held, that in the absence of any explanation, this circumstantial evidence coupled with other evidence was sufficient for conviction of the accused (PLD 1964 Kar 530 (DB).Where the ocular evidence is considered unreliable, the mere recovery of blood-strained clothes is insufficient to support a conviction for murder, for in scuh case the possibility of the clothes having become blood stained in an innocent manner or in an incident not connected with the case which the appellant is facing cannot be excluded (1977 PCrLJ 980). But where there is reliable ocular evidence which corroborates the recovery of blood-stained clothes and knife, the accused may be convicted on it (1974 SCMR 1; 1976 PCrLJ 660). Where bloodstrains have disintegrated and their origin is not traceable because of the time that has elapsed, the recovered articles on which the stains were found do not lose their evidentiary value, and such recoveries may support direct evidence in the case (PLD 1965 SC 363).

Before the evidence of bloodstains on the clothes of the accused can be considered, the recovery of the clothes from the accused must be definitly proved. Where there was no recovery memo of these clothes nor have the three Investigating officers said anything about the recovery of these clothes from the person of the appellant. The evidence of recovery cannot be used to corroborate other evidence (1977 SCMR 435). The recovery of blood-stained clothes from the accused may corroborate other evidence so asto pave the way for his conviction (1981 SCMR 618; AIR 1936 Lah 335 (DB).

Conviction of the accused may rest on his retracted confession together with circumstantial evidence that the knife and shirt recovered from the accused were found stained with blood (1968 SCMR 349) Where blood-stained clothes were recovered from the person of the accused some time after his arrest, the recovery does not becomes doubtful and may be used to corroborate other evidence (1969 SCMR 795).

Before the evidence of blood-strains on the clothes of the accused can be considered, the recovery of the clothes from the accused must be definitely proved. Where there was no recovery memo of the clothes nor have the three investigating officer said any thing about the recovery of those clothes from the person of the appellant. The evidence of recovery cannot be used to corroborate other evidence (1972 SCMR 435).

Absence of blood-stains in the clothes of eye-witness or in their hands effect.- Serveral cuts with sharp-edged weapon were inflicted on the deceased and the deceased had profusely bled but there was hardly any material to come to the conclusion that during the incident the accused also were stained with blood. The witnesses claimed that they snatched the weapons and held them. It was held that the evidence of the eye-witnesses could not be rejected because of the absence of blood- stains in their clothing or their hands (AIR 1979 SC 1831 (1835).

58. **Evidence of recovery.**- It is rule of caution and prudence not to accept the evidence of recovery if the investigating officer does not seal the recovered article at the spot or the link evidence is not adduced during the trial to prove that the article

recovered is the one produced before the Court. In the eye of law, it is the statement on oath before the Courts of law which is the substantive evidence and other evidence is merely to corroborate that testimony or to show that such testimony is authentic and should be accepted. Where substantive evidence is itself acceptable, the Courts shall not be justified in rejecting it for want of stereotyped evidence or for want of corroboration. For example, if the recovered article is a suit, made to order, tailored by one who invariably stitches and has stitched his name tag on the suit with the name of the person for whom it was so tailored, it is not at all necessary to seal the recovered article and to lead during the trial the necessity link evidence. The investigating officer can easily, without beign guilty of any omission or negligence, not seal the recovered article and instead, enter full particulars incldung those of the nake tag in the recovery memo. Such a recovery memo shall be good evidence to corroborate the testimony of the investigating officer and also of the witnesses to recovery. In other words disregard of a rule based on caution and prudence is not fatal to the prosecution, provided that the court is satisfied that the evidence adduced in the case is reliable and can be accepted without any doubt. The same porinciple can be applied to the recovery of unlicensed arms (AIR 1965 All 260).

Police officials are as good witnesses as any other citizen and unless any malafides is established against them, their deposition cannot be brushed aside simply on the ground that they belong to the police department responsible for maintaining law and order (Muhammad Naeem Vs. state 1992 SCMR 1617).

If the evidence of the investigating offier, who recovered the material objects, is convicing, the evidence as to recovery need not be rejected on the ground that seizure witnesses do not support the prosecution case (Madan Singh Vs. State AIR 1978 SC 1511= 1978 CrLJ 1531). The police officers have been examined to prove the search but the other witnesses have not been examined. That by itself does not introduce any serious infirmity ih the evidence furnished by the recoveries which at best is only a corroborative piece of evidence (AIR 1977 SC 472(483). Where the recovering of the weapons made at the instance of the accused were attested by police officers and some independent witnesses, but only police officers were examined to prove the search, the non-examination of the independent witness would not introduce serious infirmity in the evidence furnished by the recoveries (AIR 1977 SC 472 (483)= 1977 CrLJ 273). Unless from the facts and circumstances of the case it was not possible to obtain Mashir of the same locality where the recovery and arrest was made, prosecution might pick up any other person to act as such, otherwise it was the duty of the investigating agencies to pick up Mashir from the locality itself (Yar Muhammad V. State 1992 SCMR 96; Rab Rakhio v. State 1992 SCMR 793).

To prove recovery of weapon of offence in the absence of the corroboration from an independent quarter, the evidence of the police official has has to be looked into with care and caution. But merely because they are police officials, their testimony cannot be ignored (Chander Shekhar Vs. State 1988 (2) Crimes 834 (Del).

Where the evidence of recovery is doubtful no use can be made of such evidence. Where independent witnesses were excluded deliberately from factum of recovery, presumption would be that such recoveries were not genuine (1987 PCrLJ 1871 (DB); PLD 1987 Lah 603 DB). Where recovery of crime weapon was not supported by independent and reliable evidence, the recovery was eliminated from consideration (1988 PCrLJ 924 DB). Recovery of gun from huse of accused was rendered doubtful as same was not attested by any person of the village although a large number of such persons were present where occurrence took place (1988 SCMR 1592; 1986 PCrLJ 1940).

The non-production of a public witness who attested the recovery memo, without any explanation, may cast great doubt on the case of the prosecution (Mohd. Shafi vs. State of Rajasthan 1989 (3) Crimes 471 (Raj). It cannot be laid down as a broad proposition of law that if two public witnesses are not joined the recovery affected by the police should be held to be doubtful (Mohd. Hussain Vs. State 1989 (3) Crimes 680 (Del).

Where investigating officer was the only witness of recovery and evidence on record showed conduct of such investigating officer being not above board. Testimony of such witness without further independent support could not be relied upon for accepting recovery of crime weapon from the accused (1985 SCMR 453). Two witnesses who acted as panches to the seizure memo turned hostile but two police officers proved the seizures. The seizures was believed (Naseem Ahmed Vs. Delhi Administration AIR 1974 SC 691; 1974 CrLJ 617). But recovery was disbelieved when the witness to prove it was a person who had already deposed in seven different cases in favour of the prosecution (Duth Nath V. State AIR 1981 SC 911; 1981 CrLJ 18 = 1981 SC Cr 379).

Recovery without the presence of witnesses.- In Dalbir Kaur Vs. State of Punjab (AIR 1977 SC 472 (483), the recoveries of weapons were made at the instance of the accused persons. They were attested by the police officers and some independent persons as search witnesses. The police officers were examined to prove the search but the other witnesses were not examined. It was held that this by itself, does not introduce any serious infirmity in the evidence furnished by the recoveries which at best is only a corroborative piece of evidence (AIR 1977 SC 472(483); AIR 1976 SC 951).

The fact that the witnesses who made the search were customs officials would be no ground to distrust their evidence unless there was any serious infirmity in the intrinsic merits of their testimony (1980) 2 SCC 428 (430).

Search in presence of witnesses and other safeguards.- It is necessary to make recovery in the presence of two independent and respectable witnesses. Whether or not the witnesses are independent and respectable is a matter for the Court to be believed or disbelived (1967 Cut LT 1145).

The presence of two respectable witnesses of the locality is essentially a matter of evidence and the breach of any such provision would not invalidate the search. It would only affect the weight of the evidence in support of the search. It would only affect the weight of the evidence in support of the search and the recovery (AIR 1956 SC 411; (1964) 2 CrLJ 487).Recovery of pistol took place at bus stand but only close relations of deceased were examined to prove the same. No person from the vicnity of place of recovery was made to attest the recovery memo. Recovery, held, was doubtful (Adalat Hussain Vs. State 1989 PCrLJ 34).

The mere irregularity committed by the searching officer in taking one witness from the way who lived a couple of miles away in the city cannot be deemed sufficient either to invalidate the search or to ake the recovery unreliable. The evidence of the police officer who had conducted the search was that he had taken four persons on the way to the place. One of them was produced as a witness in the case. He stated that he lived two and a half miles away. It was contended that as other had not been produced they should be presumed to be not of the locality. From the none production of the witnesses, no such presumption can be drawn. The persons taken on the way may be of the same locality. Even if they were not the circumstance will not invalidate the search (1976 CrLJ 465 (466).

Whatever the breach of section 100 (old section 103) the evidence as to recovery of articles is not inadmissible, nor is the conviction based upon such evidence illegal. What is really intended by section 100 (old section 103) is that it should be strictly followed to the extent it is possible to ensure that the incriminating articles were recovered as alleged and it leaves no room for doubt. If the search is defective, it cannot be said that *ipso facto* the evidence as to the search is inadmissible and the case based upon such search must neecessarily fail. In such case it only becomes the duty of the Court to assess the evidence of search wth more than ordinary caution (AIR 1957 Assam 74). There is nothing in law which makes the evidence relating to an irregular search inadmissible and once it is found that the evidence of the recovery of articles in the search is reliable, a conviction can very well follow (AIR 1961 Ker 8; AIR 1965 Ori 136).

In Gopalpura Tea Co. Vs. Calcutta Corporation (AIR 1966 Cal 51), theCourt held that it is now well settled that even failure to call search witnesses will not vitiate the search. In fact the gist of the provision in section 100 (old section 103) is that honest effort should be made to secure presence of respectable persons of the locality. But if no such witness was available, the search would not be vitiated for that reason only and each case must be decided on its own facts and circumstances.

In Himachal Pradesh Administration Vs. Om Prakash (1972) (2) SCR 765) was observed at page 777 tht it could not be laid down as a matter of law and practice that where recoveries have been effected from different places onthe information furnished by the accused, different sets of persons should be called in to witness them. There was no injunction in law against the same set of witnesses being present at the successive enquiries if nothing could be urged against them (Khujji V. State of MP 82 (89) (SC).

59. **Injury on accused.**- Injuries on the person of the accused are tell tale evidence of his implication in the commission of murder and it may corroborate other evidence against him. (1984 P. Cr. L. J. 2708.

Where the evidence of prosecution witnesses was corroborated by injuries on the person of the accused and recovery of blood- stained shirt and lathi, conviction of the accused upheld (1969 PCr LJ 1372). But where evidence is not reliable mere injuries on the accused would not be sufficient for conviction of the accused (1969 PCr LJ 1204 DB).

Prosecution should ordinarily expalin injuries on the person of the accused. Where prosecution made no attempt to explain injuries sustained by accused persons during the occurence nor did it show that injuries found on their persons were either self-sufferred or caused by friendly hand, the prosecution case becomes doubtful (1982 PCrLJ 138). But where the accused themselves persistently asserted that injuries on their persons were received otherwise than an encounter with the deceased, the case of the prosecution was not prejudiced by the failure to provide an explanation for the injuries on the persons of the accused (1969 SCMR 885).Presence of incised injury on the head of accused for which prosecution had no proper explanation and the incident was an altercation between two parties, the accused might have acted in right of self defence has force (Kanwarjeet Sdint V. State of Punjab 1992(2) Crimes 657(658).

The fact remains that both the respondents had sustained serious injuries, Kishna mainly on the skull whereas Madho on the skull as well as scapular region. If the prosecution witnesses shy away from the reality and do not explain the injuries caused to the respondents wherein it casts a doubt on the genesis of the prosecution case since the evidence shows that these injuries were sustained in the course of the

same incident. It gives the impression that the witnesses are suppressing some part of the incident. The High Court was, therefore, of the opinion that having regard to the fact that they have failed to explain the injuries sustained by the two respondents in the course of the same transaction, the respondents were entitled to the benefit of the doubt as it was hazardous to place implicit reliance on the testimony of the injured PW 1 (AIR 1991 SC 1065). When the injuries have been caused on the person of accused in the same incident and the prosecution is unable to explain the same, the prosecution case has to be thrown out in its entirety. (Ram Autar Singh & another V. State of UP 1992 (2) Crimes 458(459).

The entire prosecution case can not be thrown out simple because the prosection witness do not explain injuries on the person of the accused (AIR 1974 SC 1550 = 1974 Cr LJ 1050). The prosecution has no obligation to explain the injuries on the person of accused if those are minor in nature and are not caused during the occurrence itself (Sarat Kumar Pradhan and others Vs. State 1988 (2) Crimes 410 (Ori).

Before the obligation is placed on the prosecution to explain the injuries on the person of the accused it must be satisfied that the injuries are very serious and severe and not superficial and that these injuries have been caused at the time of the occurrence in question (Mohammad Ali and other vs. State of U.P. 1988 (1) Crimes 1012 All).

Where serious injuries are found on the person of the accused, it becomes obligatory onthe prosecution to explain the injuries so as to satisfy the court as to the circumstances udner which the occurrence originated (AIR 1979 SC 1010; 1979 CrLJ 888).

It is now well settled that where the accused receives serious and substantial injuries in the same transaction prosecution must explain the same (Ram Bilas, Ram Pragat and Kashi Vs. State of U.P. 1989 (1) crimes 420 All). In case the eye-witnesses do not mention anything about the injuries on the person of the accused, it is unsafe to rely on their evidence completely unless the same is corroborated by independent evidence (AIR 1972 SC 245= 1973 Cr LJ 29). But if no question is put to the prosecution witnesses regarding the injuries on the accused so as to give them opportunity to explain the injuries on the person of the accused, there is no scope to interfere with the appraisement of the evidence by the trial court (AIR 1972 SC 2593 = 1973 Cr LJ 44).

There is no hard and fast rule that simply because the prosecution witness did not explain the injuries on the person of the accused, their evidence should be discarded (AIR 1974 SC 21 = 1974 CrLJ 145). Rather the presence of injuries on the person of the accused lends support to the prosecution case (AIR 1974 SC 1699= 1974 Cr LJ 1168).

In a serious offence entailing death penalty, false explanation with regard to injuries on the person of the accused is hardly sufficient to warrant conviction. Where the prosecution fails to exmplain the injuries on the person of an accused, any of the three results follow: (1) that the accused had inflicted the injuries on the members of prosecution in exercise of the right of self-defence. (2) it makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt. (3) it does not affect the prosecution case at all (AIR 1975 SC 1478= 1975 Cr LJ 1097).

Absence of any statment in the F. I. R. as to the injuries recieved by some of the accused goes against the prosecution (AIR 1976 SC 2423= (1976 Cr LJ 1883). But

dying declaration cannot be ignored merely on the ground that it did not include as to how the accused received injuries (AIR 1981 SC 617= 1981 Cr LJ 9).

Where the defence did not put any question to doctor about age of injuries on accused person, contention of the accused that they received the injurie prior to the incident could not be accepted (1984 P Cr LJ 2708). Where the accused have suffered injuries in the same incident but those injuries are suppressed by the prosecution, the evidence of injured P. W. S. cannot be accepted as the whole truth. The evidence becomes tarnished (1985 P Cr LJ 32; PLD 1980 Lah 639).

Failure to explain injuries on accused- effect.- Non-explanation of the injuries sustained by accused at or about the time of occurrence is a very important circumstance from which the court can draw an inference that witnesses had suppressed the genesis of occurrence, witnesses denying presence of injuries on accused were lying and that the defence version which explains injuries of accused if renders version probable then if create doubt on prosecution case (Ramjilal and others Vs. State of Rajasthan 1992 (1) Crimes 1154(1155). Absence of the explanation of the injuries of the accused in the FIR and also in the statement under section 161 Criminal Procedure Code created a lot of suspicion regarding the prosecuton case especially where the accused received a number of serious injuries (Sheonath and other vs. The state 1988 (1) Crimes 890 All). In a murder case, when the prosecution has failed to explain the injuries sustained by the accused, the defnece version suggested by them can be accepted particularly when the prosecution has not led any evidence to contradict that piece of evidence (Sheikh Muntijim Vs. State of Maharasthra 1988 (3) Crimes 675 Bom). Failure to explain injuries on the person of the accused is not always fatal to the prosecution case (AIR 1971 SC 2233= 1971 Cr LJ 1540; 1984 Cr LJ 848). Non-explanation of prominent and serious injuries on accused is fatal (1980 Cr LJ (NOC) 162; 1984 Cr LJ (NOC) 209 Ker). Omission on the part of the prosecution to explain the injuries on the person of the accused affects the credibility of the prosecution evidence when the prosecution case regarding the injuries of the accused is inconsistent and uncertain (Jodh Singh and others Vs. State of UP 1992 (3) Crimes 485 (846).

In Lakshmi Singh Vs. State of Bihar (AIR 1976 SC 2263), the Indian Supreme Court obsered relying upon AIR 1968 SC 1281 :

"It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inference :

(a) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probale so as to throw doubt on the prosecution case."

The Supreme Court further observed -

"The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much 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 one."

The principle has been reiterated in Jagdish Vs. State of Rajasthan (AIR 1979 SC 1010):

"It is true that where serious injuries are found on the person of the accused, as a principle of appreciation of evidence, it becomes obligatory on the prosecution to explain the injuries, so as to satisfy the Court as to the circumstances under which the occurrence originated. But before this obligation is placed on the prosecution, two conditions must be satisfied :

(i) that the injuries on the person of the accused must be very serious and severe and not superficial;

(ii) that it must be shown that these injuries must have been caused at the time of the occurrence in question."

Before an adverse inference is drawn because of failure to explain in injuries, it must be reasonably shown that in probability, the injuries were caused to him in the same occurrence or as a part of the same transaction (AIR 1977 SC 2252=1977 CrLJ 1930). When it was established that the accused too received injuries in the course of same transaction but the prosecution had absolutely no evidence to explain as to under what circumstances these injuries were sustained, it was clear that there was mutual assault between the two parties in course of which person from both the parties sustained injuries. As the prosecution had suppressed the true events and the prosecution witnessess were also not fully trustworthy, it could not be safely concluded that the accused was guilty of murder. Hence, his acquittal held proper (State of Orissa Vs. Sarat Chandra Puri, 1990 CrLJ 814 (Ori) DB).

It cannot be laid down as an invariable proposition of law of universal applciation that as soon as it is found that the accused had received injuries in the same transaction in whch the complainant party was assaulted, the plea of private defence would stand *prima facie* established and the burden would shift on to the prosecution to prove that those injuries were caused to the accused in self-defence by the complainant party. For instance where two parties come armed with a determination to measure their strength and to settle a dispute by force of arms and in the ensuing fight both sides receive injuries, no question of private defence arises (1989 LW (Cr.) 397 (402) SC; 1988 CrLJ 925(930) SC; AIR 1988 SC 863; AIR 1976 SC 2263= 1976 CrLJ 1736).

When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and in what circumstances injuries have been inflicted on the person of the accused (1989 LW (Cr) 397(403) SC; 1988 CrLJ 925(930) SC= AIR 1988 SC 863). The effect of non-explanation by the prosecution about the injuries on the accused persons depends on the facts and circumstances of each case. Normally if there is such non-explanation, it may at the most give scope to argue that the accused had the right of private defence or in general that the prosecution evidence should be rejected as they have not come out with the whole truth particularly regarding the genesis of the occurrence (1993 CrLJ 3915 SC).

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much 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 case (Rakesh Kumar Vs. State of Punjab 1988 (3) Crimes 45 P&H).

The effect of non-explanation of injuries on the person of the accused is not a question of law but a question of fact. Although non-exaplanation is not always fatal to

the prosecution, the fact of failure to explain is to be taken into ac ount to test the truth of the prosecution case and the veracity of the prosecution witness (1974 SC 1550= 1974 Cr LJ 1015= 1974 SCD 708).

Prosecution when fails to explain injuries on the person of the accused, depending on facts of each case any of the results may occur: (a) the accused had inflicted injuries on the members of the prosecution party in exercise of the right of private defence, (b) it makes prosecution story doubtful resulting in accused's having the benefit of resonable doubt; and (c) it does not effect the prosecution case (AIR 1975 SC 1703; 1984 Cr LJ 1086 (Pat).

For failure to explain injury on the person of the accused the following infereneses may be drawn; (a) that the prosecution has suppressed the genesis and the origin of the occurrence and has not presented the true version; (b) that the witness who has denied the presence of injuries is lying on a material point and his version is not reliable; and (c) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to cast a cloud on the prosecution case (AIR 1976 SC 2263= 1976 CrLJ 1736; (1986)2 Crime 243 Kant). It is only when the injuries sustained are minor and superficial and the evidence is so clear and cogent, so independent and disinterested and that it far outweigh the effect of omission on the part of the prosecution, non-explanation of injury does not affect the prosecution case (AIR 1976 SC 2263=1976 Cr LJ 1736; 1981 Cr LJ (NOC) 4 Gau; (1986)1 Crimes 490).

Injuries on the accused when is not consistent with defence version according to medical evidence , injuries on accused is not to be explained- non-explanation does not vitiate trial (AIR 1979 SC 1828=1979 Cr LJ 1196).It is well settled that if the evidence of the eye-witnesses are held to be reliable and inspire confidence then the accused cannot be acquitted solely on the ground that some superficial injuries found on the person of the accused concerned, had not been explained by the prosecution (A.M. Kunnikoya @ Koya Vs. State of Kerala 1993 (1) Crimes 1193 SC). It is settled principle of law that when the injuries on the accused are of serious and grievous nature, the prosecution is bound to prove as to in what circumstances the accused sustained the injuries. But if the injuries on the accused are of minor and superficial nature, there is no obligation on the part of the prosecution to prove as to how the accused sustained such injuries (1986 (1) Crimes 490 (495) Ori.; AIR 1976 SC 2263). Mere non-explanation of minor scratches or superficial injuries on the person of the accused does not in any way detract from the veracity of the eye-witnesses (Tasvir singh Vs. State of Haryana 1988 (3) Crimes 23 P&H).

Non-explanation of injuries on accused may lead to an inference that the prosecution suppressed the real facts. It may also lend to make the evidence of witnesses who suppressed the injuries of the accused unbelievable and the defence version probable. There may be cases where non-explanation of injuries does not affect the prosecution case, e.g. when the injury is minor or superficial. All depends upon the facts and circumstances of a given case (1986) Crimes 385 (388).

Before adverse inference against the prosecution is to be drawn for its alleged suppression or failure to explain injuries on the person of the accused it must reasonably be shown in all probability that the injuries were caused to him in the same transaction in which the victims were injured. Prosecution is not to explain injuries on the accused in all cases and in all circumstances (1977 SC 2252=1977 Cr LJ 1930; (1979)3 SCR 428; 1984 Cr LJ 1164). Accused absconding and arrested two days after incident, simple injury between fore-finger and thumb was seen, in that case prosecution is not to explain injury on the accused (1978 Cr LJ (NOC) 155 Delhi).

In the State of Gujarat vs. Bai Fatima and another (AIR 1975 SC 1478) it has been stated that even if a plea of private defence was not taken by the accused but when the prosecution fails to explain the injuries on the person of an accused, any of the three results may follows :-

"(i) that the accused had inflcited the injuries ont he members of the prosecution party in exercise of the right of self defence.

(ii) it makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(iii) it does not affect the prosecution case at all.

In a murder case when the prosecution witnesses do not seem to be reliable and the injuries sustained by the accused are serious and dangerous in nature inflicted by dangerous sharp weapon, it is obligatory on the part of the prosecution to explain as to how these appellants sustained these injuries. Failure of the prosecution to do so entitles the appellants to be acquitted (Ganesh Behera and others Vs. State; 1990 (1) Crimes 566 (Ori); Jagdish Vs. State of Rashan 1979 SC 1010 relied on).

In Hari Krishna Singh Vs. State of Bihar, AIR 1988 SC 863, Indian Supreme Court held as follows :-

"It is not an inveriable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. The burden of proving the guilt of the accused is undoubtedly on the prosecution. The accused is not bound to say anything in defence. The prosecution has to prove the guilt of the accused beyod all reasonable doubts. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of the guilt of the accused beyond any reasonable doubt, the question of the obligation of the prosecution to explain the injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and in what circumstances injuries have been inflicted on the person of the accused."

It is now well settled that where it is shown or proved that some of the accused persons had sustained injuries which were significant and on vital part of the body during the course of the occurrence in which the main person died, heavy burden rests upon the prosecution to offer plausible explanation for the injuries of accused persons. If no satisfactory and plausible explanation is forthcoming at the earliest opportunity, i.e. either in the FIR or in the statements of the witnesses recorded under section 161 cr. P.C. within a day or two of the occurrence, the conclusion is irresistible that the prosecution was not coming out with the correct and true version of the occurrence (State of U.P. Vs. Jahdish Ojha, (1993) 1 Crimes 158 (163) All DB).

In the case of Hare Krishna Singh and others Vs. State of Bihar (AIR 1988 SC 863), it has been held :

"The obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. The burden of proving the guilt of the accused is undoubtedly on the prosecution. The accused is not bound to say anything in defence. The prosecution has to prove the guilt of the accused beyond all reasonable doubts. If the witnesses examined on behalf of the prosecution are

believed by the Court in proof of the guilt of the accused beyond reasonable doubt. The question of the obligation of the prosecution to explain the injuries sustained by the accused will not arise.When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reaosnable doubt, it become, hardly necessary for the prosecution to again explain how and in what circumstances injuries have been inflcited in the person of the accused."

Referring to the case of Mohar Rai Vs. State of Bihar (AIR 1968 SC 1281), it has been observed that non-exoplanation of the injuries sustained by the accused at about the time of the occurrence or in the case of altercation is a very important circumstance from which the Court can draw the following inferences : (i) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version; (ii) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and, therefore, their evidence is unreliable; (iii) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to thrown doubt on the prosecution case (Jodh Singh Vs. State of U.P. 1992 (3)Crimes 845 (848).

Relying on the case of Stat eof Gujarat Vs. Bai Fatima (AIR 1975 SC 1478), it has been observed that "there may be cases where the non-explanation of injuries by the prosecution may not affect the porosecution case. The principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent so independent and disinterested that it far outweights the effect of omission on the part of the prosecution to explain the injuries."

In Lakshim Singh Vs. Stat eof Bihar (AIR 1976 SC 2263), it was held :

"It is well settled that fouler the crime, higher the prooof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect int he prosecution case and shows that the prosecution genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with true version fo the occurrence....."

The Supreme Court also observed that :

"..... There may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle obviously apply to case where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far otuweighs the effect of the omission on the part of the prosecution to explain the injuries."

When the prosecution shows an inclination to suppress material aspects of the case, the Court will be constrained to disbelieve the entire story. In the instant case, only one stab was inflicted according to the prosecution and after that the assailant fled from the scene. But on the person of the deceased a number of injuries were found. The situation arising from the presence of such multiple injuries had not been explained. It was held that the conclusion to be drawn under such circumstances was that the prosecution version of the occurrence was false (1974) Ker L.T. 71 (74,75). Non-explaining injuries on body of accused may infer suppression on genesis and

origin of the occurrence and make the prosecution story very doubtful (Manphool and another Vs. State of U.P. 1988 (3) Crimes 781 (All) Laxmi Singh Vs. State of Bihar AIR 1975 SC 2263 relied on).

Before an adverse inference is drawn aginst the prosecution for its alleged suppression or failure to explain the injuries on the person of an accused; it must be reasonably shown that in all probability, the injuries were caused to him in the same occurrence or as a part of the same transaction in which the victims on the side of the prosecution were injured. The prosecution is not obliged to explain the injuries on the person of an accused in all cases and in all circumstances. This is not the law. It all depends upon the facts and circumstances of each case whether the prosecution case becomes reasonably doubtful for its failure to explain the injuries on the accused (1977) 83 CrLJ 1930 (1931) SC).

It is true that where serious injuries are found on the person of the accused, as a principle of appreciation of evidence, it becomes obligatory on the prosecution to explain the injuries, so as to satisfy the Court as to the circumstances under which the occurrence originated. But before this obligation is placed on the prosecution, two conditions must be satisfied :

(i) that the injuries on the person of the accused must be very serious and severe and not superficial;

(ii) that it must be shown that these injuries must have been caused at the time of the occurrnece in question (1979) 2 SCC 178, 179).

The mere fact that in a murder case the evidence of eye-witnesses is inconsistent with the medical evidence will not by itself render the former unreliable. The failure of the prosecution to explain a very minor or superficial injury found on the deceased or the accused by itself is no ground to discard the entire prosecution case (1977 CrLJ 1197 (1203) Ker).

Where the evidence given by the prosecution is wholly inconsistent with the medical evidence, the prosecution deliberately concealed the manner in which the accused persons received injuries and it appears that the prosecution has not come out with the true version of the occurrence it was held that conviction could not be justified (1980 CrLJ 407(408); AIR 1980 SC 552).

60. **Blood grouping : significances**.- Though the sickle was found stained with human blood, there was no evidence to show that the blood which was found on the sickle was the blood of the deceased. Had evidence about the blood group found on the sickle been available, the court could have come to proper conclusion as to whether the blood found on the sickle was likely to be the blood of the deceased. Therefore, the mere discovery of the sickle found with human blood on it, does not connect the accused with main incident of the murder (1978 CrLJ 1619 (1630) (HP); 1982 Raj Cr. Cas 269).

If the prosecution had shown that the blood stains belong to the same group as the blood of the deceased, the answer would be clinching (AIR 1950 Mad 714 (715).

Human blood found on the weapon of assault as well on the pant of the appellant but the report or serologist could not determine the blood group. Presence of human blood on the weapon and the pant of appellant lends corroboration to the testimony of eye witnesses who deposed that he had seen appellant inflicting knife blow on the deceased in such circumstances absence of determination of blood group is of no consequence (Khujji @ Surendra Tiwari Vs. State of MP. AIR 1991 SC 1853; 1991 (3) Crimes 82 (SC); Decisions in the case of Kansa Behara Vs. State of Orissa 1987 (3) SCC 48 and Surinder Singh Vs. State of Punjab 1989 Suppl (2) SCC 21 were held distinguishable).

In the absence of examination of the blood stained articles by the chemical examiner, the prosecution has utterly failed to connect the blood in the articles with the human blood to connect it with the murder of the victim (Siddik Ali Vs. State 41 DLR 26). In a murder case where factum of murder is itself under challenge since body of deceased was untraceable, non-examination of blood found at place of occurrence by chemical examiner is fatal to prosecution case (Devendra choudhary and others Vs. State of Bihar 1988 (1) Crimes 747 Pat).

A failure of the police to send the blood recovered from the place of occurrence for chemical examination in a serious case of murder is to be deprecated. In such cases, the place of occurrence is often disputed. However, such an omission need not jeopardise the success of the prosecution case where there is other reliable evidence to fix the scene of occurrnece (AIR 1974 SC 463, 468). When blood stains on any article become distergated, their origin of blood group cannot be determined (Mohammad Ismail Vs. State of Rajasthan 1989 (2) Crimes 710 Raj). The blood group and the semen group of a person is always the same (State of Maharashtra vs. Mukesh Khushaldes Mepani 1990 (2) Crimes 82 Bom).

61. **Punishment.**- Section 302 Penal Code, which punishes murder, does not specify in which case death sentence should be given and in which case transportation for life to be awarded, but leaves the matter to the discretion of the Court. Every case should be considered in the facts and circumstances of that case only (Nawsher Ali Sarder Vs. State 39 DLR (1987) AD 194). Normally, the sentence is the discretion of the Trial Court and the courts sitting in appeal or revision do not interfere with the said discretion (Harriram J. Haseeja and another Vs. deepak Sunderdas Valecha and others 1991 (1) Crimes 231 (Bom).

Where there was no premediation nor intention for the commission of murder and murder took place in the course of rape. Held that sentence of transportation for life instead of death will meet the ends of justice (1993 BCR 144).

Modern penology leans less towards death penalty and the winds or criminological change blow over statutory thought. While murder in its agrravated form and in the absence extenuating factors connected with crime, criminal or legal process, still is condignly visited with death penalty a compassionate alternative of life imprisonment in all other circumstances is gaining judicial ground (AIR 1974 SC 677, (678).

Where the named accused persons are proved to have been armed with gandasa and there was 'reliable corroboration' to the evidence of the eye-witnesses in regard to the part played by these persons and they decapitated the dead bodies and threw the dismembered bodies into the fire, it was held that death sentence was justified (AIR 1975 SC 455 (459). Where the instances of bride killing are alarmingly on the increase. If society should be ridden of this growing evil, it is imperative that whenever dastardly crimes of this nature are detected and the offence brought home to the accused, the Courts must deal with the offender most ruthlessly and impose deterrent punishment (AIR 1983 SC 1002).

In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft. modulation of sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed,the motive for commission of the crime, the conduct of the accused and all other attending circumstances are relevant facts which would enter into the area of consideration. For instance a murder committed due to deep seated personal rivalry may not call for imposition of death sentence as deterrnece.

Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system, to undermine the public confidence in the efficacy of law and society could not long endure under serious threats. If the courts did not protect the injuried, the injured would then resort to private vengence. It is, therefore, the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. (Sevaka Perumal Vs. State of Tamil Nadu 1991 (2) Crimes 516 SC).

Merely because leniency had been shown to some of the accused in the matter of sentence is no ground for reducing the sentence passed on the other accused who was shown to be responsible for the killing (1957 Cr LJ 591; AIR 1957 SC 474).

In view of the fact that the accused was about 76 years old and he was not guilty of any over act in strangulating the deceased and he had been in jail for about 19 of months, it will meet the ends of justice, if the sentence imposed on the accused was reduced to that already undergone by him (AIR 1982 SC 64).

Both the accused were convicted for the offence of murder by the Sessions Court and each of them was sentenced to undergo imprisonment for life. On appeal the High Court acquitted one of the accused as he made a gift of 3 acres of land in favour of the widow of victim. The acquittal was held illegal (1984 CrLJ 832 (SC).

Two accused persons one of them being lady caused fatal injuries to deceased and one simple hurt each on the face of prosecution witness with hatchets. Lady accused was awarded lesser sentence by the Trial Court by taking lenient view of her being a female. Sentence of male accused could not be reduced on the ground of lenient view having been taken for the female accused by the High Court. Suprme Court, however, following the law laid down in Muhammad Bashir Vs. The State PLD 1982 SC 139 enhanced the sentence of male accused by enhancing the sentence of fine with direction that the amount shall be paid as compensation to the heirs of deceased (Haw Nawaz Vs. Falak Sher PLD 1992 (SC) 435).

Supreme Court, in appeal against acquittal, altered the sentence of accused form section 304, II, Penal Code to section 304 - I, Penal Code, and having found case fit for enhancement of sentence on the agreement of both the parties instead of enhancing the rigrous imprisonment enhanced the fine which was ordered to be paid to the heirs of deceased as compensation (Ahmad Khan Vs. Muhammad Iqbal PLD 1992 SC 336).

In order to convict an accused for murder the Court must be satisfied first that the murder had been committed; then it must be satisfied that the accused has committed the murder. At the third stage the question of sentence should be determined upon the gravity of the office quite irrespective of the circumstances whether the body has or has not been discovered (AIR 1926 Oudh 234). The question of sentence demands utmost care on the part of the Courts dealing with the life and liberties of the people. The sentence must be weighed in golden scales, as it were, properly balanced, to punish the offender in proportion to the character and extent of his guilt, to be deterrent for him and for the rest of the society, without being unnecessarily harash or needlessly indulgent. All the circumstances surrounding the guilt must be carefully borne in mind and in determining the kind and quantum of sentence to be awarded the overriding consideration must be that it should be fair and even on humane standards, and to produce the corect results in a given case, to be solacing palliative for the party that has been wronged and an effective punishment for hte one that has done the wrong (PLD 1967 Pesh 119).

Conviction under section 302, Penal Code can be safely recorded in a case of circumstantial evidence and in extreme case even the death sentence can be

awarded (State Vs. Rajit ram 1992 (1) Crimes 719). If a Court has the power to pass one of the two alternative sentences, it should take into consideration all the circumstances of the case and award the sentence which is in its view more be fitting(AIR 1964 Mad 83). The normal sentence which must be passed in case of murder is that of death (PLD 1979 Kar 286). Where there are more than one accused, the court should rather enhance lenient sentence awarded to some convicts than reduce sentence of others in the interest of equal treatment (PLD 1976 SC 452). Death sentence was awarded where the accused played a prominent role in the whole tragedy of bus robbery in which two young men were murdered, or where the accused armed with deadly weapon in a preplanned manner without prior altercation with deceased attacked helpless and unarmed deceased and caused his death, or where accused were found to ahve killed the deceased callously and without any reason whatsoever, or where the accused had caused six knife blows on a petty grievance and that too, from behind while the deceased was proceeding towards the pan cabin and thus succeded in causing injuries by surprise, which was a cowardly act (1979 PCrLJ 113; 1979 PCrLJ 432; 1972 PCrLJ 781; 1972 PCrLJ 373). Refusal of the Sessions Judges to award capital sentence in appropriate cases besides amounting to refusal to administer the law, produces other unfortunate repercussions. For one thing, it creates a sense of injustice in the mind of the complainant party and no greater mischief than that can be imagined. Secondly, in most of the cases the complainant party is compelled to spend considerable amount of money for preferring revision petitions for enhancement of the sentence to High Court, which inevitably leads to congestion of work (PLD 1966 Pesh 97).

While awarding sentence for an offence under this section the conduct of the murderer, the nature of the temptation to which he yielded, the manner in which the crime was committed are some of the considerations which will weigh with the Court. But the code provides no exception for young persons on the ground that they are young (1960) ALJ 499; 1983 SCC (Cri) 559; 1985 SCC (Cri) 400).

Where the accused -appellant, a servant, was alleged to have murdered his employer's wife and one of the children and caused serious injuries to the other child when his employer was away from home on some business and the accused appellant also had received some injuries in the course of the incident, it was held that though the appellant had given his age as 13 during the committal proceeding, which was not disputed by the prosecution at that time, yet the evidence showed that he must have been of 18 or 19 years of age at the time of the occurrence and it would not have been impossible for him, able bodied as he was, to have committed the assault alleged against him. The large number of injuries found on the appellant would show that the deceased had resisted him in the course of the robbery or possibly sexual assault. However, it was considered not safe to impose sentence of death on the appellant on the basis of the surviving child's testimony. In the result, the conviction of the appellant under section 302 and 307 was confirmed but the death sentence was modified to one of life imprisonment (1981 SCC (Cri) 559). In Nisa Stree vs. State of Orissa (AIR 1954 SC 279), a young woman of twenty years was sentenced to death and her appeal was rejected by the Supreme Court as 'the murder undoubtedly was cold blooded and committed out of pure greed".

Under this section, whoever commits murder shall be punished with death, or imprisonment for lfie. Section 302 provides that whoever commits murder shall be punished with death or imprisonment for life; it is clear, that the choice between the two penalties does not depend upon any classification of murderers on the basis of youth, sex, etc. (1960 ALJ 499). Accused committing murdes of young boys for gain as a means to living. Plea to convert death sentence into life imprisonement on

ground that accused were young men and bread winners of family consisting young wife, minor children and aged parents. Held, such compassionate grounds present in most cases, not relevant for interference with sentence (AIR 1991 SC 1463).

The mere fact that the accused are young, cannot be an extenuating circumstnace. As observed by their lordships of the Supreme court of India in vadivelu Thevar vs. State of Madras, (AIR 1957 SC 614), the question of sentence has to be determined not with reference to the volume or character of the evidence adduced by the prosecution in support of the case but with reference to the fact whether there re any extenuating circumstnaces to mitigate the enormity of the crime (1971) 1 Mys LJ 149(165).

The murder committed by the accused was not a premediated one. It was committed by him in a sense of frustration all of a sudden when he saw the deceased walking along the road. He was very much charged in mind that his wife eloped with another. The panchayatdars also effected a dissolution, approving, as it were, the conduct of the deceased to refuse to live with her husband and elope with a stranger. The murder was not a premediated one. Held that ends of justice would be amply met if the appellant was sentenced to imprisonemnt for life (AIR 1965 Mad 385 (389); AIR 1956 SC 99).

Where a murder is by a bully, a man armed with a deadly weapon against a man who is unarmed, or where the appellant was a hired assassin and he had committed the murder of the deceased for no other motive except to earn a reward (1979 crLJ 902SC) or where the object is to kill and then to steal (1978 CrLJ 1251 SC), the proper sentence is that of death (1940) 42 CrLJ 786); 1975 CrLJ 645 SC). The punishment for murder is death; and accordingly if lesser sentence is awarded there must be some mitigating circumstances (22 DLR (SC) 414). Where the murder is premediated, cold blooded and brutal, extreme penalty must be imposed (1987) 2 SCC 197; 91987) 2 SCC 224).

Where there was a dispute between the parties over the boundary between their fields and it was also the prosecution case that the appellant used to buy groceries from the informant on credit, and had not been able to pay back the sum owed by them, and owing to this ill will, the appellant on the right of the occurrence threw a hand grenade into the court yard of the informants' house and in the resulting explosion the informant's wife and child died and the informant himself sustained injuries, it was held that the crime being cruel and inhuman and the consequential death of a woman and a child dastardly and pathetic, there was no reason to interfere with the death sentence impoosed on the appellant for his conviction udner section 302 (1975 CrLJ 461 SC).

Where the adult bread-winner of a Muslim family were slaughtered by the accused persons with bows and arrows owing to communal hatred, it was held that the commission of offences motivated by the fact that the victims professed different religion could not be treated with leniency and the death sentence passed on the accused were confirmed (1973 CrLJ 680 SC). Where five persons were murdered because of marriage of a lady of a higher caste with a Harijan boy on a cruel and barbaric manner shocking the judicial conscience, death, sentence on the accused was proper (1987) 3 SCC 80; 1987 CrLJ 1073(SC). A person who can afford to make gifts of land or money to the heirs of the victim cannot get away with a charge of murder (1984 crLJ 832(833) SC).

It was held in 1993 BLD 354 :

"Although, due to the said injuries, the decdased died after about two dyas of the occurrence, there is no doubt whatsoever that the injuries caused by dao on the

vital parts of the body including the head of the deceased were so severe that the deceased would die in the ordinary course of nature after suffering such injuries. The said offence of causing death of the decased by the accused, for that reason, will not come within the purview of section 304 part II of the Penal Code, but clearly comes within the definition of offence of intentional commission of murder as defined in section 300 of the Penal Code which is punishable under section 302 of the Penal Code. As there is a possibility that before the occurrence there might hav been some sort of altercation between the accused and the deceased or loss of temper by the accused, it cannot be held that it was a premeditated murder. If the deceased had been killed by the accused with premeditation, the Court would be justified to sentence the accused to death. In the facts and circumstances of the case, we are inclined to hold that it may not be a premeditated murder and, therefore, the ends of justice will be sufficiently met if the accused is sentenced to imprisonemnt for life for committing the offence punishable under section 302 of the Penal Code."

In the instant case the appellant was a spendthrift. He killed not only his wife but also his father-in-law, who was his benefactor and has given shelter to him in his house. As many as 22 injuries were caused to the wife and 13 to the father-in-law, of whom some of them poroved fatal. The Supreme Court held that it was a fit case where the extreme penalty of death was righly inflicted (1977 CrLJ 1744, 1745 SC). Where in a case it is proved by the prosecution witnesses and medical evidence that the four murders were committed at about the same time as a part of the same transaction and by one and the same person it was held that the High Court was justified in confirming the death sentence (1976 CrLJ 1873(1874) 1875 (SC).

Crimes committed aginst public servants for reasons arising out of the performance by them of their public duties must be discouraged and put down with a firm hand. Where the deceased, who was an Amin, acted as an officer of the Court in effecting the auction sale of the appellant's land to recover the arrears of land revenue, and after the sale proceedings were over he was returning home on a bicycle along with his peon, when the appellant and his son weylaid him and fired three shots at him, two of which hit the deceased making him fall down from the cycle and after he fell down the appellant attacked him with a sword and chopped off his head, and the appellant's son then absconded, on an appeal aginst conviction of the appellant under section 320/34 and 307, it was held that there was no reason for commuting the sentence of death imposed upon the appellant to one of life imprisonemnt (1981 SCC (Cri) 590).

Where the accused suspected the chastity of his wife and there were frequent quarrels between him and his wife on that ground, and about two weeks prior tot he occurrnece, the accused's wife had gone away to the house of her parents and was staying with them along with her daughter (aged about six years), and on the day of the occurrence, the accused had gone to the village of his wife, and after asking her to accompany him to brook to wash clothes, he killed his wife and daughter with an axe, it was held that the facts and circumstances of the case did not make out a 'rarest of rare' case for imposing death sentence upon the appellant. Hence, the sentence of death imposed upon him was set aside and a sentence of imprisonemnt for life was substituted (1983 SCC (Cri) 570).

A woman threw her children into a well and jumped into the well herself but afterwards, repenting of her intention to take her own life, managed to get out. The reason why she had decided to take her children's life and her own was that she had been very harshly treated by her husband and was living a life of the utmost misery. She was convicted for murdering the children. It was held that the sentence of imprisonemnt for life was proper and not that of death (1967) CrLJ 1321). Where

the appellant had committed the murder of his wife under grave stress of object proverty for which he was taunted from time to time by his wife and other relatives it was held that considering that the appellant had led a happy married life with his deceased wife for about a decade and the fact that the couple had three small children, the sentence of death imposed upon him could be reduced to one of imprisonment for life (1977 CrLJ 1156 (SC).

Where the accused - respondent murdered his wife and two children owing to economic destitution and his utter helplessness to provide for a major operation on his wife to remove a tumour in the uterus, the death sentence was commuted to one of life imprisonment (1977 CrLJ 1604 (SC).

Where the appellant had fired a shot on the abdomen of the deceased at the instigation of his brother which proved fatal and his brother had been acquitted but the appellant had been visited with the extreme penalty of death sentence, the Court was of the opinion that having regard to the various facts and circumstances of the case the extreme penalty of death was not called for (1977 CrLJ 1604 SC).

If the offence has been perpetracted with attendant aggravating circumstances, if the perpetrator disclosed an extremely depraved state of mind and diabolical trickery in committing the homecide, accompanied by brutal dealing with the cadaver, the Court can hardly help in the present state of the law, avoiding infliction of the death penalty. When discretion has been exercised by the trial Court and it is difficult to fault that Court on any ground, statutory or precedential, an appellate review and even referral action become too narrow to demolish the discretionary exercise of power by the inferior Court (1977 CrL.R. 432, 433).

There can be no doubt that death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape from its clutches. (AIR 1982 SC 1325 (1388-89).

Murder under influence of others.- When the accused acts under the influence of his elders or superiors and commits a murder, death sentence should not be awarded (1986 PCrLJ 2487 (DB).

Thus where a son when committing murder may well have been acting under the influence of his mother (1987 PCrLJ 1673 (DB)=NLR 1981 Cr 60 DB), or father, death sentence was not awarded (1988 SCMR 1640).

Where the accused dealt only a dang blow on the head of the deceased, causing merely simple injuries, and there was a possibility that he might have acted under influence of his elder brother, a co-accused, his death sentence was altered to one of transportaiton for life (PLD 1987 Lah 591).

Where accused aged 24 and 29 years caused injuries to deceased under influence of their uncle. Their sentence of death was reduced to life imprisonment (1987 PCrLJ 2037 DB).

Where one accused was armed with a pistol but others were armed with lathis and spears and death was caused by a pistol shot fired by the accused at the bidding of another. It was held that the accused who fired the fatal shot may be sentenced to death while other may be sentenced to life imprisonment. The fact that the shot was fired on the bidding of another was immaterial (AIR 1959 SC 572).

But where a murder was of the most brutal kind and there was no extenuating circumstances the fact that one of the accused took part in the murder simply to oblige the other accused who was his thick friend, is not an adequate reason for

imposing on him the lesser sentence of transportation for life (AIR 1950 East Punj 159-51 CrLJ 747 (DB).

Where it was urged that accused was acting under the influence of his father who was not present at the spot. The accused was thirty years of age and not devoid of exercising discretion in the matter. He brutally killed his brother-in-law over a dispute of purchase of land. Sentence of death was not reduced (1984 PCrLJ 3015(DB).

Domestic servant, murder by.- Where accused, a domestic servant of deceased killed those who had faith and confidence in him. He could not be treated at par with an accused who, under different circumstances of stress or strain committed a crime. Age of accused in such a situation would not constitute a mitigating circumstances (1985 SCMR 269).

Sudden fight.- Where it was a sudden fight which took place in the heat of passion upon a sudden quarrel. The appellant caused only one injury to each of the deceased persons although there was nothing to prevent him from causing further injuries to them. Lesser penalty of imprisonment for life was rightly awarded (1987 SCMR 2053=1983 SCMR 219).

62. **Death sentence to be awarded in rarest of rare case.**- While onfirming the death sentence passed on the accused on his conviction on two counts under section 302 of the Penal Code, 1860 for having committed the double murder of the deceased Tarlok chand and of his neighbour Bahal Singh by successively stabbing them on the chest with a knife, the 'special reason' recorded by the High Court as enjoined by section 354 of the Code of criminal Procedure, is that they were brutal murders executed in cold blood and therefore the appropriate sentence was one of death (Amrik Singh Vs. State of Punjab 1989 Cr. LR. 372(372,373) (SC).

Sentence of death is not open to exception. When the accused was fully aroused by previous quarrel, coupled with 'excitement of chase' and 'interference' by deceased, which accused thought unjustified' lesser sentence supplemented by fine to be made over to deceased's relatives, would meet the ends of justice (Dost Md. Vs. State (1963) 15 DLR (SC) 175).

Death sentence should be awarded only in the 'rarest of rare' cases when the alternative opotion is unquestionsably foreclosed. In the present case one cannot also lose sight of the act that the death sentence has been hanging over the appellant's head for almost three years, subjecting him to unbearable mental agony and pian. Thus it was impossible to hold that this was one of the 'rarest of rare' cases where the alternative option of awarding life imprisonment was unquestionably foreclosed. The sentence of death, in the circumstances of this case, should be commuted to one of imprisonemnt for life. (Hemangshu Pahari Vs. State 1986 CrLJ 622(631,632 (Cal).

Where the murders of mother and her son and a brutal attack on the third are premeditated, pre-planned, cold blooded and gruesome in nature, extremely cruel in execution with a motive behind it, only the extreme penalty of law, viz the sentence of death alone will meet the ends of justice (Murthy Vs. State 1988 (1) Crimes 326 (Mad).

Where the accused was a young man aged about 32 years and he has a young daughter aged about 7 years an that she has already lost her mother and even according to the prosecution, the accused was heavily drunk and his married life was not very happy and it appears that at the time of the incident, he was under the influence of liquor and there is every likelihood that he may not have been in proper

senses, it was held that the case could not fall in the category of one of 'the rarest of the rare cases', and imprisonment of life could be justified in place of death sentence (State of Maharashtra Vs. Gopichand Uttam Chand; (1985) (1) Bom C. R. 559, 571).

Where the petitioner was ayoung man aged about 22 years and he appears to be genuinely repentant and he now desires to stone for the grievous wrong that has been done by him and the repentance and the desire appear to be sincere and the jail authority has no adverse comment to make agianst his conduct and the sentence of death has now been hanging over his head for two years and nine months, it was held that the death sentence could be quashed and in its place the sentence of imprisonment for life could be substituted (Javed Ahmed Vs. State of Maharashtra 1985 CrL.R. (SC) 35, (36, 40).

The act of killing his wife cannot be said to be one of the rarest of the rare cases warranting death penalty when there is evidence that relationship between the deceased and the accused was cordial and the accused committed the crime in a fit of anger when his wife refused to pay money (Aravindakshan Pill vs. State of Kerala 1989(2) Crimes 336(Ker). One circumstance that stands out in favour of the respondent for not awarding capital punishment is that the respondent did not commit murder of his near and dear ones actuated by any lust, sens of vengeance or for gain. The plight of an economic have not sometimes becomes so tragic that the only escape route is crime. The respondent committed murder because in his utter helplessness he could not find few chips to help his ailing wife and he saw the escape route by putting an end to their lives. This one circumstance is of such an overwhelming character that even though the crime is detestable, the Courts would refrain from imposing capital punishment. The respondent should accordingly be sentenced to suffer imprisonemnt for life (State of U.P. Vs. M.K. Anthony 1985 CrLJ 493(503-504)(SC); AIR 1958 SC 48).

Accused wife and the other accused her paramour conspired with each other for the prosecution of their illicit liason and illegitimate pursuits with a view to murder her innocent husband. Obvious motive, held, was absolutely enough to justify capital punishment. award of lesser sentence in such cases was disapproved by the Supreme Court (Noor Muhammad Vs. State 1991 PLD 150 (SC). Ends of justice can be met in a case by sentencing an accused to imprisonment for life when the murder has been committed under a sudden impulse in a grave fit of rage as has been done in the instant case by the accused when he saw the deceased who had succeeded in her litigation against him, moving on the village road. Death sentence is to be imposed only when life imprisonment appears to be an altogether inadequate punishment. What seems to have prompted the mind of the accused is not immediate gain by the commission of the murdr but his sense of frustration and disappointment in connection with the litigation between him and the deceased. There are no special reasons for imposing the death sentence. Therefore the Orissa High Court was of the view that it would meet the ends of justice if instead of sentencing the accused to death, he is sentenced to undergo imprisonment for life (State Vs. Aru @ Arun Kumar Pradhan, 1984(2) Crimes 198 (212) Ori.).

Punishment for murder should be life imprisonment unless there are special circumstances justifying awarding of maximum punishment of death and in making the choice the Court should take into consideration not only the circumstances relating to the crime, but also to the offender and it is only in the rarest of rare cases that the maximum punishment of death may be awarded (Metropolitan Sessions Judge, Vijaywada Vs. Bolem Srinivasa Rao @ Sreenu 1992(3) Crimes 404(405); Machising Vs. State of Punjab AIR 1983 SC 957; Alauddin Mian vs. State of Bihar AIR 1989 SC 1456; AIR 1977 SC 2423).

Extreme penalty of death is to be awarded to a convict only in those discerning few cases where the murder committed by him is shocking, brutal, diabolical and revolting and the Courts while awarding the death penalty should not look only to the crime but also to the circumstances of the Criminal (Sikander @ Mohd. Shafi vs. State 1992(2) Crimes 970 (972); AIR 1987 SC 1346). When both the accused persons had unmistakably, unequivocally and without any reservation whatsoever admitted the fact that they were responsible for the murder of General Vaidya and they had no remorse or repentence, in fact they felt proud of having killed him in execution of their plan; the case falls within the description of the rarest of a rare case to award extreme penalty of death to both the accused (State of Maharashtra Vs. Sukhdeo Singh and Another. 1992 (3) Crimes 5(9).

The accused was chasing a man with a knife in his hand. The deceased an innocent passer by was coming out of a mosque after prayer and seeing the accused pursuing another man with knife in hand asked the accused to close his knife and to give up the pursuit of that man. Whereupon the accused charged the deceased with being a helper of that man and promptly stabbed him in the abdomen. The stabbed man fell down and after wards died. Offence of mruder being charged and proved, the question raised was whether there was any mitigating circumstance for imposing a lesser punishment than a sentence of death. Held, that lesser sentence is not called for because the appellant had no justification for killing an innocent person who merely asked him not to fight. Sentence of death in these case is an appropriate one (Dost Muhammad Vs. State (1963) 15 DLR (SC) 175).

While in circumstance of a case the fact that a particular accused has not given the fatal blow or that his liability is only vicarious, may be a good ground for imposing the lesser penalty, in a case like the present where a number of persons inflict a large number of injuries with the intention of causing death so that each is contributing towards the death of the deceased, it is not necessay for the purpose of imposing maximum penalty to determine who gave the fatal blow. In such a case all those accused to whom the Court attributes the intention of causing death in a brutal manner should (in the absence of some other circumstances justifying the imposition of the lesser penalty) be awarded the maximum penalty (Fateh Khan Vs. State (1963) 15 DLR (SC) 51).

For persons convicted of mruder, imprisonment for life is the rule and death sentence is an exception. A real and abiding concern for the dignity of human life postulates reistance to taking a life through law's instrumentality. This ought not to be done except in the rarest of rae cases when the alternative option is unquestionably foreclosed. A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances has to be drawn up and in doing so, aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigatin circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before the option is exercised (Binode Pundey Vs. State 1989 cal Cr. L.R. 25(36,37) Cal). The guidelines for awarding a sentence of death have been laid down by the Supreme Court in the case of Bachan Singh Vs. State of Punjab (AIR 1980 SC 898). These guildelines have been followed by the Supreme court in the subsequent decision in the cases of Machhi Singh Vs. State of Punjab (AIR 1983 SC 957), and Asharfi Lal Vs. State of Uttar Pradesh (AIR 1987 SC 1721).

In the undemoted case the learned trial court felt strongly that the violence and cruelty with which the crime had been committed and the helpless state of the victim, moral basness and criminal propenstities of the convict as also his antecedent indicating his being possessed by lustignited criminality making him

inverterate rapist having unsuspecting and helpless minors as his favourite targets, rendered him deserving of the terminal sentence of death and nothing short of that would meet the ends of justice. This case does not appear to fall in the category of rarest of the rare cases so as to attract the highest penalty of death, notwithstanding the gruesome nature of the offence involved (State Vs. Ataur rahman 1989 (1) Cr. L.C. 278, 287 (Delhi). The mere fact that infants are killed, without remorse, is not sufficient to bring the case within the category of the rarest of rate cases (Allauddin Main and others vs. The State of Bihar 1989 (2) Crimes 266 (SC).

In the undernoted case in addition to the dying declaration there is also clear circumstantial evidence furnished by the letter Ex. P.K. and the testimony of Atar Singh (P.W. 3) father of the deceased regarding the demands for dowery and the harassment and torture inflicted on the deceased by the accused as part of the endeavour to extract more dowry. The dying declaration made by the deceased has the ring of truth and the testimony fo the doctor P.W. 2 and of the Head constable P.W. 7 clearly establishes that she was in a fit condition to make the statement. The conviction of the appellant by the High court was, therfore, fully justified and there is absolutely no ground for interference with the same by Supreme Court. The Court only expressed its regret that the Sessions Judge did not treat this as a fit case for awarding the maximum penalty under the law and that no steps were taken by the State Government before the High Court for enhancement of the sentence (1987 Cr. LJ 1127 (1129)SC=AIR 1987 SC 1368).

Punishment must fit the cirme. These were cold blooded brutal murders in which two innocent girls lost their lives. The extreme brutality with which the accused acted shocks the judicial conscience. Failure to impose a death sentence in such grave cases where it is a crime against hte society particularly in cases of murders committed with extreme brutality will bring to naught the sentence of death provided by section 302 of the Penal Code. It is the duty of the Court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment. The only punishment which the accused deserve for having committed the reprehensible and gruesome murders of the two innocent girls to wreak their personal vengeance over the dispute they had with regard to property with their mother Smt. Bulakan is nothing but death (Ashrafilal Vs. State of U.P. 1987 crLJ 1885(1887) SC; AIR 1987 SC 1721). Where death is caused after savage planning which bears a professional stamp, the accused deserve no sympathy even in terms of the evolving standards of decency of a mature society (1982 CrL.R. 59 (61) SC).

In Ghasita vs. State of Uttar Pradesh (AIR 1973 SC 211, (212, 213), it was held that looking at the nature of the injuries which suggest that their author intended to sever the neck of the deceased from his body and the circumstances in which this brutal murder was committed, the sentence of death can be no means be considered to be too severe. In Ramesh Ramdas Teli vs. State of Maharasthra (AIR 1976 SC 345), the deceased had done no harm to the appellant. The appellant was appraently a desperate character who would not stop at killing rather than he caught in an attempt to steal after breaking into a house. It was held that death sentence was deserved by him.

Death sentence is to be imposed when the muder is committed in a brutal manner or when the natur of the crime is ghastly (AIR 1975 SC 1501(1505)=1975 CrLJ 334 Gau).

The accused was a trusted friend of the deceased. But for achievment of his vicious object to relieve him of his cash and valuables he not only killed the deceased but also exterminated his whole family including his aged parents, his wife and five

children, two of whom were infants aged five years and three years respectively. He committed these blood chilling murders of the nine innocent persons for monetary gain and to destroy the evidence of the crime he had committed. It is difficult to find words strong enough to condemn these gruesome and dastardly murders. Ironically the accused chose not to spare even the two infant daughters of deceased who dearly used to address him as "Dr. Chacha" and were incapable of giving evidence even if they had been left alive. The tragedy has few parallels. The accused was neither demendted nor mentally sick. There are absolutely no extenuating circumstances of passing a lesser sentence. The contention is of little value that accused was financially in straits with wife and two small children and this should be taken into consideration to merit clemency for the lesser sentence. On the other hand, the case is eminently fit for impsoing the extreme penalty of law (AIR 1977 SC 2423 (2425) (SC).

In this case it was contended that the appellant did not want to fire the pistol and was hesitating to do so till he was asked by his father to fire and therefore penalty of death should not have been imposed on him. Held, the appellants carried the pistol from his house and was a member of the party which wanted to take forcible possession of the land which was in possession of the other party and about which proceedings were going on before the revenue officer. He fully shared the common object of the unlawful assembly and must be taken to have carried the pistol in order to use it in the prosecution of the common object of the assembly and he did use it. Merely because a son uses a pistol and cause the death of another at the instance of his father is no mitigating circumstance which the Courts would take into consideration. The Courts below have rightly imposed the sentence of death (AIR 1959 SC 572, 577).

The court cannot reduce the sentence of death on ground of delay in its execution but the convict can approach the Executive Authorities for commutation of sentence on that ground. However, the Court cannot recommend and such action (PLD 1973 SC 322; PLD 1975 SC 227). In a proper case inordinate delay in the execution of the death sentence may be regarded as a ground for commuting it. But this is not a rule of law and is a matter primarily for consideraton by the Government (AIR 1954 SC 278; AIR 1957 Ker 34; 1975 CrLJ 634).

Where the accused are equally guilty of mruder, the fact that some of the accused have been sentenced to life imprisonment is a good ground for commuting the sentence of all to life imprisonment (1973 SCMR 532; PLD 1962 Dacca 278; 13 DLR 646 DB).

A general amnesty declared by the President commuting sentence of death of condemned prisoners would apply on those who are under sentence of death on that date, including those whose death sentences stood confirmed by High Court but their apeals were pending before Supreme Court (PLJ 1976 Pesh 76 DB). It would not apply to prisoners whose sentence of death had not yet been confirmed by High Court on the day of amnesty (PLD 1977 SC 39), or whose death sentence had been set aside prior to that date, but they were sentenced to death again by Supreme Court on a subsequent date (1979 SCMR 364).

The argument was that the appellant is a young man of 28 years of age; that he is no more guilty than co-accused and if co-accused was sentenced to imprisonment for life, there is no reason why he should be sentenced to death; and that almost two years have elapsed since the Sessions Court gave its judgment and therefore, the sentence of death should be reduced to that of imprisonment for life. The Supreme Court found it impossible to accept this argument in view of the fact that it was the accused more than co-accused who had a strong and direct motive for committing

the crime. Then again, it was he who had given the threat to deceased that he will kill him. Lastly, the accused fired a shot at the deceased from a very close range on a vital part of the body like the head (1977 CrLJ 345, 346 SC; AIR 1975 (SC) 1411).

63. **Mitigation of sentence**.- Sentence is always to be determined not with reference to the volume or character of the evidence adduced by the prosecution in support of its case, but with reference to the fact whether there are any extenuating circumstances which can be said to mitigate the enormity of the crime. If it is satisfied that there are such mitigating circumstances, only then it was justified in imposing the lesser of the two sentences provided by law. It was stressed that the question as to what punishment should be imposed is for the court to decide in all the circumstances of the case with particular reference to extenuating circumstances, if any (PLD 1983 Pesh 91=AIR 1957 SC 614; 1981 SCC (Cri) 760).

In case of murder, when the facts are clear, the onus is upon the accused to show circumstances which would bring the offence within the category of those offences where capital sentence should not be imposed (NLR 1983 AC 330). The law indicates the gravity of the offence by the maximum penalty and the courts have to judge whether the act committed falls short of the maximum degree of gravity and, if so, to what extent (12 CrLJ 448).Therefore unless extenuating circumstances can be found a murderer must be sentenced to death (PLD 1981 Cr.C 16). Where accused was responsible for murdering three persons without legal or moral justification. No mitigating circumstances existed to reduce the sentence. Death sentence was confirmed (PLD 1983 Lah 602). Where the accused had the intention only to beat the deceased but then one of the accused suddenly strangulated him with his bare hands, death sentence was confirmed (NLR 1981 Cr 387).

Award of lesser penalty of imprisonment for life by trial Court was appropriate as the deceased was having illicit connection with the wife of accused which constituted a mitigating circumstance. Revision petition for enhancement of sentence was dismissed in limine accordingly (Mukhtar Ahmad Vs. Sdtate 1992 PCrLJ 1396).

Where the accused admitted the occurrence but pleaded to have acted in self defence when the deceased opened attack on him, but the accused was found to have a strong motive to attack the deceased and there was nothing on record to support the plea of the accused that he received two slight injuries on his hand from the deceased because such injuries were explainable on several grounds; the sentence of death imposed on the accused was confirmed by the High Court (1970 PCrLJ 1080).

Where the accused tried to regain possession of his trespassing cattle by use of force. The deceased resisted the attempt and caused injuries to the accused. The accused had no right to retaliate and cause death. There was no mitigation of the offence(PLD 1976 SC 241). Where the defence was that the accused was insane at the time when the offence was committed and it was observed that section 84 did not apply ot the case, it was held that the capital sentence should not be passed. The proper course in such cases was to sentence the accused to transportation for life (1977 CrLJ 513,515,523(Pat).

Regarding sentence it is found that the accused had no intention to commit the murder but the murder resulted from gagging and throttling on the girl in course of rape which was done with a view to stop her from raising any voice. There was thus no premeditation nor intention for the murder which only took place in course of the rape. It is also to be noted that the accused was convicted and sentenced on as long ago as 20.9.80. Having considered all the circumstances sentence of transportation for life instead of death will meet the ends of justice (State Vs. Abdur

Rashid (1983) 35 DLR 195). If the death sentence has been inflicted nearly two years ago and the agony of such a sentence has been excruciating experience suffered by the convict for a long period, this by itself, may not be a circumstance to bring down the death sentence, if otherwise the act is too brutal, depraved or meriting the highest penalty. Where it is also apparent that there was no motive for the appellant to kill the innocent child who died and the other circumstances present also indicate that there is no particular reason why the appellant should have been given the severer sentence, the ends of justice would be met by awarding life imprisonment (1977 CrLJ 1139(1141) (P&H); AIR 1976 SC 653).

In cases where the honour of their women folk is involved male members of the family in the rural areas feel under an imperative obligation to vindicate the family honour by resort to violence. That is a circumstance of which notice may appropriately be taken by the Courts nearby a century of administration of the law relating to murder in cases of this kind, considering the facts and circumstance Supreme Court commuted the death sentence to imprisonment for life (Muhammad Ramzan Vs. State (1965) 17 DLR (SC) 606). Where appellant was clearly on terms of improper intimacy with the deceased and was perhaps overcome by a sense of jealousy or indignation of what he thought was unfaithfulness on the part of the deceased and there was long lapse of time since the imposition of the capital sentence by the trial court and the consideration of the question of sentence by the Supreme Court, and the interests of justice require that the sentence of death should be reduced to that of life imprisonment (1977 CrLJ 1156 SC). The facts that the appellant aged about 22 years at the relevant time, was having a parasitical existence on his maternal grandfather's family, he did not take any part in the act of killing of Hazera, the real culprits escaped punishment for want of legal evidence and that upon confessing his guilt in Court he begged for mercy, were considered extenuating circumstances in taking a lenient view in the matter of sentence. The sentence of death was commutted to imprisonment for life (Abdul Awal Vs. The State; (1994) 14 BLD (AD) 224 (225).

Where a period of more than two years has elapsed since the acquittal of the acucsed respondents by the High Court, it would be appropriate for the Supreme Court to sentence the accused - respondents for the offenece under section 302 Penal Code, to imprisonment for life (AIR 1974 SC 1115(1117). When there are two opinions on the guilt of the accused as to murder, by the two Courts below, ordinarily the proper sentence would be not death penalty but imprisonment for life (Smt. Lichahmadevi vs. State of Rajasthan 1988 (3) crimes 1 SC).

Where the primary intention of the appellant was to commit theft and it was just a chance that the unfortunate deceased entered the house when the appellant was busy in his operations and he committed the murder, the sentence of death passed under section 302 of the Penal Code was converted into sentence of life imprisonment (1976 CrLJ 1680, 1690 (All).

The injuries being too many and very serious the Supreme Court would ordinarily be disinclined to interfere with the sentence in such a case. If however, it finds that the deceased was a quarrelsome person and there had been a quarrel on the previous day of the occurrence as well as the day of the occurrence between the decceased and the appellant, and the actual origin of the quarrel at the time of assault is not known, and some amount of provocation from the deceased may not be ruled out completely, the Supreme Court would therefore, inclined to award the lesser penalty to the appellant (1974 CrLJ 1305(1306) SC).

Where the crime was committed in a most high handed and cruel manner on a mere small provocation, if at all provocation it were, and it was urged that the

appellant is an old man and he should not, therefore, be sentenced to death it was held that there were no circumstances which would warrant awarding of any sentence lesser than death on the appellant (AIR 1973 SC 926, (927).

When the accused considered that the boy was not his son and had been born as a result of adulterous conduct on the part of his wife and shortly before the murder, the accused enquired from her, the deceased, regarding the father of the boy and the deceased thereupon abused him, the Supreme Court held that the act of the deceased in abusing the accused must have been taken by the accused to be adding insult to the injury by an unchaste wife, and in view of the above, it would meet the ends of justice if the accused is awarded the lesser penalty (AIR 1972 SC 2077, (2078,2083). The accused convicted under section 302 of Penal Code should be spared from the extreme penalty of death when he committed double murder when agitated on account of circumstances upsetting his mental condition (Moorthy vs. State of Tamil Nadu 1988(2) Crimes 705 SC).

The accused had some sort of mental trouble prior to the date of the occurrence. There was nothing to show that he was not suffering from a mental obession which may not amount to insanity but which would affect a person's mind in a way quite different from that of a normal person. The apellant seemed to harbour some sort of grudge that his trouble was due to the evil influence of the deceased. He was in all likehood not in a position to weigh and analyse in a rational manner whether his trouble could be due to the reason mentioned before. The origin of the incident was not known. Held that this is not a case in which the penalty of death should have been inflicted. The sentence will stand reduced to that of life imprisonment (AIR 1973 SC 806, (807).

The extenuating circumstances which would justify a court in inflicting the leser penalty upon a person convicted of murder are well understood and a court cannot make a departure and introduce an entirely novel extenuating circumstance which has not so far occurred to any other court (PLR 1951 Lah 477). The normal sentence for murder is capital sentence, but if there are mitigating circumstances then the apppropriate sentence would be the leser sentence (PLD 1979 Kar 286). But the fact that fault lay with deceased which resulted in his murder by accused, or where posibility that deceased might have said something provoking to accused before his causing him injuries was not excluded, or where one person from accused side was killed and another injured in the occurrence. Family honour of accused was involved. The deceased and complainant having given beating to one accused before occurrence were mitigating circumstances calling for lesser punishment (PLD 1979 Kar 286; NLR 1988 Cr 603; PLD 1986 Lah 102;1986 PCrLJ 2261).

Death sentence should not be imposed, where it was complainant party who invited trouble and medical evidence casts some shadow on prosecution evidence, or where there was no promeditation and murder was committed on the spur of the moment, or where the accused killed his father in order to wreak vengeance upon him for debarring him from inheritance as well as for his anti social and immoral conduct particularly when a grown up girl of marriageable age was in the house (NLR 1981 CrLJ 68; PLD 1979 Kar 286;PLD 1976 Lah 68). It seems the victim died for his depraved habit which made him *persona non grata* with his entire family of grow up children. His conduct in divorcing the mother of the children would have also deprived him of every sympathy from them and would have created hostility and rancour in their mind and they must have started loathing their father, or where the accused was a school boy of tender age and the possibility that the deceased tried to take liberties with him could not be excluded (PLD 1976 SC 568).

In a case the sentence of death was not awarded to the accused who were tried in the hope that the absconding co-accused would appear before the court, which might reveal other facts as to the crime, and as to who committed it (16 DLR 558). Similarly sentence of death was reduced to that of imprisonment for life in view of the fact that (i) the convict at the time of occurrence was only 15 years of age, (ii) existence of ill feeling between convict and deceased (convict's own brother) and (iii) family of convict had reconciled themselves with situation and were averse to taking any action against him (PLD 1969 Lah 257).

The following have been held to be extenuating circumstances so that when they exist, death sentence may not be passed. (a) Where there is a free fight and no unfair advantage is taken by the accused (PLD 1962 SC 502). (b) Where there is an unjustified interference by the deceased with the possession of the accused, as where the deceased in unlawful occupation of land refused to give possession in spite of demarcation by girdawar (PLD 1964 SC 177). Death was caused in an attempt by the owner to take possession by force (PLD 1975 SC 556). (c) When the murder was the result of intimacy between the deceased and the accused's wife (PLD 1964 BJ 9). (d) Where the accused committed the offence when he was desperate and sick of life (PLD 1956 Lah 579). But the fact that a rejected lover murdered his beloved in desperation is not a mitigating circumstance (PLD 1976 BJ 9). (e) When the accused acts on provocation, even if it is not sudden provocation and even when the provocation has been offered by a person other than the deceased (PLD 1963 SC 285). (f) When the case has been pending for a very long time (PLD 1959 Kar 460). (g) When there is no motive for murder, or where a motive was definitely alleged but was not proved (1980 SCMR 859). (h) Where the accused was subjected to such severe beatings on the hands of the crowd that he had to be admitted into Jail Hospital for treatment which necessitated his detention in the hospital for six months (PLD 1962 Dacca 467). (i) Where the accused was acquitted by the trial court and the High Court three years after the acquittal convicted the accused on appeal, or where an appeal from acquittal was dismissed by High Court but the Supreme Court on further appeal convicted the accused (PLD 1969 SC 398). (j)Absence of premeditation and commission of murder on the spur of the moment and in heat of passion unless death was caused in a cruel or unsual manner (PLD 1979 Kar 286). (k) Where the deceased father in law refused to return the wife of the accused in spte of his best efforts at reconciliation (PLJ 1974 CrC 474). Where death was caused out of religious zeals and a person of the other sect was killed (1977 SCMR 316).

64. **Age of accused.**- In a murder case even when the crime seems to be quite shocking, injuries are numerous and quite serous in nature and the murder is preplanned, death sentence awarded can be converted into life imprisonment considering, that the accused was only 25 years of age at the time of commission of the crime (State Vs. Rajit ram 1992(1) Crimes 719).

Where a young offender has committed a murder, the principles which must be kept in view in awarding a sentence are :

(i) The normal sentence in a conviction under section 302 of the Penal Code is death.

(ii) In case of extreme youth, namely, of persons in their early or middle teens, youth itself is invariably a sufficient ground for commuting a sentence of death to transportation for life.

(iii) In very rare cases a youth in middle or later teens, is condemned to death. It is only in exceptional circumstances and in cases of extreme depravity that a teenager is awarded a death sentence.

(iv) In other cases when a person is of a higher age but quite in early youth, the question of his age alone is not sufficient to justify a commutation of the sentence, and the question, namely, the youth of the person is usually taken into consideration along with other extenuating circumstances in order to commute a sentence of death passed on such a person (PLD 1962 Dhaka 46).

Age of the accused should alwayus be considered while determining the sentence to be imposed (AIR 1915 Mad 542). Age of twenty five is not such young age as to be considered a mitigating circumstance(PLD 1976 Lah 788). But where there was no evidence that accused came with the intention to cause death, and he was only 22 years old at the time of the incident, revision for enhancement of his sentence from life imprisonment to death was dismissed (1984 PCrLJ 243).

If the evidence reveals that the criminal, though young in age, fully understood what he was doing and the murder was cold blooded, deliberate and planned, and there are no extenuating circumstances, his age alone will not save the murderer from the sentence of death. He will then be given the extreme punishment as a normal case (1960 A.W.R. (H.C.) 369= 1960 ALJ 499).

In Mohd. Aslam Vs. State of Uttar Pradesh (AIR 1974 SC 678, (679), the appellant was hardly 19 or 20 years when he murdered his brother-in-law. The appellant was convicted by both the Courts under section 302 and sentenced to death. It was held that the appellant must have been influenced by the general atmosphere in the family which was hostile to the deceased, and having lost his head committed this crime. The High Court would have been well advised, having regard to the age of the appellant and also the circumstances of the crime, to have reduced the sentence to one of life imprisonment.

In a case of murder, youth alone is not such an extenuating circumstance as to justify awarding of lesser punishment, it should be taken into consideration with other facts(PLD 1954 Lah 73). Mere youth of an accused person or his being a student does not entitle him to a lesser penalty which otherwise is not made out from the facts and circumstances of the case(PLD 1972 Pesh 27?). Sentence of death was upheld where a young accused committed a brutal murder, or where the injury inflicted by him was sufficient by itself to cause death and motive for offence was revolting(1974 PCrLJ 533).

Where a young man of sixteen or twenty committed a cold blooded murder, death sentence was upheld(1972 SCMR 610). Where a murder is committed in broad daylight in the presence of distinterested witnesses the fact that the convict at the time of occurrence was aged about 20/21 years was no mitigating circumstances in view of the convict being inimically disposed towards the deceased who was a boy of 10/11 years of age (1968 SCMR 737). Where a gruesome murder was committed in road daylight in Court premises, the court refused to alter death sentence to imprisonment for life on account of the youth of the accused (PLJ 1980 CrC 458).

Where the accused a Matric student of 20 years of age dealt a fatal blow with a deadly weapon on the deceased who was unarmed and begged for life after the deceased had been attacked and injured by his co-accused and the facts showed that the murder was preplanned. It was held, that presence of the co-accused does not minimise the gravity of the offence and the accused was convicted and sentenced to death (1969 PCrLJ 491). The mere youth of the accused or his fear or apprehension that the deceased would make a complaint against him for theft could not justify the lesser sentence imposed on him. Sentence of life imprisonment however, was not enhanced to that of death by the High Court (AIR 1953 Mad 372). The fact that there was no motive for the offence cannot be construed as indicating

the existence of provocation. In such cases youth of the murderer will be insufficient to inflict lesser punishment (AIR 1930 Lah 50).

When murder is found to have been committed under provocation which is not such as to take the case out of this section, but which is still such as, having regard to the age of the accused and the class is which he belongs filled him with blind passion and banished self-control there is a fit case for awarding the lesser penalty of imprisonment for life (AIR 1935 Cal 591; 36 crLJ 1254).

Where one convict was only 16 years of age, no overt act was attributed to him and he had already undergone 5 months sentence, the Supreme Court in a special appeal directed him to be discharged at once (AIR 1980 SC 83; 1983 CrLJ 10).

The accused was admittedly a young boy of 15 years at the time of occurrnece. He acted in exercise of the right of private defence but exceeded it. It was held that it would be fair and just if the sentence of imprisonment as reduced to the period already undergone by him (1977 CrLR (SC) 48).Accused 17 years old when offence committed. Held, death sentence be reduced to life imprisonment (AIR 1981 SC 2009; 1981 CrLJ 1960). accused 16 years of age at the time of offence sentence commuted to life imprisonment (1976 CrLR (SC) 1).

65. **Sex of accused :** The fact that the accused is a woman is not a conclusive reason for not passing a sentence of death (AIR 1924 Rang 179). Where the crime committed is atrocious, the sex of the accused cannot bar the imposition of maximum penalty (AIR 1915 Mad 821). Even the existence of an extremely young baby born to the accused since the commission of murder is not a mitigating circumstance (AIR 1947 Mad 27). But where the liability arose under section 302 read with section 114 Penal Code and murder has not been committed by the woman herself, and it is further found that she had three children including an infant, the court awarded her the lesser penalty (AIR 1952 HP 81). Sex alone is not sufficient reason for imposing lesser penalty unless there are extenuating circumstances (AIR 1960 All 748= 1960 CrLJ 1536).

Where a woman kills her newly born illegitimate child, there are mitigating circumstnaces sufficient to reduce the death sentence very much below a sentence of life imprisonment (25 CrLJ 63= AIR 1924 Nag 119).

Similarly, a young girl of fifteen years, who killed her step son because her husband was ill treating her, was sentenced to life imprisonment (AIR 1926 Lah 144; 26 CrLJ 1373).

Comparative leniency to women is common rule of practice though not of law, but in dealing with an atrocious crime, the mere sex of the accused is no bar to imposition of death sentence (16 CrLJ 20; 1915 Mad 821). Where a woman murders a child for ornaments, penalty of death is proper although she has recently delivered (1936 Na 200= 37 CrLJ 1047).

66. **Plea of insanity**.- Where conduct of accused shows his insanity the trial Judge should not convict and sentence him for the grave offence without obtaining medical report about his mental condition (Elkari Shankari Vs. The State of Andhra Pradesh 1989 (2) Crimes 702 (AP). The manner in which the appellant killed his wife is also relevant. The Courts are not suggesting that the brutal and callous way in which a murder is committed, by itself, is indicative of diseased mind. But that has to be taken along with the medical evidence to the effect that a schizophrenic patient may have homicidal or suicidal tendencies. There was no attempt on the part of the appellant to hide his crime or to keep away from people or hide himself. After the occurrence, in a very unusual and abnormal manner, holding the head and the

chopper in each of his hands, he walked down the road and ultimately reached the police station. This by itself, would not be sufficient to come to any conclusion but taken along with the other circumstances of the case would clearly point to the validity of the defence put forward on behalf of the appellant (1986 (1) Crimes 155(162) Ker).

Acccording to section 105 of the Evidence Act the burden of proof lies on the accused that his case falls within the exception as contained in section 84 Penal Code. However, it is true that the dishcarge of that burden is not inconsistent with the rule of reasonable doubt, which pervades our criminal jurisprudence and according to which a doubt occurring in the matter will react on the prosecution case as a whole resulting in the benefit of the doubt to the accused (PLD 1979 Lah 805). A person cannot plead insanity if he is capable of knowing the consequences of his act (PLD 1978 Kar 295).

One of the essential ingredients of crimes is intent. Intent involves an exercise of the reasoning powers, in which the result of the criminal act is forseen and clearly understood. Where the mind of the perpetrator is so diseased as to exclude the presence of an intent or animus in the commission of the crime in question, he should not be punished as a criminal (PLD 1975 Lah 658). If an accused person is aware that the act is one which he ought not to do and the act at the same time is contrary to law, he is punishable. Therefore, to establish successfully a defence on the ground of insanity, it must be proved that as accused person at the time of committing the act was labouring under such a defect of reason, from disease of the mind as not to know the nature of his act and that what he was doing was wrong and contrary to law. On this legal concept of insanity no amount of queerness in habit, morbidity of temper peculiarities of character or eccentricities of behaviour, or even aberrations of mind resulting in abnormality will constitute insanity for the purpose of section 84 although they may be relevant factors for determining whether or not the accused was insane (PLD 1974 Pesh 90). Therefore if the cognitive faculty, is not impaired and the accused knows that what he is dong is either wrong or contrary to law, he is not legally insane. Merely being subject to uncontrollable impulses or insane delusions or even partial derangement of mind will not do, nor mere eccentricity or singularity of manner. If there is evidence of premeditation or design or evidence that the accused after the act in question tried to resist arrest or run away, the plea of insanity will be the act in question tried to reist arrest or run away, the plea of insanity will be negatived (PLD 1976 Lah 805). When there is positive evidence on record stating that at the time of commission of the offence of murder, there is every possibility of the accused being mentally ill, he should be given the benefit of sectin 84 of the Penal Code and to be sent to the Mental Hospital (Darshan Singh Vs. Superintendent Customs (Prevention) R.S. Pora; 1990 (1) Crimes 608 (Ap).

Where the appellant did not behave like an insane person. He was selective in choosing his enemies and attacked and killed only those persons who were connected directly or indirectly with a certain family. If he would have been a person of deranged mind he would certainly have remained available at the spot because he would have been hardly conscious of his acts but he ran away from the place of occurrence in order to avoid his arrest. He further acted in a crafty manner by concealing the weapon of offence which shows that he was capable of thinking and was acting with design. His plea of insanity cannot be accepted (1976 PCrLJ 82). The person facing charge of murder, to avail defence of insanity, must establish that at the time of commission of offence he was suffering from a disease of mind so severe as to render him incapable of knowing the nature and quality of the act or of knowing that the act was wrong or contrary to law (Radhakrishnan Nair vs. State of Kerala

1988 (2) Crimes 574 Ker). The crucial point of time at which unsoundness of mind has to be proved is the time when the crime is actually committed (Gour Chandra Vs. State of Orissa; 1990 (1) Crimes 169 Ori).

Unsoundness of mind at the time of commission of an offence is a ground for not inflicting the extreme penalty under section 302 (AIR 1933 Rang 144). Where there is no enmity and it is proved that murder was committed only on account of inanity and the accused had a previous history of insanity, the convictin should be set aside by the High Court and the case may be referred to Government for orders as to how the accused may be dealt with (PLD 1975 Pesh 109).

"Section 84 of the Penal code lays down that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. In the instant case, there are several circumstances, namely that the accused was sitting near the dead body without running away, that he also put the cut lemon, turmeric and sindur near the dead body and curiously, he was also treated for unsoundness of mind coupled with the evidence of P.W. 1 who deposed that at the time of commission of the offence, there is every possibility of the accused being ill. Therefore, we think that this is a case where the accused should be given the benefit of section 84 of the Penal Code. In the result, the conviction and sentence are set aside. However, in view of the positive evidence that the acucsed is a mental patient, he shall be sent to a Mental Hospital either at Visakhapatnam or at Hyderabad as provided under section 335 of the Criminal Procedure Code where he shall be detained till such time as he is cured" (Sudabonia Mallaiah Vs. State 1990 (1) Crimes 608 AP).

67. **Lapse of time as a ground for commutation of death sentence**.- Mere delay in disposal of appeal is no ground for awarding a lesser penalty in a murder case (PLD 1984 (AJ&K) 82=1984 PSC 548; 1987 PCrLJ 2476). Delay of about two years or so in the disposal of the death reference case and the jail appeal in the High Court Division can not by itself by a ground for lessening the sentence (Abdul Khair vs. State (1990) 42 DLR (AD) 171). Delay by itself is no extenuating circumstnces for commuting the sentence. There must be other circumstances of a compelling nature which together with delay will seek commutation ((1992) 44 DLR (AD) 225). Procrastination in conclusion of trial or disposal of appeal per se, was not a valid reason for commutation of death sentence (1987 SCMR 1177).

If a person commits cold-blooded murder for which there are no mitigating circumstances, he cannot escape the punishment of death merely on the ground that there had been delay in final disposal of the case. Because in law, if a case is proved under section 302 normal sentence provided in law is death and delay in the disposal of the case, per se, is not a legal ground for awarding lesser sentence (1987 SCMR 1059).

Condemned prisoners were under peril of death sentence for almost 3 years suffering agony and torments thereby partially purged their guilt. Their life may be spared. Sentence of death commuted to one of imprisonment for life (Abul Kasem Vs The state (1990)42 DLR 378)= 1990 BLD 309). Undue long delay in execution of the sentence of death entitles the condemned person to approach Supreme Court for substituting the sentence to that of imprisonment for life (Smt. Terivenipen vs. State of Gujarat etc. 1988 (3) Crimes 771 (SC).

Excessive delay of 6 years may be considered for commutation of death to life imprisonment. Delay by 2 years and seven month can not be called as mitigating circumstances. The fact that the accused is an old man of 60 years is not a ground for

taking a lenient view (Nowsher Ali Vs. State (1987) 39 DLR 57). Undue long delay in execution of the sentence of death will entitle the condemned person to approach Supreme court to consider the question of commutationof sentence of death into imprisonment for life (Smt. Triveniben etc. Vs. State of Gujarat etc. 1988 (2) Crimes 771 (SC).

What constitutes extenuating circumstance is not capable of any precise formulation. It has to be judically determined in the facts of each particular case. Among other things, grave and sudden provocation has some times been considered as an extenuating circumstance. Delay in execution of death sentence for want of confirmation cannot by itself constitute mitigating circumstances but abnormal and excessive delay may be considered for commutation of death sentence to life imprisonment. Delay of about two years or so cannot by itself be ground for awarding lesser sentence. There was nothing in the circumstances of the case and in the conduct of the acused to take a lenient view in the matter of the sentence to temper justice with mercy (Abed Ali Vs. State 1990 BLD (AD) 89).

No premediation for causing murder condemned prisoner having two minor children (the younger one being only 20 days old on the date of occurrence). Regard being had to the facts and circumstances, the conviction under section 302 of the Penal Code upheld but the sentence of death to meet the ends of justice altered to life imprisonment (State Vs. Kalu Bepari (1990) 10 BLD 373 (16,25 and 26).

Where it was contended that having regard to the fact that six years have elapsed since the occurrence, the capital sentence imposed upon the appellant accused should be commutted to life imprisonment. It cannot be disputed that six long years have elapsed since the occurrence and it would be really hard to confirm the death sentence imposed upon the appellant accused. Moreover, the appellant accused was not responsible in any manner for such lapse of time that has occurred. Therefore the sentence of death was converted to life imprisonment (AIR 1979 SC 702 (705).

It is well settled now that undue long delay in execution of the sentence of death would entitle the condemned person to approach Supreme Court or to be approached under Art. 2 of the constitution, but the Supreme Court would only examine the nature of delay caused and circumstances that ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to reopen the conclusions reached by the Court while finally maintaining the sentence of death. But the Court is entitled and indeed obliged to consider the question of inordiante delay in the light of all circumstnces of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay can be considered to be decisive (Modhu Mohta Vs. Union of India 1989 CrLJ 2321 (2326) SC=AIR 1989 (SC) 2299).

In some cases inordiante delay in the execution of death sentence may be considered a ground for commuting it to transportation for life but some delay such as in this case shoud not be considered to be a ground for commutation, particularly when the delay is not due to any laches of the prosecution. Section 302, which punishes 'murder' does not specify in which case death sentence should be given and in which case transportation for life to be awarded, but leaves the matter to the discretion of the Court. Every case should be considered in the facts and circumstances of that case only. In view of ext. 9 there is no hestitation in saying that bitter matrimonial relationship played a part in this nefarious situation and while inflicting sentence such relationships cannot be overlooked. In this case, ends of justice will be met if the three appellants are sentenced to transportation for life

instead of death (Nausher Ali Sarder Vs. The State (1987) 39 DLR (AD) 194 (para 11)= 1987 BLD (AD) 324).

Where the delay involved inthe execution of the sentence was owing to the time taken by the judicial process invoked by the appellant at the appellate stages, the death sentence passed against him was upheld (1975 CrLJ 66 SC; 1986 CrLJ 1326; AIR 1986 Mad 204 DB). Where the murder was ruthless and cold blooded and there was no extenuating circumstances, held the accused were rightly sentenced to death (AIR 1968 SC 43 (46).

The accused, who had committed a series of murders, prayed before he supreme Court that thier death sentence should be commuted to life imprisonment as the same was hovering over their minds for about five years. Having regard to the magnitude of their crimes, the gruesome nture of the offences and the manner in which they had perpetrated them, it was held that any lincency shown to them in the matter of sentence would be misplaced (980 Cr LJ 971 (SC) ; 1983 CrLJ 960 (SC). But in another case, where the occurrence took place about eight years back and the accused was convicted by the trial Court but acqutted by the High Court and the appeal agaisnt acquittal remained pending for about five years, it was held that though the murders committed were extremely gruesome, brutal and dastardly, extreme penalty was not called for in the circumstances of the case (AIR 1981 SC 1142 = 1981 Cr LJ 1034.).

Supreme Court, in appropriate cases, even after the impostion of sentence of death has commuted that sentence to one of life imprisonment by exercising its extraordinary powers when this Court felt that the execution of that sentence was not justified on account of the subsequent supervening circumstances namely, the undue long delay which has elapased since the confirmation of that sentence by the Supreme Court (Jumman Khan v. State of U. P. 1991 (1) Crimes 152 (SC). The only relief a convict awaiting execution of death sentence, can get from Supreme Court on the ground of unreasonable delay is the conversion of death sentence into that of life imprisonment and on such jconversion the accused would not be governed and dealt with as a life convict for all purposes (Days Singh V. Union of India & ors. 1991 (2) Crimes 181 (SC).

In AIR 1983 SC 361=1983 Cr LJ 481, it has been held that delay exeeding two years in the execution of a sentence of death should be considered sufficient ground for commutation sentence of death. But the above view as dessented in AIR 1983 SC 465=1983 Cr LJ 803, and held that the fixation of time limit of two years did not accord with the common experience of the time normally consummed by the litigative process and the procedeeding before the executive and that there were also other factors besids the delay to be taken into account while considering the question whether the sentence of death in a particular case should be vacated. The specific reasons were held out for not accepting the two years formula. They were . (1) that it ran against the teeth of common experience regarding the time generally occupied by the litigative process and the proceeedings, before the executive; (2) that the Corut must find why the delay was caused and who was responsible for it and the accused had not resorted to a series of untenable proceedings for delaying or defeating the ends of justice. and (3) the nature and gravity of the crime comitted by the accused must also be taken into account.

Inordinate prolonge and callous delay of ten years or more occasioned entirely by the prosecutions default, in the constext of reversal of clean acquittal in a capital charge, would be *per se* prejudicial to the accused (1985 Cr LJ 1782 Pat (FB).

68. **When charge proved against several accused.**- Where a number of accused persos are found guilty of the offence under section 302 and 149, the trial Judge can award sentence of death of all the accused persons or to only a few depending upon the facts and circumstances of the case. He should not, in each and every case, be unduly moved by the factor that it was not known who had inflicted the fatal injury or caused injuries which by themselves would have been sufficient to cause death as penalty when the accused persons have acted brutally in committing a preplanned murder. What is necessary is that there should be no discrimination and all the accused persons equally placed be awarded the same sentence (AIR 1956 SC 746; AIR 1953 SC 364; (1964) 2 CrLJ 75 (dAll).

Nine murders were committed in brutal way and in indiscriminate manner by group of persons. The High Court granted death sentence to some accused persons and some were sentenced to rigorous imprisonment for life. The Supreme Court modified the order and sentenced all of them to rigorous imprisonment for life in view of the fact that there was no evidence as to which the accused persons had used his fire-arm on particular victim (1970 SC Cr R 312).

Whether or not sentences of death should be imposed on persons who are found to be guilty not because they themselves committed the murder, but because they were members of an unlawful assembly and the offence of murder was committed by one or more of the members of such an assembly in pursuance of the common object of that assembly, is a matter which has to be decided on the facts and circumstances of each case (1979 SCMR 35). Where several persons have been found guilty of deliberate intention to murder, there is no justification for refraining from passing a death sentence on all concerned, merely because it cannot be said which of the accused struck the fatal blow (NLR 1981 CrLJ 287). If on the facts of a given case, law and justice demand a heavier toll for the extinction of a single life at the hands of more than one culprit, it has to be exacted (22 DLR (SC) 364).

Where three persons perpetrated a gruesome murder in a blatant manner pursuant to an agreement between them, there is no scope for any compunction being shows to any one of the accused. The mere fact that one of the co-accused had not fired a shot at the deceased was not sufficient reason for awarding him a lesser sentence (1968 PCrLJ 906). Where five persons are convicted under section 302 for the murder of two men, the reasoning that five persons should not be sentenced to death for the murder of two is not in accordance with law and cannot be sustained (AIR 1937 Pat 497).

Where all accused are found equally guilty of murder, they should all be awarded equal punishment. The court sentenced seven persons to death for the murder of seven persons (NLR 1982 CrLJ 136). Where some fo the accused have been dealt with leniently while others have not been so treated, a severer sentence may not be reduced on the ground that others have been dealt with leniently, nor need the lenient sentence be enhanced because others are sentenced to a more harsh punishment, provided that the lenient sentence is a legal sentence (AIR 1938 Rang 331). But where role attributed to all the convicted accused was similar and all the five fatal injuries had not been caused by accused appellant alone, his liability was the same as that of other accused. Death sentence awarded to accused appellant was altered to life imprisonment but amount of his fine was enhanced (1988 SCMR 443). Where co-accused who also had fired one of the fatal shots had been awarded sentence of imprisonment for life and neither, state nor complainant had filed any revision for enhancement of his sentence, death sentence awarded to accused was altered to imprisonment for life to maintain the rule fo consistency (1988 PCrLJ 1059).

Where the accused are convicted of an offence under section 302/34, they are all equally guilty and ordinarily they should all be sentenced to the same punishment, unless there are some extenuating circumstances in favour of an accused which qualify him for the lesser sentence (PLD 1963 SC 109). Where death sentence is considered proper sentence, all the accused should be awarded the same punishment (AIR 1963 Ori 144). Where common intention to commit murder is clear, the accused holding the deceased and the one giving the fatal blow are equally liable (1976 PCrLJ 685). But where co-accused, mother of three children including a suckling baby, did not cause any injury to deceased but facilitated commission of murder by catching hold of his legs, her sentence of death was altered to imprisonment for life (1987 PCrLJ 1178).

Where two accused persons commit a murder under the influence of the main accused, the latter may be sentenced to death whereas the other two to imprisonment for life (PLD 1977 SC 14). Where there were several accused persons and it was not clear as to whose shot was fatal (1985 SCMR 479), or who gave the fatal blow could not be ascertained, all the accused may be sentenced to imprisonment for life (1979 PCrLJ 455; 1968 SCMR 502).

Where the common object of an unlawful assembly is the beating of a person and death is not intended but is the likely consequence of riot, death sentence is withheld from those who are only constructively liable, but is imposed on the particular member of the unalwful assembly who brought about the death (AIR 1953 SC 364; 1979 PCrLJ 877). Where one of the accused was armed with a pistol but others were armed with lathis and spears and death was caused by a pistol shot fired by the accused at the bidding of another. It was held that the accused who fired the fatal shot may be sentenced to death while other may be sentenced to life imprisonment. The fact that the shot was fired on the bidding of another was immaterial (AIR 1959 SC 572).

Where a number of accused persons are found guilty of the offence under Section 302 and 149, the trial Judg can award sentence of death of all the accused persons or to only a few depending of death of all the accused persons or to only a few depending upon the facts and circumstances of the case .He should not , in each and every case, be unduly moved by the factor that it was not known who had inflicted the fatal injury or caused injures which by themselves would have been sufficient to cause death as penalty when the accused persons have acted brutally in committing a preplanned murder. What is necessary is that there should be no discrimination and all the accused persons equally placed be awaredd the same sentence (AIR 1956 SC 746= (1964) 2 CrLJ 75 (All). AIR 1953 SC 364, Rel. on.

Nine murders were commmitted in brutal way and in indiscriminate manner by group of persons. The High Court granted death sentence to some accused persons and some were sentenced to rigirous imprisonment for life. the Supreme Court modified the order and sentenced all of them to rigorous imprisonment for life in view of the fact that there was no evidence as to which the accused persons had used his fire-arm on particular victim (1970 SC Cr R 31).

It cannot be laid down as a rule of law that in every case where it is not possible to allocate the wound inflicted to a particular accused, lesser penalty should be given. Where a group of persons brutally murdered the deceased, they all deserve the same punishment. But there may be cases where part taken by each of the accused may vary , one of the accused taken a part and other taking a subsidiary Part, though their common object is to commit murder. In such a case, perhaps, there may be a good ground for differentiating the accused for inflicting punishment. Where it was fund that all the accused who were guilty of murder were in the habit of manufacturing

illicit toddy and were drunk as ususal when they committed the murder, but had not primed themselves with drink for the purpose of committing the murder, it was held that this was sufficient extenauting circumstances for awarding the lesser punishment of transportation for life (1955 CrLJ 181 = AIR 1954 Andhra 46).

Several accused were charged under section 302 read with Section 34 for having committed murder of two persons .The Sessions Judge while finding the accused guilty under section 302 read with section 34 awarded the sentence of death to three of them as they were armed with deadly weapons. the other two were sentence to imprisonment for life. It was held that no distinction in sentence could be made on the ground that some of them were armed with deadly weapons. If two of them were awarded the lesser punishment of imprisonment for life, there was equally good reason that the other should have been awarded the same penalty. [(1963) 1 Cr LJ 55= AIR 1963 MP 29; AIR 1956 SC 754)].

In a conviction of the accused persons , four were awarded death sentence and rest imprisonment for life. Distinction was made by lower Court on the ground that they were armed with fire arms and they all fired at the deceased and one had given a hatchet blow. There was no clear evidence that three accused had simultaneously fired. It was held that possibility of any one or two of them having fired three shorts in succession could not be ruled out, that further, inasmuch as the other accused also were armed with equally dangerous weapons, such as spears and bankas, the distinction made out by lower Court being not sustainable and that proper punishment to be awarded to the four acused in absence of clear evidence as to who inflicted the fatal blows would be the same punishnment as imposed on the rest. (1968 Cr LJ 1655 = 1967 SCD 1097= AIR 1968 SC 1402).

69. **Sentence of fine**.- When a Court imposes a sentence of fine also under Sec. 302, Penal Code, then obviously the Court has got to give reasons why a sentence of fine also was being imposed for the simple reason that a sentence of fine over and above the substantive sentence is deemed to be in excess thereof and it has always been thought desirable to give reasons for imposing the excess penalty, so to speak. A sentence of fine in a murder case looks appropriate only where the murder has been motivated by monetary gain (A.I.R. 1957 All. 317 (391)= 1957 Cr .L.J. 498). It is only suitable in cases where the Court thinks that the justice of the case will be met by inflicting a substantial fine, but at the same time thinks that a short term of imprisonment in addition will serve as a salutary lesson to the accused or in cases where the accused has profited financially by his misdeeds (A.I.R. 1957 All. 764 (765)= 1957 Cr.L.J. 1205).

The Court has the discretion to impose or not to impose a fine sentence also in addition to the sentence of imprisonment for life (Sebastian @ Kunju V. State of Kerala 1992 (3) Crimes 864 (865).

It is not necessary to pass a sentence of fine after inflicting life sentence (AIR 1956 Bom 711) , except where compensation to the heirs of the deceased is contemplated (PLD 1969 Lah 319), or when murder is motivated by monetary gain (AIR 1957 All 317 = 1957 Cr LJ 498) .Where the deceased was a young man of 25 years, the accused was orderd to pay TK 50.000 to his father as compensation was not shown to have possessed any property, trial Court could make no order as to award of compensation to heirs of deceased (1985 P Cr LJ 181).

Where the convict was a young lad who had no property the High Court remitted the fine on the ground that it will not meet the ends of justice to render his parents paupers for the fault of their son (PLD 1967 Pesh 25).

The sentence of fine for an offence of murder is wholly in apposite (1957 Cr L J 498). Where the appellant had been under a sentence of death for a period of six years, the same was reduced to one of imprisonment for life while a fine of Rs. 10,000 was directed to be paid, if collected, to the apppellant's sister -in-law and her children (1979 SCC (Cri) 897).

Where the question before the suprem Court was with regard to the propriety of a fine of Rs. 20,000 imposed upon the appellant by the High Court in addition to a sentence of imprisonement for life for having committed an offence of murder, it was held that though the High Court had the power to impose upon the appellant a sentence of fine along with a sentence of life imprisonment for an offence under S. 302, that power was generallly sparingly exercised because the sentence of death or of the grave penalty a sentence of fine was hardly calculated to serve any social purpose. The fine of Rs.20,000 was considered unduly excessive and was reduced to Rs. 3,000 by the Supreme Court (1977 Cri LJ 992 (SC) . Where the accused was sentenced to life imprisonment and a fine of Rs. 500 in a bride burning case, on appeal, the Supreme Court set aside the imposition of fine (1987 Cri LJ 537 (SC): AIR 1987 SC 692).

70. **Enhancment of sentence by the Appellate Court**.- The High Court both in exercise of its revisional jurisdiction under section 397 (old section 435) read with section 401 (Old section 439) of the Cr. P.C. and its appellate jurisdiction under section 377 read with section 386 (c) (old section 423) of Cr. P.C. in matters of enhancement of sentence should give the accused a reasonable opportunity of showing cause aginst such enhancement as contemplated under the first proviso to section 386 as well under sub-section (3) of section 377 of the Code. As pointed out in Surjit Singh's case (1984 (Supp) S.C.C. 518), the rules of natural justice as also the prescribed procedure require of issuing notice to the appellant and affording an opportunity to be heard on the proposed action for enhancement of sentence (Gavind Ramji Jadhar Vs. State of Maharashtra 1990 (2) crimes 256).

In an appeal against conviction, the court can alter nature and or extent of sentence but not so as to enhance the same (Govind Ramju Jadhav Vs. The State of Maharashtra 1990(2) Crimes 257 SC).

High Court can enhance sentence suo motu in an appeal by accused under revisional power only by issuing notice of enhancement and hearing the convicts on the question of inadequacy of sentence (Sahab Sing Vs. State of Haryana 1990 (2) Crimes 97 (SC); 1990 (1) SC 303). The power of issuing Rule for enhancement of sentence suo motu exists with the High Court. The power is however to be exercised sparingly and with great restraint (Rangta Majhi Vs. state of Assam 1988 (2) Crimes 744 (Gau).

In Surjit Singh and orthers Vs. State of Punjab 1984 (Supp) SCC 518 the facts disclosed that the High Court while disposing an appeal preferred under section 374 sub-section (2) enhanced the sentence by imposing additional sentence of fine of Rs. 5,000/- with a default clause in addition to the sentence of life imprisonment inflicted by the trial Court without issuing show casuse notice and without affording an opportunity to be heard. Indian Supreme Court while allowing the appeal held thus :

"Rules of natural justice as also the prescribed procedure require that the sentence imposed on the accused cannot be enhanced without giving notice to the appellants and the opportunity to be heard on the proposed action."

Accused committed two murders, one for a very insignificant motive and other seemingly without any motive. Both murders of two real brothers were committed by

accused in cold blood without any provocation, but in spite of that, trial Court imposed lesser penalty of imprisonment for life merely on plea of medical evidence. Held, when it was proved that accused was guilty of cold-blooded murder, normal punishment for that offence should have been death and there should be very strong extenuating circumstances to justify imposition of lesser penalty of imprisonment for life. No extenuating circumstances existing to justify imposition of a lesser penalty. High Court in exercise of its suo motu jurisdiction enhanced sentence to death (Fayyaz Ahmed Vs. State 1989 PCrLJ 784).

71. Duty of the court to arrange for defence of the accused.- There can not be a proper trial where an accused charged for murder remains undefended in the trial. The trial of such an accused is vitiated (State V. Tikaram Haneri, 1970 CrLJ 780, 781). No trial is valid if held against a person who is incapable of making his defence (Dhani Ram Vs. State of Himachal Pradesh; 1990(1) Crimes 144 HP). Since the accused did not have a proper defence at the trial the whole proceeding was vitiated (32 DLR (1980) 254).At no stage of trial neither any counsel was engaged by the accused nor the Court itself appointed any counsel to defend the accused at State expense despite the concusion that the accused was of sound mind. Accused having not been provided the essential legal assistance to defend him at the trial, the trial was vitiated as same was not in accordance with law. Conviction and sentece of the accused were set aside and case was remanded for holding the trial in accordance with law after providing proper legal assistance to the accused (Zafar Ahmad Vs. State 1992 PCrLJ 493).

Section 340, Cr.P.C. provides that any person accused of an offence before a criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by an advocate. The section gives due recognition to the right of any person hauled up before the criminal Court to answer any charge or accusation to be defended by an advocate or his choice.

In the case of State Vs. Jahurul Ali,(1994) 42 DLR 94, the High Court Division has held that accused facing trial on capital charge is entitled to be defended by a lawyer even if the trial is held is absentia.

In this connection reference was made to provision laid down in chapter XII L.R. Manual 1960 which reads thus :

"Every person charged with committing an offence with death shall have legal assistance at his trial and Court should provide an advocate as to plead for the defence unless they certify that accused can afford to do so".

The High Court Division held :

"Since the learned Sessions Judge did not take any step to make the proper arrangement for their defence during trial at the cost of the state, thereby the condemned prisoners were denied of their substantive right of being defended though their trial was held in absentia and the entire trial stands vitiated on account of prosecution witnesses being not cross-examined."

It is obvious that the provisions in legal Rememberancer's Manual, 1960 Chapter XII were made in aid of section 340 of the Code of Criminal Procedure with the manifest intention that the aid must by given in a manner so that the Advocate appointed to defend the accused gets an adequate opportunity of preparing the case for the defence and if necessary in consultation with the accused. But a last moment appointment of an Advocate for defending a prisoner, accused of capital sentence, results in a breach not only of the provisions of section 340 Cr. P.C. but also of 6th paragraphs of Chapter XII of the Legal Rremembrancer's Manual, 1960 and this kind of appointment frustrates the object behind the elaborate provisions of that Chapter

(Abdur Rashid Vs. The State; (1975) 27 DLR (AD) 1(2); State V. Hanif Gani 1993 BLD 260).

An accused who has no sufficient means, has a statutory right to be defended at the expenses of the state in respect of a trial before a Court of Session (Kannan Vs. State of Karala, 1992 (2) Crimes 1068).

In India section 304, Cr. P.C. has created a statutory right to an accused without sufficient means to be defended at the expenses of the State in respect of a trial before a Court of Session. Thus a duty cast upon the court to assign a pleader for the accused. Section 304 provides that where, in a trial before the ourt of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has no sufficient means to engage pleader, the Court shall assign a pleader for his defence at the expence of the State.

In Suk Das vs. Union Territory of Arunachal Pradesh (AIR 1986 SC 991= 1986 CRLJ 1084), the Indian Supreme Court has held that free legal assistance at state cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by article 21 of the constitution (followed in Nekram vs. State of M.P. 1988 CrLJ 1010 MP).

Conviction of a person charged with committing an offence punishable with death without his being represented bya lawyer is illegal. "Every person charged with committing an offence punishable with death, shall have legal assistance at his trial and the Court should provide an Advocate or to plead for the defence unless they certify that the accused can afford to do so."

Late appointment of defence lawyer in murder trial by the Court result in the prejudise of the accused and that owing to this reason the sentence of death is liable to be set aside sending back the case for retrial (27 DLR (1975) 29).

When the accused had thought of making his defence by engaging a Senior Counsel of his choice, but services of the Senior Counsel, it appears, were not available to him for one or other reason. The records do not show if the accused was told of his rights and he had consented to conduct of the case in the case of the Senior Counsel by his junior. That is a serious infirmity in the trial and therefore, on this short ground the conviction of the accused for want of opportunity to make proper defence is bad (1986 Cr. LJ 1201 (1202) Knt).

72. Duty of the prosecutor.—The prosecutor has to be fair in the presentation of the prosecution case. He must not suppress or keep back from the Court evidence relevant to the determination of the guilt or innocence of the accused. He must present a complete picture and not one sided picture. He must not be partial to the prosecution or to the accused. He has to be fair to both sides in the presentation of the case (Probhu Dayal vs. State 1986(1) Crimes 3(9) Delhi).

Court or Judges cannot be expected to be fully conversant with the intricacies of evidential law and the criminal procedure and therefore, Judges have a right to expect assistance from counsel and more particularly from counsel instructed on behalf of the State (AIR 1957 Mad 379; ILR 1957 Mad 412; AIR 1942 Bom 71 FB). The Public Prosecutor is supposed to assist the Court in dispensing justice.The minmum which is expected from him is to satisfy himself after going through the relevant record that there could be no objection. (State of Maharashtra . Editor, Nagpur Times, (1990) 3 Bom Cr 57).

It is futile to equate the office of the public prosecutor with a political office. The public prosecutor holds a public office and is charged with the duty of so acting

as to best serve the interest of administration of justice. His appointment is not due to hs political affiliation, but in recognition of his merit as a competent and honest lawyer. He is not to be dictated by the Governement, and in all cases must give his honest opinion. He is appointed by the Government, objectivity and impartiality are the hallmarks of that office. (Udai Nath Roy V. State of Bihar, (1993) 1 BLJR 242 (246): (1993) 1 BLJR 225: 1993 BBCJ 97: (1992) 1 PLJR 258 (DB).

The prosecutor is an officer of the Court expected to assist the Court in arriving at the truth in a given case. The prosecutor no doubt, has to vigorously, and conscientiously prosecute the case so as to serve the high public interest of finding out the truth and in ensuring adequate punishment to the offencer. At the same time,it is no part of his duty to secure, by fair means or foul, conviction in any case. He has to safeguard public interest in prosecuting the case; public interst also demands that the trial should be conducted in a fair manner, heedful of the rights granted to the accused under the laws of the country including the Code. The Prosecutor, while being fully aware of his duty to prosecute the case vigorously and conscientiously, must also be prepared to respect and protect the rights of the accused (Narayanakutty Vs. State of Kerala, 1982 Cr. LC 597 at 600 (Ker).

Secondly, though, it is the duty of the Public prosecutors to prosecute and not to prosecute, it is equally their duty that in the abduction of evidence they should press the case against the accused fairly and fairlessly and with a full sence of the responsibility that attaches to their position as prosecutors. The guilt or the innocence of the accused is to be determined by the Tribunals appointed by law and not according to the predilections of the Public Prosecutor or his desire to stand well with defending counsel or to acquire cheap popularity (AIR 1935 Rang 370 FB; ILR 13 Rang 570).

Thirdly, as has been repeatedly laid down by their lordship, of the Privy Council it is not necessary that the prosecution must call all witnesses irrespective of considerations of reliability, or that the prosecution ought to discharge the functions both of prosecution and defnece. Witnesses essential to the unfolding of the narrative on which the prosecution is based must, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution. There is no obligation on the prosecution to call every witness who may speak to something having direct or indirect bearing on the offence. An extreme position has sometimes been taken up by some courts that it is the duty of the prosecution to adopt an-attitude of non-committal to any version of the case and to examine all witnesses alleged to have known something about the offnece, whether or not they will support the prosecution case and whether or not the prosecution regards them as true or false or necessary or unnecessary or merely repetitive and futile. This position is not acceptable. it is the duty of the prosecution to put forward a definite case and to refrain from calling witnesses whom it regards false or unnecessary or repetitive and futile (AIR 1954 SC 51).

Non-examination of some witnesses by prosecution will not adversely affect the prosecution case, where sufficient and reliable eye-witnesses were already examined (1972 CrLJ 1552). Non-examination of some witnesses by prosecution can vitiate the trial, if it is due to oblique motive (1971 Ker LT 761; ILR 1971 (2) Ker 381).

The public prosecutor should be required to examine the witnesses in their proper order so as to bring out facts in their logical sequence, and particularly the expert witnesses, such as the medical witness ought not to be examined at an early stage of the trial, when it is impossible to realise on what points their opinion is necessary (AIR 1941 Rang 209). It is the public prosecutor's privilege and discretion to detrmine the order in which witnesses should be produced and examined subject

to the limitations of section 135 of the Evidence Act. The public prosecutor should not examine the medical witness as P.W. 1 before other witnesses (Md. Abdul Wahab Vs. State 1990 BLD (AD) 280).

The Government Advocates or public Prosecutors who appear in the case while arguing a bail applciation should maintain an upto date record so that he can furnish the details whether earlier a bail applciation had been moved or not (Banwari Vs. State of Rajashthan 1990 (2) Crimes 58 Raj).

It is not open to the prosecution to adopt a device to keeping back eye-witnesses because the witnesses are likely to go against the prosecution. The prosecution owes a duty to the Court to be fair. Its obligation is not to see that an accused is convicted. Its duty is to see that the truth is reached and jsutice is done.Where, however, it chooses not to examine any of the witnesses named in the FIR, or the complaint, it ought to bring on record the reasons which implied it not to examine them. Where it does not come forward with any explanation, adverse inference is available to be drawn that had the witnesses been examined, the evidence would have gone against the prosecution. However, where a number of persons have witnesse the occurrence, it is open to the prosecution to make a fair and honest selection and the purpose should not be to suppress independent witness. Where the witnesses named in the FIR are withheld without any explanation and witnesses not named in the FIR are examined to support the prosecution version, that introduces unless explained a serious infirmity (State of Orissa vs. Dayal @ Dayanidhi Ghose 1988(2) Crimes 302 Ori).

It is the duty of the public Prosecutor as well as the defence lawyer to help the Court with all material facts by putting it in evidence including previous statements of the witnesses which are contradictory in material particulars for deciding the involvement of accused with the crime. In their failure, it becomes the duty of the Court, in appropriate cases, to peruse the case diary and statements under section 164 for ascertaining the credibility of the witnesses and probability of the prosecution case. The Court is entitled to do this under section 172(2) of the Code of criminal Procedure. Statements in the case diary and under section 164 are important materials, although not substantive evidence, in a criminal trial,to test the credibility of the witnesses by contradicting them in the manner provided under section 162 of the Code of criminal Procedure and under section 162 of the code of criminal Procedure and under section 145 of the Evidence Act. Inadequate cross-examination in serious offence casts a duty on the Court to peruse the case diary and the statements under section 164 to discover the truth of the allegation for the interest of justice. The meterial facts had not been placed before the tiral Court and had these been brought into evidence, the involvement of the accused could be found either false or doubtful (Abdul Hamid and others Vs. State of assam 1988 (2) Crimes 438 Gau).

73. Interference by Supreme Court.- Ordinarily Supreme Court should not interfere with the judgment of acquittal unless there are glaring infirmities in the judgment of the High Court resulting in gross miscarriage of justice (State of U.P. Vs. Pheru Singh etc. 1989 (2) Crimes 124 (SC)=(1987) 39 DLR (AD) 166). Where in appeal against aquittal, Court finds that prosecution evidence is of an unimpeachable nature and affords no scopoe for two views being taken, and one of them being more plausible than other then interests of justice call for its reversal (State of Uttar Pradesh Vs. Chet Ram and others (1989) 2 Crimes 13 (SC). In case of acquittal by the

High Court there has always been an aversion not to interfere with the findings of the High Court unless there has been "something so irregular or outragenous to shock the very basis of justice" (State Vs. Fazal (1987) 39 DLR (AD) 166; AIR 1917 PC 25 rel on).

In an appeal aganst acquittal, the order of acquittal passed by lower Court should not be interferred with when the reversal of the order after more than 11 years would lead to injustice rather than advancing the cause of justice (State of Dhuda Singh 1989 (2) Crimes 31 Raj).

In an appeal against acquittal, if on the evidence brought on the record, the Appellate Court feels satisfied that the accused has been illegally acquitted then in that case it is its hounden duty to pass necessary legal order of conviction even after lapse of 9 years period (State of Guj. Vs. Luhar Mithu @ Ismail 1990 (2) Crimes 401 Guj).

Where reasons given for conviction of accused were fairly sound but at the same time the reasons given by High Court for acquittal cannot be characterised as perverse or wholly unsound; the Supreme court will not disturb acquittal (State of Kamataka vs. Embichi, Ahmed 1990 (2) Crimes 282 (SC). A concurrent finding of fact cannot be re-opened in an appeal by special leave unless it is shown by error apparent on the record that substantial and grave injustice has been done (Ashok Kumar Chatterjee Vs. State of MP. 1989 (2) Crimes 423 SC).

When there is overwhelming evidence on record pointing to the guilt of the accused and the High Court committed a grave error in lightly brushing it aside and reversing the order of conviction recorded by trial Court, the Supreme Court can restore the order of conviction even in an appeal aginst acquittal (Kanti Kumari Roy vs. Suresh Kumar Roy and others 1990 (3) Crimes 235 SC). Where Courts below have given sound reaosns for acquittal Supreme court cannot interfere with their findings (The State of Gujarat vs. Rasulmiyan Ahmedmiyan Malek and others 1990 (3) Crimes 31 SC). Where the High Court acquitted the appellants but it found that there were some non-apealing accused whose case rested on the same evidence and who were also entitled to the benefit of doubt, it may acquit them in exercise of sou motu power of revison (1975 PcrLJ 195).

Although it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, but this jurisdiction should be exercised only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been flagrant miscarriage of justice (Madan Mohan Bag Vs. Naba Kumar Adhikari and State 1990 (3) Crimes 369 Cal).

A Court of revision will not interfere with the judgment of subordiante Court or the finding arrived at there unless there is gross violation of the procedure or perversity in the reasoning resulting in miscarriage or total failure of justice (Ashoke Kumar Rough Vs. Smt. Sovana Routh ; 1990 (1) Crimes 492 cal).

On going through the evidence on record, if the other view of convicting accused was possible, even the High Court should not lightly interfare with finding of acquittal unless it is proved to be perverse (Vora Mohammad Hussain Faidahusen vs. Doshi Talachchand Durlabhdas and others. 1990 (3) Crimes 363 Guj). When two views are possible and the Court, below has taken a plausible view, the order of acquittal cannot be interferred with on an appeal (Manish Kumati Jena alias Mohanty Vs. Purna Chandra Mohanty and others 1989 (2) crimes 246 Ori).

In an appeal against acquittal, if two reasonable views are possible, the view leaning towards innocence of the accused can be accepted even if the other view is reasonably possible (The State of Maghalya Vs. Johan Francis Manliana 1988 (2) Crimes 546 Gau).When two views are possible and the Court, below has taken a plausible view, the order of acquittal cannot be interfered with an appeal (Manish Kumar Jena alias Mohanty V. Puras Chandra Mohanty and others. 1989 (2) Crimes 245 (Ori).

74. **Order of retrial.**- In an appeal against conviction, the order of retrial can also be made, but that must be in exceptional cases when the ends of justice require. Appeal must be decided on merits in case the evidence is sufficient (Dina Nath Mishra vs. State of U.P. 1988 (2) crimes 689 All).

75. **Bail**- It is not the *prima facie* case against the acccused but 'reasonable grounds' for believing that he has been guilty which prohibit granting of bail. The onus is on the prosecution to disclose those reasonable grounds. court has to examine the data available in the case to find out whether reasonable grounds exist to connect the accused with the crime alleged (Shaikh Shahidul Islam Vs. State; 44 DLR (AD) 192).

Where there is *prima facie* case of accused in grave offences and apprehension of tempering with evidence if released on bail; bail cannot be granted even if accused is suffering from heart trouble or is the only earning member in family (Venkataramanappa and others. vs. K.R. Subramany Setty and another 1991 (2) Crimes 684 Kar).

Section 497 Cr. P.Code enjoins upon the Court to exercise judicial discreation in the matter of granting bail for ascertaining whether the material placed before the court by the prosecution are of such a tangible nature that if left unrebutted, they may lead to the inference of guilt of the accused. In the present case there is no other materials on record other than the FIR and mere allegations thereof. The Court thus committed an error in refusing bail in this case (AKM Mosharaf Hossain Vs. State; 44 DLR (AD) 246).

Considering the statments under section 161 of the Code of Criminal Procedure wherein no specific overt act involving the appellants with the killing of the victim is found, the appellants are granted bail and if the trial starts the Sessions Judge will be free to take them into custody during trial (Abdul Matin and others Vs. The State; 44 DLR (AD) 8).

While granting bail the Court must consider the gravity of the offence of which the accused is charged, the character of the evidence, circumstnces which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or the state and similar other considerations (K. Ghandra vs. State (Through C.B. I). 1993 (1) Crimes 1491 Delhi).

It is not permissible to allow bail to an accused person where reasonable grounds to believe that he has committed an offence are shown to exist. Conversely, where the Court is satisfied that no reasonable ground exists to connect the accused with the liability it is free to enlarge him on bail. The actual test for grant or refusal of bail, therefore, rests on availability of reasonable grounds (1984 PCrLJ 3092; 1985 PCrLJ 1315).

Where fatal injury with a sharp edged weapon was attributed to the accused in the FIR. The mere fact that subsequently serveral persons gave affidavits to say that he was not present at the occurrence would be no ground for grant of bail (AIR 1982 CrLJ 225).

Where the accused were named in the FIR recorded at the instance of the deceased and which was subsequently relied on as dying declaration; it was held that the Sessions Judge was not justified in releasing the accused on bail. The bail granted was therefore, cancelled by the High Court (PLD 1967 Pesh 321; 1979 PCrLJ 36). Where specific part is assigned to accused in first information report in the commission of two murders and murderous assault on three persons. High court was justified in rejecting bail of the accused (1985 SCMR 2082; NLR 1985 SCJ 571 (1).

Where a *prima facie* case of brutal murder is made out against the accused he cannot be enlarged on bail (1982 SCMR 962; NLR 1983 CrLJ 179). In considering the quesiton of bail, Court must extend equal consideration to the cause of public justice, as to the cause of the liberty of the accused. Nothing that deters the investigation or hampers public justice, should be done. Bail cannot be granted except for compelling reasons in a serious crime, when investigation is in progress (Shahul Hameed Vs. State of Kerala 1988(3) Crimes 903 (Ker).

The Court for purposes of bail had to see whether reasonable grounds existed to believe that acused had been guilty of relevant offence and for that not only first information report but also statement of prosecution witnesses was recorded by the police, plea raised by the acucsed during investigation and any other special circumstance may be taken into account (1984 PCrLJ 3086).

The Court does not have to ambark on a detailed factual inquiry but has only to see if reasonable grounds exist for believing that an accused person is guilty of an offence punishable with death or imprisonment for life. The court has to form his belief on the accusation contained inthe police report, "the nature and credentials" of the evidence and the relevant circumstances surrounding the occurrence (1985 PCrLJ 1315; NLR 1981 CrLJ 116; 1974 PcrLJ Note 85 (kar).

Where the prosecution case satisfy the Courts that there are reasonable grounds for believing that the accused is guilty of a serious offence, which is punishable with death or imprisonment for life, the Court has no discretion; it must refuse bail (PLJ 1983 SC (AJ&K) 77; PLD 1967 Pesh 321; PLD 1951 BJ 29). Where the accused were named in the FIR recorded at the instance of the deceased and which was subsequently relied on as a dying declaration. It was held, that the Sessions Judge was not justified in releasing the accused on bail. The bail granted was, therefore, cancelled by the High Court (PLD 1967 Pesh 321). When a murder was committed and the petitioner was one of the accused persons, armed with fire arms and was present at the scene and raised lalkara, he could not be granted bail (1970 SCMR 789).

The nature of injuries caused by an accused is a matter to be considered by the Court in granting bail to him. Where an accused causes only simple injuries he may be enlarged on bail (PLJ 1978 SC 378; PLJ 1978 SC 390; PLJ 1977 BJ 13; 1986 PCrLJ 2735). Bail was granted where a fire arm injury was allegdly caused on thigh, a non-vital part of the body and that too was declared as simpile. During investigation of a D.S.P. petitioner was also found innocent (1986 PCrLJ 2275), or where prosecution case did not disclose that accused party was aggressor. Accused was not attributed fatal injuries to deceased. Guilt of accused persons and their criminal liability was a matter of further enquiry particularly when serious injuries were sustained by some of the accused persons. First information report showed that one of the accused inflicted injuries were sustained by some of the accused persons. First information report showed that one of the acused inflcited injuries to the deceased on his leg while other accused was alleged to have caused injuries to witnesses and not to the deceased (1986 SCMR 489). But if death is caused by cumulative effect of such injuries bail cannot be granted (PLJ 1978 SC 378).

Even in murder cases bail cannot be withheld as punishment. It may be allowed in appropriate cases depending upon the circumstances of each case. No hard and fast rule can even be laid down nor can there be any rule of practice upon basis of which such discretion can be judicially exercised (1985 PCrLJ 1313). Mere heinousness of the offence is not by itself a circumstance to take away the discretion of the Court to grant bail, provided there are reasonable grounds for believing that the person seeking bail has not been guilty of the non-bailable offence with which he is charged (PLD 1981 SC AJ&K 10). Bail cannot be refused merely because accused is charged with an offence punishable with death or imprsonment for life. Where bail is sought at a initial stage, the Court has to take into consideration the allegations made against accused in the FIR, the evidence which prosecution proposes to produce before Court and the defence plea, if any, raised by accused. Bail orders cannot be passed in vacuum and the Court has to assess the evidence tentatively without going into deeper appreciation of the same (Qaim Ali Shah Vs. State 1992 PCrLJ 9).

The well established principle of our criminal jurisprudence that a grant of bail should be a rule and its refusal an exception. This principle is based upon a cardinal principle that liberty of an individual is a very valuable and sacred right and ought not to be allowed to be violated unless the law indicates compelling reasons to do so. There is no doubt, that since a case under section 302 of the Penal code, stands registered against the bail applicant, Shyam Chand, the Court has to be highly circumspect while considering the petition since ordinarily no bail is granted in serious cases like murder and more so in cases of this nature which are becoming more and more frequent (Shyam chand and others V. State of H.P. 1988 (2) Crimes 19 H.P).

The offence under section 302, Penal code is punishable with death or imprisonment for life. Bail is not to be granted in such cases unless reasonable grounds appear *qua* the accused having not committed the offence, but this is not the only criteria. The Courts can make tantative assessment of the allegations and come to a tentative conclusion that in particular circumstances of the case even though the sentence provided is death or imprisonment for life but ultimately the merits of the case may not warrant any such sentence. If the data available is such, that the assessment can be made about the possibility of lesser sentence, grant of concession of bail can be considered. Where the inquiries have been caused in such a manner that it is difficult to assume conclusively that the petitioner had the knowledge that his act will certainly cause death. Bail may be granted (1982 PCrLJ 103 Lah).

There was no legal or moral compulsion to keep apellants in detention merely on the allegation that they had committed an offence punishable with death or imprisonment for life. If they are granted bail the ultimate conviction of appellants after conclusion of their trial can repair the wrong done by grant of interim bail to them but no satisfactory reparation can be aforded to them for their unjustified detention if they are acquitted after trial (NLR 1982 AC 393 SC AJ&K).

The basic rule perhaps be tersely put as bail, to jail, except where there are circumstances suggestive of fleeing from justice or intimidating witnesses and the like. But the gravity of the offfence so also the heinousness of the crime may induce the accused to avoid the course of justice (AIR 1977 SC 2447; 1977 SC Cri. 594). Bail

is not to be withheld as a punishment but that the requirements as to bail are merely to secure the prisoner at trial (AIR 1978 SC 439; 1978 CrLJ 502; 1978 SC Cr. 115).

Rejection of a bail stands on a different footing from cancellation of bail and it is by and large permitted only if by reason of supervening circumstances it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial (AIR 1978 SC 961).

In successive bail application, the changed circumstances are required to be consciously noted and justified for exercising successive jurisdiction granting bail (Om Parkash Vs. State of J. & K 1990 (2) crimes 674 J&K).

Whenever an accused is released on bail he need not be required to appear before the Court until the charge-sheet is filed and process is issued by the Court (AIR 1982 SC 1463; 1982 CrLJ 1943).

Where there is no inculpatory evidence against the accused, bail may be granted by the Court (1986 PCrLJ 2335; BNLR 1983 CrLJ 150; 1974 PCrLJ Note 33, p. 22; 1970 PCrLJ 1013). Where there was no direct evidence of murder. Case of prosecution rested on evidence of last seen and recoveries. Accused had no motive against deceased. Age of accused was about sixteen years at the time of occurrnece. Bail was allowed to accused (1985 PCrLJ 2924). Where there was no ocular testimony regarding fatal firing at deceased and prosecution mainly relied on testimony of two prosecution witnesses appearing before police after unexplained delay of 25 days. Such witnesses did not claim to have witnessed actual firing at the deceased but was only seen carrying the deed body. Bail was allowed (1986 PCrLJ 1578).

An accused person who remained in custody for more than two years was entitled to be released on bail as a matter of right under third proviso to sub-section (2) of section 497. Criminal Procedure Code, unless delay had been occasioned due to any act on the part of acused or any person acting on his behalf (PLD 1986 Kar 561). Ina murder case if there is some negligence or delay in filing either the complete or incomplete challan in court, that per se would not provide a good ground to an accused person for being admitted to bail (1974 PCrLJ 161 Lah).

There is no hard and fast rule regarding grant or refusal to grant bail. Each case has to be considered on its own merits (Binoy Jacob Vs. Central Bureau of Investigation 1993 (2) Crimes 106 Delhi). Where the trial has protracted for about 3. years and all the prosecution witnesses had not yet been examined bail should be allowed to accused (Nafa Singh vs. State 1993 (1) Crimes 681 Delhi).

Grant or refusal of bail is the discretion of the Magistrate and thus bail can be declined by him for reasons to be recorded (Munna Mistri vs. State of Bihar 1993 (2) Crimes 593 Patna).

Granting of bail cannot be a precedent, each case has to be looked into on its merits (Man Singh Vs. State of Rajasthan 1993 (3) Crimes 1026 Raj). Once an accused is released on bail, he cannot be taken back into custody unless special reasons for doing so exist and unless bail is cancelled for reasons germane to cancellation (Chandramani Swain Vs. State of Orissa 1993 (2) Crimes 659 Ori). Once bail is granted, if it is to be cancelled on the ground of misusing the bail, the accused must be given an opportunity to refute the allegations (1983 BCR (AD) 273). Bail can not be cancelled upon the apprehension expressed by the prosecution that the accused may abscond (1987 BLD (AD) 154).

Very cogent and overwhelming circumstances are necessary for an order seeking a cancellation of bail (Anil Kumar Vs. State of Maharashtra; 1990 (1) Crimes 455 Bom). When the accused secures bail by suppressing or concealing the fact that his earlier bail application had been rejected, he can not be allowed to remain on bail (Ramadhar pandey Vs. State of Bihar and another 1993 (2) crimes 297 patna).

Bail obtained by suppressing the material facts from the knowledge of the Court is liable to be cancelled (Ram pal Singh and others. Vs. State 1990 (1) Crimes 61 All). For cancellation of bail there must be very cogent and overwhelming circumstances and one of the material consideraiton is whether the accused is likely to abuse the discretion granted in his favour by tempering with evidence (Nawal Kishore Singh Vs. Rabindra Mahto and another 1991 (3) crimes 576 Patna).

Even where bail was granted by non-application of mind it cannot be cancelled merely on the allegation of chance of tampering of evidence, more so when accused had enjoyed long liberty on bail without any incident of tampering in the evidence (State of Orissa. Vs. Jagnnath Patel and anothers 1991 (3) Crimes 859 Ori).

Bail order can not be recalled by Sessions Court only on the ground that earlier bail application of accused had been rejected by High Court and the Sessions Court then had no jurisdiction to release petitioner on bail on subsequent application (Chandramani Swain Vs. State of Orissa 1993 (1) Crimes 982 Ori). When the bail plea of accused has been rjected by the High Court and no new fact for consideration for grant of bail has been shown to exist there is no justification for Court to grant bail and in such circumstances when accused is found giving threats to prosecution witness his bail is liable to be cancelled (S. Amrik Singh Vs. State and Another 1993 (2) Crimes 709 Delhi).

In cases where bail has been granted considering the status or influence of the person accused regardless of the nature of the accusation and relevancy of the material on record.Supreme Court woudl not hestitate to interfere with the order for the ends of justice (State of Maharashtra vs. Anand Chintaman Dighe 1990 (1) Crimes 392 SC).

76. **Administration of justice.**- Judge must wear all the laws of the country on the sleeves of his robe. Failure of counsel to properly advise Judge is not a complete execuse in the matter (Board of Intermediate and others Vs. Salina Afroze PLD 1992 (SC) 263).

Accused must be presumed to be innocent unless he is found to be guilty. This is the basis fundamentals of criminal jurisprudence (Abu Taher Choudhury Vs. State; 1991 BLD (AD) 2 (para 135) = (1990) 42 DLR (AD) 253). Suspicion, however, strong it might be, is not substitute for evidence on which to base a conviction (Ibid (para 18a)

For the belated disclosure of the knowledge of the commission of offence if fear or threat is easily accepted as an explanation, particularly in a case punishable by death, then it will endanger administration of criminal justice by opening up opportunities for concoctions and false implications (Ibid).

In a gruesome murder when the accused can not be brought to book for lack of evidence beyond reasonable doubt the prosecution, instead of be wailing on an order of acquittal, should take heed to improve its quality of investigation (Ibid).

A duty is cast upont he investigating officer to bring the truth in a case and to bring the culprit into book (Ibid).

Non-disclosure of occurence of murder by witnesses who were present during the preliminary investigation by police, starting disclosure of murder three days after occurrence with explanations not worthly of any credit, the only reason that may be is that their story is an after thought and product of dress-re-hearsal given by I.O.(Ibid).

Wrogful acquittal of accused on flimsy and minor grounds is undesirable and the same will shake the confidence of the people in the judicial system of the administration of criminal justice (Ibid; Per Latifur Rahaman J, Para 140).

For promating the cause of justice, for doing camplete justice and for prevention of miscarriage of justice. Appellate Division's power is very wide, overriding and exceptional and is not incumbered by any technicality (Ibid; per M.H. Rahman, J. para - 22).

Every case is to be judged from the facts and circumstances of that given case as no two cases are alike (Ibid; per Latifur Rahman, J.).

A Judge should dispose of a case on the basis of the evidence on record and the law applicable thereto; Philosophical and moralizing comments are hardly relevant in determining the nature of sentence which an accused diserves in a particular case (Hazrat Ali Vs. State; 1991 BLD (AD) 270).

A Judge does not preside over a criminal trial merely to see that no innocent man is punished but he also presides to se that a guilty man does not escape (State of UP Vs. Anil Singh (1988) 3 Crimes 367).

Court has pointed out on some occasions that the court is not a disinterested spectator of the contest between the prosecution and the defence and that it should take an intelligent part in the proceedings and should not allow any obscurity left out by the prosecution or the defence and should make an earnest endeavour to get at the truth. If and when the attention of PW 3 was not drawn to this by the defence, it was the duty of the court to do so which the learned trial Judge, did not. It may not be fair for this court to condemn PW 3 on this ground, but the other frailties and suspicious features in his evidence and his inconsistent statements different stages would entail the rejection of his evidence (1985) 1 Crimes 593).

Parties appeared to have compromised when the case was fixed for arguments after recording evidence of eye witnesses and the statements of accused under section 342, Cr. P.C. Eye witnesses were prevailed upon at such belated stage to resile from their previous statements when their affidavits exonerating accused were produced in court. Trial Court, held, rightly believed eye-witnesses and discarded the affidavits because to do otherwise would amount to reduce the system of administration of justice into a farce or mockery and no weight could, therefore be attached to said affidavits to consider the compromise for reducing sentence (Ashiq Hussain @ Babu v. state 1990 PCrLJ 1773).

Court while convicting an accused for an offence particularly in a case of capital sentence has to be fully convinced that the accused facing trial is the only person responsible for committing the offence and that there is not even the slightest doubt his false implication (Faziq Ali Vs. State 1990 PCrLJ 1779).

303. Punishment for murder by lifeconvict.-Whoever, being under sentence of [imprisonment] forlife, commits murder shall be punished with death.

304. Punishment for culpable homicide not amounting to murder.- Whoever commits culpable homicide not amunting to murder, shall be punished with [imprisonment] for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.

Synopsis

1. Scope and applicability.
2. Conviction under section 304 read with section 34.
3. Conviction under section 304 read with section 149.
4. When offence falls under section 304, Part - I.
5. Exceeding the right of private defence.
6. When offence falls under section 304, Part - II.
7. Whether delay in the death of the victim brings the case within the ambit of section 304, Penal Code.
8. Death caused by intervening disease - whether culpable homicide not amounting to murder.
9. Sudden quarrel.
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11. Death caused by single blow.
12. Accused liable for individual act.
13. Conviction founded for minor offence.
14. Evidence and proof.
15. Sentence.
16. Compromise.
17. Charge.

1. **Scope and applicability.**- This section creates no offence, but provides the punishment for culpable homicide not amounting to mruder,and draws a distinction in the penalty to be inflicted, where an intention to kill being present, the act would have amounted to murder, but for its having fallen within one of the Exceptions to section 300, and those cases in which the crime is culpable homicide not amounting to murder, that is to say, where there is knowledge that death will be a likely result, but intention to cause death or bodily injury likely to cause death is absent (AIR 1932 Nag 121= 33 CrLJ 849; AIR 1942 Oudh 368 = 43 CrLJ 634). Provisions of section 302, Penal Code would come into play when there was positive intention to kill while provisions of section 304, Penal Code would come into play where there was knowledge that act of a person was likely to cause death (State Vs. salim-un-Din 1990 PCrLJ 818).

Section 304 of the Penal code embraces two parts of the Code. In the Ist one if the intention of killing is presence and the act would have amounted to murder or an act is done with the intention of causing such bodily injury as is likely to cause death, but the act having fallen within any one of the five exceptions in section 300 of the Code, the offence will fall within its ambit. The second part of the section is attracted to a case where the act is done with the knowledge likely to cause death but without any intention of causing death or to a case where such bodily injury is caused as is likely to cause death. The first part applies to a case where there is guilty intention, and the second part where there is no such intention, but there is guilty knowledge. Where the finding is that the accused has the guilty intention of

causing such injury as is likely to cause death the offence cannot be converted into one under Part - I of section 304 of the Code unless it is brought to any of the five exceptions of section 300. (State Vs. Siddique Ahmed, (1979) 31 DLR (SC) 29).

To attract section 304 of the Penal Code what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger without taking any undue advantage or acted i na cruel manner (Bopai Ali Vs. State of Assam 1989 (3) Crimes 184 (Gau).

Before an accused is held guilty and punished under first part or second part of section 304, Penal Code, a death must have been caused by the assailant under any of the circumstances mentioned in the five exceptions to section 300, Penal Code (Harendra Nath Mandal Vs. State of Bihar 1993 (1) Crimes 984(SC).

In the case of death by giving a single head injury by a stick, when there are circumstances to support the view that the accused did not-have intention to kill the deceased, but he must be attributed knowledge that in inflicting the injury, the accused was likely to cause his death, the offence committed will be culpable homicide punishable under section 304 Part, II Penal Code (Desigamani @ Deivasigamani Vs. State 1992 (1) Crimes 82).

Before an accused is held guilty and punished under first part or second part of section 304, a death must have been caused by him under any of the circumstances mentioned in the five exceptions to section 300, which include death caused while deprived of power of self-control under grave and sudden provocation, while exercising in good faith the right of private defence of person or property, and in a sudden fight in the heat of passion without premeditation. Where the informant and injured having learnt that the accused persons were harvesting their paddy from the plot went there and when they protested as to why their crops were being harvested one of the accused caught hold of the hands of the injured and the appellant accused assaulted on his head with the back portion of a weapon, there would be no occasion for convicting the accused under section 304 when death itself had not been caused. Once the finding was recorded that the prosecution has not disclosed the true version of the occurrence and the right of private defence of person and property was available to the appellant accused than he would be entitled to be acquitted (1993 CrLJ 2830).

The section draws a distinction in the penalty to be inflicted where an intention to kill or an intention to cause such bodily injury as is likely to cause death being present, the act would have amounted to murder but for its having fallen within one of the Exceptions to section 300, and those cases in which the crime is culpable, homicide not amounting to murder, that is to say, where there is knowledge that death will be likely result but intention to cause death or bodily injury likely to cause death is absent (PLD 1967 Pesh 45). Whether culpable homicide not amounting to murder is punishable under Part I or Part II of section 304, depends entirely upon whether the act by which the death was caused was done with one of the two intentions, or whether it was done with the knowledge mentioned in section 299. Hence, unless that is first ascertained, it is not possible to pass a sentence under second part of section 304, rather than under the first (AIR 1939 Rang 225).

Part II of section 304 applies when the act is done with the knowledge that it is likely to cause death but without any intention to cause death. So this clause will not come into operation when there is intention to cause such bodily injury as is likely to cause death (1951 ALJ 464; AIR 1953 All 189; 1953 CrLJ 450). Where a fatal injury is inflicted by the accused on a vital portion of his victim with a deadly

weapon in the course of a sudden and unexpected quarrel, a conviction under section 304, Part II, will be justified (AIR 1983 SC 185= 1983 CrLJ 346). Where the evidence does not disclose that there was any intention but it is clear that the accused had the knowledge that their acts were likely to cause death, the accused were rightly held guilty under the second part of section 304 (AIR 1983 SC 284= 1983 CrLJ 429).

Knowledge that an act is likely to cause death is insufficient for conviction under clause 4 of section 300 but is sufficient for conviction under second part of section 304 (AIR 1924 Rang 33). Section 304, Part II does not apply if the court comes to the conclusion that the intention of the person causing death was either to cause death or to cause such bodily injury as might bring the case either under Part I of section 304 or under section 302 of the Code. In case the court comes to the conclusion that there was no intention of any of the kinds mentioned above, but there was knowledge that the act was likely to cause death, the offence would fall under Part II of section 304 only if the court finds that the offender did not know that the act was so imminently dangerous that it must in all probability, cause death or such bodily injury as was likely to cause death and the offender had not committed the act without any excuse for incurring the risk of causing death or bodily injury. But if the court is unable to come to such finding the offence would still be murder unless an Exception to section 300 be applicable (AIR 1950 Lah 169).

Both the parts of section 304 refer to distinct offences. Part I would be attracted to an offence which was otherwise murder but was reduced to culpable homicide not amounting to murder by reason of being covered by any of the exceptions to section 300; Part II of section 304, would be applicable if the fatal injury inflicted on the deceased was caused to him without any intention on the part of the accused to cause death or such bodily injury as was likely to cause death but about which the accused could be burdened with the knowledge that it was likely to cause his death (31 DLR (SC) 29). In other words the first part applies to a case where there is guilty intention, and the second part where there is no such intention but there is guilty knowledge (31 DLR (SC) 29). In view of the finding of the High Court that when the accused wielded their lathis on the head of the deceased they must have had knowledge that they were causing such bodily injuries to him as were likely to cause death and that they do not seem to have intended to cause death of anyone, it was held that it is apparent that that the High Court was in error in convicting them under section 304, Part I, instead of under section 304, Part - II whereunder whoever commits culpable homicide not amounting to murder without an intention to cause death, is punishable with imprisonment of either description for a term which may extend to ten years, or with fine, or with both (AIR 1972 SC 955(957).

Where the accused had no intention to cause death and no injuries were inflicted on the head or any other vital part of the body but certain injuries were proved to have been caused by blunt weapons and the victim succumbed to those injuries; it was held that it would not be reasonable to infer that the accused had knowledge that the injuries would in all probability result in death but nevertheless it could be inferred from the severe nature of the injuries that the accused intended to cause injuries which were likely to cause death and the offence would amount to culpable homicide not amounting to murder punishable under the first part of section 304 (1946 Jaipur LR 450).

The offence committed would fall under Part I of section 304 where an arrow shot by the accused, who was drunk, hit the deceased in the ribs and caused his death, by penetrating his spleen,(AIR 1956 MB 271) or where in a free fight both

sides used lethal weapons resulting in death of one person, (AIR 1947 Lah 377) or the accused caused death of his uncle by striking blows with an axe on his right ear on the grievance that he brought from her parents's house his wife who was alleged to be a witch, and her practice of witchcraft was responsible for the death of the child of the accused,(AIR 1955 NUC 3660) or where the accused stabbed his daughter to put her out of the way when she intervened when he was going to cut the nose of her mother,(AIR 1957 MP 217) or where the deceased was set upon by the accused persons with heavy weapons and was beaten till his ribs were broken, (3 Sau LR 129) or where death was caused after exchange of abusive language and grappling,(AIR 1935 NUC 5395) or where a person attempted to beat another witha shoe, particularly in the midst of a number of villagers right in the street, and the person in return caused death of the opponent,(AIR 1953 Mad 579) or where the wife of accused resorted to adultery and on accused's asking her to refrain from it abused him and swore that she would continue to do so, and he caused her death(AIR 1957 Mad 541).

Accused gave kick on testicles and scrotum of victim. The kick blow given by the accused had caused an injury on the scrotum and penis of the deceased. Doctor who had conducted autopsy on the dead body of the deceased opined that the injury on scrotum and penis was not the direct cause of death of the deceased. It was held that the accused had knowledge that the kick blow on the scrotum and penis of the deceased was likely to result in his death although he had no intention to cause death. The appellant has therefore, rightly been convicted for an offence under section 304, Part I of the Penal Code (1993 CrLJ 3517 (P&H).

The second part of section 304, deals with cases where the act is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death (PLD 1969 SC 552; 21 DLR SC 429). The question whether the act of an accused person would constitute an offence of murder under section 302 or an offence of culpable homicide not amounting to murder under section 304, Part II must be determined on facts of each particular case. This question about the intention or knowledge on the part of the accused is always a matter of inference to be drawn from the facts and circumstances of each case and from the nature of the weapons used and the injuries inflicted (1979 SCMR 448).

Where the deceased was given fist blows and kicks in abdominal region causing severe damage to the internal organs. It was held that even if it be said that appellant did not intend to cause injuries likely to cause death. He can be fuxed with the knowledge that his act was likely to cause death. Conviction was altered from first part of section 304 to Part II of the section (PLJ 1981 CrC 470). The fact that accused did not select head, heart, chest or abdomen of deceased for inflicting injuries when he was completely at accused's mercy, shows absence of intention on the part of accused to kill deceased. In such cases accused would be entitled to conviction under section 304-II and not under section 302 (NLR 1988 Cr 161).

An accused persons, who had given a knife blow with such force to the deceased that it penetrated the chest cavity, punctured the lung and cut into his heart, in consequence of which he died on the sport was not guilty of murder but was guilty of an offence under section 304, Part II, Penal Code in view of the circumstances that the blow was given without any premeditation, in the heat of the moment and for the purposes of deterring pursuit and avoiding capture, and consequently it was not possible to hold that the accused had the requisite intention to commit murder but could only be saddled with the knowledge that the injuries which he was causing were likely to result in death (PLD 1980 Kar 199). Where the

accused assaulted his wife with a wet rope knowing it to be so dangerous an act as was likely to cause death although it was not an act so imminently dangerous that it must, in all probability cause death or such bodily injury as was likely to cause death. It was held that the accused was punishable under second part of section 304 (1969 PCrLJ 715).

Where the accused intending to give a beating to his nephew for his misbehaviour, administered lathi blow on his head. The injury was reported by the doctor to be dangerous to life and it subsequently resulted in actual death. There was neither any motive nor intention to kill on the part of the accused. The accused in the circumstances, could not urge that he had no knowledge that such an injury was likely to cause death, his conviction under section 302 was altered to that under section 304,, Part II(PLD 1970 Lah 757). Where the deceased jumped into a river to save himself from being hit by stones thrown at him by the accused, and when he was drowning a third person tried to rescue him but just then he was hit by a stone thrown by the accused, he fell back and was drowned, the accused was held to have knowledge that death was likely to be caused even if he had no intention to cause death and therefore he was guilty of an offence under section 304, Part II (PLD 1959 Pesh 61= 11 DLR (WP) 131). Accused gave lathi blows on head to deceased R and his brother M.R. never regained consciousness and died at the following day due to injury on the head. The fight had suddenly developed in the heat of passion. accused though could be fixed with knowledge that blows were such as were likely to cause death were not animated with intention to cause death. Held, that the offence falls under the second part of section 304 and not the first one (AIR 1964 Punj 321; 1983 CrLJ 897).

Where the accused being deprived of self control on provocation offered to him by A, shot at A but killed an infant who was hit instead of killing A. It was held that the death of the child, was caused by mistake or accident when the accused was deprived of self control and conviction under section 302 was alterd to one under section 304, Part I (1969 SCMR 855).

Where death was caused by a brick thorwn during a fight at night, (PLD 1961 Kar 673) or when the accused attacked a woman in defence of his property and hit a child in her lap, killing it, (PLD 1958 AJ & K 34) or where the accused who was an exorcist caused the death of a woman believed to be possessed of evil spirit by exposing her to prolonged suffocation by smoke during the course of a ritual and in addition causing burns by heat brought too near her body (AIR 1964 Mad 480) or where the accused gave a minor injury with a penknife which did not show that he had an intention to cause death, (AIR 1950 Trav Co 12) or where the accused gave a single blow on the head of the decesed with a firewood and he fell unconscious and when all efforts of the accused to revive the deceased failed, he burnt the body on a pyre, (AIR 1949 Ori 43) or where an arrow shot in the thigh, a non vital part of the deceased, cut his femoral artery and caused death, (AIR 1956 MB 207), or where a15 year old boy, who was drunk, shot an arrow into the deceased without any intention to cause his death, (MBLJ 1954 HCR 1269) or where death was caused by kicking a young man in the abdomen and thus perforating his intestines, (ILR 1955 Patiala 399) or where death was caused by a handkerchief stuffed into the mouth of the deceased in order to silence her, (AIR 1952 MB 25 or where the accused fired shots in the air indiscriminately and caused the death of a woman, or where the accused committed rape on a girl and she died of fright and shock (NLR 1981 Cr 103). It was held that though they had no intention to cause death, yet there was

every reason to believe that they had knowledge that death would be caused, therefore section 304 Part II applied to the cases and not section 302 (PLD 1967 Pesh 45).

Right of private defence was subject to limitation that it in no case extended to inflicting of more harm than it was necessary to inflict for purpose of defence. Where in a case of trespass on the property of accused multiple injuries were caused to prosecution witnesses/deceased with blunt and sharp-edged weapons inevitably showed that there was concerted attack on them with lethal weapons and causing of injuries was out of proportion. Appellants who had attacked and killed deceased could not be said to have used force in exercise of their right of private defence to the extent of taking life. Conviction under section 304, Part I was upheld (1987 SCMR 1953).

Where medical evidence does not conclusively prove that the injury suffered by the deceased was direct cause of his death. The deceased lived for some three months after suffering the injury. The injury was no doubt caused on a vital part of the body of the deceased, but the fact that there was no proof that death resulted from it did not make the accused liable under section 304, Penal Code. The conviction in the circumstances could not but be made under section 325, Penal Code (1988 PCrLJ 1240).

One of the accused, was charged with many others, under sections 147 and 448 of the Penal Code, with an additional charge under section 304 of the Code but when he was examined under section 342 Cr. P.C. he was not told that he was facing trial under section 304 in addition to common charge under sections 147 and 448. as such his conviction under section 304 is illegal (Joynal Abedin Vs. State 37 DLR (AD) (1985) 114).

Where only one injury proved fatal and such injury was caused not on any vital part of the body but on knee resulting in severance of femoral artery and consequent loss of blood lead to death. Incident being not premeditated but a sudden affair causing injury on knee in the heat of moment could not be itself saddled accused with knowledge of precise locale of different arteries and veins in limbs of human body so as not lead to the inference that he had the intention to kill. Other incised injury was also to inflicted on any vital part of the body. Accused was convicted under section 304, Part II (1983 SCMR 53). Where no particular injury was indicated as fatal; most of them were lacerations effected by lathi blows and according to the first examination by the doctor these were simople injuries, there is thus some doubt about the intention to kill and conviction can be recorded under section 304, Part II/34 of the Penal Code (PLD 1986 Dhaka 339 (DB).

Where the accused fired shots at the lower part of the body of the deceased which showed that they had no intention to kill but the deceased died, conviction would be under section 304, Part II (PLD 1961 Dhaka 1 = 20 DLR 537 (DB). But the offence would fall under section 304, Part - I where to wreak vengeance the accused inflicted as many as 18 injuries on the arms and legs of the deceased with a gandasa while his companion held the head of the deceased, or where the accused administered six blows with a lathi on the person of the deceased who was a young man and strongly built and the accused died 15 days later (AIR 1955 SC 654), or where the accused caused injuries with a knife on the left side of the heart of his victim (1980 SCMR 885). Where the number of injuries inflicted on the deceased was large, but they were mostly the result of the use of blunt weapon. The blows were mostly aimed on the left arm and the left leg, no ribs were broken, nor was

there any head injury to the deceased. Therefore the offence fell more appropriately under section 304, Part II and not under section 302 (1970 PCrLJ 966).

Where the respondents used ordinary sticks. They inflicted only one head injury. The other injuries were on the legs of the deceased. It was therefore, quite clear that the respondents had no intention to kill the deceased. The motive in the case was not sufficiently strong to cause death. Therefore, the accused were rightly convicted under section 304, Part II (1972 SCMR 419).

When a qualified doctor undertakes operation but patient dies it cannot be concluded that it was commission of a culpable homicide actionable under section 304 Penal Code (Dr. Debendranath Tripathi and two others Vs. State of Orissa & five others 1991 (1) Crimes 871 (Orissa).

2. **Conviction under section 304 read with section 34**.- When two or more persons make preparation, arm themselves with deadly weapons and go to a place at the dead of night with the intention to kill a person is killed by one of them, all of them are liable for the killing as in such cases they also serve who stand and wait (Mahbood alias Booba Vs. State 1990 PCrLJ 887). A conviction under section 304, Part II read with section 34 is legal and valid. Part II of section 304 can be read together with section 34 notwithstanding that part II speaks only of knowledge while section 34 deals with common intention. The second part no doubt speaks of knowledge and does not refer to intention which has been segregated in the first part. But knowledge is the knowledge of the likelihood of death. Can it be said that when three or four persons start beating a man with heavy lathis each hitting his blow with the common intention of severaly beating him and each possessing the knowledge that death was likely to result of the beating, that the requirements of section 304, Part II are not satisfied in the case of each of them ? If it could be said that knowledge of this type was possible in the case of each of the assailants, there is no reason why section 34, Part II cannot be read with section 34. The common intention is with regard to the criminal act, i.e. the act of beating. If the result of the beating is the death of the victim and each of the assailants possesses the knowledge that death is likely consequence of the criminal act, i.e. beating, there is no reason why section 34 or section 35 should not be read with the second part of section 304 to make each liable individually (AIR 1964 SC 1263= (1964) 2 CrLJ 350; 1971 CrLJ 40; 1971 UJ (SC) 346).

When B caught hold the hand of S, his other two brothers gave beating with sticks as a result of which S expired. B did not say a word nor assulted S with lathi. B can be held guilty under section 304, Part II as he had intentionally joined in the commission of an act with the knowledge that the assault on S was likely to result in his death. He shared the commission of lesser offence than murder (AIR 1977 SC 2252; 1977 CrLJ 1930). But where co-accused was empty-handed at time of occurrence and he did not cause any injury to deceased. No evidence of pre-consultation betwween co-accused and accused was available. Co-accused thus was given benefit of doubt and was acquitted as a matter of abundant caution on question of vicarious liability (Muhammad Arshad Vs. State 1989 PcrLJ 750).

Where total 13 injuries were inflicted by accused persons. Some of accused persons used blunt weapons. Any injury on any vital part of body of deceased not attributable to them. Accused held guilty for offence under section 304, part II, Penal Code read with section 34, and not under section 302 (Darbara Singh Vs. State of Haryana AIR 1992 SC 1429). According to the evidence of doctor the deceased had two head injuries. One was a lacerated wound and the other was in incised wound. In his opinion, the lacerated wound was caused by a blunt edged weapon and the

incised wound was caused by a sharp-edged weapon. The unimpeachable testimony of the three eye-witnesses clearly showed that both the accused made a joint assault on the deceased by their weapons. In view of this, the Sessions Judge was right in convicting the accused for having committed culpable homicide not amounting to murder punishable under sections 304, Part II and 323, and the other accused under section 304, Part II read with section 34. There can be no doubt whatever that both the accused acted with prior concert when they assaulted the deceased (1983 CrLJ 229= AIR 1983 SC 172).

Where there was a dispute over land, three accused armed with sharp edged weapons inflicted injuries on deceased. There was no conflict between direct and medical evidence. There was no serious injuries on vital parts of body of deceased except one blow of blunt side of axe on head of deceased, who died six days after occurrence. Held, that no intention to cause death was attributable to accused. Conviction under section 302/34 altered to one under section 304, Part II/34 (AIR 1993 SC 1941).

Section 34, Penal Code can and does apply to an offence punishable under section 304, Part II, if the evidence shows that the act which caused the death was done in furtherance of the common intention of the accused persons. The common intention mentioned in section 34, Penal Code is relatable to the act which caused the death. The further question whether the act itself was intended to cause death or not has reference only to determination of the nature of the offence and not to joint liability of the offenders (PLD 1961 Lah 195). It follows that it is posible to convict an accused of an offence under section 304, Part II read with section 34 provided the Court is of the opinion that each person taking part in committing the crime in furtherance of the common intention of all had knowledge that their act was likely to cause death (AIR 1965 HP 49). Where the death was caused when three accused jointly assaulted and administered prolonged beating to the deceased. All the accused were liable to conviction under section 304, Part II read with section 34, the question as to which of the three accused delivered the fatal injury is immaterial (PLJ 1974 Cr C 192).. Where the accused does not share common intention to cause death he can be convicted of the offence of culpable homicide if it is shown, that he was responsible for any blow which caused the death (AIR 1954 Sau 156). In Barendra Kumar Ghosh's case (AIR 1925 P.C. 1) it was observed :

"Section 34, Penal Code deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furthrance of a common intention, each person is liable for the result of them all as if he had done them himself. the act and then again 'it' in the latter part of the section must include the whole of the action covered by the criminal act in first part of the section." (Afrahim Sheikh Vs. State of West Bengal, AIR 1963 SC 1268).

If section 34 applies to the case then all the accused would be guilty even when it was not known as to who caused the fatal injury (AIR 1933 Rang 340). Where two accused attacked the deceased with the common intention of giving him a beating and death was caused thereby, (AIR 1935 All 504) or where the two accused assault the deceased and only one of them gave injuries likely to cause his death, both of them would be liable under section 304 read with section 34 (AIR 1929 Pat 65). But if nature of the injury is such that it was not in all probability likely to cause death and there was no intention to cause death, it would be wrong to convict all the accused under section 304/34 when the person who caused the injury is not known (AIR 1925 Lah 318).

The facts proved in the case reported in Afrahim Sheikh Vs. State of West Bengal (AIR 1964 SC 1263 (1265, 1266, 1268), clearly established that the

deceased had gone for a peaceful purpose in the company of his young son, and immediately after his arrival, he was chased by two of the appellants, and caught and felled to the ground. After this the remaining four appellants appeared and beat the deceased with diverse weapons, while those who were not armed, held him pinned to the ground. Held, that the conviction of all accused under section 304, Part II read with section 34 was not illegal. Common intention must exist before the criminal act is perpetrated, and that is the essence of section 34. That requirement was completely satisfied because the six appellants could not but by a prior concert have appeared simultaneously at the scene and chased and overthrown the victim, held him down and beaten him. The facts disclosed in evidence clearly established a prior concert amongst the six appellants.

Death caused by injuries inflcited on head of deceased in sudden quarrel. Accused having no intention to cause particular injury which was sufficient to cause death. Accused, however, might have knowledge that said injury is likely to cause death. Conviction of accused under section 302 read with section 34 altered to section 304, Part II read with section 34 (1993 CrLJ 1058 (SC).A person does not do an act except with a certain intention; and the common intention which is requisite for the application of section 34 is the common intention of perpetrating a particular act. Previous concert which is insisted upon is the meeting of the minds regarding the achievement of a criminal act. That circumstance is completely fulfilled in a case where a large number of persons attack an individual, chase him, throw him, on the ground and beat him till he dies. Even if the offence does not come to the grade of murder, and is only culpable homicide not amounting to murder, there is no doubt whatever that the offence is shared by all of them, and section 34 then makes the responsibility several if there was a knowledge possessed by each of them that death was likely to be caused as a result of that beating (AIR 1964 SC 1263 (1266, 1267 and 1268).

Where the incident was the result of a sudden quarrel and the accused beat the deceased with stones which were lying there, it was held that though the accused could not be said to have intention to cause death or bodily injury which was sufficient to cause death in the ordinary sense of nature, they could be presumed to have known that the injuries caused by them were likely to cause death of the deceased. It was further held that the offence committed by the accused did not come under section 302 read with section 34, Penal Code, but it came within the mischief of section 304, Part II read with section 34, Penal Code (1979 ACC 144 (SC)= 1979 CrLR (SC) 638).

Where the common intention of the accused persons was to pull down the thatch put up by the complainant's party and to do so by the use of force if any one obstructed them as could be gathered from the evidence, and they had beaten to death two persons and severely injured another, it was held that since two out of the six accused had been acquitted by the High Court and there was no appeal against the acquittal, the conviction of the remaining four could not be sustained either under section 307 read with section 34 (1972 CrLJ 227 (SC).

Participation of accused persons in occurrence resulting into death of victim proved. Most of injuries however found on body of deceased were external and on lower legs and arms. Intention of accused to cause grievous hurt, not murder - Conviction altered from section 304, Part I read with section 34 to section 325 read with section 34 (AIR 1993 SC 141). Where the appellant's mother, who was of loose character, was excommunicated from the caste, whereupon the appellant drove her out of his house about eight days prior to the occurrence, and the appellant's mother used to visit the house of one N, and the appellant suspected N of having concealed

his mother in his house and that provided the motive for the attack on N on the day of the occurrence by the appellant and two others, and in the course of the attack N received fatal injuries and others who came to his rescue also received injuries, it was held that the appellant could be convicted of the offence under sections 304, Part II and 323 read with section 34, even though the co-accused had been acquitted by being given a benefit of doubt (1970 CrLJ 1544 (All); AIR 1963 SC 1413; 1963 CrLJ 351).

The fact that there is no injury by a sharp edged weapon nor the fawda is used from the sharp side, clearly negatives the case of common intention to kill or to cause such bodily injury which is sufficient in the ordinary course of nature to cause death. When on the spur of the moment the three accused inflicted injuries by hard and blunt object. Knowledge could be attributed that their act may result in death and they could be convicted for an offence under section 304, Part II read with section 34, Penal Code (1984) 1 CrLJ 237 (239) (MP).

Where, from the evidence, it was clear that although both the accused might not have intended to cause the death of the deceased, both of them acted in furtherance of the common intention to give a sound thrashing to the deceased and since they were armed with deadly weapons they must necessarily be attributed with the knowledge and that they were likely to causes such bodily injuries as were likely to cause death, it was held that in such a case, the conviction of the accused who had caused the injury that was likely to result in death should be under section 304, Part II and that of the other accused should be under section 304 Part II/34 (1983 CrLJ 229 (SC). Where death caused by injuries inflicted on head of deceased in sudden quarrel. Accused having no intention to cause particular injury which was sufficient to cause death. Accused, however, might have knowledge that said injury was likely to cause death. Accused held, liable to be convicted under section 304, Part II read with section 34 (1993 CrLJ 1058 (SC).

There is no illegality in convicting the accused of an offence which he is found to have actually committed where certain persons were charged of some offence with the aid of section 34, Penal Code, even if the offence against the other accused was not proved and section 34 was not applicable. In this case the appellant was convicted of the offences under section 304 and 324 Penal Code, in spite of the fact that the charge against other accused was not proved and section 34 was not applicable (Ram Chandra vs. State, 1957 CrLJ 270 (272).

Omission may also render an offender liable for punishment under section 304/34.- Although as a general rule participation renders an offender liable for joint action but sometimes omission may also render an offender liable under sections 304/34 of the Penal Code if for example a man joins with another to assault a person even though the original intention was merely to inflict relatively harmless injuries but he sees his companions in course of the action give serious beating which is likely to cause his death, but he does ot take any step to interfere with that action or to render any assistance tot he victim but the victim dies subsequently such act of omission may render him liable under section 304, Penal Code, for 'action' as defined under section 32 of Penal Code includes an omission also (Bhagawat Singh and anothers. Vs. Emperor reported in AIR 1929 Pat 65).

3. **Conviction under section 304 read with section 149.**- In the case of an unlawful assembly, conviction under section 304 must depend upon one of the two alternatives-either that the person convicted has been proved individually to have committed offence or that the persons convicted has been proved to have been member of an unlawful assembly, that is to say, of an association of persons having a common unlawful object (AIR 1942 All 225= 1942 ALJ 255; 1942 AWR 109; 43 CrLJ 654).

Where a number of persons who were armed with axes in order to assault their opponent or enemies and use axes in prosecution of the common object, every one of them may reasonably be expected to know that the offence of culpable homicide is likely to be committed in prosecution of that object. Hence although the death of the injured may have been caused by the blow given by one of the accused, all the other accused who took part in the offence along with him can be held constructively liable for causing the death of the victim and should be convicted under section 304, Part II read with section 149, Penal Code (1956 CrLJ 1066= AIR 1957 Bom 609).

Four accused armed with lathis and one with spear having common object of beating deceased attacked the deceased, one of the accused was hit by the deceased and become incapable of taking any further part in the incident. The rest of the accused beat the deceased and killed him on the spot. It was held that the accused had formed unlawful assembly with common object of giving beating to deceased. As regards the accused who was rendered incapable of taking any further part, it was held that he ceased to be a member of the unlawful assembly after he had withdrawn himself from it and was not responsible for causing death of the deceased but was guilty under section 304, Part II read with section 149 (AIR 1950 All 418; 51 CrLJ 1133).

Where all accused persons were armed with lathis. They inflicted simple injuries on non-vital parts of deceased. It can not be said that object of accused was to kill deceased. They had no knowledge that blows given likely to cause death. Held, accused were liable to be convicted under section 304 part II/149 (1993 CrLJ 63(SC).

In the case of an unlawful assembly, conviction under section 304 must depend uon one of the two alternatives, i.e. either that the persons convicted have been proved individually to ahve committed the offence or that the person convicted has been proved to ahve been a member of an unlawful assembly, that is to say, of an association of persons having a common unlawful object (AIR 1942 All 225). Section 304 coupled with section 149 applies to such persons who, though not taking an active part in an unlawful assembly, are liable to be punished by reason of their being members of the unlawful assembly, if a person is killed in prosecution of the common object of the assembly (6 Cal WN 98), unless anyone of them can show that he had not the common object of the assembly in prosecution of which death was caused (AIR 1934 All 881). When five or more accused are found guilty under section 304, second part, of causing death by doing an act with the knowledge that they were likely by such act to cause death, they can be convicted under section 304/149, because they knew that death was likely to result from their attack (AIR 1943 All 271).

Where the accused with the object of puishing the deceased for abusing one of the dignitaries in the village ran, caught and held the deceased permitting the principal offender to stab the victim twice with a dagger, the accused are guilty of abetment of culpable homicide under section 304/149 (AIR 1950 Kutch 5). Where a number of persons went armed with axes in order to assault their opponents or enemies and used axes in prosecution of the common object everyone of them might reasonably be expected to know that the offence of culpable homicide was likely to be committed in prosecution of that object. Hence although death of the injured might ahve been caused by the blow given by one of the accused, all the other accused who took part in the offence along with him could be held constructively liably for causing death of the victim and should be convicted under section 304, Part II read with section 149 (AIR 1956 Bom 609).

Where the accused had assaulted the deceased with various weapons even after he had fallen down on the ground causing as many as 27 injuries to the deceased to which the later succumbed, it was held, on a consideration of the circumstances and the nature of the injuries, it was not posible to hold that the common object of the assembly was to cause a pistol injury which was sufficient in the ordinary course of nature to cause death. All that could be said was that the common object of the assembly was to cause such bodily injury as likely to cause death. In view of the circumstances the conviction of the appellant under section 302/149 was set aside but instead they were convicted under section 304, Part I, read with section 149 (1978 CrLJ 1598 (SC).

In the case reported as Mehtab Singh Vs. State of Madhya Pradesh (AIR 1975 SC 275 (277) =1975 CrLJ 290), it was held that it was possible that when the accused started abusing and pelting stones at the Chamars, their common object was only to cause hurt to the Chamars, but when they went after Halku and dragged him out of the room and Mehtab Singh struck him with a knife and Payare Picked up a leg of a bed-stead and gave a blow with it on the head of Halku and others also gave stick blows to Halku after he had fallen, there would be no doubt that they developed the common object to kill Halku or at least to give him a beating with full knowledge that it would be likely to cause death of Halku and it was in prosecution of this common object that Halku was killed and an offence under secton 304, Part II was committed. This would be sufficient to sustain the conviction of Mehtab Singh, Ram Sing, Sukhram, Maniram and Nandram under section 304, Part II read with section 149.

Neither party was in peaceful possession of the lands in dispute and that there was a scramble for possession and that both parties were prepared for a fight and in fact fought, the accused cannot have a right of private defence. In such a free fight, the question of one party being aggressor may not arise. However, the members of each party would be members of the unlawful assembly with the common object to fight. But the nature of the participation, the weapons used and the injuries caused would also be relevant to infer the nature of the common object. In the instant case, it is not safe to hold that the common object of the unlawful assembly was to commit murder and that everyone knew that and that the same would attract section 302, Penal Code. But under the circumstances the accused armed with deadly weapons formed into an unlawful assembly with a view to fight with the other side and attacked them. One of the deceased received two fatal injuries and the other deceased received only one fatal injury. In such circumstances, the members of the unlawful assembly must be held to have knowledge that some of them are likely to cause injuries and thereby likely to cause death. In other words, they had the knowledge that at least an offence of culpable homicide was likely to be committed. Under these circumstances they can safely be convicted under section 304, Part II read with section 149, Penal code (1993 CrLJ 3664 (SC).

Where there is no evidence that the appellants or any of them intended to cause the death of deceased persons and there is no external injury on the person of one of the deceased and there is only one injury on the head of another deceased and there is also no evidence that the common object of the appellant was to cause the deaths of deceased persons or such bodily injury on their person which was sufficient in the ordinary course of nature to cause death, it was held that in the circumstances, the conviction of the appellants under section 302, Penal Code or under sections 302, 149 Penal Code, could not be sustained and they were liable to be convicted under section 304, Part II, 149 Penal Code (1985 CrLR 62(64) (MP).

4. **When the offence falls under section 304, Part - I.**- Where the accused inflicted fatal injury and could be attributed with having intention or knowledge that stabbing by means of a spear on the left side of the chest was likely to cause death, he clearly exceeded the right of private defence. Therefore, the conviction and sentence of the accused under section 302 could not be supported as he committed an offence under section 304 Part I (State of Orissa Vs. Bata alias Khandi sethi, 1990 CrLJ 1087 Ori (DB). Where the accused inflicted as many as 18 injuries on arms and legs of deceased with gandasa while his companion held the hand of deceased. No injury was inflicted on the vital part of the body. The motive for the offence was to wreak vengeance for what the son of the deceased had done to the son of the accused. It was held that intention of the accused was not to kill the deceased outright, that the injuries were inflicted not with intention of murdering deceased but were such as the accused must have known would likely to cause death and that the proper section under which accused could be convicted was section 304,Part I and not under secton 302 (AIR 1956 SC 654 = 1956 CrLJ 1265).

Where accused exceeding his right of self-defnece and inflicted fatal injury resulting in the death of the deceased, the offence would be one not punishable under section 302, Penal Code (Simplicitor) but under section 304, Part - I, Penal Code (Sundaramurthy Vs. State of Tamil Nadu 1990 (3) Crimes 114 (SC).

"The two injuries in the occipital region are the cause of death as the expert evidence of P.W. 6 shows, while the other injuries are simple nature. It is difficult to hold that these injuries were caused with the intention to cause the death, nor such injuries appear to be sufficient to cause death in the ordinary course of nature. But these injuries, though caused intentionally, are of such a nature that these are likely to cause death. We do not think that this criminal act of causing the death falls into any of the four categories of criminal acts which constitutes 'murder' as described in section 300 of the Penal Code. We rather find that this criminal act was done with the intention of ccausing such injuries as are like to cause death, as described in section 299. As such, it constitutes culpable homicide not amounting to murder, punishment under section 304 Part I of the Penal Code"(State Vs. Montu 44 DLR (AD) (1992) 290). Ocular account coupled with evidence of motive had left no room for doubt that accused had caused gun shot wounds to deceased on his ankle which was not a vital part of body. Accused obviously had no intention to commit the murder of deceased who was his cousin and a partner in thefts. Deceased had died due to profuse bleeding and for want of timely medical aid. Act, however, was done by accused with the knowledge that the same was likely to cause death. Conviction of accused under section 302, Penal Code, was consequently altered to section 304, Part I, Penal Code and his sentence of life imprisonment was reduced to seven years R.I. with fine (Shamboo Vs. State 1991 PCrLJ 228).

It was the accused who was responsible for inflicting injury which ultimately resulted in the death of the deceased. Even though the blows were inflicted by the accused on the head of the deceased with force, the lathi not being iron road and the deceased being a young man and strongly built, with the intention of causing the death of the deceased nor despite the medical evidence. The injury was sufficient in the ordinary course of nature to cause death seeing that the deceased survived for 3 weeks and seeing on the doctor's that an inquiry of that kind was not incurrable. But he no doubt knew that he would be causing such bodily injury as was likely to cause death and the offence committed by him woudl fall under section 304, Part - I and not under section 302 (AIR 1955 SC 439; 1955 CrLJ 1014).

Where from evidence it is clear that there was a sudden quarrel regarding the fencing between the prosecution party and the accused, during the course of which,

unexpectedly, the deceased who intervened, sustained one injury and died instantaneously, the accused could be made liable for an offence under section 304, Part 1 of the Penal Code and not for murder under section 302 of the Penal Code (Chinnathambi and another Vs. State 1989 (3) Crimes 48 (Mad).

Evidence showing that accused inflcited a blow of knife which along with injury caused by another accused proved fatal. Accused cannot be acquitted on ground of acquittal of co-accused. However, in view of injuries caused to accused with knife he would be held to have exercised his right of self-defence. Conviction altered from section 300 to 304 Part I (AIR 1992 SC 2199).When the accused had neither any intention nor any premeditation for causing death of his wife; nevertheless he assaulted the deceased by blunt side of the axe, causing her death, case is covered by section 304, Part - I Penal Code, 1860 (Brushava Bariha Vs. State 1988 (3) Crimes 109 (Ori).

Where in a quarrel between the parties Kadir attacked the appellant and inflicted several blows with a stick and the latter then stabbed him with knife in the heart. The injury to the heart was far too grievious resulting in death of Kadir. It was held that the appellant acted in the exercise of his right of private defence, but if regard was had to nature and violence of the blows suffered and apprehended by him he exceeded that right when he stabbed Kadir in the heart. The appellant was guilty of an offnece under the first part of section 304 of the Penal Code (AIR 1979 SC 1179 (1181).

Even if the appellants were provoked, the nature of injuries would show that they assaulted him (deceased) with the intention to kill and in that view the offence committed falls under Part - I of section 304 Penal Code (Md. Shah Alam Vs. The State 1985 BLD (AD) 198).Where accused stabbed the deceased as he (deceased) provoked him on day of occurrence by going to and in front of accused's house with the motive of catching eye of the wife of accused deceased having misbehaved with wife of accused earlier as well the offence is one falling under section 304, Penal Code Part I and not under section 302, Penal Code (Tangaswamy vs. State 1989 (2) Crimes 412 (Mad).

From the evidence there be no manner of doubt that the assault was done with the intention of causing such bodily injury as was likely to cause death. The accused - husband was not content by striking his wife with a branch of a tree but was reckless enough to kick her in the tender part of her body which immediately caused bleeding. It was not a case of mere knowledge only (to constiute offence under section 304 Part II) that such act was likely to cause death but that the intention to cause such injury as is likely to cause death was very clear. It is true there is no finding as to "intention" eithr in the impugned judgment or in the judgment of the trial Court. This is certainly not desirable because the law requires a clear finding as to intention before recording a conviction under Part I of section 304. Notwithstanding the absence of the requisite finding as to intention, the appellant husband was rightly convicted under Part I of section 304 (Jatin Chandra Sil Vs. The state (1991) 43 DLR (AD) 223).

Where there is material to show that similar injuries which caused the death were suffered by some of the accused persons in the free fight the proper section under which the two accused should be convicted is section 304, Part I of the Penal Code and not section 302, Penal Code (1988 (25) All Cr. C. 109 (109) SC). In a sudden fight when injuries on head are caused by lathis resulting in death, the offence falls under section 304, Part I, Penal Code and not under section 302, Penal Code (Mohinder Singh and Another Vs. The State of Haryana 1991 (2) crimes 365 (Punj).

"There is no evidence on record nor the Doctor was asked any question as to with what kind of weapon the injuries on the person of the deceased were or could be caused. There is no evidence either as to how long after the assault Hosne Ara Begum breathed her last. We have no evidence before us that the appellant had any intention to cause the death of his wife or to cause such bodily injury as was ordinarily sufficient to cause death. For all these reasons we are inclined to think that the assault upon the wife must have come about suddenly and following certain instant incident. The injuries caused are not, *prima facie*, such as could be fatal. It is not unusual in our society or for that matter in any society for the spouses to be involved in occasional fits of violence, sometimes transgressing the limits of common rudeness. For all these reasons we are inclined to think that the offence committed by the appellant was one of culpable homicide not amounting to murder" (Kala Mia Vs. The state 1985 BLD 129 (para - 24).

Where the fatal injury was caused without premeditation in sudden fight, the cause fell under section 304, Part I (1971 SCC (Cr) 671; AIR 1971 SCC 2268; 1971 UJ (SC) 250). Where the accused finding his wife in a compromising position with another man assaulted her with a stick in the heat of passion and she died after receiving the injuries, the accused was held guilty under section 304, Part I and not under section 302 (1984 CrLJ (NOC) 12 Orissa).

It appears there was a confrontation between the accused and Yasin on the land of occurrence, the former claimed it to be their own, and there the appellant Lalu gave a dao blow on the right side of the chest of Yasin. From the circumstnces of the case and the nature of injury that resulted in death eleven days after it was inflicted, the appellant cannot be held guilty of murder but he must bear the consequences for causing the bodily injury that resulted in the death of the victim. Conviction altered to section 304, Part I (Lal Miah @ Lalu Vs. The State 41 DLR (AD) (1989) 1).

From the materials on record and the nature of injuries caused and the instantenous death of the victim, it is not difficult to hold that at the time the accused persons assaulted Nurul Islam they did it with intention of causing death or such bodily injury as is likely to cause death and as such the case falls clearly under part - I of section 304 of the Penal Code (The State Vs. Abdul Aziz 1985 BLD (AD) 176 (para -12).

Petty and sudden quarrel flared up between brother, over the sharing of the door leaves. The deceased brought them out and threw them out to be divided between 4 brothers in equal shares. The appellant then brought out a sharp cutting instrument 4 kati and stated that he would prepare another door leaf of bamboos. The appellant dealt a blow on the neck of his brother who died instantaneously. Held, the offence fell under section 304, Part - I (1985 CrLJ 1589).

Where the common intention of the accused was evidently to cause hurt to one K and not to kill or cause grievous hurt to him, and when they were attacking K, his mother had suddenly come there and lay herself over her fallen son in order to protect him, and the appellant had then struck a blow on her head with a kirpan as a result of which she died. It was held that under the circumstances the appellant would be guilty only under section 304, Part I, and not under section 302 (1975 SCC (Cri) 186).

There was a confrontation between the accused and the deceased on the land of the occurrence. From the circumstances of the case and the nature of injury that resulted in the death of Yasin eleven days after it was inflicted, the appellant cannot be held guilty for murder but he must bear the consequences for causing the bodily injury that resulted in the death of the victim. Accordingly the conviction for murder

is altered to that for culpable homicide not amounting to the murder. (Lal Miah @ Labu Vs. The State 1988 BLD (AD) 107). Where injuries inlficted by accused were not on vital part and which were not sufficient in the ordinary course to cause death. However the accused could be attributed with knowlede that such injuries was likely to cause death of deceased. Offence of accused fell within section 299 punishable under section 304 Part I (1993 CrLJ 1387 (SC).

According to the P.Ws 3 and 4 the accused persons were armed with lathis and halangas. The four injuries were however caused by lathis. There is no doubt that a lathi can be wielded as a deadly weapon. The lathi blows were finflicted on the vital parts of the victim the temporal regions of the head, the chest and the abdomen. There does not, however, appear to have been any fracture of bones caused by the assault. The doctor found only swelling injuries. The victim did not immediately sucumb to the injuries and was alive for more than two days. Thus it is reasonable to hold that the injuries caused by the appellants do not appear to have been inflicted with the intention of causing the death of victim. Nevertheless, from the use of the lathis on the vital parts of the deceaseds body and that also one after another it can reasonably be inferred that the accused had at least the intention to cause such bodily injuries as were likely to cause death. The offence committed by the appellants, therefore, falls under the first part of section 304 of the Penal Code (Abul Kshem Vs. The State (1990) 10 BLD (AD) 210). When the accused had no premeditation to murder deceased, he did not enter into conspiracy with any one for the above purpose but caused bodily injury as was likely to cause death, the appropriate section to hold him guilty is not section 302 but section 304 Part I of Penal Code (Sudhir Mahanta Vs. State of Orissa 1988 (2) Crimes 342 (Ori).

There was no enmity between the appellant and the occurrence was a sudden affair. Something which has not been completely unravelled, might have sparked off the incident. Only one blow was given by the appellant with a small knife to the deceased who died more than nine days after the receipt of the injury in the hospital. In these circumstances held, that it had not been clearly established that the intention of the assailant was to cause death of the deceased. The offenece committed by the appellant would therefore fall under the first part of section 304, Penal Code. Accordingly, the conviction of the appellant was altered from one under section 302 to that under section 304, Part I, Penal Code, and sentence was reduced to eight years rigorous imprisonment (1976 CrLJ 1186 (1191, 1192)= AIR 1976 SC 1519; 1976 CrLJ 236 (SC).

From the evidence on record, it transpires that there was quarrel and golmal over the fencing on the disputed land and also altercation took place on the day of occurrence between the parties over removal of the fencing which ultimately culminated into a 'maramari' causing thereby bleeding injury on the person of the appellant's son kalu in one hand and the death of the victim Abdul Karim on the other. Besides, the injury on the person of the son of accused Momin Malitha could not be explained away by the prosecution. It also appears that the accused had not undue advantage in the matter. Be that as it may, on a careful consideration of the facts and circumstances of the case and the evidence on record and also the relevant provisions of law, it was held that the alleged offence committed by the appellant Momin Malitha comes within the ambit of the exceptions 1 and 4 of section 300 of the Penal Code and as such this appellant can not be convicted and sentenced under section 302 of the Penal Code. Conviction altered from section 302 to section 304, Part I (Momin Malitha vs. State 41 DLR (1989) 39 (Para 24).

Where the appellant brought the gun from his house to protect himself having seen the 'aggressive posture' of the students and then faced with the fury of the

students, he lost nerve and fired from the gun, it was held that the case fall under the first part of section 304 of the Penal Code and not section 302. Taking all the relevant circumstances into consideration including the fact that the appellant had been under the sentence of death for about a year, a sentence of rigorous imprisonment for seven years was justified to meet the ends of justice (1976 CrLJ 2002(2003, 2004 (SC); AIR 1976 SC 2619; 1976 CrLR 525 (SC);1977 SCC (Cri) 95).

Where the evidence showed that the accused was drunk at the time of offence, which was committed at night, and that the arrow discharged by accused struck the deceased on his ribs causing rupture of the spleen resulting in his death, it was held that it was night time and accused being drunk might not have chosen the particular spot where the injury was caused. In the absence of evidence regarding the accused having selected the place of injury all that could be said was that he intended to cause bodily injury which was likely to cause death and not one which was sufficient in the ordinary course of nature to cause death. The offence of the accused, therefore, fell under secton 304, Part I and not section 302 (1965) CrLJ 1410; 1987 CrLJ 713 (SC); AIR 1987 SC 768; (1982) 2 SCC 652).

Before the provisions of section 304, Penal Code, can apply, it must be shown that the act committed by the accused was not a cruel one (AIR 1978 SC 1082 (1084). If the accused commits an act while exceeding the right of private defence by which the death is caused either with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death then he would be guilty under Part I of section 304 (1979) 1 SCJ 506 (511). Where the accused inflicted a single stab which proved fatal in the course of sudden quarrel without the mens rea to murder then he is guilty under section 304, Part I of the Penal Code and not under section 302 of the Penal Code (Kathan & ors. Vs. State & ors. 1989 (3) Crimes 130 (Mad).

During the quarrel between the parties Kadir attacked the appellant and inflicted several blows witha stick. The appellant stabbed Kadir with a knife. The knife pierced the heart of the deceased and the blow was of such violence that the deceased fell down immediately and the blood drained out from his heart. It was held that the appellant acted in the exercise of his right of private defence, but if regard is had to nature and violence of the blows suffered and apprehended by him, he exceeded that right when he stabbed Kadir in the heart. The appellant is guilty of an offence under the first part of section 304 of the Penal Code (1979 CrLJ 705 (707, 708 (SC); 1993 CrLJ 2008 (SC).

Out of three accused, one of the accused giving fatal blow on head of deceased. However injuries given by other accused, with spear on knee and arm of deceased were simple. First accused liable to be convicted under section 304, Part I, was not proper when section 34 has not been applied. Second accused liable to be convicted under section 324 only. Conviction of third accused giving simple blows upheld under section 323 (AIR 1992 SC 1629).

Where according to doctor the inuries could have been fatal independently but not necessarily, this would mean that one injury could have been fatal but it was not necessarily so. It is, therefore, possible that one injury alone did not cause the death of the deceased though it was likely to cause such death. On this state of the evidence, the Supreme Court held that the offence which the appellant appeared to have committed is one under section 304, Part I, Penal Code (1977 CrLJ 341(342) (SC).

Where there was some dispute between the accused and his father, the deceased came there and intervened and pushed aside the accused. Thereafter the

accused went into his room and came with a knife and inflicted two stab injuries, as a result of these the deceased died. It was held that the accused could be convicted under section 302 and not under section 304 Part I (AIR 1980 SC 448). Where the injuries are caused on vital part of the body and sufficient to cause death in the ordinary course of nature, the offence is murder and section 304, Part I or II are not attracted (AIR 1980 SC 573). Where intention was not to kill the deceased, and the injuries inflicted were not with the intention or mruder by the deceased but were such as the accused would have known to be likely to cause the death, section 304 first part, would apply (AIR 1956 SC 654; 1956 CrLJ 1265). Where the deceased who was strongly built young man was struck with Lathi, and survived for 3 weeks after the injury was inflicted and the doctor's evidence was that an injury of that kind was not incurable, first part of section 304 and not section 302 applied (AIR 1955 SC 439= 1955 CrLJ 1014.).

In the undernoted case the trial Judge was not wholly justified in observing that there was no evidence about the so-called illicit relationship between Maya Bai and Kishore Singh; the deceased. The materials available create considerable doubt in mind as to whether the appellants really intended to kill Kishore singh or whether his misconduct pushed them to wreak revenge against the deceased and in this pursuit attacked him. Courts are not unmindful of the fact that the 7th injury noted in the post mortem certificate is in the ordinary course sufficient to cause the death of the deceased. But the Courts are not fully satisfied that the appellants intended to kill the deceased. The correct approach on the evidence and other circumstances in this case would, accordingly be to find the accused guilty under section 304, Part I, and to sentence them under that section (1987 CrLJ 987(987, 988)(SC)=AIR 1987 SC 1151).

5. **Exceeding right of private defence**.- Accused exceeding right of private defence can be held guilty under section 304, Part I (1971 SCD 1158; 1977 CrLR (SC) 48). No doubt initially accused did have apprehension that grievous hurt would be caused to him by deceased's assault considering that deceased had picked up a Chhuri to assault him, but no sooner accused was able to snatch chhuri from him, deceased became completely unarmed and any further apprehension of grievous hurt dissipated. Accused inflicted two severe stab wounds on deceased's person after he was unarmed. Accused, held, had exceeded his right of private defence in circumstances and was rightly convicted under section 304, Part I, Penal Code (Muhammad Akram Vs. State 1990 PCrLJ 574).

The injuries were caused to the deceased with slaps and first blows. Nobody from the complainant side was armed with deadly weapons. In these circumstances, the use of knife by the appellant was not justified. The appellant exceeded the power given to him by law. He is, therefore, not totally absolved from the guilt. His case is covered by Exception (2) of section 300 Penal Code. The offence made out would, therefore, be punishable under section 304, Part I, Penal Code (1985 R.L.W. 707 (721).

The accused exceeded his right of private defence in causing culpable homicide not amounting to murder accessing to the trial Court. The prosecution had suppressed the origin and genesis of the occurrence. Evidence was on record that the complainant party initiated the attack on vital parts of the body viz head. Held, under the circumstances the accused apprehended that the aggressor would cause his death, his right of private defence exceeded to causing the death of aggressor (1984) 3 Crimes 319).

The deceased having picked up quarrel with accused's brother sat on his chest and gave him fist blows. The accused on finding that he could not prevent deceased

from doing so by merely giving him knife blow at the back of the deceased so as to cause his death. It was held that the offence committed was culpable homicide not amounting to murder on the ground that death was caused in exercise of right of private defence, but by exceeding that right, conviction must be under Part I of section 304 (AIR 1971 SC 1491= (1971) 1 SCR 943= (1970) 2 SCC 480).

In a dispute over erection of wall, the court held that it was likely that injuries were caused to the deceased when trespassed into shop and the accused would be entitled to throw out deceased out of shop but as the deceased was not armed, the accused far exceeded his right by using the dangerous weapon with deadly effect and causing two injuries which out the heart and lung (1978 UJ(SC) 652).Where accused in an encounter with the deceased exceeded his right of private deence his conviction was altered to one under section 304, Part I (PLJ 1987 SC 630; NLR 1987 SCJ 554; 1987 SCMR 919).

Culpable homicide will not be murder if a person is called upon to defend himself and then exceeds the right of private defence. Where grievous injuries are on the arms and legs of the appellant, an intention to kill, cannot be inferred from these injuries. Therefore conviction of the apellant was converted to one under section 304, Part II and his sentence was reduced to seven years' rigorous imprisonment (1971 PCrLJ 1224 (DB) (Lah).

The number and nature of injuries sustained by the acused and the deceased in any case, may furnish good evidence to consider whether the accused had exceeded the right of private defence (Patori Devi and another Vs. Amar Nath and others 1988 (1) Crimes 555 (SC).Where accused suffered 10 injuries but except one swelling on head, all other injuries were found to be on non-vital parts of body. All injuries were simple. He could not be safely presumed, having apprehension of death but might have apprehension of grievous injury. Accused picked up a gun, more dangerous weapon than weapons of his assailants and fired at abdonmen of deceased, which in all probability was to cause death. Accused exceeded right of private defence. Conviction under section 304, Part I was maintained (1985 PCrLJ 1932).

Where appellant had caused six injuries with sharp weapon, out of which two on vital parts of body of deceased were fatal, he exceeded his right of defence. He was convicted under section 304, Part I and sentenced to 10 years' rigorous imprisonment (1986 SCMR 1884). Where accused had no previous enmity with deceased nor was there any pre-planning to attack him. Incident erupted suddenly and in the fight accused inflicted three head injuries on deceased knowing that blows were likely to cause his death. Accused, was held to have exceeded his right of private defence and as such was guilty of culpable homicide not amounting to murder (1984 PCrLJ 2175; NLR 1984 AC 2).

Where there existed neither reasonable apprehension of death or grievous hurt to accused nor was there any need to deal numerous kassi blows causing head injuries to deceased which proved fatal. It was held that accused had exceeded his right of self-defence (1983 SCMR 796 (DB). K started attacking A with stick. A then stabbed K with knife causing grievous injury to K's heart resulting in death of K. It was held that A acted in exercise of his right of private defence but exceeded that right of stabbing K in heart (AIR 1979 SC 1179; 1979 CrLJ 706).

The deceased trespassed on the land of the accused and assaulted the co-accused which provoked the accused and he, purporting to act in self-defence, assulted the deceased and caused death. It was held that the accused must be deemed to be guilty only of exceeding the right of private defence as neither accused received any injury (1978 CrLR (SC) 109= 1978 CrLJ 1089= AIR 1978 SC 1096).The

accused were in possession of the land from which complainant tried to dispossess them. Complainant's party was armed with sticks and the accused in exercise of right of private defence while defending their person and property caused death of one of the complainant's party. Held, right of private defence was exceeded (AIR 1976 SC 2273).

Where the injuries inflicted on the person of the deceased by the appellant were inflicted by him in exercise of the right of private defence of person and property though it cannot be denied that he has exceeded that power which is given to him by law and thereby he caused the death of the deceased. He obviously had neither the intention to cause death nor was there any premeditation. the case of the appellant, therefore, squarely is covered by section 304, Part II, Penal Code (1985 (2) Crimes 943 (949) (Delhi).When the deceased picked up quarrel with accused by preventing him from taking water to his land for irrigation, accused fired shot in exercise of right of private defnece, and killed the deceased. The accused exceeded his right in putting an end to the life of the deceased. accused would be liable to be convicted under section 304 Part I and not under section 302 (Jasbir singh vs. State of Punjab AIR 1993 SC 968).

Where a son, on finding that his father is being beaten up, inflicts injuries on his father's assailants and the accused persons had received simple injuries possibly as a result of scuffle, it could not be said that the accused are falsely pleading the self-defence. They are entitled to the right of self-defence. However, when there was no reasonable apprehension that death or grievous hurt would be caused it has to be held that in causing death of the deceased the accused had exceeded their right of self-defence. Accordingly they would be liable to be convicted under section 304, Part I, and not under section 302 read with section 34 (1993 CrLJ 3674 (SC). Occurrence taking place in field of deceased on his objection to removal of crops by accused persons. Deceased biting finger of hand of accused causing provocation to the accused sons. Medical evidence proving that death was caused by back portion of axe. Accused armed with axe convicted under section 304 Part I for exceeding right of private defence. Other accused acquitted (AIR 1992 SC 599).

Where the explanation of the incident put forward by the accused is not unreasonable, it is at least as worthy of acceptance as that put forward by the prosecution. Therefore effect must necessarily be given to the accused's version as reasonably possible which reacts upon the credibility of the prosecution case by creating reasonable doubt regarding the truth of the incidents upon which it rests (PLD 1963 SC 740; 16 DLR SC 33; PLD 1965 Lah 553 (DB).

Where the accused party received a large number of injuries. Such injuries were not explained by the prosecution. The, prosecution witnesses were inter-related and interested and there were material discrepancies in the statements of such witnesses. The facts did not disclose a sudden fight and self-defence though not specifically pleaded was yet inferable from witness's cross-examination. The accused was held to have acted in self-defence (1968 PCrLJ 560).

Where both sides receive injuries in the incident they do not generally come out with true facts and try to minimize the part played by them and throw blame of aggresson on each other. Therefore in such cases proper course for the court is to draw inferences from evidence and flow of the circumstances of each case (1984 PCrLJ 2445).

Where deceased after makign preparation, trespassed into house of accused and caused head injury to father of accused. Accused inflicted only one injury to deceased in order to save his father. He was well within his right to cause death and

no case of exceeding right of private defence was made out. Accused was acquitted (1988 PCrLJ 2006; NLR 1988 PCrLJ 367).

Where the accused was armed whereas the deceased was not armed, and there was some sort of grappling between the parties before the fatal injury was inflicted. It was held that the accused had far exceeded his right of self-defence and at best could apprehend simple hurt at the hands of the accused. By way of abundant caution conviction under section 302, Penal Code was altered to one under section 304, Part I, Penal Code (1981 PCrLJ 324 (DB) (Lah).

Where a person who is not in danger of suffering grievous hurt or death causes fatal injury to another in defence of his property, the offence would fall under section 304, Part II, Penal Code (PLD 1954 Lah 602; 6 DLR WP 130; PLD 1953 FC 93).

Where death was caused in a scuffle after a thief had thrown down the sheep which he was carrying away, it was held that the accused had exceeded the right of private defence and he was convicted under section 304, Part II (PLD 1956 SC 420; PLR 1957 (1) WP 185; 1956 PSCR 218).

Where however the accused inflicted such injury to the deceased that it could be presumed that he intended to cause a fatal injury, his offence would fall under section 304, Part I, Penal Code (1970 DLC 354; 22 DLR 69; 1970 PCrLJ 776 (DB).

6. When the offence falls under section 304, Part - II.- Where the accused had knowledge but no intention that blow with knife was likely to result in death, it was held that the offence committed was culpable homicide; not amounting to murder punishable under Part II of section 304, Penal Code (1973 CrLJ 1220; 1977 UJ (SC) 24 (Notes); AIR 1983 SC 185; 1983 CrLJ 346). If the totality of circumstances justify an inference that the accused intended the injury to be inflicted,though the injury inflicted was sufficient in the ordinary course of nature to cause death, he is liable to be convicted under section 304, Part II, Penal Code (Sebastian @ Kunju Vs. State of Kerala 1992 (3) Crimes 864(865).

Where no injury was inflicted on the vital organ of the deceased, the case falls under part II of section 304, Penal Code, because the act was done with the knowledge that it was likely to cause death but without any intention to cause death or to cause injury as was likely to cause death (Fatech Singh and another Vs. State of Rajasthan 1989 (2) Crimes 249 (Raj). Where it was found that even though the accused might not have the intention to cause death, his act was done with the knowledge that it was likely to cause death he would be considered to have committed the offence unishable under section 304, Part II (AIR 1991 SC 917; 1993 CrLJ 1058).

Where the weapon used was merely a walking stick and such weapoon normally would not cause death, it was held that the accused did not have the intention to cause the particular injury which resulted from the blow given to the deceased; but as the accused aimed the blow at the head of the deceased, there could be no doubt that he must have the knowledge of that death was the likely result of his act and as such his act attracted section 304, Part II (1978 crLJ 798).

In a case the evidence of the eye-witnesses disclose that the accused struck the deceased with the blunt side of his takwa. It appears that earleir there was a druken brawal leading in an altercation and in the heat of the moment the accused struck a solitary blow with the takwa on the head of the deceased which unfortunately proved to be fatal. It is true that P.W. 3 Dr. Ram Lubhaya has deposed that the death of the deceased was due to shock resulting from the head injury which was sufficient in the ordinary course of nature to cause death. The facts and circumstances however do not bring the case within clause thirdly of section 300 but the offence comes under

section 304, part II, Penal Code (Taren Singh Vs. State of Punjab 1988 CrLR 284 (285) (SC). Injury attributed to accused not individually sufficient to cause death. Medicla evidence that death was caused due to shock and haemorrhage resulting from two injuries one attributed on accused and other to accused No. 2 who was aquitted. Conviction altered from section 300 to that under section 304, Part II (AIR 1993 SC 292).

Where the incident was the result of a sudden quarrel and the accused beat the deceased with stones which were lying there, it was held that though the accused could not be said to have intention to cause death or bodily injury which was sufficient to cause death in the ordinary sense of nature, they could be presumed to have known that the injuries caused by them were likely to cause death of the deceased. It was further held that the offence committed by the accused did not come under section 302 read with section 34, Penal Code, but it came within the mischief of section 304, Part II read with section 34, Penal Code (1979 ACC 144 (SC); 1979 CrLR (SC) 638).

Where death ensues because of a single knife injury inflicted by the accused in a sudden fight without any intention on the part of the accused the offence is one of culpable homicide not amounting to murder punishable under section 304, Part II, Penal Code, and is not murder as held by Court below. (Sundarapandian Vs. State 1988 (2) Crimes 428 (Mad); Jagtar Singh Vs. State of Punjab AIR 1983 SC 463).

When the injury is found to be sufficient in the ordinary course of nature to cause the death but is not found to have been caused by the accused intentionally, the conviction under section 304, Part II, Penal Code, is maintainable and not under section 302 of the Code (Swaran Lal Vs. State 1988 (2) Crimes 892 (J&K). At the most, the violence committed on the deceased, whoever committed it, was done with knowledge that it was likely to cause his death, but without any intention either to cause death or to cause such bodily injury as was likely to cause death. In this view of the matter, the offence committed in this case is clearly one failling under Part II of section 304 (PLD 1969 SC 552).

Evidence establishing that accused alone had inflicted injury which caused death. Deceased died two days after infliction of injury. In the circumstances, though injury resulted in death of deceased, it cannot be conclusively said that it was sufficient to cause his death. Accused convicted under section 304, Part II and not under section 302 (AIR 1993 SC 973). The assailant no doubt had given manual pressure on the throat of the victim but he withdrew his hand realising that the victim was going to die. Therefore, intention to kill in this case appears to be lacking. Thus the charge under section 302 of the Penal Code fails. We find that the assailant although had no premeditated intention to kill the victim yet he appears to have had knowledge that such pressure as he exerted upon the victim was likely to cause her death and in fact the victim succumbed to her injuries 5/7 hours later. The accused appellant, therefore, is liable for commission of the offence of homicide not amounting to murder punishable under section 304 Part II, Penal Code (Afazuddin Pramanik Vs. The State 1988 BLD 282).

Where deceased had fallen victim at the hands of accused only after he entered their house and only one injury out of multiple was found serious in nature, the offence is not one of murder but of culpoable homicide not amounting to murder under section 304, Part II of the Penal Code (State of Karnataka Vs. Siddappa Basanagouda Patil and another 1990 (2) Crimes 233 (SC). Accused inflicting a single blow by tabbal i.e. a blunt agricultural equipment, which is not a deadly weapon. No intention to cause death of deceased. Accused cannot be convicted by invoking clause

(1) or (3) of section 300. His conviction converted to one under section 304, Part II (AIR 1993 SC 1487).

Where the accused persons simultaneously attacked the deceased with sticks and caused as many as 10 injuries one of them being the fracture of tenth and eleventh ribs and rupture of the spleen.And all persons participating in such an attack could at least be imputed with the knowledge that they were likely to cause injuries which were likely to cause death, it was held that the High Court was right in holding that on factual and medical evidence, the accused persons were guilty of committing an offence under section 304, Part II read with section 34 of the Penal Code (1985 SCC (Cr) 54(59).

Where there was sudden quarrel between father-in-law and son-in-law on the issue of not sending daughter to her matrimonial home and both side started throwing stones on each other and stone throwing by son-in-law caused a head injury on his father-in-law which resulted in his death the offence cannot fall under section 302 of the Penal Code but would fall under section 304 Part II of the Penal Code (Rama Nago Kumbhar Vs. State of Maharashtra 1989 (3) Crimes 597 (Bom).

Where death caused by lathi blows inflicted by accused on head and ribs of deceased who intercepted during the fight between two groups. Accused, prior to giving of lathi blows received injuries at hands of son of deceased. None of accused except one had any cutting weapon. Injuries inflicted by accused by lathi, cannot be said to be with sole intention to cause death. Conviction altered from section 302 to section 304, Part II (1993 CrLJ 57(SC); 1993 CrLJ 3673 (SC).

Where the case was of a not single injury and the occurrence took place in the night and the death of the deceased did not take place instantaneously on the spot but he died after five days and the doctor of the post-mortem examination did not state that the injury of the kind sustained by the deceased is generally sufficient in all the case to cause death in the ordinary course of nature, it was held that the offence made out was punishable under the Part II of section 304, Penal Code, as culpable homicide not amounting to murder (1985 R.L.W. 97 (103).

Where the accused persons wielded their lathis on the head of the deceased, it was held that they must have had knowledge that they were causing such bodily injuries on him as were likely to cause death, and their case would fall within the purview of section 304, Part II and not Part I of the section (Chand Vs. State of Uttar Pradesh, AIR 1972 SC 955 (957). The deceased and the appellant lived in the same locality and were friends. There was sudden altercation between the appellant and the deceased. They exchanged abuses. Thereafter, they are alleged to have caught each other from the collar and grappled. In that process the appellant is said to have taken out a knife from the dub of his trouser and given one blow on the left side in the abdoment which, unfortunately proved fatal. Held to be an offence under section 304, Part II, Penal Code (1985 (2) Crimes 536 (438) Delhi).

The two boys had no previous enmity and, therefore, is not a case of per-meditation or pre-planning. The age of the accused, as estimated by the learned Trial Judge at the time of his statement, was 16-17 years. There being no specific evidence about accused below 16 years, he was tried by the learned Additional Sessions Judge instead of his case being referred to the Children Court. The two boys being of immatured understanding, might have quarrelled, on a trivial point and in such circumstances if one of them inflicted lathi blows to the other, he cannot be imputed with intention to cause murder or the intention to cause injuries likely to cause death. The injuries have been caused by a lathi. Thus, the case cannot be said to fall within the ambit of clause thirdly of section 300, Penal Code. All that can be

said is that the assailant while causing lathi injuries to the victim should have knowledge that by his act he may cause bodily injuries to the victim likely to cause his death. In this view of the matter, knowledge envisaged by section 304, Part II, Penal Code, can be imputed to him (1986 (1) Cr. LC 15 (16) Raj).

Doctor, who conducted the postmortem, found 28 injuries. Only three lacurated injuries were on the head and certain punctured wounds were on the face but the doctor did not find any internal damage. The doctor noted that the teeth were artificial and the denture was complete. Only three teeth of the denture were broken. The doctor even did not say that the injuries cumulativly were sufficient in the ordinary course of nature to cause death. There is no injury on any of the vital organs. This only shows that the common object of the unlawful assembly was only to belabour the deceased. Convicton for murder with common intention is not warranted. Conviction altered to one under section 304, Part II (AIR 1993 SC 350).

All the four accused shared the common intention to beat the deceased violently and they must have knowledge that by inflicting such injuries, they were likely to cause the death of the deceased. The High Court has convicted them under section 304, Part II, P.C. as though they intentionally inflicted such injuries which are likely to cause death. Taking the case as a whole into consideration it must be held that the accused were responsible for inflicting those injuries and they must be attributed the knowledge only that by inflicting such injuries they were likely to cause the death in which case the offence would be one punishable under section 304, Part II, P.C. (AIR 1993 SC 2302 (2305).

It is found from the evidence on the record, that Ram Briksh Rai repondent No. 1 is alleged to have been armed with a lathi and rope while Giani Mandal, respondent No. 2, is stated to have been in possession of a knife, with which he cut the belt to remove the pistol from the person of the deceased. The accused were therefore in possession of a loaded fire arm also. According to the medical evidence of Dr. T.P. Sahi, PW 12 and the post mortem report, no injury had been caused to the deceased either with the lathi or with a knife or with the pistol. The respondent, therefore, did not use any of the weapons with which they were armed. Cause of death, according to the medical evidence, was shock and haemorrhage associated with strangulation as a result of the injury on the chest and the neck. According to the prosecution witnesses, who have been believed by both the Courts below, injuries were caused to the deceased only by kicks and first blows. Keeping in view the ocular testimony and the medical evidence, we find it difficult to hold that the accused respondents had intended to cause the injuries on the deceased which were sufficient in ordinary course of nature to cause his death. Had the accused shared the common intention to cause the death of the deceased, nothing prevented them from using the pistol. The courts have to take into consideration all the attendant circumstances while considering the question of offence. The fact that neither the knife nor the lathi nor the pistol was used, even though the deceased was lone some and was attacked by four young perons, would go to show that in all probabilities the respondents did not intend to cause death of the deceased and that they wanted to severely assault him only. The facts proved by the prosecution and the established circumstances on the record go to show that the case does not fall within the ambit of any of the four clauses of the definition of murder confined in section 300, P.C. However, in causing the injuries as have been noticed in the post mortem report, the respondents must be attributed the knowledge that by their acts they were likely to cause the death of the deceased, though without any intention to cause his death or to cause such bodily injury as is likely to cause his death. The offence, in this case, would therefore be culpable homicide not amounting to murder as per the

third clause of section 299, Penal Code, punishable under section 304, Part II/34, Penal Code (AIR 1993 SC 2317(2319).

Where the accused exceeded this right of self-defence and struck blows on the deceased with a dagger resulting in his death conviction under section 304, Part II was held proper (AIR 1969 SC 956= 1969 CrLJ 1430). Where the accused returned the deceased to their relatives in a seriously injured state and while the deceased was in the hospital, the accused meeting the prosecution witnesses, offering to meet the medical expenses for treatment, thus negativing any intention to kill, conviction of the accused under section 304, Part II was held to be proper (1979 CrLJ 1386= AIR 1979 SC 1708).

The accused inflicted only one injury on the abdomen. The other injury ont he left knee would also have been caused in the course of causing the other injury to the abdonmen. The occurrence took place on 22. 6. 78 and the deceased died on 30.6.78. As already noted an operation was also conducted but gangrenous got set in. Therefore, these circumstances would show that the accused would not have intended to cause the death of the deceased by inflicting injuries which were sufficient in the ordinary course of the nature to cause the death. However, by inflicting this single injury he had knowledge that he was likely to cause the death in which case the offence is one Punishable under section 304, Part II, Penal Code (1993 CrLJ 3680 SC).

Where the appellant, while standing in a street, was abusing the organisers of a chit fund scheme by using filthy language, whereupon a woman who was in front of her house told the appellant to move away, and when the appellant would not do so, the deceased came out of his house and told the appellant not to use vullar language where ladies were present and also asked him to move away, and in the ensuing altercation the appellant took out a soori knife from his west and fatally stabbed the deceased on his chest, it was held that as the incident had occurred on the spur of the moment and the appellant was not alleged to have entertained any malice towards the deceased, it could not be said that he intended to cause the death of the deceased or intended to casue the particular bodily injury which he had in fact inflicted, and as at the most he could only be ascribed a knowledge of likelihood of causing the death of the victim, he would be punishable only under section 304, Part II, and not under section 302 (1984 SCC (Cri) 164; 1984 CriLJ 478 (SC; AIR 1984 SC 759 see also PLD 1969 SC 552). Where as a result of a sudden quarrel the accused threw stones lying there on the deceased and the accused had no intention to cause death the accused must be presumed to have known that the injuries caused were likely to cause death of the deceased and the offence fell under section 304, Part II read with section 34 (AIR 1956 SC 116).

Where a fatal injury of one blow on the head was inflicted by the accused without any intenton to cause death but the accused knew that the injury was likely to cause death the case fell under section 304, Part II. In a free fight with sticks the deceased received a fatal injury on the head and the accused also received some injuries on the head, the case was held to fall under section 304, Part II (AIR 1954 SC 36).

Where a police constable attempting to arrest a prisoner who had ascaped fired at him but it hit some body else, the case was held to fall under section 304, Part II (AIR 1955 All 379). Where a woman of hystria being possessed of evil spirit inhaled considerable smoke before choking and received some burns by fire at the instance of the accused he was held guilty of an offence under section 304, Part II and sentenced to 3 years R.I. (AIR 1964 Mad 480; (1964) 2 CrLJ 537).

Where the accused hit the deceased woman sitting with others in broad daylight the offence was held to fall under section 304, Part II (1977 CrLJ 1656). Where there was improbability of the accused having caused the fatal injury with the type of weapon he was alleged to have used, the benefit of doubt given was held to be justified (AIR 1976 SC 912; 1976 CrLJ 674; 1975 UJ (SC) 657). Where deceased died two days after infliction of injury. Injury could not be said to be sufficient to cause death, accused is liable to be convicted under section 304, Part II and not for murder (1993 CrLJ 411 (SC); 1993 CrLJ 2667 (SC). Where death caused by single blow with blunt agricultural equipment which is not deadly weapon, accused is liable to be convicted only under section 304, Penal Code (1993 CrLJ 1809 (SC).

In a case the deceased and his companions were guilty of enacting an ugly and disorderly scene at the house of a respectable person like the accused and the given circumstances clearly showed that it was because of their that wrong act that the aecused had lost his mental balance momentarily. Again, it was because of their that condemnable action that the accused was deprived of his power of self-control by grave and sudden provocation, and on coming out had the misfortune of giving a blow to deceased which however proved fatal. But that act of the accused in causing the injury to the deceased was done with the knowledge that it was likely to cause death, although without any intention to do so, or to cause such a bodily injury as was likely to cause death. That being so, he was held guilty only under section 304, Part II, of the Penal Code (1989 CrLJ 1516 (1519) Pat).

In the undernoted case though the accused had not at all taken the plea of right of private defence in his statement, the circumstances on record leave no manner of doubt that the accused inflicted the deadly blow in the exercise of right of private defence of his person. That being the case, the accused cannot be convicted under section 302 of the Penal Code for an offene of murder. However, taking into consideration, the situation and the nature of the injury resulting from the blow on the chest, it appeared that the accused had exceeded in the exercise of that right. Admittedly, deceased was an old person of about 55 years of age, he was unarmed. In such circumstances, it is clear that the accused inflicted the injury on the chest of the deceased exercising his right of private defence. The facts and circumstances also clearly point out that the death is not caused with the intention of causing death or causing such bodily injury as is likely to cause death but the accused had inflicted the injury with the knowledge that it is likely to cause death but without any intention to cause death. That being the case, the offence would fall under Part II of section 304 of the Penal Code (1989 CrLJ 1714 (1718) Bom).

In the instant case fighting took place between two groups. The accused was injured by son of deceased. The deceased (mother) intercepted when fighting was going on and was given lathi blows on her head and ribs by accused. However except one accused none of the accused persons inlcuding the appellant had any sharp cutting weapon and the appellant/accused had only a lathi in his hands. Held, the injuries caused by accused/appellant were not inflicted with the sole intention to cause death of the deceased but when the lathi blow was dealt, with force on the head of the deceased, it may be contended that the accused should be aware that such injury was likely to cause death. Considering such circumstances of the case conviction of the appellant under section 302, Penal Code liable to be converted to one under section 304, Part II, Penal Code (AIR 1993 SC 302).

There was a severe exchange of abuses between the parties and in the course of the quarrel the accused dealt fatal blow on the head of the decesed with the lathi. Even though the circumstances were such as not to bring the case within Exception 1 to section 300, the crime was committed without premeditation in a sudden fight

in the heat of passion upon a sudden quarrel and without the accused's having taken undue advantage or acted in a cruel or unusual manner, thus bringing the case within Exception 4 thereto with the result that the offence committed was culpable homicide not amounting to murder. When the fatal injury was inflicted by the accused on the head of the deceased by only one blow given in the manner alleged by the prosecution it could as well be that the act which the death was caused was not done with the intention of causing death or of causing such bodily injury as is likely to cause death. The act appears to have been done with the knowledge that it was likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death within the meaning of Part II of section 304 of the Penal Code (AIR 1954 SC 622; (1955) 2 SCR 1140= AIR 1956 SC 116).

Participation of accused in attack on deceased proved. Victim surrounded by all accused, each armed with weapon attacking him simultaneously. Appellant accused giving blow to victim after he fell down. Due to attack by other accused persons, fatal injury can not be fixed to appellant accused. Conviction under section 300 and sentence for life imprisonment altered to that under section 304, Part II and rigorous imprisonment for five years (Sakder Singh Vs. State of Punjab, AIR 1992 SC 755). In a free fight between two parties assaulting each other with sticks in their heads, the accused dealt only one blow on the deceased resulting in his death. The accused also received several injuries including injury on head and fracture of bone. It was held that the accused could invoke the benefit of exception to section 300, and was guilty under section 304.II (AIR 1954 SC 36= 1954 CrLJ 331).

There was a quarrel between the accused and the victim which ended fatally. Incensed by the situation, the accused gave a blow with stick. It fell on a vulnerable part of the victim's body, resulting in his death. It was held that th accused was guilty udner section 304, Part II (1981 CrLJ 30(30) SC).

Where the accused gave a blow with a cane stick on the head of the decesed, knowledg that death is likely to result must be imputed and to conviction under section 304, Part II instead of that under section 302 was proper (AIR 1979 SC 1525= 1979 CrLJ (NOC) 168; 1979 UJ (SC) 423; 1979 CrLJ (SC) 355). Where the occurrence took place suddenly and the accused caused injury with a dagger on the neck. Held, that he must have knowledge that death may result from his act. Held, section 304, Part II was applied. (1979 CrLJ 1135; AIR 1979 SC 1532).

The deceased was put in front of a wheel cart. Thereafter the accused drove the cart passing the wholl over the body of the deceased and running him over. After postmortem of the dead body it was found that the abdomen was slightly distended and death was due to the rupture of the baladdar and peritonitis which could have been as a result of the deceased having been run over under the cart. At the same time the conduct of the driver of the cart in meeting the witneses in the hospital and taking steps to bear the expenses of the treatment of the deceased clearly showed that they had no clear intention to cause the murder of the deceased. It was held that in the circumstances the Sessions Judge was right in convicting the accused not under section 302 but under section 304, Part II of the Penal Code (1980 SC Cr. R 108 (110-11).

In the instant case, the assault on the deceased was not a premeditated one or a calculated move. It appeared that the appellant insisted upon the deceased to make immeidate payment of the loan. The deceased could not make the payment. Thereupon in a fit of anger the appellant caused a blow on his head with a cane-stick as a result of which he fell down and died on account of extra-dural haemorrhage. Held, that the accused-appellant should have been convicted under section 304, Part II, Penal Code (1975 CrLJ 1445 (1450) Raj; 1983 CrLJ 852; AIR 1983 SC 463).

In the undernoted case, the deceased was pressuring the accused for supply of liquor but since he did not oblige, the deceased gave filthy abuses upon which the accused inflicted number of injuries on the vital part of his body with dangerous weapons, and the doctor deposed that the injuries were sufficient in the ordinary course of nature to cause death and the accused intended to inflict the injuries that were found on his person and they were held guilty of the offence under section 304, Part I (1986 CrLJ 1700 Bom).

The accused inflicted as many as eighteen injuries on the arms and legs of the deceased with a gandasa while his companion held the head of the deceased. No injury was caused on the vital parts of the body. The motive for the crime was to wreak vengeance on the deceased for what his son had done to the accused's son. He was convicted under section 302 and sentenced to death. It was held that the fact that no injury was inflicted on any vital part of the body of deceased showed that the intention of the accused was not to kill the deceased outright. He inflicted the injuries not with the intention of murdering the deceased, but caused such injuries as he must have known would be likely to cause death having regard to the number and nature of the injuries, under the circumstances of the case the proper section under which the accused should have been convicted was section 304 and not section 302 (1956 CrLJ 1265 (SC).

The accused slapped the deceased across the face. The deceased who was a binge and strong man shock his fist in the face of the accused and the accused snatched a hockey stick from his younger brother and hit the deceased, one blow on the head and two blows on the hips. The injury on the head proved fatal. It was held that the accused was guilty under Part II of this section (1955) 2 SCR 1140).

The deceased was seated with persons in a broad day light when the accused came with a dagger in hand. It was held that the accused must be presumed to know the consequences from the stab caused by him namely causing injury if not committing his murder. Conviction under Part II of section 34, was maintained and that of section 302 was set aside (1977 CrLJ 1656). Where death was due to shock, haemorrhase and strangulation caused by kicks and fist blows only. Accused did not use weaons in their possession on lonesome deceased. Circumstances show that accused had intention to assault severely and not to cause injury sufficient in ordinary course to cause death. Conviction was altered from section 300 to 304, Part II (1993 CrLJ 3177(SC); 1993 CrLJ 3673(SC).

The accused who was highly intoxicated caused a fatal injury in abdomen of deceased. Attending general circumstances proved that the accused was incapable of forming requisite intention envisaged by section 300. But under section 86, knowledge could be attributted to him that by his act he was likely to cause death. It was held that the accused committed act was guilty of the offence under section 304, Part II and not under section 302, Penal Code (1975 CrLJ 1337).

The occurrence tooks place without any premeditation while the deceased along with the accused and others finished meals. It was held that the accused could not be said to have any intention to cause the particular injury on the vital part, but he must be deemed to have knowledge that death might be caused by his act and, therefore, conviction under section 302 was liable to be charged to one under section 304, Part II (AIR 1979 SC 1532; AIR 1979 SC 1525).

The multiple injuries were received by the deceased persons which were caused by blunt weaons like lathis and were of minor character. Furthermore, the injuries were not on any vital parts of the body and even those which were on the scalp portion apeared to be very superficial. There was nothing to show that the

accused intended to murder them. Held, that the accused undoubtedly had the knowledge that the cumulative effect of the injuries would result in the death of the deceased. In these circumstances, the accused have committed an offence under section 304, Part II of the Penal Code and not one under section 302, Penal Code (1976 CrLJ 1895(1901)(SC); AIR 1976 SC 2499= 1976 CrLR 387 (SC); 1983 CrLJ 693= AIR 1983 SC 361 (1).

In Keshoram Bora Vs. State of Assam (AIR 1978 SC 1096 (1099), the deceased entered the land of the accused and assaulted the co-accused with a lathi which provoked the accused to assaut the deceased pourporting to act in self-defence. Neither the accused nor co-accused received any injury, there can be no doubt that the accused exceeded the right of private defence. Thus the accused could only be convicted of an offence under section 304, Part II of the Penal Code for having exceeded the right of private defence.

In the case reported in Kundan Singh Vs. Delhi Administration (AIR 1975 SC 1484 (1486-87), the accused persons took away the deceased Ajit Singh to the house of accused Mohinder Singh. There was no evidence of the use of force or deceit in taking away Ajit Singh to the house of Mohinder Singh. It was clear that Ajit Singh went voluntarily. It was however, clear that the appellants did play a leading part in taking away Ajit Singh to the house of Mohinder Singh and had actually on an earlier occasion, threatened him with dire consequences. At least the three appellants inflicted the injuries on the deceased Ajit Singh in the occurrence that took place at the house of Mohinder Singh. Death was the combined result of rupture of the spleen as well as of one of the blows on the head. It was not even known which accused caused the severe stray injury on the head. Held, that the Court cannot hold all the accused liable for it unless it was common intention to cause such injuries as may cause death. On this aspect Court was left in the region of doubt. In these circumstances, the end of justice would be served if the convictions and sentencs of the appellants under section 302/24 and section 364/34, Penal Code, are set aside and each of the apellants is convicted under section 304, Part II, Penal Code.

Where in a case in which only one blow was given and that too by the blunt side of the (illegible) and altercation on a minor dispute took place, it was held that the conviction under section 304, Part II was justified instead of section 302, Penal Code (AIR 1982 SC 690 (690)= 1982 CrLJ 195 (196-7).

Where the deceased was having illicit relations with one J. Seven in the life time of her late husband and the appellants, the relatives of the widow including her own son, were very resentful towards her due to her affair and had even beaten her with shoes and sticks on the day prior to the occurrence, and on the day of the occurrence, the appellants lured the deceased to the house of one K, sent away the children and then beat up the deceased with shoes and sticks till she died of the injuries received, it was held that it was not possible to conclude on the basis of the evidence adduced by the prosecution that the accused had a common intention to cause the death of the deceased. However, as there was apparently a common intention on their part to give a beating to the deceased, and they must have had the knowledge or likelihood of causing his death through the beating, their conviction was altered from one under section 302/34 to one under section 304, Part II/34 and they were sentenced to imprisonment for a period of five years already undergone (1975 CrLJ 1085 (SC).

The accused and the deceased were cousins and the assault was not premeditated, but it took place on the spur of the moment because the deceased rebutted the accused. It was held that having regard to the facts and circumstances

of the case the ends of justice will be met if the accused is sentenced to undergo R.I. for five years for offence under section 304, Part II (1979) CrLR (Mah) 451).

Multiple injuries from blunt weapons like laths were caused to deceased and all were of minor character. They were not on any vital part. The superficial injuries were found on the scalp. The accused did not order or incite others for his killing nor could the murder be called deliberate. It was held that as all the accused acted together under a preconceived plan developing on the spot as evidenced from their pouncing upon him suddenly and then went away together with the knowledge that the injuries were likely to cause his death the accused committed an offence under section 304, Part II, Penal Code and not under section 302, Penal Code (AIR 1976 SC 2499).

The appellant tried ot overtake the scooter of the deceased with his tractor but this prosecution version was reversed by defence by alleging that the scooter hit the tractor while overtaking it. Independent witnesses supported the defence case. The relatives of the deceased supported the prosecution version. Held, speed of scooter was higher than that of a tractor. The defence version seems correct. The deceased was at fault (1985) 1 Crimes 360 (P&H).

The deceased was sitting in a shop with three persons when the accused with 3 others came there. An altercaton took a turn for a free fight in which the companions of the accused inflicted light dager injuries to them but when the deceased intervened he gae him a knife blow. The accused had no malice against the deceased. Held, offence fell under section 304, Part II and not under section 302, Penal Code (1984 CrLJ 1724 (Gau); 1984 GauLR 521).

The solitary blow given by the appellant to the deceased was on the left clavicle-a non-vital part, and it would be too much to say that the appellant knew that the superior venacava would be too as a result of that wound. Even a medical man perhaps may not have been able to judge the location of the superior venacava with any precision of that type. There is no quarrel with this proposition but then the injury which was found to be sufficient in the ordinary course of nature to cause death in the present case does not satisfy test because, it cannot be said to have been intended by the appellant. The illustration therefore, does not advance the cause of the State. Following the dicta in the two decisions of the Supreme Court the conviction of the appellant for an offence under section 302 of the Code was set aside and was substituted therefore one under Part II of section 304 thereof (AIR 1981 SC 1441).

In the heat of the altercation between the deceased on the one hand and the accused and his comrades on the other, the accused seized a jelli and thrust it into the chest of deceased. It would be noted that that was preceded by his remark that the deceased must be beaten to make him behave. Only one blow was struck by the accused at deceased. On the evidence it did not appear that there was any intention to kill the decesed. Therefore, the conviction under section 302 cannot be sustained and that on the contrary, the facts made out an offence under second part of section 304 (1983 CrLJ 346; AIR 1983 SC 185).

There was some verbal altercation as a result of which the deceased caught the hand of the accused, and the accused assaulted the deceased with a knife with very great force according to medical evidence. In view of the medical evidence and injuries received by the deceased the case squarely fells within four concerns of section 302, Penal Code. It could not be contended that the case fell under section 304, Part II, because there was nothing to show that the altercation was of such a serious nature which could cause sudden provocation. Secondly, the nature of injury,

namely, the stab on the chest which resulted in the fracture of the 6th rib and injuried the heart and the lung and which according to the doctor was given with great force showed that it was most cruel and therefore the case squarely fell under section 302, Penal Code (1983 CrLJ 683; AIR 1983 SC 364).

Where the accused gave a blow with a cane stick on the head of the deceased. Knowledge that death was likely to result was imputed and conviction under section 304, Part II instead of that under section 302 was proper (AIR 1979 SC 1525= 1979 CrLJ (NOC) 168= 1979 UJ(SC) 423; 1979 CrLR(SC) 355).

The accused started remonstratons using filthy language against certain organisers of a chit fund who had no connection with the deceased in front of the house of the deceased and the deceased came out of his house and asked the accused to go away, the accused on spur of moment gave only one blow with knife to the deceased and pushed him to some distance. It was held that in the circumstances of the case that, though requisite intention to commit murder could not be attributed to the accused he wielded a weapoon like a knife and, therefore, he could be attributed with knowledge that he was likely to cause an injury which was likely to cause death. In such a situation though he could not be convicted under section 302, he would be guilty of committing an offence under section 304, Part II (AIR 1983 SC 759= 1984 CrLJ 478).

Where the injuries were clearly of the nature likely to cause death, even if the nature of injuries was such that they were not sufficient in th ordinary course of nature to cause death, they could certainly be said to be the result of acts so imminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death, so as to fall within the fourth limb of section 300. It can however be said without hesitation that the acts of the accused were done with the knowledge that they would cause such bodily injury as was liekly to cause death. The High Court was not in error in convicting the accused under section 304, Part II read with section 34 (1982 CrLJ 1394= AIR 1982 SC 1183= 1982 CrLR (SC) 282).

In a free fight with sticks the accused dealt with a blow on the head of the deceased resulting in his death and several others injuries and it was held that part II of section 304 applied and not section 302 (AIR 1954 SC 36).

Where the accused stabbed the decesed with a knife while apprehending danger to an unarmed relation of the deceased, the offence fell under section 304 Part I (1965) 2 CrLJ 440). The accused without any premeditation hit the deceased on a vital portion of the body without any intention to cause his death. It was held that part II of section 304 applied (AIR 1979 SC 1532). The deceased was run over by a cart driven by the accused. The accused took steps to pay the medical expenses. It was held that part II of section 304 applied (AIR 1979 SC 1708).

Where the accused acted under a preconceived plan developed on the spot pouning on the deceased suddenly, the offence was held to fall under Part II of section 304 (AIR 1976 SC 2499).

Where the accused persons assaulted the deceased on different parts of the body except the head and the skull was not fractured it was held that the accused persons were guilty under section 304,Part II of the Penal Code as they assaulted and caused the injuries with the knowledge that they in the ordinary course of nature were likely to cause the death of the deceased (1979 CrLJ 603 (609). The irate and exasperated husband caused some injuries to his wife without any weapon on the heat of the moment. He has a minor child by the deceased wife. It will be pretly inhuman to keep the father in confinement for long. His conviction is altered to part II of section 304, Penal Code from section 302 and he is sentenced to suffer rigorous

imprisonemnt for 4 years only (Shafiullah @ Kala Mia Vs. The State 1985 BLD 129 (para 26 and 27).

Where some of the doctors examiend by the prosecution stated that the injuries sustained by the deceased were at all sufficient to cause death in the ordinary course of nature, and the state Counsel also could not point out anything in the evidence on record to show that the injuries were sufficient to cause death in the ordinary course of nature and the prosecution failed to establish the offence to be one of murder, it must be held that in the absence of the evidence to prove that the injuries were sufficient to cause death in the ordinary course of nature, the only reasonable conclusion can be that the knife blow upto the abdomen was dealt with the knowledge that the act was likely to cause death but without any intention to cause death or to cause such bodily injury as was likely to cause death, and that being so, the offence committed by appellant falls under section 304, Part II of the Penal Code (1985 CrLR 21(23).

Where there is previous back ground of enmity between the parties and there was absolutely no previous quarrel between the deceased and the victim and the altercation developed that very day followed by stabbing by the appellant and the stabbing with a knife without any attempt to cause any further blow can only impute knowledge that the injury could cause death and there is no evidence to establish that the appellant intended to cause this type of injury (1985) 1 CrLR 139 (145) All).

In the present case undoubtedly, the deceased died due to injury on his head. But the question is how and under what circumstances, the injuries came to be inflicted on the deceased. The evidence clearly established that there was a quarrel between the two. Both were throwing stones on each other. The accused has set out as to how and why the quarrel started between him and the deceased. There is no reason why the Court should not accept the case of the accused. It cannot be said that the accused had any intention to cause the death of the deceased. So also it cannot be said that he had any intention to cause such injury, as would cause death in the ordinary course, nor, can it be said that he had any knowledge of causing such injury. The offence, therefore, cannot fall within the scope of section 302 of the Penal Code but would fall under section 304, Part II of the Penal Code (Rama Nago Kumbhar Vs. State of Maharashtra 1989 (3) Crimes 597 (598) Bom).

7. **Whether delay in the death of the victim brings the case within the ambit of section 304.**- There mere fact that the victim luckily survived for two weeks on account of treatment in the hospital is no ground to put a premium on the offnece committed by the accused. A victim of violence cannot be left to die quickly leaving him unattended only for securing a conviction for murder.? There having been no material on record to sustain the contention that the case is covered by exception there was no occasion to consider that the offence is homicide not amounting to murder (Abul Mazid Sarker Vs. State 1988 BLD (AD) 71). Negligence in medical treatment, held, was no ground to take a case outside the pale of section 299, Penal Code (Qamar sultan Vs. State 1989 PCrLJ 402).

Accused inflicting single knife injury on abdomen of deceased. Other injury on leg. Deceased operated but died 8 days after incident. Knowledge that injury was likely to cause death cannot be attributed to accused. accused liable to be convicted under secton 304, Part II (1993 CrLJ 3680 (SC)=AIR 1993 SC 1941).

In a case under section 302, what courts have to see it whether the injuries were sufficient in the ordinary course of nature to cause death or to cause such bodily injures as the accused knew to be likely to cause death although death was ultimately due to supervention of some other cause. An intervening cause or

complication is by itself not of such significance. What is significant is whether death was only a remote possibility or is one which itself occurs in due course (Tewaram Vs. State of M.P. 1978 CrLJ 585(861) MP)=1989 PCrLJ 402).

Where the deceased who was strongly built young man was struck with lathi, and survived for 3 works after the injury was inflicted and the doctor's evidence was that an injury of that kind was not incurable, first part of section 302 applied (AIR 1955 SC 439=1955 CrLJ 1014; AIR 1993 SC 973).

There was no enmity between the appellant and the occurrence was a sudden affair. Something which has not been completely unrevelled, might have sparked off the incident, only one blow was given by the appellant with a small knife to the deceased who died more than nine days after the receipt of the injury in the hospital. In these circumstances held, that it had not been clearly established that the intention of the assailant was to cause death of the deceased. The offence committed by the appellant would therefore death of the deceased. The offence committed by the appellant would therefore fall under the first part of section 304, Penal Code. Accordingly, the conviction of the appellant was altered from one under section 302 to that under section 304, Part I, Penal Code, and sentence was reduced to eight years rigorous imprisonment (1976 CrLJ 1186 (1191, 1192)=AIR 1976 SC 1519=1976 CrLJ 236 SC).

There was a confrontation betwen the accused and the deceased on the land of the occurrence and the former claims it to be their own, and there the accused gave a dao blow on the right side of the chest of the deceased. From the circumstances of the case and the nature of injury that resulted in the death of deceased eleven days after it was inflicted the accused appellant cannot be held guilty for murder but he must bear the death of the victim. Accordingly the conviction for murder is altered to that for culpable homicide not amounting to murder and sentenced to 10 years rigorous imprisonment (Lalu Mia Vs. State 1988 BLD(AD) 107; 1988 BCR (AD) 147; 41 DLR (AD) 1).

Defence that victim could be saved by medical treatment is of no avail in view of the facts that the injuries which resulted from the stab wounds in the abdonmen of the deceased were undoubtedly sufficient in the ordinary course of nature to cause death (1968 PCrLJ 852; 1968 SCMR 428).

The doctor was asked to speculate as to the manner in which the injuries found on the deceased could have been inflicted and further said that 'two cuts inthe intestines are not always fatal' and that timely treatment might have saved the deceased. This evidence was of no assistance to the accused persons, in view of the facts that the injuries which resulted from the stab wounds in the abdomen of the deceased were undoubtedly sufficient in the ordinary course of nature to cause his death (1968 PCrLJ 852; 1968 SCMR 428).

Where deceased died two days after infliction of injury. Injury could not be said to be sufficient to cause death. Accused is liable to be convicted under section 304, Part II and not for murder (1993 CrLJ 411(SC); 1993 CrLJ 2667 SC).

In Randhir Singh alias Dhira Vs. state of Punjab (1982 SCCr.R 106), there was only one injury. The weapon was not carried by the appellant in advance. There was no premeditation. He was a young college going boy. There was some altercation between the deceased and his father. Death occurred nearly after six days. It was held that the appellant must be attributed the knowledge that he was likely to cause on injury which was likly to cause death. Under these circumstances, the appellant is shown to have committed an offence under section 304, Part II of the Penal Code and he must be convicted for the same.

Where the accused returned the deceased to their relatives in a seriously injured state and while the deceased was in the hospital, the accused meeting the prosecution witnesses, offering to meet the medical expenses for treatment, thus negativing any intention to kill, conviction of the accused under section 304, Part II was held to be proper (1979 CrLJ 1386=AIR 1979 SC 1708).

The accused inflicted only one injury on the abdomen. The other injury on the left knee would also have been caused in the course of causing the other injury to the abdomen. The occurrence took place on 22. 6.78 and the deceased died on 30.6.78. As already noted an operation was also conducted but gangrenous got set in. Therefore, these circumstances would show that the accused would not have intended to cause the death of the deceased by inflicting injuries which were sufficient in the ordinary course of the nature to cause the death. However, by inflicting this single injury he had knowledge that he was likely to cause the death in which case the offence is one punishable under section 304, Part II, Penal Code (1993 CrLJ 3680 SC= AIR 1993 SC 2636 (2637). Where medical evidence does not conclusively prove that the injury suffered by the deceased was direct cause of his death. The deceased lived for some three months after suffering the injury. The injury was no doubt caused on a vital part of the body of the deceased, but the fact that there was no proof that death resulted from it did not make the accused liable under section 304, Penal Code. The conviction in the circumstances could not but be made under section 325, Penal Code (1988 PCrLJ 1240).

8. **Death caused by intervening disease - Whether culpoable homicide not amounting to murder.**- Where a wound is dangerous to life but it is not by itself sufficient to cause death, and the death was caused because the wound became septic; it was held that the offence committed by the person who caused the wound fell under section 320 Peanl Code and not under section 304 Penal Code (AIR 1930 Lah 305; 1956 PLD 453).

Where the disease which supervened was itself a direct result of the injury caused, the person causing the injury would be liable for death resulting from the injury. Thus where medical evidence was clear to the effect that gangrene was itself the result of two injuries suffered by the deceased and the offender must be deemed to be responsible not only for causing gangrene but also for death which was its natural consequence. The offender cannot contended that it was no more than a case of grievous hurt inasmuch as the death of the deceased was postponed and in the meantime gangrene supervened (AIR 1964 Pat 158).

The son killed his father, the deceased, on account of domestic squall be arising from the marriage of the son. This gave rise to domestic tension. The father even declined to attend the weeding. The mortal wound was caused by a single sickle blow on the head. It was not fatal and the victim, for a time, survived in the hospital. Later, a surgery was done but, on account of infection, eventually he passed away 10 days later. It was held that the offence was one under section 304, Part II, Penal Code and not under section 302 (Ramaswami Vs. State of Tamil Nadu (1982) 1 SCC 74 (475).

Death of deceased had occurred due to serious complications such as ursemia, myocardial infraction and pulmonary embolism resulting from injuries suffered by him at the hands of accused and even if the deceased had died due to some other causes such as lack of proper diagnosis or treatment, it did not mitigate the severity of the offence bringing the same within the ambit of any other provisions of the Penal code other than section 302 there of because the explanation to section 299, Penal Code took adequate care of such a situation (Muhammad Anwar V. State 1992 PCrLJ 1554).

When the accused inflicted two knife blow injuries in a sudden quarrel and death took place after 37 days occasioning due to septicaemia then accused can be held guilty under section 304, Part II, Penal Code instead of offence under section 302, Penal Code Narsingh Vs. State of MP 1993 (1) Crimes 777 (MP).

Accused causing gun shot injuries to deceased. Death of deceased not direct result of injuries caused during occurrence. Injured died nearly one and half months after incident. In between he was operated and for purpose of surgeries several incised wounds were made. Second haemorrhage resulting in death, took place on day when right arm of deceased was amputated. Accused liable to be convicted for grievous hurt under section 326 and not under section 302. (AIR 1992 SC 950). An incised wound which by itself was not grievous or dangerous was inflicted on the right calf on the 22nd August, 1922. Titanus set in onthe 31st August, 1922, and this caused death of the victim on the 3rd September, 1922. The assailant was sentenced to two years R.I. under section 324, Penal Code (26 CrLJ 204).

9. **Sudden quarrel.**- Where a sudden quarrel was followed by an assault with the 'pasas' and 'Kudal' resulting the death of the assailant, the case falls under section 304, Part II, Penal Code, 1860 (Sheo Prassad Vs. State of U.P. 1988 (3) Crimes 762 (All). Where death is caused on a sudden quarrel in the heat of passion, without any premeditation or intention to kill, the accused wuld be guilty of an offence under section 304 and not under section 302 (PLD 1987 Lah 505; PLJ 1981 SC 449). Where there is no previous enmity, and death is caused in a sudden quarrel, there is no presumption that the accused had the intention to cause death and the offence would fall under section 304, Part II (AIR 1955 NUC 4233). Where death was caused in sudden fight and the origin of the fight was not clear. No undue advantage was taken by the accused. Conviction under this section was upheld (1977 SCMR 5).

Where the deceased and the accused met originally on fair terms and it was only after some hot words had been exchanged that the accused inflicted a deadly injury on the person of the deceased in the course of a sudden fight and without any premeditation. It was held that the accused was guilty under section 304 and not under section 302 (1971 SCMR 476). Where on the objection of the accused that no other person should sit with his fiance, the father of the girl ordered him out of the house and this led to a sudden fight in which the accused stabbed the father of the girl in the abdomen and killed him, it was held that death was caused by the accused without premeditation and in a sudden fight. The accused was held guilty under section 304, Part I (PLR 1950 Lah 251). When the accused inflicted two knife blow injuries in a sudden quarrel and death took place after 37 days occasioning due to septicaemia then accused can be held guilty under secton 304, Part II, Penal Code instead of offence under section 302, Penal Code, Narsingh Vs. State of M.P. 1993 (1) Crimes 777(MP).

In a case of sudden fight in the heat of passion where neither party took undue advantage of the other and accordingly maximum culpable responsibility could be attached only by application of Exception IV to section 300, the accused is punishable only under section 304, Part I and not under section 302 (PLD 1981 SC 127). The question of self defence becomes merely academic, and in view of Explanation to Exception to section 300 Penal Code it is immateiral which aprty offers the provocation (PLD 1958 SC 251).

Where the persistent refusal of the wife of the accused to accompany him to his home seems to have provoked the appellant and in the heat of passion a sudden quarrel ensued between them, and without any premeditation on his part he picked up the danda lying nearby and gave a few blows to her resulting in her death. This would certainly negative any element of preparation on his part or the intention to

cause her death as he seems to have picked up the danda in the heat and excitement of the moment. In these circumstances the appellant could not be held guilty of murder. He was convicted under section 304, Part II (1972 PCrLJ 149).

Where it was found that there was a severe exchange of abuses between the parties preceding the incident, that during the abuse the tempo rose and both parties came out of their respective houses in anger and that in the course of the quarrel the accused dealt a fatal blow on the head of the deceased with his lathi, and even though the circumstances were not such as to bring the case within exception 1 to section 300, it appeared that the crime was committed without premeditation in a sudden fight in the heat of the passion upon a sudden quarrel and without the accused having taken undue advantage or acted in a cruel or unusual manner, it was held that the case fell within exception 4 thereto with the result that the offence committed was culpable homicide not amounting to murder, and since the fatal injury was inflicted by only one blow, it appeared to have been done with the knowledge that it was likely to cause, but without any intention to cause death or to cause such bodily injury as is likely to cause death within the meaning of Part II of section 304 (AIR 1954 SC 652 (553).

The deceased in the instant case had nothing to do with the quarrel or with the subject matter of the quarrel intervened and it is stated that the accused lost tempoer and dealt one blow with a weapon styled as Huja which accidently fell on the chest part of his body. The quarrel stopped, the deceased was taken for medical treatment but died on the way. Non-production of the weapon of assault and as a matter of fact non-description of the weapon clearly establish that it was an innocuous weapon and definitely was not of a dangerous type. Therefore it appears that the accused in a fit of passion without having any intention to murder the deceased, used a small weapon which unfortunately resulted in the death. Thus the accused had committed an offence of culpable homicide not amounting to murder and is liable for punishment under section 304, Part II, Penal Code (1982 CrLJ 75(76)= 1982 SC 690 (690). Death caused by injuries inflicted on head of decesed in sudden quarrel. Accused having no intention to cause particular injury which was sufficient to cause death. Accused however, might have knowledge that said injury is likely to cause death. Conviction of accused under section 302 read with section 34 altered to section 304, Part II read with section 34 (AIR 1993 SC 1360).

Dispute over the utilisation of the irrigation water, early in the morning, between complainant party and the accused party allegedly comprising six persons. Lathi blows were exchanged resulting in the death of one from the complainant side and injuries to four of the accused persons also. Fifteen injuries were received by the complainant side and sixteen by the accused side. Held, it was not a case of free fight in which both the parties were determined after premeditation to give a fight to each other but as such a sudden fight which would clearly fall in exception 4 to section 300, Penal Code. Conviction under section 302, Penal Code, was set aside and converted into conviction under section 304, Part I, Penal Code in circumstances (Muhammad Yousuf Vs. State PLD 1991 168 (SC).

Where there had been previous altercation between the parties over the suspectd poisoning of the deceased's sister by the appellant's mother, and on the day of the occurrence, when the deceased was returning home in an intoxicated condition, he was knocked down and run over with car by the accused, it was held that the appellant must be convicted under section 304, Part II and not under section 302 as there was no clear intention to cause the death of the deceased (1979 SCC (Cri) 920).

In the course of a quarrel between the accused and the deceased, the accused slapped the deceased across the face. The deceased who was a big and strong man shook his fist in the face of the accused and the accused snatched a hockey stick from his younger brother and hit the deceased, one blow on the head and two blows on the hips. The injury on the head proved fatal. It was held that the accused was guilty under Part II of this section and he was sentenced to five years rigorous imprisonment (1955) 2 SCR 1140).

In every case of sudden fight a definite element of revenge of graver or lesser intensity is involved. When it is grave it projects itself in the form of cruelty or unusual act which may also be accompained by undue advantage. When the intensity is lesser there are no such elements in the conduct of the accused. In the former case the accused could lose the right to lesser offence under section 304, Part I, Penal Code, if the initial charge is of murder under section 302, Penal Code. But in every such case the penalty of death is not always awarded. In case some of the conditions in the exceptions to section 300 Penal Code, are substantially satisfied but others are not then the least that the court can do in such a difficult situation is that it may award lesser sentence under the charge of mruder, because for acquittal from that charge and conviction for the lesser offence under section 304, Part I, Penal Code, all the conditions of an exception must be satisfied (Ghulam Abbas Vs. Mazher Abbas, PLD 1991 SC 1059).

Exception 1 to section 300, Penal Code provides that culpable homicide shall not amount to murder if the offender while deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation. Supposing in a given case the condition of suddenness is not established but that of the provocation being grave is satisfied the accused shall not be entitled to the benefit under the exception. He, if convicted under section 302, Penal Code, might be given lesser sentence on account of one of the conditions of the exception having been satisfied. Similar example can be cited regarding Exception No. 2, which relates to exceeding the right of private defence. In a given case if the conditions of Exception 2 are satisfied the offence shall be altered to section 304, Part I, Penal Code but in case some of the conditions are satisfied and the others are not satisfied, while maintaining the conviction under section 302, Penal Code, the sentence could be reduced to the lesser penalty. These principles could apply *mutatis mutandis* to the case wherein an element of revenge is inherent in all these exceptions (Ghulam Abbas Vs. Mazher Abbas PLD 1991 SC 1059).

10. **Grave and sudden provocation.**- In case of self-defence, grave and sudden provocation under the other exception to section 300, Penal Code the act notwithstanding being intentional, benefit to the accused is given on account of the condition relevant to the provocation and self-defence, which are mentioned in the concerned Exception. Similarly, the benefit under Exception 4 to section 300 is not granted on account of the reason that the act is not intentional; rather, it is granted on account of the conditions and other factors stated in the exception itself, namely, that even intentional act was not premeditated. The intention might have developed all of a sudden during the quarrel and the ensuing sudden fight. The other conditions laid down are also additional factors. For example there should not be an undue advantage and /or the act should not be cruel one. If the law would have intended that the act should not be intentional it would have been so stated in these provisions. Lastly, section 304, Part I, Penal Code, which is one of the relevant punishing provisions in these case itself provides that certain punishment would be imposed if the act amongst other is with the 'intention of causing death'. Lesser punishment is provided when the said intention is missing and the case is one only

of knowledge of the death being a likely result rather than there being intention to cause death - that is why section 304, Penal Code, is divided into two parts: namely, I and II (Allah Dawaya Vs. State PLD 1993 SC 35).

The occurrence had taken place on the spur of the moment after a sudden quarrel between the appellant and the deceased over the distribution of jackfruits of a tree. The co-accusd Palaka Durmaya, who also stood trial and was acquitted, intervened and at this, the deceased attempted to assault the co-accused by means of a stick which was snatched away by the co-accused who assaulted the deceased as a result of which he fell down. The appellant then assaulted the deceased on his head by means of a stone without any pre-plan or pre-meditation and this unfortunately resulted in his death. As has been submitted at the Bar, the appellant belongs to an aboriginal tribe and persons belong to such tribes are easily inflammable by nature. In these circumstances, it cannot be said that the appellant had the intention of causing the death of the deceased. It would be reasonable to hold that the appellant had the knowledge that by his act, he was likely to cause, the death of the deceased. The appellant is liable to be convicted under section 304, Part II of the Penal Code (1985 (1) Crimes 528 (529).

Where deceased had gone during night of occurrence on one of his usual visits to see the wife of accused for illicit connection and he had locked his cycle in a field at a distance from the house.He was surprised by the accused who killed him under sudden and grave provocation. The sentence was reduced to 7 years which the accused had already suffered (1985 PSC 513). A sentence of 3 years rigorous imprisonment was passed where the accused discovered deceased with his wife behind chained doors in the house at dead of night (1959 CrLJ 850).

Murder of a person in course of a sudden quarrel without intention and premeditation is covred under section 304, Part II of the Penal Code (Ujjala Sahu Vs. State of Orissa 1990(2) Crimes 118 (Ori). Where circumstances of case show that there was possibility of husband having caused the death of his wife while he was deprived of his power of self control by grave and sudden provocation on exchange of abuses, the husband cannot be held guilty under section 302, Penal Code but would be guilty under section 304, Part I, Penal Code (Om Prakash Vs. State 1988 (2) Crimes 153 (All).Where a wife admitted before her husband her illicit intimacy with another, the husband killed her on account of that grave provocation, he was sentenced to 7 years R.I. (PLD 1960 Kar 966 (DB); see also AIR 1933 Lah 126; 1973 PCrLJ 101).

Where the accused did all that he could to induce his wife to live sober and proper life, but he was told by his wife that she was going to live with her paramour whereupon he became enranged, lost control of himself and caused her death at the spur of the moment, as there was an element of grave and sudden provocation a sentence of 7 years was reduced to 3 years and 9 months already undergone (PLD 1967 Lah 649). But the court may pass a more severe sentence where the offence amounts to premediated killing or where the relationship of the accused with the delinquent female is not very close. Where the accused found his sister missing from her bed at night and went in search of her. He found her having sexual intercourse with her paramour in the nearby field and killed her as wel as her paramour, a sentence of 10 years R.I. was held to be proper sentence (17 DLR (SC) 420; PLD 1965 SC 366).

11. **Death caused by a single blow**.- When the accused inflicted single fatal stab blow on deceased without any premeditated plan he is liable to be convicted under section 304, Penal Code and not under section 302 Penal Code (Dass Vs. State 1992 (3) Crimes 236).

The single-injury theory cannot be made applicable to a case where a deadly weapon like a fire-arm is used. Even a single injury caused by a fire-arm would only lead to the inference that death was caused intentonally (Ram Pal Singh and others Vs. State of U.P. 1990 (3) Crimes 445(SC). Accused inflicting single injury on abdomen of deceased death due to that injury, not certain. It cannot be said that accused intended to cause death. Offence committed is culpable homicide not amountign to murder (1993 CrLJ 3253 (SC). Death took place due to single stab injury. As the totality of established facts and circumstances do show that the occurrence had happened most unexpectedly in a sudden quarrel and without premeditaton during the course of which the appellant caused a solitary injury, he could not be imputed with the intention to cause death of the deceased or with the intention to cause that particular fatal injury but he could be imputed with the knowledge that he was likely to cause an injury which was likely to cause death. Held, offence falls under section 304, Part II and not under section 302 (Hem Raj Vs. State (1991) 1 SCJ 286).

Where only one lathi blow was inflicted in a sudden quarrel without premeditation nd the injury resulted in death, the offence falls under section 304, Part II, Penal Code and not under section 302, Penal Code (Rais Uddin Vs. State of U.P. 1993 (1) Crimes 647 (All).

Accused inflicting single knife injury on abdomen of deceased. Other injury on leg. Deceased operated but died 8 days after incident. Knowledge that injury was 'likely to cause death' cannot be attributed to accused. Accused liable to be conviction under section 304, Part II (1993 CrLJ 3680(SC).

Where death occurs due to a single assault without there being any pre-design or pre-determination as a sudden and imulsive act, the offence more properly falls under section 304, Part II than that of section 302, Penal Code (Brahman Dehury Vs. State 1988 (2) Crimes 550 (Ori).

An altercation started over the passing of dirty water through the drain in front of the house of the deceased. An alteration followed in course of which the appellant was said to have given a cane stick blow to the deceased. The weapon was merely a walking stick and would not have normally caused the death of the deceased. In the circumstances the appellant did not have the intention to cause the particular injury which had resulted from the blow given to the decased. But as the appellant aimed the blow at the head of the deceased, which was a vital part of the body, there could be no doubt that he must be presumed to have the knowledge that death was the likely to result of his act. In these circumstances, this case clearly falls within the ambit of section 302, Part II, Penal Code. Conviction of the appellant was altered from section 302, Penal Code to section 304, Part II and the sentence was reduced to the period already undergone (Mirza Hidayatullah Baig Vs. State of Maharashtra, 1979 CrLR 355 (356) (SC).

The offence committed by the accused will be culpable homicide not amounting to murder punishable under section 304, Part I, Penal Code when the accused gave a single knife blow on the left flank of the decesed after some sudden altercation between the parties (Sat Pal Vs. State of Punjab 1988 (2) crimes 709 (P&H). When the accused inflcited a single blow in the incident, as a result of some altercation when there was no premeditation or motive or enmity he may be convicted under section 304, Part II, Penal Code (Babul Lal Vs. State of Rajasthan 1988 (2) Crimes 967 (Raj).

When a single knife blow injury on thigh has been inflicted which was deep enough cutting artery resulting in haemorrgage and shock, the accused can not be

said to have intended to commit murder but intended such a bodily injury which was likely to cause death and hence his conviction under section 302, Penal Code is liable to be converted to under section 304, Part I, Penal Code (Chandnath Singh and others Vs. State of M.P. 1992 (3) Crimes 444 (445). Where the accused inflicted one blow with an axe from its blunt side on the head of deceased in a sudden quarrel without there being intention to cause death the legitimate inferene to be drawn is that accused dealt the blow with knowledge that it was likely to cause an injury which likely to cause death and is thus liable to offence under section 304, Part II, Penal Code (Desh Soren and another Vs. State of West Bengal 1992 (2 Crimes 629 (630).

Where death occurs in a sudden fight because of single blow given by the accused without any intention on the part of the accused to commit murder the offence is culpable homicide not amounting to murder and is punishable under section 304, Part II, Penal Code (Ramalyan Vs. State 1988 (2) Crimes 455 (Mad). Accused inflicting single stab landing on chest of deceased. Occurrence happening in a spur of moment and in heat of passion upon sudden quarrel. There was no premeditation. Intention to cause death or to cause fatal injury could not be imputed against accused. Offence is punishable under section 304, Part II and not under section 302 (Ham Raj Vs. State (Delhi Admn.) AIR 1990 (SC) 2252).

Only one blow inflicted with blunt side of axe to deceased. Intention to cause death absent as sharp edge of axe was not used. Incident not premeditated act and happened in sudden manner in a quarrel. Conviction altered from Section 300 to section 304, Part II (1993 CrLJ 64 SC). Where a single blow was dealt with by the accused in heat of altercation the intention to kill, cannot be said to be apparent (Buta Singh V. State of Punjab 1992 (1) Crimes 91 (P&H).

When only single knife blow is inflicted by accused on deceased in an incident which took place on spur of moment without there being any pre-planing, over a triffling matter and no attempt was made by accused to repeat the blow, conviction is liable to be held under section 304, Part II, Penal Code, instead of under section 302, Penal Code (Har Vansh and another Vs. State of U.P. 1993 (2) Crimes 723 All).

Where after an altercation over an ordinary matter, one blow is given by accused to empty handed deceased there was no intention to kill but death was caused. Conviction was altered to section 304, Part II (PLD 1982 Kar 152). Where the circumstances under which injury was inflicted on the person of deceased did not clearly come on record. Deceased was given a single blow and the weapon of offence used was a knife, having an ordinary blade, there was no intention on the part of the accused to cause death; the accused was convicted under section 304, Part II (1981 PCrLJ 511). Where the accused struck only one blow on the head of the deceased and abusive language was exchanged just before the blow was struck in a sudden quarrel without any deliberate intention and without the accused having taken undue advantage or having acted in a cruel or unusual manner, and as soon as the deceased fell down, the accused refrained from inflicting any further injury upon him; a light sentence should be passed (AIR 1954 SC 36).

The accused inflicted only one inujury on the abdomen. The other injury on the left knee would also have been caused in the course of causing the other injury to the abdomen. The occurrence took place on 22.6.78 and the deceased died on 30.6.78. An operation was also conducted but gangrenous got set in therefore, these circumstances would show that the accused would not have intended to cause the death of deceased by inflicting injuries which were sufficient in the ordinary course of the nature to cause the death. However, by inflicting this single injury he had knowledge that he was likely to cause the death in whcih case the offence is one

punishable under section 304, Part II, Penal Code (Rajangam Vs. State of Tamil Nadu AIR 1993 SC 2636(2637)=193 Cr;K 3680).

Single knife blow was inflicted on the chest of the deceased on the spur of the moment. There was no suggestion of previous enmity and the presence of the accused at the scene of the crime was found to be accidental. Even though according to medical testimoney the chest injury was sufficient in the ordinary course of nature to cause death, the Court allowed the conviction from one under section 302 to one under section 304, Part II (1984 SCC (Cri) 164.

All the three eye-witnesses have spoken that the appellant dealt only one blow with the implement. Having regard to the time and the surrounding circumstances it is difficult to hold that he intended to cause the death of the deceased particularly, when he was not armed with any deadly weapon as such. As an agriculturist he must have been having a tabbal in his hands and if in those circumstances he dealt a single blow it is difficult to convict him by invoking clause (1) or (3) of section 300, Penal Code. It cannot be said that he intended to cause that particular injury which unfortunately resulted in the fracture of bones. Therefore, the offence committed by him would be one amounting to culpable homicide punishable under section 304, Part II, Penal Code (1993 CrLJ 1809 SC).No legal proposition can be laid down that whenever one blow by means of a lethal weapon or by stabbng instrument is dealt on the person of the deceased the case would not come withinthe purview of any of the clauses of section 300 of the Code defining murder and that the case would come invariably within the purview of section 304, Part I of section 304, Part II of the Code. Each case would depend on its own facts and circumstances (1958 CrLJ 1770(1772) Ori.).

There is no universal rule that where death occurs with a single blow with a knife at a vital part, the conviction could only be under section 304, Part II and not under section 302, Penal Code (Dhanei Majhi Vs. State 1988 (2) Crimes 448 (Cri). When the appellant dealt a severe knife blow on the stomach of deceased without provocation and when deceased was unarmed and had already been injured by co-accused the apellant cannot be held had no intention to cause a murderous assault by mere fact that only one blow was inflicted (Nashik Vs. State of Maharashtra 1993 (1) crimes 1197 SC).

12. **Accused liable for individual act**.- Incident took place at the spur of the moment. Accused was grappling with the deceased when his brother, co-accused picked up a chhuri from the fruit stall and caused only one blow to deceased. On witness attributed Lalkara to accused but remaining witnesses were silent on the point. Common intention, thus was the sole test of joint liability. Provisions of section 34, Penal Code, therefore would not be attracted and every person taking part in the fight would be responsible for his individual act. Acquital ordered in circumstances (Babar Vs. State 1990 PCrLJ 1067).

From the injuries suffered by members of both the parties they were found to have armed themselves for anticipating resistance from the other and were determined to have a trial of strength in which deceased was killed and prosecution witnesses and accused received injuries. Each of the accused was thus, responsible for his individual act (Akbar Shahbaz Vs. State 1991 PCrLJ 412).

One of the three accused gave fatal blow on head of deceased. However, injuries given by other accused with spear on knee and arm of deceased were simple. First accused was held liable to be convicted under section 304 part I. However, conviction of second accused under section 304, Part I, was not proper when section 34 has not been applied. Second accused liable to be convicted under section

324 only. Conviction of third accused giving simple blows was upheld under section 323 (AIR 1992 SC 1629).

Both parties were found to have twisted true facts to minimize their own part in the occurrence. No satisfactory evidence was forthcoming that either party was in peaceful possession of disputed land and therefore it could safely be concluded that both parties went armed to enforce their right of private defence in circumstances would arise and each participant would be liable for his individual act (Muhammad Ali Vs. State 1990 PCrLJ 1132).

The deceased had died on account of the severe head injury causing multiple fracture of the okull besides extradural haemorrhage which by itself was fatal. Since the fatal injury was attributed to appellant Kadar Prasad he should be convicted under section 304, Part I, Penal Code. So far appellant Ramlal was concerned the injuries given by him with a spear on the knee and the arm of the deceased were simple. For these injuries Ramlal appellant cannot be convicted under section 304, Part I, Penal Code as section 34, has not been applied. His conviction was brought down to one under section 324 Penal Code (Kedar Prasad Vs. State of MP, AIR 1992 SC 1629).

13. **Conviction founded for minor offence**.- If the injuries can be called only the remoter cause of death, and death of the deceased is not proximately connected with the act of violence, the appellants can not be held responsible for causing death, and can not be credited with the knowledge that such bodily injuries as the deceased sustained were likely to cause his death. In this case, there were only two injuries on the body of the deceased and these injuries were not grievous. The medical evidence was to the effect that these injuries could not have ordinarily produced death. Held, that the appllants could not be convicted for an offence of culpable homicide not amounting to murder, the conviction of the appellants must be altered to one under section 323, Penal Code, from that under section 304, Penal Code (Kanhaiyalal Sewaram Vs. State, AIR 1953 MB 262(264)=1954 CrLJ 6).

All the three accused had acted independent of one another in inflicting injuries on deceased. Motive as set up by prosecution had not been established. Fatal injury was attributed to co-accused who was convicted and sentenced under section 324, Penal Code. Accused did not intend to cause death of deceased as he had inflicted only a single simple injury with chhuri on deceased. Conviction and sentence of accused under section 302, Penal Code, were consequently set aside and he was instead convicted under section 324, Penal Code, and sentenced to two years R.I. with fine (Abdul Sattar Vs. State 1991 PCrLJ 103; Akbar Shahbaz Vs. State 1991 PCrLJ 412).

If a lathi blow, intended and aimed to kill a particular persons, misses that person and falls on the head of another person, causing his death, the conviction should be under section 325, Penal Code and not under section 304, Penal Code (Deo Nath V. State 1952 RLW 394).

In a Punjab case (Raju Vs State of Punjab, 40 PLR 562), the accused struck an old man on the head with a lakwa, thereby causing injuries of a simple nature and the fractures which caused the death of the old man were caused when he was knocked over by the accused. It was held that it was impossible to hold that the act of knocking him over though it did result in the death of the old man, was on that the accused could reasonably be held to have known was likely to cause death, and therefore, section 304, Part II, could not apply. Nor could it be held that merely by knocking the old man down, the accused intended or knew himself likely to be causing greivous hurt. The accused was therefore held liable under section 323 read with section 324, Penal Code.

The accused and the appellant were neighbours. In one morning, there was a quarrel between the appellant's father and the deceased. Both grappled with each other. While they were doing so, the appellant came up with an iron, rod and seizing it with both hands struck a blow on the deceased's head. The deceased feel down and subsequently died. It was held that the appellant must be credited with the knowledge that the heavy iron rod was likely to cause death. He was, therefore, liable to be convicted under Part II of section 304, Penal Code (Sadhu Vs. Emperor, AIR 1938 Lah 618 (618)=39 CrLJ 927; State Vs. Durgewar Datta V. State of Assam AIR 1958 Assam 44=ILR 8 Assam 191).

Where there was nothing to establish that the accused intended to kill his father or that he intended to cause such bodily injury as was likely to cause his death, and the accused hit his father enraged by his refusal to pay the accused money, the offence made out was not under this section but under section 324 (State of Mysore Vs. Nanja, AIR 1958 Mys 48(53)=1958 CrLJ 529).

Accused gave fist and kick blows to deceased. Possibility that while deceased was being given fist blows traches got pressed as a result of the same. Accused was not armed with deadly weapon nor he caused any injury on vital part of body of the deceased. Intention to kill was negatived and accused could not be burdened with knowledge that by giving fist blows deceased was likely to be killed. No offence under section 302, Penal Code, or 304 Penal Code thus was made out. Conviction of accused was altered to one under section 325, Penal Code and he was sentenced to seven years R.I. with fine of Rs. 1,000 (Gharib Alam Vs State 1991 PCrLJ 1477).

Appellant had given two fist blows to the deceased resulting in the latter's death. Inner condition of the deceased was found to be highly diseased during the course of autopsy. His heart was enlarged. Heart valve was thinner than normal. Liver was enlarged. Appellant was not aware of the internal disease of the deceased. He had no intention to kill. By giving two fist blows, no knowledge could be attributed to the appellant. Chest injury was found to be simple. Conviction under section 325 not unwarranted. He is to be held guilty only under section 323 of the Code (Bashishat Singh Vs. State 1990 (2) Crimes 276 (Pat).

Death of deceased, a heart patient, (Unknown to accused) as a result of push and pull by the accused squarely falls under section 323 of Penal Code not under section 304 (Vijayan Vs. State of Kerala 1991(2) Crimes 305 (Ker).

14. **Evidence and proof**.- "It may be asked how can the existence of the requisite intention or knowledge be proved, seeing that these are internal and invisible acts of the mind? They can be ascertained only from external and visible acts. Observaton and experience enable us to judge of the connection between men's conduct and their intentions. We know that a sane man does not usually commit certain acts heedlessly or unintentionally - and generally we have no difficulty in inferring from his conduct what was his real intenton upon any given occasion" (1976 SCC (Cri) 636).

Though there was consistent evidence to establish that the deceased was assaulted by the accused persons with lathies and the blood on lathi was of the same group as that of the deceased but as the injuries were not on any vital parts of the body it could not be held that the intention was to cause death by the accused. Therefore convictin was altered from section 302 to section 304 Part II (Kumar Malik and others. Vs. State of Orissa 1990 CrLJ (NOC) 75 (Ori) (DB).

Where the case is on the border line between murder and culpable homicide not amounting to murder, the accused is entitled to the benefit of any reasonable doubt and he can be convicted only under this section (1987 CrLJ 987 (SC); AIR

1987 SC 1151). Only one blow inflicted with blunt side of axe to deceased. Intention to cause death absent as sharp edge of axe not used. Incident not premeditated act and happening in sudden manner ina quarrel. Conviction altered from section 300 to section 304, Part II (Hardeve Bhanji Joshi Vs. state of Gujrat, AIR 1993 SC 297).

Where it was a case of sudden mutual fight between the parties on account of the demolition by the deceased party of a mud wall constructed by the accused party on the boundary wall between their fields, and hence section 149 did not apply, and it transpired from the prosecution case itself that when the fight began the appellant had a dantli in his hand which he had used against one of the injured persons, but the medical evidence showed that the fatal injury on one of the decesed for whose death the appellant had been convicted under section 304, had been caused by some sharp-cutting object like an axe, it was held that since the story of the prosecution with respect to the second stage of the occurrence during which the appellant had armed himself with an axe had been disbelieved by both the lower courts, he must be given the benefit of doubt and acquitted from that charge (1975 SCC (Cri) 750).

Where injury attributed to accused not individually sufficient to cause death. Medical evidence that death was caused due to shock and haemorrhage resulting from two injuries one attributed to accused and other to accused No. 2 who was acquitted. Conviction altered from section 300 to that under section 304, Part II (1993 CrLJ 49 (SC). When the prosecution witnesses have failed to prove their version of the manner of the occurrence the Court can not convict the accused on some other theory of manner of occurrnece which is not established by any evidence the Court can not obviously also convict the accused when the credibility of all the prosecution witnesses is compoletely shaken (Yunus Ali Vs. State (1982) 34 DLR 208). When the appellant went on the spot not with any intention to kill deceased but to chastise him and there was no previous enmity it would be appropriate to convict accused under section 304, Part II, Penal Code (Jaswant Singh & others Vs. State of Punjab 1992 (1) crimes 998 (999).

Where the blunt side of an axe was used causing death, the offence would fall under section 304 (1986) 1 Crimes 582 Ori). From the facts proved it is clear that the victim did not die immediately after assault by her husband. There is no evidence of ill feeling between the two, rather it is in evidnece that he enticed her away and then married her. In the circumstances the accused husband is not guilty of murder but of culpable homicide not amounting to murder (Abdul Khaleque Vs. State 45 DLR 75; 1993 BLD 401).

There was a free fight between the deceased party and the appellant's party over the possession of the field in the field itself. The appellant was first to lodge FIR of the aggression.The prosecution did not produce the evidence in the situs of occurrence nor did it establish that appellant had committed a criminal trespass nor did it claim that the complainant party was in its possession. There was no evidence of trespass. Held, under the circumstances conviction was set aside (1984) 3 Crimes 394).

There was no direct evidence to connect the accused with the murder of his wife. The only eye-witnesse in the case P.W. 3 turned hostile and did not support the prosecution case which was put up by P.Ws 4 and 5 that were found trustworthy. Dying declaration was also true and reliable. Burn injuries were caused to the victim at the house of the appellant when he and his mother were present. The dying declaration was recorded by I.O. It directed that it would not be safe to convict the accused on such a dying declaration. Conviction under section 302 and sentence to life imprisonemnt were both uphold in on appeal (1986) 1 Crimes 278; 1985 CrLJ 1988 Sik). In a case of murderous assault in broad day light the first question before

the supporters of the victim would be to take him to save his life and to give him medical aid. A FIR lodged at 1 p.m. in respect of an occurrence of 9.30 a.m. followed with its submission to the Magistrate at about 5.15 p.m. does not disclose grounds of delay (1985) 4 SCC 80).

The accused was found at dawn with his head in a pool of blood. A weapon was struck to his head that was bleeding. The prosecution case that he had murdered his wife and later tried to commit suicide. The defence case was that the accused was moving like a mad man 4/5 years back. His brother was half mad. He was unable to understand the nature of the act he was doing at the time of the commission of the offence. Held, the prosecution had done nothing to rebut the defence case. Appeal allowed (1984 CrLJ 124).

The broad fact is that the victim woman who is found to have been suffering from no ailment whatever at the relevant evening received a kick on chest and died instentaneously and this being the position it may be safely held that she died from the kick. The offender knew that the kick on the chest was likely to cause death of the victim. Accused Mokles is found guilty udner section 304, Part II (A Hakim Vs. Mokless Mridha BCR 1986 AD 324). Occurrence took place near the tube well of accused. Deceased had no reason to be present near that tubewell nor the prosecution had explained it. Daughter of aceused was abducted by deceased previously. Statement of accused that his daughter was waylaid by deceased, and then he fired at deceased appeared to be forceful and element of grave and sudden provocation could be well-understood. Conviction based on the statement of accused was maintained in circumstances (Amanullah V. State 1991 PCrLJ Note 229).

The difficult lay in the fact that the blow by the accused could not be co-related to the internal injury of the victim from the medical evidence. Other persons involved in the case were not convicted. Held, offence should be converted from section 304, Part II to section 325, Penal Code. Earlier the High Court had converted the offence from sections 302 to 304, Part II (1985 CrLJ 1903).

Main accused and hte deceased were brothers contesting a case of land dispute of long standing. He shot at the decesed where sons were also injured. Held, the co-accused were not responsible for any evert act of the accused, who had knowingly and intentionally shot him down. He should be convicted under section 302, P.C. and section 323, Penal Code whereas the others should be converted under section 323/34, Penal Code (1986 CrLJ 197 All). Accused persons having no intention of causing death injury found on deceased not sufficient to cause death in ordinary course of nature. Previous litigation between parties had nothing to do with deceased. It was not established as to which of two accused had inflicted injury on head of deceased which was described as dangerous to life. Accused liable to be convicted under secton 326/34 and not under section 307/34 (1993 CrLJ 1053 SC).

In a case of sudden quarrel where fists and kicks were exchanged and it resulted in death in the absence of knowledge of act the offence under section 304, Part II would not be constituted instead the case would fall under section 325 (Rajesh Anantram Thakur Vs. The State of Maharashtra 1993 (2) Crimes 75 (Bom).

Extra-judicial confession by accused that he kidnapped the girl and raped her in the field and killed her thereafter can be relied upon as regards place of incident, recoveries made at the instance of accused and when corroborated by medical evidence can form basis for conviction (1993 CrLJ 1616 (Raj).

According to the eye-witnesses the three accused came together armed with sharp-edged weapons and inflicted injuries which resulted in the fracture of the skull bones. The fracture of the tibia, fracture of the metacarpal bone and some other

injuries were also caused. However, if their intention was to cause death,they should have inflicted some more injuries on any vital part of the body but they have given one blow only with the blunt side of the axe and the deceased died only six days later. Therefore, in these circumstances, it cannot be said that they had a common intention for causing the death. But they must be attributed that by inflicting such injuries they were likely to cause the death of the deceased, in which case the offence will amount only to culpable homicide and not murder (1993 CrLJ 2667).

15. **Sentence.**- Although the law provides sentence of life imprisonment for offence of culpable homicide not amounting to murder yet sentence awarded must be commensurate with nature of offence and as facts would justify and at the same time sentence should not be so low as to encourage commission of homicide (29 DLR (SC) 211; 1986 PCrLJ 520). Where after exchange of hot words the accused stabs an unarmed person to death in a brutal and cruel manner and he is convicted under section 304, Part I, he should be sentenced to life imprisonment (1987 SCMR 1050). However in cases where no brutality is involved a shorter sentence is sufficient (1974 PCrLJ 454).

Where the occurrence was 9 years old and the accused already suffered imprisonemnt for 2.50 months, it was held that it was a fit case where sentence of imprisonemnt should be reduced to already undergone (1979 UJ(SC) 131= AIR 1979 SC 577= 1979 CrLJ 584). Accused was in custody for almost a period of two years. Keeping in view the state of his mind under which accused had committed the crime sentence of ten years R.I. awarded to him was reduced to the period already undergone by him (Khannan Khan Vs. State 1992 PcrLJ 1993).

Where the offence was under secton 304, Part II and not under section 304, Part I sentence of 3 years R.I. and the imposition of a fine Rs. 10,000 to be given to the dependents of the deceased instead of 7 years was held to be proper (AIR 1979 SCC 577= 1979 CrLJ 584).

Conviction under section 302, Penal Code was held erroneous and convered into one under section 304, Part I, Penal Code in a case where doctors opinion was that injuries 1 to 5 could have been fatal but not necessarily No. 6 which if alone was not sufficient to cause death (1977 CrLR (SC) 348).

The accused committed murder under grave provocation involving sodomy on his son by the deceased. His sentence of life imprisonment was converted into a sentence already undergone (1977 CrLJ 1448 SC). Two deceased (paramour and wife of accused) had illicit relations before occurrence. Paramour, as a dare devil, came to house of accused to have intercourse with his wife. Held, two deceased had forced accused to kill them, if he wanted to live honourably in society to which he belonged in order to vindicate his honour. Sentence of 10 years R.I. was reduced to 3 years R.I. in circumstances (Muhamad Bakhash Vs. State 1991 PCrLJ 1982).

Particular of accused in attack on deceased proved. Victim surrounded by all accused, each armed with weapon attackng him simultaneously. Appellant accused giving blow to victim after he fell down due to attack by other accused persons. Fatal injury cannot be fixed to apellant accused. Conviction under section 300 and sentence for life imprisonemnt altered to that under section 304, Part II and rigorous imprisonment for five years (AIR 1992 SC 755).

Where only one blow was given and that too by the blunt side of the (illegible), it was held that the offence committed by the accused would fall under section 304, Part II, Penal Code. Looking to the facct that the victim (accused) was aged about 13 years and altercation on a minor dispute took place and in this trivial dispute only one blow was given, a sentence of rigorous imprisonment for seven years would meet

the ends of justice (AIR 1982 SC 690=see also Muhammad akram V. State 1990 PcrLJ 574).

Since the accused had acted under grave and sudden provocation and the offences committed by him are punishable only under secction 304, Part I, Penal Code, a sentence of seven years rigorous imprisonment under each of the two courts would meet the ends of justice (Ajit Sing Vs. State of Punjab 1990 SCC (Cr) 34(36).

It is not illegal for a Court after framng charge under secton 304/34 against certain accused persons, to record a conviction under section 304 itself, apart from section 34 (Muzaffar Sarkar Vs. Crown (1950) 2 DLR 190). But the accused having been charged under section 304, Part II/149 can not again be charged under section 304, Part II/34 (Akbar Vs. State (1956) 8 DLR 378).

Normally, for an offence under section 304, Part II, a sentnce of five years is awarded but where it appears that the appellants have been in jail for about three and half years or a little more and with remissions it will come to about four and half years of a little more, the sentence already undergone will meet the ends ofjustice (Bablu Vs. State of MP (1984) 1 CrLJ 237(239) MP); 1984 (1) Crimes 26 (34) Raj). In conviction udner section 304, Part II, Penal Code, 1860, sentence of seven years of R.I. will be sufficient where the acccused is an old and peaceful men who killed his wife for his paranoic mania that his wife was unfaithful to him (Alex Martin Fornandes Vs. State 1988 (3) Crimes 711 (Bom).

Accused a young agriculturist with no criminal antecedents and deceased his sister's husband. Conviction and sentence under secction 302 set aside on overall appraisal of material on record and accused convicted under section 304 and directed to undergo 10 years' R.I. However, on special facts of case option awarded to accused to pay fine of Rs. 40,000/- in all, i.d. to undergo R.I. for 7 years totally. If fine be paid within 12 weeks jail sentence to stand reduced to one of 3 years R.I. Out of fine, if paid, Rs. 10,000 to be given to mother of deceased and Rs. 30,000 to be utilised for benefit of three minor children of deceased in sum of Rs. 10,000 each (1993 CrLJ 3281 Bom).

In conviction under section 304/34, Penal Code, sentence of five years rigorous imprisonemtn to each will meet the ends of justice considering that all the accused are in their early twenties and the injuries suffered by the deceased were not serious as he had died of the injuries on the vital organs like spleen and multiple fractures (Ram Phal and anothr Vs. State of Haryans 1988 (3) Crimes 449 (P&H). In the instant case, taking into consideration all the circumstances of the case, including the fact that at the time of occurrence th appellant was a raw youth of 19 years, it was held that the conviction of the appellant under section 304, Part II, Penal Code, was maintained but was reduced to imprisonemnt already undergone, which was about eighteen and half months (AIR 1981 SC 1638).

The fact that the accused was government servant and had lost his job is not a consideration which should weight with the Court in dealing with cases (1984 CrLJ (NOC) 105 (Delhi). After setting aside conviction under section 302, accused was conviced under section 304. The accused was already in jail for about three and half years. It was held that the sentence already undergone was enough to meet the ends of justice (1984 CrLJ 237 MP).

Where two deaths were caused in a fight maximum punishment of 10 years R.I. was awarded in spite of the old age of the accused (1959 All LJ 340). Where a collcge student used a dagger against a fellow student deterrent punishment was necessary and he was sentenced to 7 years R.I. (1977 PCrLJ 1085). Where out of 16 injuries on person of deceased 15 were simple. Rupture of stomach resulted in his death.

Nature of injuries did not call for maximum punishment. Sentence of 10 years R.I. was reduced to 7 years R.I. (1988 PCrLJ 2003). In another case the sentence was reduced to 7 years R.I. in view of injuries sustained by respondent and also because he had remained in jail for more than two years as an under trial prisoner (NLR 1981 SCJ 187). But where he intention was only to give a beating but death was caused, a sentence of four years was held sufficient (AIR 1953 Punj 261).

Where the appellant was convicted under section 304, Part I and sentence of 10 years was imposed upon him and the High Court reduced the sentence from 10 years to 7 years R.I., it was held that no reducton in the sentence was possible on the ground that he was only the bread earner of the family as the offence committed by the appellant was a very serious one and the sentence given to him was extremely lenient (Para Singh Vs. State of Punjab, 1980 CrLJ 1014 (1014-15) (P&H); AIR 1980 SC 1315).

16. **Compromise.**- As the offence under section 304, Penal Code is not legally compoundable the compromise arrived at between the parties can be taken into account in determining the quantum of sentence (Dakshnamurthy etc. Vs. State 1988 (1) Crimes 849 (Mad). Where occurrence took place all of a sudden. Deceased died after receiving a kick on her abdomen while she was in advanced stage of pregnancy. Compromise was filed by husband of deceased, during course of arguments at appellate stage. Parties being closely related inter se, sentence already suffered would meet the ends of justice (1985 CrLJ 2430).

Where parties compromised and legal heirs of deceased were duly compensated. Accused had already served for about 2 months besides remaining in judicial lock-up during trial. Sentence of imprisonment was reduced to one already undergone by accused (1987 PCrLJ 1941).

Where parties were related to each other, lived in the same village and had entered into a compromise. In the interest of future good relations between the parties and place in the village, sentence was reduced to the period already undergone by accused (1987 PCrLJ 210).

17. Charge.- The charge should run thus :

"I.....(Name and office of Session Judge, etc.), hereby charge you..... (Name of accused), as follows:

"That on or about the ..... day of..... at ..... you murder [by causing the death of with ..... the intention of causing his death on a grave and sudden provocation (or as the case may be)] and thereby committed an offence punishable under section 304, Clause 1 [or clause 2 (as the case may be)] of the Penal Code, and within any cognizance.

"And I hereby direct that you be tried by the said Court on the said charge.

There is no illegality in convicting the accused of an offence which he is found to have actually committed where certain persons were charged of some offences with the aid of section 34, Penal Code, even if the offence against the other accused was not proved and section 34 was not applicable. In this case the appellant was convicted of the offences under section 304 and 324, Penal Code, in spite of the fact that the charge against other accused was not proved and section 34 was not applicable (Ram Chandra Vs. State 1957 CrLJ 270(272).

One of the accused, was charged with many others, under sections 147 and 448 of the Penal Code, with an additional charge under section 304 of the code but when he was examined under section 342 Cr.P.C. he was not told that he was facing trial under section 304 in addition to common charge under sections 147 and 448. As such his conviction under section 304 is illegal (Joynal Abedin Vs. State 37 DLR (AD) (1985) 114).

[1][**304A Causing death by negligence.**— Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to [2][five] years, or with fine, or with both.]

Synopsis

1. Scope and application
2. Rash or negligence act.
3. Act done intentionally.
4. Death should be direct result of rash or negligent act.
5. Contributory negligence.
6. Negligence by medical practitioner.
7. Acts held rash or negligent.
8. Charge.
9. Conviction and sentence.

1. **Scope and application.**- The requirements of this section are that the death of any person must have been caused by the accused doing any rash or negligent act. In other words, there must be proof that the rash or negligent act of accused was the proximate cause of the death. There must be direcct nexus between the death of a person and the rash or negligent act of the accused (State Vs. Hammppa Chandrasidappa AIR 1969 Goa 39; Kurban Hussain Modammedahiv AIR 1965 SC 1116). The requirement of section 304-A is the causing of death by doing any rash or negligent act and this means that the death must be the direct or proximate result of the rash or negligent act. Where it was found that the direct or proxmate cause of the fire which resulted in seven deaths was the act of a labourer who acted in a hury and who did not wait until the bitumen or rosin cooled down and thus it was his negligene which was the direct and proximate cause of the fire breaking out. The appellant, namely the manager and the working partner of the firm could not be held to have committed the offence under section 304-A of the Code (Bhalchandra Vs. State of Maharashtra, AIR 1968 SC 1319(1321)=(1968) 2 SCWR 576). The impose criminal liability under section 304-A, Penal Code it is necessary that death must be the direcct result of the rash or negligent act of the accused and that act must be the proximate and efficent cause without the intervention of another's negligence (Dr. A.K. Mitra Vs. Nanak Chand Rampuria & State 1988 (2) Crmes 318 (Cal).

Section 304-A Penal Code refers to a case where any person by any rash or negligent act causes the death of a human being but there is no intention to cause death and no knowledge that death is likely to be caused by the act done. This section does not apply where there has been voluntarily commission of an offence against a person, such as causing of hurt or grievous hurt. Section 304-A does not say that the act must be rash and negligent; it says that the act must either be rash or negligent. A rash act means hazarding a dangerous and wanton act with the knowledge that it is dangerous or wanton and that it will probably be caused. The criminality in such a case lies in running the risk of doing the act with recklessness or indifference as to the consequences (1969 DLC 539). Acts, prabably or possibly, involving danger to others, but which in themselves are not offence, may be offences under this section, if done without due care to guard against the dangerous consequences (4 Cal 764). If a person is driving a car and sees a little boy walking in the street alone, and yet does not stop his car or take the necessary precaution to avoid causing any injury to the child but drives on as usual and in the process runs down the child, it cannot be said that he had the knowledge that his act was, in all probability, likely to cause injury to the child, and he is guilty of an offence under section 304-A (1969 DLC 539). In order to constitute an offence under section 304-A, the death of the person must have been caused by the accused doing an act in a

1. S. 304A was inserted by the Indian Penal Code Amendment Act, 1870 (XXVII of 1870). section12.
2. Subs by Ord. No. X of 1982, s. 4, for "two".

rash or negligent manner and the nexus between the negligent act and the death must be established. The proximate cause which resulted in the death of the deceased must be positively proved (Suleman Rahim Multani, AIR 1968 SC 829). If death of a trespasser is caused soon after contact with an electrically charged naked copper wire which the owner had fixed at the back of his house with a view to prevent the entry of intruders, the owner is guilty under section 304-A of the Penal Code (Cherubin Gregory Vs. State of Bihar AIR 1964 SC 205(206).

2. **Rash or negligent act.-** Rash act, is primarily an overhasty act and is opposed to a deliberate act but would also include a deliberate act done without due deliberation and caution. Negligence would be breach of duty caused by omission to do something which a reasonable man would ordinarily do or the doing of something which a prudent and reasonable man would not do (Shafqat Ali alias Furqan Vs. State 1990 PCrLJ 961). The term rash act within the meaning of section 304A cannotes want of proper care and caution. It means an overhasty act (1970 PCrLJ 1159). Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury, but without intention to cause injury or knowledge that it will be probably caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is gross and culpable neglect or failure to exercise that reasonable and proepr care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen it was the imperative duty of the accused person to have adopted (AIR 1926 Cal 300).

The test which ought to be applied in each case is firstly the amount of care and circumspection which a prudent and reasonable man would consider to be sufficient in the circumstances of the case and secondly whether the accused had taken that amount of care or he had conducted himself in a careless manner (1977 PCrLJ 818). Where the owner of a place sets up a fence covered with a live electric wire to keep out trespassers, and a trespasser who touches the wire dies of the shock, he would be guilty of an offence under section 304-A (AIR 1964 SC 205). But where there is no rashness involved, the section would not apply. Thus where the driver of a goods train did nto see a raised signal, which was meant for him, due to visual obstruction caused by a tree and other railway construction but wrongly thought that another lowered signal was meant for him, took the train to a dead end and the collision resulted in an accident; it was held that the driver was not guilty of an offence under section 304A (AIR 1953 All 72).

Where there was no negligence or rash act on part of accused in causing accident which resulted in death of three persons and injuries to others. No conviction and sentence under sections 304A and 338, Penal Code could be recorded (1988 PCrLJ 1468). Similarly where a lorry carrying wooden sleepers was driven through a gateway at an ordinary speed and one projecting sleeper hit a pillar and it fell down and killed a man; it was held that it could not be said that death was caused directly by the act of the driver. Under the circumstances of the case, the driver was guilty of an error of judgment and could nto be convicted under section 304A (AIR 1938 Sind 100).

According to 'Chamber dictionary' 'negligence' means the act or quality of being negligent want of proper care, etc, while 'rash' means "over-hasty, want of any caution, etc". There may be a certain state of consciousness in rashness but there is close relationship between the two. In negligence there is failure to observe such care as the occasion demands to protect the interest of other persons and in rashness there is failure to consider the consequences of an act with the result that

the act is devoid of proper care and caution (1970 PCrLJ 1159). Negligence under section 304-A does not mean absolute carelessness or indifference but want of such a degree of care as is required in particular circumstances (PLD 1962 Lah 267).

Mere carelesess is not sufficient for conviction under section 304A. The section like other sections of the Penal Code, requires mens rea or guilty mind. The rashness or negligence must be such as may fairly be described as criminal. The phrase 'criminal negligence' as used in ordinary conversation conveys something of the meaning (1977 PCrLJ 818). Before a person can be convicted of a criminal offence, it must be proved that mens rea exists, that is fact the accused had a guilty mind. In order to establish criminal iability the facts must be such that in the opinion of the court, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state. Simple lack of care such as will constitute civil liability is not enough. For purposes of criminal law, there are degrees of negligence, and very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied reckless most nearly covers the case. But it is probably not all embracing, for reckless suggests an indifference to risk, whereas the accused may have appreciated the risk and intended to avoid it; and yet shown in the means adopted such a high degree of negligence as woudl justify a conviction (AIR 1965 All 196).

A man can be held guilty of manslaughter only when death was caused by gross negligence (1974) 12 Cox. 625). Where death was caused by devil dancers who branded a girl to cure her of evil spirits; it was held that they were guilty under sections 326 and 304A (AIR 1935 All 282). Section 304A would apply where the accused by mistake supplied sodium nitrate to the deceased in the place of potassium nitrate, and by taking it he died (PLD 1955 FC 63). Where the accused had kept a bottle of Atlas treekiller in his farm shed and two of his farm servants drank the stuff thinking it to be arrack and died in consequence. It was held, that his prosecution under section 304-A was not warranted (AIR 1941 Mad 766).

3. **Acts done intentionally** : Section 304-A deals with the causing of death by a rash or negligent act and not with a case where injuries are inflcited neither rashly nor negligently, but intentionally and designedly (13 CrLJ 798). It does not apply to cases where there is an intention to cause death or knowledge that the act done will in all probability cause death. It only applies to cases in which without any such intention or knowledge death is caused by what is described as a rash or negligent act. A negligent act is an act done without doing something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or an act which a prudent or reasonable man would not do in the circumstances attending it. A rash act is a negligent act done precipitately. It is not necessary that there should always be consciousness of mischievous or illegal consequences in a rash act (AIR 1950 All 300). It follows that a wilful offence does not take the character of rashness because the consequences have been unfortunate. But acts which in themselves are not offences but which possibly or probably involve danger to others may be offences under section 304-A, if they are done without due care to guard against dangerous consequences (AIR 1955 All 626).

This section does not apply if death is caused by an act which is in its nature criminal (12 Mad 56). Thus the section does not apply :-

(a) Where a blow is given to another in the course of a fight (PLD 1959 SC 251).

(b) Where hurt is voluntarily caused (1900) 2 Bom LR 613).

(c) Where death results from violence intentionally directed against the deceased by the accused (7 Mad HCR 110).

(d) Where the accused fired at a crowd of unknown persons engaged in a free fight and killed one man (AIR 1945 Sind 38).

(e) Where the accused knew that the object of his assault was a weak old man and in spite of that, he attacked him most violently with a lathi causing no less than five fractures (AIR 1923 Lah 516).

(f) Where in a quarrel with his wife, the accused struck her a blow on the left side with great force. Her spleen was badly ruptured and she died within a little more than an hour (81) 3 All 776).

4. **Death should be direct result of rash or negligent act.**- In order that a person may be guilty under this section, the rash or neglignt act must be the direct or proximate cause of the death (Kurban Hussain (1964) 67 Bom LR 447=(1965) 2 SCR 622; Mahammed Saffique vs. State 1983 CrLJ 535 (Ori). For conviction under this secction, proof of rashness or negligence is essential (Padmacharan Naik vs. State 1982 CrLJ (NOC) 192 (Ori). A person can be guilty under section 304-A Penal Code, only when it is held that he caused the death. A conviction can be sustained under section 304-A if death is the direct result of rash or negligent act of the accused. That act must have been the immediate, proximate and efficient cause, the *causa causans* and not merely the *causa sine qua non* of death, without the interventing of any other negligence (AIR 1965 SC 1616). Where the accused, a car driver was absorbed in looking at certain preparations for a festival on grounds adjoining the road and a child was run over by the car and killed as a direct result of accused's disregard of people on the road, he was held guilty under this section ((50) 1 Weir 327).

In a case where a link between the act and the death of the person could not be shown to exist, the accused would always be entitled to the benefit of the doubt (1975 PCrLJ 813). Therefore where the conductor of a bus fell down from the footboard of the bus and died. The driver could not be held responsible on the ground that he started the bus witha jerk (1975 PCrLJ 813). Where, as a result of collision of certain motor vehicles, the occupant in one of them was thrown out and killed; it was held that in order to impose criminal liability ont he driver, it must be found as a fact that the collision was entirely or at least mainly due to the act fo the driver and in the absence of such a finding his conviction could not be upheld (AIR 1933 All 232). Where the accused persons in their endeavour to save themselves from an imminent danger caused by the collision of the truck with the railway engine jumped out of the truck and received fatal injuries, while the persons who remained in the truck did not receive such severe injuries on their persons; it was held, that it was a fit case for giving benefit of the doubt to the driver accused under section 304A (AIR 1954 Assam 169).

5. Contributory negligence.- The doctrine of contributory negligence, has no palce ina criminal trial. That would pertain to the domain of torts. The question for consideration in a case under this section would be whether the accident and the consequential death occurred, as a result of any gross negligence and lack of care and circumspection which a prudent and reasonable man was expected to show, considering all the circumstances of the case (1979 PCrLJ 985). The accused's liablity is determined by what is the proximate cause ofthe accident. If the proximate cause s negligence of the accused the presence of another and contributory cause is no defence (AIR 1925 Sind 233). Where a worker died because his khes (chaddar) was caught in the worm of the flour mill which had been left uncovered by the

carelessness of the management, it could not be said that because the decased was wearing along khes (chaddar) which got entangled in the worm, he was guilty of contributory negligence and, therefore, the petitioners were not liable, contributory negligence could not relieve the petitioners of their liability. At best, it might be urged for the grant of a lesser sentence (PLJ 1979 CrC 426).

Mere negligence on the part of a pedstrain cannot excuse negligence on the part of the driver of such a fast and dangerous vehicle as a motor bus. As between the pedestrain and a driver of a motor vehicle the responsibility of the latter is greater. He has a duty to keep better look out than a pedestrain. A driver of a motor vehicle who is himself negligent cannot plead in his defence the negligence of a pedestrain whom he knocked unconscious and killed (9 DLR 207). Where there is collision of a motor bus and a car, all that the court has to see is whether the accused acted rashly irrespective of the fact whether the cartman coming from the opposite direction also contributed to the accident and judge his conduct, by the standard of an ordinary, reasonable and careful driver (AIR 1938 MP 205). Where the facts show that it was possible for the driver of a car to have averted the collision in spite of the negligence of the pedestrain by leaving a sufficient margin for the man to pass, nevertheless as the collision occurred, the inference is irresistible that it was directly due to the reckless and negligent conduct of the driver of the vehicle. In those circumstances, a driver of a motor vehicle is culpable seen if there is proof of negligene on the part of the pedestrain. A driver who is himself negligent cannot plead in his defence the negligence of a pedestrain whom he knocked unconscious and killed (AIR 1935 Nag 200). Where the accused booked two boxes of fireworks for transportation by train and marked the boxes as iron locks and during loading one of the boxes exploded and killed one coolie. The accused was held guilty under this section; it was held that contributory negligence on the part of the deceased could not be set up in defence by the accused (2 CrLJ 207).

6. **Negligence by medical practitioner.** - Great care should be taken before imputing criminal negligence to a professional man acting in the course of his profession. A doctor is not criminally responsible for a patient's death unless his negligence or incompetence passed beyond a mere matter of compensation and showed such disregard for life and safety as to amount to a crime against the State. What amount of negligence is to eb regarded as gross is a question of degree depending onthe circumstances of each particular case. The negligence required should be in fact gross, and a court for convicction cannot transform negligence of a lesser degree into gross negligence merely by giving it that appellation. Where in a charge against a medical pracctitioner for man slaughter due to negligent administration of medical dose of sobita by ijection, the defence maintained that the decesed was peculiarly susceptible to the effect ofthe particular medicine and therefore, unexpectedly succumbed to a dose which would have been harmless in the case of a normal child and that in any case, the negligence (if any) did not amount to criminal negligence. It was held, that merely because too strong a mixture was once dispensed and a number of persons were made gravely ill, it could not be said that a criminal degree of negligence was proved (AIR 1943 PC 72). But where the accused, who was registered as a Homoeopath, administered to the patient suffering from guinea worm, 24 drops of starmonium and a leaf of dhatura without studying its effect and the patient died of poisoning, the accused was held guilty under section 304-A and not under section 302, Penal Code (AIR 1965 SC 831). When a qualified doctor undertakes operation but patient dies it cannot be concluded that it was commission of a culpable homicide actionable under section 304, Penal Code (Dr. Debendranath Tripathi & two others. Vs. State of Orissa & five others 1991 (1) Crimes 871 (Ori).

Quacks.-The fact that a person totally ignorant of the science of medicine or practice of surgery undertakes a treatment or performs an operation is very material in showing his gross ignorance from which an inference about his gross rashness and negligence in undertaking the treatment can be inferred. Where the accused a Hakim had no knowledge whatsoever of Penicillin injection treatment, his act of givin Procain Penicillin injection to the deceased would be clearly rash and negligent within the meaning of section 304-A (AIR 1960 MP 50=1960 CrLJ 234).

7. **Acts held rash or negligent.**- Where a girl of 17 years being tired of her husband's ill-tretment attempted to commit suicide by jumping into a well and she had no consciousness that her child was on her neck and she jumped with the child and the child died of the jump though the girl survived, it was held that the girl was only guilty under section 304-A (AIR 1925 Bom 310=27 Bom LR 604-26 CrLJ 1016). The mere administering of a love potion or a drug which a person thinks might be beneficial is not in itself an offence but when it is supposed to have effect upon persons with whom the paramour of the accused had enmity, and when she administers it without due care and caution or any enquiry as to what it really is, her act falls within section 304-A (77 IC 801=25 CrLJ 449).

The accused administered to her husband a deadly poison believing it to be a love potion to stimulate his affection for her. The husband died from the effects of the poison. It was held that the accused was guilty of an offence punishable under section 304-A inasmuch as she acted both rashly and negligently in giving as a love potion, a deadly form of posion (AIR 1915 Bom 297=281 IC 641;16 CrLJ 305; 6 ALJ 23; 9 CrLJ 522). A person who has sexual intercourse with his wife who had not attained puberty though above twelve years of age and causes her death is liable under section 304-A as the husband's right to enjoyment is subordinate to her personal safety (AIR 1917 Sind 42; 42 IC 731; 18 CrLJ 1003).

Where two persons go out for shooting with a rifle, and after setting a target on the side of a public road, proceed to fire at it, against the light and without the lest circumspection with regard to the safety of others and one of the bullets so fired hit and killed a man, held, both were guilty under section 304-A and that it was necessary to call in section 34 or section 107 as abetment of negligence must itself be negligence (9 CrLJ 393). Where the owner fixed live naked electric wire of high voltage across passage to his latrine to dissuade trespassers. There was no warning that the wire was live one. The trespasser got shock and died some time after. The occupier held guilty under section 304-A (AIR 1964 SC 205= (1964) 1 CrLJ 138= (1964) 1 SCJ 417).

Where a ferry contractor who had not taken a licence for the ferry service across that river after the expiry of his previous licence took the risk of putting the boat in water and ferrying passengers and transporting them, as floods in the river were receding, and there was as heavy wave which dashed against the beat and capsized it resulting in the loss of lives, the accused is guilty of rash and negligent act under section 304-A (1963) 1 CrLJ 44; AIR 1963 Bom 1). A Mahant went to the house of the accused who was having a drinking party. The accused was respectful to him and was over anxious to show all hospitality to him. The accused was anxious that the Mahant should not go away from his house without taking meals and spending the night with him. Seeing that he was going away the accused let go his gun without aiming at the Mahant in order to prevent him from leaving his place by terrifying him to some extent. The shot hit the Mahant in his chest and he died of the wound later on. It was held that this act was rash and negligent and the accused was guilt of an offence under this section (1954 CrLJ 727; AIR 1954 SC 271).

8. **Charge.**- The charge should run thus :

"I (name and office of Magistrate etc.) hereby charge you (name of accused) as follows :

"That on or about the ..... day of ..... at ..... you ..... caused the death of ..... by doing an act, to wit ..... which was a rash (or negligent) act to amounting to culpable homicide,and thereby committed an offence punishable under section 304-A of the Penal Code, and within my cognizance.

"And I hereby direct that you be tried for the said offence."

A charge framed under section 304-A, would be defective if it used the words "rashness" and "neglignece". Criminal rashness and criminal negligence are two different things. The accused can be charged alternatively for rashness or negligence. (7 MHCR 119).

"Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputablity arises from acting despite the consciousness. Culpable negligence in acting without the consciousness that the actor has not exercised the cauton incumbent upon him and that if he had he would have had the consciousness. The imputability arises from the negligence of the civic duty of circumspection " (State Vs. Banshi Singh AIR 1960 MP 105 (106) (1959) Gab. LJ 495; (1959) MPLJ 856; 1959 MPC 614).

9. **Conviction and sentence.**- In conviction under section 304-A Penal Code, 1860, the legislature in its wisdom has given discretion to the Court to fix up the proper sentence and imprisonment is not a must merely because human life is lost (State of Karnaka Vs. A. Joseph 1988 (3) Crimes 452 (Kar).

In conviction under section 304-A, Penal Code, 1860, sentence of one month's rigorous imprisonment with a fine of Rs. 1,000 would meet the ends of justice, regard being had to the fact that the accused was aged about 28 years with no previous conviction and conviction is recorded for the death of 85 years old man after reversing the order of acquittal, passed five years back (State of Karnataka Vs. Mohd. Ismail @ Maqbool Ahmed 988(3) Crimes 460 (Kar).

[1][304B. **Causing death by rash driving or riding on a public way.**-Whoever causes the death of any person by rash or negligent driving of any vehicle or riding on any public way not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to [2][three years], or with fine, or with both.]

Synopsis

1. Scope and application.
2. Rash and negligent driving.
3. Rash and negligent driving test.
4. Proof of rash and negligent driving.
5. Conviction and sentence.

1. **Scope and application.**- This is a new provision arising out of offences, falling under section 304-A Penal Code. This section was inserted by the Ordinance NO. XLVIII of 1985 on 8.10.85. This section deals with the causing of death by a rash and negligent driving. For conviction under this section, proof of rash driving or riding on a public way is assential. The prosecution has the obligation of proving relevant facts from which the inference of negligence can be drawn.

1. Section 304B was inserted, ibid., s. 5.
2. Subs. by Ordinance No. XLVIII of 1985, for "seven years".

A person driving a motor car is under a duty to control the car; he is *prima facie* guilty of negligence if the car leaves the road. It is for the person driving the car to explain the circumstance under which the car came to leave the road (AIR 1934 Mad 209; 35 CrLJ 691). The provisions of this section seem to apply to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death (14 Cal 566). It only applies to such death which is caused by reason of rash and negligent driving on public way.

When the accused in a car accident on a road made no attempt to save the victim even when there was sufficient space on either side of the road it was held that accused was guilty under this section (Baldevji AIR 1979 SC 1327; 1979 CrLJ 1136). The fact that the accused has not acquired sufficient proficiency in driving and is guilty of a rash or negligent act in driving the jeep, is by itself not sufficient to convict him under section 304-A, Penal Code. The prosecution must go further and prove that it was that rash or negligent act of his that caused the death of the deceased (Suleman Rahimah Mulani Vs. State of Maharashtra, 1968 MPLJ 361 (363)= AIR 1968 SC 829).

There is no presumption in law that a person who possesses only a learner's licence or possesses no licence at all does not know driving. For various reasons not excluding sheer indifference, he might not have taken a regular licence. The prosecution evidence that appellant No. 1 had driven the jeep to various places on the day previous to the occurrence is a proof of the fact that he knew driving. There was no basis for the conclusion that it was a sheer stroke of good fortune that he did not meet with any accident on that day (Suleman Rahimah Mulani Vs. State of Maharashtra, 1968 MPLJ 361 (364)= AIR 1968 SC 829). It is not possibleto hold that the bus driver is negligent if he could not see the man trying to suddenly cross the road in front of his bus because, howevr slowly he may be driving, he may not be in a position to save the accident (Mahadeo Hari Lokre Vs. State of Maharashtra, AIR 1972 SC 221 (222,223).

2. **Rash and negligent driving.**- A person who is driving a motor car owes a duty to the members of the public to keep a look out on the road. This is more so when approaching a pedestrain crossing where he would normally expect a pedestrain to cross the road. Regard must be paid to the habits of the public (1966 CrLJ 400=AIR 1966 Bom 122).

Where the driver knocked down the pedestrian who had avoided the road, the driver was held guilty of rash and negligent driving (AIR 1955 NUC (Cal) 2938). The accused drove the truck with the head lights on in full speed straight on the steel cot on which the deceased was resting with the result that the truck dashed aginst the cot and deceased was thrown away to a distance of about ten feet from the cot. Held, that the accused was unable to control the vehicle in high speed while taking a turn to get into the kutcha road from the open field and in this process hit the cot throwin the deceased out of the cot by the impact resulting in injuries which ultimately led to his death. This would not reveal the accused's intention or any deliberate act with the requisite knowledge for an offence of culpable homicide. There is, therefore, no error committed by the High Court in holding that the case falls under section 304-A, Penal Code, and not under section 304, Part II, Penal Code (State of Gujarat vs. Haidaralli Kalubhai, 1976 CrLJ 732(733, 734, 735) (SC)= AIR 1976 SC 912; 1976 CrLR 1976 SC 1012= 1976 CrLR 114 (SC).

Where the driver of a motor vehicle cannot stop the vehicle in time to avoid collision with a pedestrain on a crowded streed due to inefficiency in the strength of the brakes the result of the death of the pedestrian must be attributed to the culpable negligence of the driver in driving the vehicle with defective brakes making

him liable for a conviction under section 304-A (1961 Raj LW 466). Where the passengers, who were allowed to sit on the top of the goods due to the negligence of the driver, fell down and were run over by the truck, the driver was held liable under section 304-A (ILR 1964 Cut 603).

The important criteria for deciding whether the driving which led to the accident was rash or negligent would include not only the speed of the vehicle but also the width of the road, the density of the traffic and the attempt if any to overtake other vehicles, resulting in coming to the wrongside of the road and being responsible for the accident (Shakila Khader Vs. Nausher Gama 1975 CrLJ 1105 (SC). Where the evidence showed that it was the accused respondent who came over to the wrongside of the road in his car while overtaking other vehicles and was responsible for knocking down a scooterist fatally and the car driven by him then travelled another 45 feet, hit against the parapet wall on the wrongside and overturned, killing one of the occupants of the car, it was held that on these facts, his conviction under section 304-A and other sections as found by the trial Court must be restored (Shakila Khader Vs. Nausher Gama 1975 CrLJ 1105 (SC). Where the question is whether an offence under section 304-A has been committed or not, the criterion is whether upon the evidence on the record a person can be said to have been driving with due care and caution or else had been engligent, i.e. had omitted to do something which a reasonable man, guided by the considerations which ordinarily the conduct of human affairs would do, or done something which a prudent and reasonable man would not do (1974 PCrLJ 586).

Where the evidence showed that there was no direct impact of the speeding truck of the accused respondant with the cot on which the deceased was lying down but there was only a tangential contract of the truck with the corner of the steel cot while it was turning towards a kuchha road, thereby showing that it was not a deliberate act on the aprt of the accused with the requisite knowledge for the offence of culpable homicide, but it was more probable that the accused had lost control over the vehicle in trying to take a turn for the kuchha road at high speed, it was held that the High Court had not committed an error in altering the conviction of the accused respondent from murder under section 304, Part II, to one under secton 304-A (State Vs. Haidarali Kalubhai 1976 SCC (Cri) 211).

Use of words not amounting to culpable homicide in section 304-A is very significant. These words make it very much obvious that rash or negligent driving or act which amounts to culpable homcide would be unishable under section 304 and not under section 304-A. It is only when rash or negligent driving or act does not amount to culpable homicide that section 304-A is applicable (NLR 1987 Cr77). In case of death by motor collision, a charge for murder or culpable homicide not amonting to murder is not sustainable. The death is caused by a rash and negligent act under section 304-A (NLR 1985 SC 542). Where accused had no mens rea and he dd not know that his negligent driving was likely to cause death but death was caused, he was liable under section 304-A and section 304, Penal Code (NLR 1988 CrLJ 490).

Where death is caused by the negligent and rash driving ofa mortor car, negligence consists of two factors : (a) speed and (b) failure to apply the brakes in time. Both as regards civil and criminal liability the rate of speed which will be considered dangerous varies with the nature, condition and use of the particular highway and the amount of traffic which actually is or may be expected to be on it. The driver of avehicle must drive at a speed that will permit of his stopping or deflecting his course within the limits of his vision. It is the duty of the driver to drive his vehicle at a speed which will not imperil the safety of others using the road.

The driver is under a duty of using whatever means are at hand to avoid a threatened collision. The most obvious means of avoiding the collision is the brakes with which the car must be equipped. It will constitue culpable negligence if a driver drives a vehicle with patenity defective brakes or fails to apply the brakes in time (AIR 1959 Mad 497).

When there is heavy vehicular traffic on the road and the road is invisible in a cloud of dust, it is the duty of all motorists to stop their cars. To continue driving must obviously be dangerous when it is impossible to see anything at all in the neighbourhood particularly when the driver continues driving the car and manages to et on the wrong side of the road blocking the right of way of a car in the act of proceeding in the opposite direction. Such an act of driving undoubtedly amounts to rash and negligent act (AIR 1941 Lah 113). Where the driver was negligent as when a motor driver backed a car at night without looking at its back to see whether the way was clear and the car ran over a man sleeping on the road, the driver was held liable under section 304-B (17 Cut LT 359).

The accused was driving his lorry. A girl was run over and killed on the spot. The driver of the lorry was inattentive and had not kept a proper look out for the persons who were waling on the eastern side of the carriage way. The accused never made any attempt to apply brakes. The lorry stopped 73 fit ahead of collision. It was held that the incident couldnot be regarded as pure accident and the Court was justified in coming to the conclusion that the prosecution had established that the accused had caused the death of the girl by rash and negligent driving (Usman Gani Mohammad Vs. State of Maharashtra, 1978 CrLR (SC) 642 (645). When the heavy vehicle had no horn and the road on which the vehicle was going, was closed for heavy vehicular traffic, it was held that not blowing the horn and entering the cross road with a speed at which it was not possible for the driver to control the vehicle amounted to rash and negligent driving (AIR 1971 MP 145).

Deceased Dhanpal who had crossed half the width of a 50 feet wide road and become stationary in order to let the vehicular traffic pass before he crossed over. The deceased suddenly took a step backward. He was suddenly hit by a motor cycle which the accused was riding while trying to overtake the bus. The result of the impact was that Dhanpal was dashed to the ground and was run over by the bus. It was then that fatal impact came about. It was held that in this situation the accused was not to blame as he could well have by passed both the bus and the deceased had not the latter not taken the fatal erratic step (State of Maharashtra vs. Vijay Sadannand Shenoy (1981) 3 SCC 524; 1981 CrLR 161 (162).

A child of 6 years playing on the right side of the road got under right rear wheel and was crushed. It was not the prosecution case that accused was driving the truck on the extreme right side of the road. It was held that the child was run over by the truck not as a result of it being driven rashly and negligently by the accused but solely because the child tried to cross the street to its house on the left just when the truck was passing on the road (1969 ACJ 10 MP). Where the person suddenly crossed the road without taking note of the approaching bus, the bus driver was held not negligent (AIR 1972 SC 221; 1972 UJ (SC) 250; 1972 SC Cr R 88).

While driving a bus at moderate speed, its driver suddenly noticed a four year child attempting to cross the road from left to right. The road was 12 feet wide with deep ditches on both sides. The driver swerved the bus to the extreme right to dodge the child but it was hit by the bus and died on the spot. He swerved the bus to extreme right but to the certain limit as there was a deep ditch by the side of the road and if the bus had gone further there was risk of the bus falling in the ditch. It was held that the accident was due to error of judgment and in spite of driver

adopting best course accordingto his knowledge and belief, the principle of resipa loquitor was not attracted (AIR 1979 SC 1848).

3. **Rash and negligent driving test.**- The main criterion for deciding whether the driving of a motor vehicle, which led to the accident was rash and negligent, is not only the speed at which the car was running but the width of the road, the density of the traffic and the attempt to overtake other vehicles resulting in the car going to the wrongside of the road and causing the accident. Even if the accident took place in the twinkling of an eye it is not difficult for an eye-witnesses to notice a car overtaking other vehicles and going on the wrong side of the road (AIR 1975 SC 1324= 1975 SCC (Cr) 379= 1975 CrLJ 1105).

The mere fact that a pedestrian has been knocked down by a vehicle and has died does not justify the inference that the driver of the motor vehicle that knocked down has been guilty of rashness or negligence (1975) 41 CLT 158). Speed is not the sole contention for determining the negligent driving of a car (AIR 1975 SC 1524). Inmitended action should flow from rashness where knowledge of consequences from an action can be concluded, the offence does not fall under section 364-A, Penal Code (1984 SCC (Cr) 51).

In determining speed of vehicle for the purpose of rash and negligent driving regard must be had to the width of the road, density of the traffic, attempt to take over other vehicles etc. A driver had a right to over take a slow moving vehicle but for it he must take proper care and caution which is essential (1985) 1 Crimes 763 (AP).

4. **Proof of rash and negligent driving.**- The principle of *res ipsa loquitur* does not conflict with the principle of criminal jurisprudence that the burdenof proving an offence lies ont he prosecution *Res ipsa loquitur* means that the circumstances are themselves eloquent of the negligence of somebody, who brought about the state of things complained of. The *res* speaks because the facts remain unexplained and therefore, natural and reasonable, not conjectural inferene from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of somebody. The prosecution has, in the first instnce, the obligation of proving relevant facts from which the inferene of negligence can be drawn (ILR 1945 Nag 566).

Rashness and negligence was held to have been duly proved where both prosecutiona nd defence versions were put in juxtaposition and then the Court came to the conclusion that prosecution case against accused had been established (1988 PCrLJ 263). Where first information report showed that occurrence took place due to rash and negligent act of accused. Report of Mechanic indicated that there was no mechanical defect in vehicle. Steering foot brake and tie rod of vehicle was in order. Case was held to have been over whelminghly proved against accused (PLD 1985 Lah 529). Conviction under section 304-A requries that some rash or negligent act on the part of the accused must be conclusively established by direct evidence. Where it had not been established that at the time of the accident the accused was driving the lorry ata high speed and no element of rashness or negligence in the driver's conduct had been established, a case under section 304-A was not made out against him (1974 PCrLJ 56).

Where there was no definite evidence of rash and negligent driving there could be no conviction under section 304-A merely because death was caused in an accident (PLD 1978 Kar 655). Where there was no definite prove that petitioner was driving bus rashly or with negligence. The bus involved in the accident was also not got examined by some expert mechanic. Conviction and sentence were set adide (NOR 1982 CrLJ 364).

Where death of a person sitting on the front seat of a truck was caused by its collision with another truck. But there was no allegation that accused was driving on wrong side; that headlights of his truck were not on; that he was driving with knowledge of such mechanical defect in his vehicle which could have resulted in any accident and that he was itoxicated at time of accident. None of the vehicles was examined by investigating officer or got examined by motor vehicles inspector to prove mechanical defect. It was held that rashness and negligence by accused were not proved and conviction of the driver was set aside (1984 PCrLJ 1470).

Where a child was run over by a bus. It was held that it was the height of negligence on the part of the parents of the deceased to allow such a smallchild to corss an extremely busy road all by himself. Such unfortunate accidents are bound to occur where unattended children attempt to cross busy roads. There was no evidence that the appellant saw the child crossing the road and had the time or opportunity to stop his bus before striking the child; the accused was acquitted.(PLD 1978 Kar 655). When the driver was taking the bus in a reverse direction slowly, while very scrupoulously following condctor's instructions and he stoped it when the conductor whistled to stop, neither the rashness nor the negligence attributed of the driver in causing the death when the deceased was caught in between a pole and the back of bus (Manval Luis Desouza Vs. State of Kamataka; 1990 (1) Crimes 570 Kar).

The mere fact that three prosecution witnesses stated that a bus was being driven by the applicant at a very fast speed without giving particulars would not necessarily indicate that the bus was in fact being driven at a fast speed for there was no indication what was the approximate actual speed of the bus (1968 PCrLJ 1416). Where however a vehicle dashed against a tree, the presumption was that the accused driver was driving the vehicle rashly and negligently (ILR 1954 Mys 491).

There can be no presumption of negligence once a man is knocked down and killed by a motorist. Not only must there be evidence of rashness or negligence acceptable to the Court but, as laid down by the Indian Supreme Court in the case of Suleman Rahiman Mulani Vs. State of Maharashtra (70 Bom LR 536 (538)= AIR 1968 SC 829), there must be proof that the rash or negligent act of the accused was the proximate cause of the death and there must be direct nexus between the death of a person and the rash or negligent act of the accused. In running down cases the death of the pedestrian may very well be purely accidental, or may be due to his own negligence. To presume that because a pedestrian has been knocked down and has died the driver of the motor vehicle that knocked him down must be guilty of rashness or negligence overliks these two possibilities. It is necessary for subordinate Courts to bear in mind that the prosecution must produce evidence to establish rash or negligent driving of the motor vehicle by the accused (Tukaram Sitaram Gore vs. State of Maharashtra, 72 Bom LR 492 (494); AIR 1971 Bom 164).

No doubt when a serious accident takes place one naturally expects the driver concerned to explain the circumstances in which he was obliged to take the bus on to the footpath and to strike against the electric pole with such force, thereby killing one human being and injuring several others. The satisfactory nature of the explanation to absolve him of his criminal liability for the accident has, in such circumstances, to be appraised in the light of the entire evidence on the record. The onus of course remains on the prosecution and does not happen, is admissible and has to be duly taken into account in understanding and evaluating the entire evidence led in the case and in appraising the value of the explanation given by the accused for his compulsion which resulted in the accident (Nageshwar Shri Krishna Choube Vs. State of Maharashtra 1973 Mah LJ 144 (152); 1973 ACJ 108).

5. **Conviction and sentence.-** Where the accused-appellant was convicted by the High Court under section 304-A for running down a young girl, aged 7 years, with his lorry and killing her on the spot, and the evidence showed that the girl might have stepped down from the footpath when she was run over by the appellant's lorry which was coming from the opposite direction, but the evidence also showed that the lorry was being driven in a rash or negligent manner by the appellant, who was inattentive and was ot aware of the girl being hit by the lorry as he had not kept a proper looked out, it was held that his conviction under section 304-A must stand, but the sentence could be reduced to the period of two and a half months imprisonment already undergone by him in view of the fact that as long as nine years had elapsed from the date of the occurrence (Usman Gan Mohammad 1979 SCC (Cri) 675).

Where the evidence clearly showed that the appellant had caused the death of the deceased, while the latter was trying to cross the road, and the appellant did not make any attempt to save the deceased by swerving to the other side of the road, even though there was sufficient space, it was held that his conviction under section 304-A must be maintained and the benefit of probation of offenders Act must be denied in his case (Baldevil Bhathiji Thakore 1980 SCC (Cri) 163). Where the evidence disclosed that (1) the truck was being driven by the appellant at a very high speed; (2) it was having no lights; (3) the horn was not sounded; and (4) the visibility was poor at the time of the incident when the truck collided with a jeep killing two of the occupants of the jeep and injuring two others, it was held that the conviction of the appellant under sections 279, 337 and 304-A must be upheld (Amar Singh 1971 SCC (Cri) 530).

The accused tried to run over the deceased while the deceased was trying to cross the road. He did not make any attempt to save the deceased by swerving to the other side, when there was sufficient space. It was held that the accused had cuased the death of the deceased by rash and negligent driving. The Supreme Court upheld that conviction under section 304-A (Baldevji Bhathiji Thakore Vs. The State of Gujarat, AIR 1979 SC 1327 (1328). The main criterion for deciding whether the driving which led to the accident was rash and negligent is not only the speed but the width of the road, the density of the traffic and the attempt to overtake the other vehicles resulting in going to the wrong side of the road and being responsible for the accident (Mrs. Shakila Khader Vs. Nausher Gama, AIR 1975 SC 1324(1326-27) = 1975 CrLJ 1105).

In the present case the appellant was driving a bus on a kachcha road. On the roof of the bus certain corrugated iron sheets were kept; owing to aolting some of the iron sheets fell down and hit deceased on the head and also injured some other person who were going on that road. Held, that this part of the evidence, that who had loaded the iron sheets, was very material because unless the driver could be held to be entirely responsible for loading the iron sheets and putting them in a negligent manner or not tying them properly is difficult to sustain his conviction under section 304-A of the Penal Code (Baijnath Singh Vs. State of Bihar, AIR 1972 SC 1485 (1485, 1486).

In the case reported in Duli Chand Vs. delhi Administration (AIR 1975 SC 1960), the appellant did not look at his right though he was approaching a cross-road and failed to notice the deceased who was coming from his right and crossing the road. It was held that there was culpable negligence on the part of the appellant. The death of the deceased was caused on account of negligent driving of the bus by the appellant.

Where the appellant, a bus driver, had tried to pass through a level crossing on finding the gates open, but before he could clear the crossing a goods train had come and dashed against the rear side of the bus with the result that the bus was thrown off causing serious injuries to passengers, of whom some died, it was held that where a level-crossing was protected by a gate man as in this case, and the gate man had negligently kept the gates open at a time when an unscheduled train was passing by there was no duty cast upon the driver to stop the vehicle and look out before crossing the level crossing. Hence, the conviction of the appellant under sections 304-A, 337 and 338 was set aside (Hussain S N 1972 SCC (Cri) 254).

The accused cannot be convicted merely on the ground that he failed to give any explanation of the accident (Sarwar Khan 1968 CrLJ 1338; 1968 AIR AP 290). Where the accident happened due to an error of judgment and not negligence or want of driving skill on the part of the accused and the error of judgment was of the kind which comes to light only on post-accident reflection but could not be foreseen by the accused in that fragmented moment before the accident, it would not be a sure index of negligence (Syed Akbar 1980 SCC (Cri) 59).

The mere fact that a human life is lost due to the negligent driving of a motor car does not justify the Court in passing a deterrent sentence, if the lost life could not have been reasonably anticipated by the accused. In considering the question of enhancement of sentence, one has to consider whether the rash and negligent act of the accused which has occasioned the death, shows callousness on his part as regards the risk to which he was exposing other persons. The severity of the sentence must depend, to a great extent, on the degree of callousness which is present in the conduct of the accused (AIR 1937 Bom 96=38 Bom LR 1111= 1968 IC 870=38 CrLJ 660). The accused had already undergone imprisonment for more than three weeks in two short spells. He has also been mulated with substantial amount as fine. It would not be desirable to send him back to jail for another short term (1973 Cur LJ 188).

Where the accused was not a previous convict, had a big family to support and had already been jailed for more than 1/2 months, it was held that was a fit case to reduce sentence already under gone (1979 CrLR (Mah) 132).

In the case of awarding punishment in rash and negligent cases, sentencing must have a policy of correction and victimisation of the family of the convict may be a reality, and a welfare State must give thought to this aspect (AIR 1980 SC 84=1980 CrLJ 11). Where rash and negligent driving caused death the fact that the accused driver was supporting a large family and the proprietor of the vehicle failed to compensate the family and no compensation was shown in interference from the sentence awarded by the trial Court was called for (AIR 1980 SC 84=1980 CrLJ 11).

If the criminal proceedings against the driver have gone of more than 8 years and the circumstances in which the collision between the truck and the scooter occured seems *prima facie* to suggest that they (their drivers) were both to blame, the Supreme Court thought it would be just and proper to reduce the sentence of imprisonment to three weeks from six months but to increase the sentence of fine from Rs. 500 to Rs. 700 as penalties designed to deter crime should be gauged so far as possible to the degree of social danger that is represented by the crime and its repetition (Jagdish Chandra Vs. State of Delhi, AIR 1973 SC 2177 (2130, 2131).

When a life has been lost and the circumstances of driving are harsh, no compasson can be shown. Courts did not interfere the sentence, although the owner is often not morally innocent. Nevrtheless, sentencing must have a policy of correction. The driver, if he has to become a good driver, must have a better training

in traffic laws and moral responsibility, with special reference to the potential injury to human life and limb. Punishment in this area must therefore, be accompanied by these components (Rattan Singh Vs. State of Punjab, 1980 Bihar Cr. C (SC) 32 (34)= AIR 1980 SC 84 (85).

Indian amendment

304-B.- **Dowry death.**- (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation.- For the purposes of this sub-section, "dowry" shall have the same meaning as in section 2 of the dowry Prohibition Act, 1961.

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

Comments

This section was inserted in India by the Dowry Prohibition (Amendment) Act, 1986 (by Act No. 43 of 1988 w.e.f. 19.11.86), with a view to combating the increasing menace of dowry deaths. It provides that where the death of a woman is caused by any burns or bodily injury or otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for or in connection with any demand for dowry, such death shall be called dowry death and such husband or relative shall be deemed to have caused her death and shall be punished with imprisonment for a minimum of seven years but which may extend to life imprisonment. The same Amendment Act has inserted section 113-B in the Evidence Act, 1872 to raise a presumption of dowry death. It provides :

"Presumption as to dowry death.- When the question is whether a person has committed the dowry, death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation.- For the purpose of this section, "dowry death" shall have the same meaning as in section 304-B of the Penal Code."

Even if the wife committed suicide by hanging, still the death comes within the scope of section 304-B of the Penal Code, if it is shown that she was subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand for dowry (State of Andhra Pradesh V. T. Basava Punnaish & Others. 1990 (1) Crimes 611 (AP).

305. **Abetment of suicide of child or insane person.**-If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication commits suicide, whoever abets the commission of such suicide shall be punished with death or [1][imprisonment] for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

1. Subs. by Ordinance No. XLI of 1985, for "transportation".

306. **Abetment of suicide.**-If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment either description for a term which may extend to ten years, and shall also be liable to fine.

Comments

Conviction recorded by trial Court for an offence under section 306, Penal Code is sustainable in law even where the prosecution case depends upon the statement of two relation witnesses, father and brother of the deceased to prove the maltreatment and harassment meted out to the deceased on the demand of dowry considering that their evidence is natural and in the circumstances of the case, only relations could be the witnesses (Dalip Singh & others Vs. State of Punjab 1988 (1) Crimes 211 (P&H).

The commission of suicide due to investigation clearly falls under the first clause to section 306, Penal Code (Brij Lal Vs. Prem Chand & another 1989 (2) Crimes 192 (SC). To sustain convictions under section 306, Penal Code, on the charge of abetment to commit suicide, the cruelty or harassment must have been committed soon before her death (Samir Samanta and another Vs. The State 1991 (3) Crimes 211 (Cal).

307. **Attempt to murder.**-Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to [1][imprisonment] for life, or to such punishment as is hereinbefore mentioned.

[2][**Attempts by life convicts.**-When any person offending under this section is under sentence of [1][imprisionment] for life, he may, if hurt is caused, by punished with death.]

Illustrations

(a) A shoots at Z with intention to kill him, under such cricumstances that if death ensued, A would be guilty of murder. A is liable to punishment under this section.

(b) A with the intention of causing the death of a child of tender years exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue.

(c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and, if by such firing he wounds Z, he is liable to the punishment provided by the latter part of [3][the first paragraph of] this section.

(d) A, intending to murder Z, by poision, purchases poision and mixes the same with food which remains in A's keeping; A has not yet committed the offence in this section. A places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

1. Subs. by Ordinance No. XLI of 1985, for "transportation".
2. Inseted by the Indian Penal Code Amdt. Act, 1870 (XXVII of 1870), s. 11.
3. Inserted by the Amending Act, 1891 (XII of 1891), Sch. II.

Synopsis

1. Scope and application.
2. "Whoever does any act ..... guilty of murder".
3. Use of firearms.
4. Attempt to murder.
5. Intention or knowledge.
6. Infliction of injury not necessary.
7. Evidence and proof.
8. Section 307 read with section 34.
9. Section 307 read with section 149.
10. Sentence.
11. Compromise.
12. Alteration of conviction.
13. Charge.
14. Practice and procedure.

1. Scope and application.- In an attempt to murder all the elements of murder must exist except the fact of death. An actual intention to commit the particular crime is a necessary element of an attempt to commit crime. To constitute an attempt to murder contemplated by section 307, there must be an overt act combined with evidence of *mens rea*. The burden is on the prosecution to prove both (Laxmidhar Ganda Vs. State of crimes, 1990 (32) OJD 31(36) (Cr).

For the accused to be made liable under section 307, Penal Code they should have done any act with such intention or knowledge and under such cirucmstances that, if they by the act caused death, they would be guilty of murder (Ramaswami Vs. State, 1989 LW (Cr) 129(132) (Mad)(DB).

If an injury inflicted on the victim is not sufficient in the ordinary course of nature to cause death, a case under section 307, Penal Code, cannot be established (Khattan Vs. State of Rajesthan 1989 (1) Crimes 257 (Raj). For the offence under section 307, Penal Code presence, of any injury is not at all necessary. However, injuries inficted and their sizes may furnish a clue to the mens rea behind infliction of injuries (Bhayya @ Devendra Vs. State of M.P. 1991 (1) Crimes 288 (MP HC). Where in the circumstances if death would have occasioned because the injuries inflicted by accused and the accused could not have been held guilty of murder then conviction under section 307, Penal Code is unsustainable (Mohanbhai Ranchhodbhai Vs. State of Gujarat 1993 (2) Crimes 80 (Guj).

When the gun shot injuries on the person of injured were simple in nature though were on the vital part of the body but doctor opined them neither grievous nor dangerous the offence falls under section 324, Penal Code not under section 307, Penal Code (Kalloo and another Vs. State 1993 (1) Crimes 397 (All).

The section makes a distinction between an act of the accused and its result, if any, such an act may not be attended by any result as far as the person assaulted is concerned but still there may be case on which the culprit would be liable under section 307. It is not necessary that the injury actually caused to the victim should be sufficient inthe ordinary course of circumstances to cause death. What the court has to see is whether the act irrespective of the result, was done with the intention or knowledge and under circumstances mentioned in section 307. An attempt in order to be criminal need not be penaltimate act. It is sufficient in law if there is present an intent coupled with some over act in execution thereof (1983 CrLJ 231=AIR 1983 SC 305).

The essential ingredients of an offence under section 307, Penal Code, are firstly, the doing of an act, which by itself must be ordinarily capable of causing death in the natural and ordinary course of events and secondly, the presence of the necessary intention or knowledge that death would ensue as a result of that act (PLD 1977 Kar 726). The burden is always on the prosecution to prove, the *actus reus*, that is, in taking this step the accused was inspired by the intention to go on to reach at definite objective which would constitute a specific offence (AIR 1960 Punj 135).

Intention is a state of mind which is not ordinarily ascertainable and which can only be inferred from external acts. For this purpose it is very necessary to examine the act itself and to see whether it is such an act that it by itself is ordinarily capable of causing death in the natural and ordinary course of events (PLD 1963 Kar 1118). Conviction would be under section 307, where injury was caused by accused with hatchet on a vital part of body (head) of victim. It was 7 inches long gapping wound with depth upto brain. This clearly indicated that accused had intention and knowledge that if the act had resulted in death of victim then they would have been guilty of murder (1987 PCrLJ 1128).

Where the incident was the result of a sudden flare up and the injuries suffered by the victim were not capable of causing death in the ordinary circumstances. There was nothing to show that irrespective of its result, viz simple injuries the attack was launched by the accused with the intention or knowledge and under circumstances mentioned in section 307 (NLR 1980 Cr 4217).

Where the accused, horseman, pursued the deceased whom he though to be the person wanted at the police station and fired three shots at him, and the deceased who was standing in the river at the time of the third shot never appeared again. It was held that there is no sufficient evidence to support the conviction. It is necessary to prove that the accused did an act with such intention or knowledge that if he had caused death by that act he would have been guilty of murder. The only act which he is clearly proved to have committed is to pull the trigger of a loaded rifle three times. It was just likely on the facts disclosed that he had fired into the air in order to frighten and stop the deceased, as that he did fire at the deceased (25 CrLJ 308). Similarly where a shot not aimed at any particular person, was fired from the house in which the accused resided, and it was doubtdful whether the accused or some one else fired the shot. It was held that the accused could not be convicted under section 307 (29 CrLJ 518).

It is well established that if the intention or necessary knowlede to cause death was there it is immaterial whether or not any hurt has been caused to the victim, and the accused can be held liable for an offene under secton 307, Penal Code, even though no hurt was caused (Bhagwan Din Vs. State, AIR 1967 All). A knife stab injury which if not timely attneded would have been fatal is a murderous assault falling under section 307, Penal Code (Tamma Vs. State of Maharashtra 1988 (3) Crimes 120 (Bom).

The finding whether or not a certain act amounts to an attempt of murder punishable under section 307, Penal Code, is essentially a finding of fact. The mere use of a pistol or gun at the time of the attack by the assailants will ot necessarily bring the cause under section 307, Penal Code (Chokhey Vs. State, AIR 1968 All 49 (51).

Where an accused caused injury on the vital region of the injured, but no vital organ was actually cut, as a result of that injury, it was held that the provisions of section 307, Penal Code, was not attracted and that the accused could be convicted under section 324, and not under section 307, Penal Code, In Sarju Prasad Vs. State of Bihar (AIR 1965 SC 843 (843, 844) the contention was raised that the injury caused, though was not on the vital region of the injured person, and the injury was not such as was in the ordinary course of nature likely to result n death and the offence did not fall under section 307 but under section 321, Penal Code. Discussing this argument Mudholkar, J., observed "that the mere fact that the injury actually inflicted by the appellant did not cut any vital organ of Shankar Prassad is not by itself sufficient to take the act out ofthe purview of sction 307" (See also State of Maharashtra Vs. Balram Bama Patil ,AIR 1983 SC 305 = 1983 CrLJ 331).

2. "**Whoever does any act ..... guilty of murder.**"- A person commits an offence under section 307 when he has an intention to commit murder and in pursuance of that intention does an act towards its commission irrespective of the fact whether that act is the penultimate act or not. The expression "whoever attempts to commit an offence" in section 511, can only mean, whoever intends to do a certain act with the intention or knowledge necessary for the commission of that offence". The same is meant by the expression 'whoever does an act with such intention or knowledge and under such circumstances that if he, by that act, caused death he would be guilty of mruder in section 307. The expression "by that act" does not mean that the immediate effecct of the act committed must be death. The word 'act' denotes according to secction 33 as well, a series of acts. The course of conduct adopted by the accused in regularly. Starving the wife in order to accelerate her end came within the purview of section 307 though it was not the last act which if effective would cause death (AIR 1961 SC 1782 = (1961) 2 CrLJ 848).

Intention or knowledge and the nature of the circumstances are chief factors to be looked into in determining whether a particular case comes within the mischief of section 307 Penal Code (7 DLR 430). Where the accused does an act with such guilty intention and knowledge and in such circumstances that but for some intervening fact, the act would have amounted to murder in the natural course of events, he is guilty of an offence under section 307 Penal Code (AIR 1941 Nag 302). It follows that the act must be capable of causing death in the natural and ordinary course of things, or in other words, that death might be caused if the act took effect. The degree of probability should not enter into the question. It would be a very uncertain criterion to apply. It is sufficient if death was a possible result and if the intention was to cause death. The administration of powdered glass was certainly an act capable of causing death. Though powdered glass is not, strictly speaking, a poison, it is popularly believed to be actively poisonous, and it is in fact a mechanical irritant which may cause death. Where, therefore, a considerable amount of powder glass, the particles of which are large enough to be easily detected, is administered in food to a person with the intention of causing his death, the offence falls under section 307 Penal Code (AIR 1941 Nag 302).

Where the accused caused an injury on the head by giving a lathi blow he was guilty of an offence under section 307 (1983 PCrLJ 72). Where an accused person shoots a person with a pistol and thereby causes hurt to him, he is liable to conviction under the latter part of section 307 and his conviction under section 236 for the same offence is not warranted (AIR 1952 All 726).

All attempt in order to be criminal need not be the penultimate act. For purposes of criminal liability, it is sufficient, if the attempt had gone so far, that the crime would have been completed, but for extraneous intervention which frustrated its consummation (AIR 1959 Punj 134). It cannot be extended to consequences which have not occurred (PLD 1962 Kar 269).

Where the accused had dealt a hatchet blow on the head and his co-accused pushed the deceased into canal water thereafter, sand was present in wind pipe of the deceased and the doctor gave an opinion that death was caused by asphyxia due to drowning. Trial court did not accept medical evidence that drowning was ante mortem but reasons advanced by the Sessions Judge for not accepting medical evidence were found to be not sound. Conviction of accused under section 302, was altered to one under section 307 (1970 PCrLJ 871). The accused in order to put an

end their lives and that of their infant daughter had tied themselves together with a rope before jumping into a well. The child slipped and fell and was drowned when the two accused jumped into the well. It was held that they are guilty only of attempt to murder (1961) 2 CrLJ 781 = AIR 1961 Mad 498).

The accused used pistol from a close range and the medical evidence clearly showed injuries were caused to victims on vital parts of the body, but due to fault nature of ammunitions pellets did not go very deep. There was nothing on recocrd to show that the accused was aware of such fault nature. The accused was held guilty under section 307 (AIR 1968 All 49 = 1968 CrLJ 18; AIR 1973 SC 807 = 1973 CrLJ 584; 1967 All Wr (HC) 217 = 1967 All cr R 167).

In case of attempt to commit murder by fire arm the act amounting to an attempt to commit murder is bound to be the only and the last act to be done by the culprit. Till he fires, he does not do any act towards the commission of the offence and once he fires, and something happens to prevent the shot taking effect, the offence under section 307 is made out (1962) 1 SCJ 189 = (1962) 2 SCR 254 = (1961) 2 CrLJ 848 = AIR 1961 SC 1782). Accused brothers A and B, threw victim, daughter of A from his first wife, into canal. The victim was rescued by witnesses. Evidence of witnesses was corroborated by victim's mother and sister who were eye-witnesses. It was held that though police was contacted after a lapse of 30 hours. Conviction under section 307 was legal (AIR 1979 SC 699 = 1979 CrLJ 642).

The entire occurrence was due to a petty quarrel which arose due to scarcity of water and it was in the course of a struggle which arose after a wordy quarrel that the accused took a pen knife, which he was carrying on his person as usual, and gave three stabs successively on the back of the deceased causing penetrating injuries, the weapon going to the pleural cavity. It was held that it could not be inferred that the accused had an intention to cause the death of the man (1974 CrLJ 857).

The accused took out a revolver from his pocket and aimed it and fired at a Sub-Inspector who was leading a police party to arrest him. However, it was mis-fired and the accused was overpowered. The Sessions Judge convicted him under section 307. It was held that it could not be said that if the Sub-Inspector had in fact been injured resulting in the death; the accused could be said to be guilty of culpable homicide not amounting to murder and not murder. It was providence that saved the Sub-Inspector. The offence established was clearly that of attempt to murder (1982 CrLJ 751 (Delhi).

3. **Use of firearms**.- In cases of attempt to commit murder by firearms, the act amounting to an attempt to commit murder is bound to be the only and the last act to be done by the culprit. Till he fires, he does not do any act towards the commission of the offence. But once he fires and something happens to prevent the shot taking effect, the offence under section 307 is made out (AIR 1961 SC 1782). Generally where an accused person shoots one with a pistol and thereby causes hurt to him he is liable to conviction under the latter part of section 307 and his conviction under section 326 for the same offence is not warranted (PLD 1969 Pesh 347).

A person intentionally discharging a loaded gun at another from a short distance and inflicting injuries which might have proved fatal, should be convicted of an offence under section 307 and not merely of grievous hurt (PLD 1977 Kar 726). A shot of cartridge about No. 6 in size fired at a distance of 6 paces is very likely to cause death of the man fired at (10 CrLJ 57). Where P who was not an expert shot, was pursued as a thief by B, fired at one particular part of his pursuer's body and hit that part and that part only. It was contended that the case did not come under

section 307 because P did not fire to kill at all, but fired only to injure and stop the pursuit. It was held, that when P fired this revolver under these circumstances, his act, if death had followed, would clearly have fallen under part IV of section 300 Penal Code. It was an act so imminently dangerous that it would, in all probability cause death or such bodily injury as would be likely to cause death. Fortunately, however, for him, B was not hit in a vital part of his body and did not die; nevertheless, it could not be said that this was a simple case of an offence, under section 324 Penal Code and that section 307 Penal Code did not apply (AIR 1944 Sind 83).

A person intentionally discharging a loaded gun at another from a short distance and inflicting injuries which might have proved fatal, should be convicted of an offence under section 307 and not merely of grievous hurt (AIR 1916 Mad 629). Where certain persons who were pursued by the police were found to ahve turned round and deliberately fired their guns, it could not be said that they were not attempting to hit, and the offence fell under section 307, Penal Code although no body was hit and no bullets were found (AIR 1933 Cal 354). But where the accused was shooting at random for the purpose of frightening his pursuers and would be captors, it was not possible to hold that he had the *mens rea*, that is, he had intended to cause death, or knew that in the circumstances, his act of firing was going to cause death, to any of his pursuers (AIR 1955 Pat 330).

Where a person fired shots with small pellets, from a distance, he must have done so to frighten the police party and to effect his escape and the intention to kill cannot be inferred from the nature of the injuries which were simple and of on consequence. The offence would fall not under section 307 but under section 324 Penal Code (PLJ 1977 Kar 546). It must however be noted that if the man uses a deadly weapon like a pistol from point blank range the presumption against him is that he intended to cause death. Thus cases of shooting from a point blank range have to be distinguished from the other category of cases of shootng at random for the purpose of frightening the pursuers (PLD 1977 Kar 726). If the defence is that the accused had merely the intention of frightening a police officer by firing in the air, then the burden of proving that fact is upon the defence (AIR 1938 All 627).

The complainant was seated in the verandah of his house when the accused rushed towards him from the road, levelled a gun at him and pulled the trigger. There was no report or discharge. The complainant took fright and ran out of the house but stumbled and fell a short distance away. The accused followed up and aiming at the prostrate complainant, pulled the trigger of his gun a second time. Again there was no result. Then the complainant got up and escaped. The accused also fled and was not arrested till some days later. The gun had not been found and there was no evidence to show that it was loaded at the time when the complainant was attacked. It was held, that conviction under section 307 cannot be sustained, but that under section 352 the accused was guilty of assault (AIR 1923 Rang 251).

4. **Attempt to murder.**- Under section 307, Penal Code, what the Court has ot see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of attempt to murder. Under section 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all cirumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to

determine the intention (Hari Singh Vs. Sukhbir Singh, 1989 (1) Cr. L.C. 128 (131) (SC) = 1989 CrLJ 116 (118, 119 (SC) = AIR 1989 SC 2127 = 1989 LW (Cr) 1 = 1989 CrLR 437 (SC) = 1988 All Cr. C. 551).

Accused persons having no intention of causing death of any person nor any injury found on deceased was sufficient in ordinary course of nature to cause death. Previous litigation between parties had nothing to do with deceased. It was not established as to which of two accused had inflicted injury on the head of deceased which was described as dangerous to life. accused liable to be convicted under section 326 read with section 34 and not under section 307 read with section 34 (AIR 1993 SC 1256).

According to the accepted concept of attempt to an indictable crime, it should be an intentional act with a view to attain a certain end but which is not achieved because of circumstances independent of the will of the offender who makes the attempt. Whether any given act or series of acts constitute a criminal attempt punishable under the penal law is a question of fact in each case, depending on the circumstances surrounding the act (1973 SCMR 108).

There is a clear difference between the definition of attempt in section 511 and that given in section 307. To convict a person of an attempt to murder under section 307, it must be shown that he had done some act with such intention that if by that act he caused death he would be guilty of murder, i.e. the act must have been capable of causing death and if it had not fallen short of its object, it would have constituted an offence of murder. But under section 511 it is only necessary to prove an act done in an attempt towards the commission of the offence (PLD 1950 Lah 147).

An attempt is an act or a series of acts which necessarily lead to the commission of an offence and stops short of the commission by frustration neither foreseen nor intended. Therefore, when the accused persons were charged with entertaining the intention of making only an attempt on human life, it cannot be said that the object of the assembly was that they should be frustrated by some unforseen event just before the completion of the offence (AIR 1955 Bhopal 9). Where the accused gave arsenic poison intending to cause death but through some cause or other the persons to whom he administered the arsenic recovered, or where the accused who had previously administered dhatura to other persons who had died from the effects thereof, administered the same poison to C who became ill but recovered, he was guilty of an offence under section 307 (12 CrLJ 125).

Where the first appellant had neglected his first wife and his two daughters born of her for nearly two decades and had been living with another woman as his second wife, and on the day preceding the occurrence, the first appellant had gone alongwith his second wife and brother to the village where his first wife was living and on the persuation of his first wife he had agreed to take with him his two grown up daughters in order to arrange for their marriage, and on the day of the occurrence, on his way back from the arrange, for their marriae, and on the day of the occurrence, on his way back from the vilalge accompanied by his second wife, brother and two daughters, he and his brother had suddenly caught hold of the elder daughter and had thrown her bodily into a canal, and on seeing this the second daughter escaped and raised an alarm and the elder one was rescued from the canal by some persons who were nearby, it was held that the conviction of the two appellants under section 307 must be maintained (Sher Singh 1979 SCC (Cri) 730).

Where the accused besides causing fatal injuries to the deceased, had inflicted two stab wounds on the prosecution witness who tried to intervene, one on the back

of the chest and one in the groin region, his conviction under section 307 for the injuries caused to the prosecution witness was upheld (Jaspal Singh 1986 CrLJ 488 (SC); Ferzand Ali 1985 CrLJ 1248 All).

Where the victim had sustained one stab injury each on the right and left side of the chest, the Court altered the conviction under setion 307/34 to one under section 326/34 taking into consideration that only one of the five accused persons was armed with a gun (Adhir Banerji 1984 CrLJ (NOC) 187 Cal).

Where the accused R had incited the other accused D to shoot at the victim, it was held that there was no ground for distinguishing the case of accused R from that of D. D was armed with a pistol to the knowledge of R. Hence, the evidence clearly showed that R shared the ocmmon intention with D to attempt to kill the victim. R's conviction under section 307/34 was therefore, maintained (Rauf 1978 CrLJ 474 (SC).

Accused persons having no intention of causing death of any person. Injury on deceased not sufficient to cause death in ordinary course of nature. Previous litigation between parties had nothing to do with deceased. It was not established as to which of two accused had inflicted injury on head which was dangerous. Accused liable to be convicted under section 326/34 and not under section 307/34 (1993 CrLJ 1053 (SC).

5. **Intention or knowledge:** If a person fired several shots at a person with a rifle it would ordinarily mean that he wants to kill that person. The fact that the persons fired at were not killed though the accused was a good shot does not necessarily mean that he had no intention to kill them. A person may be excited and that is why he is not able to his properly, or the aim may be missed because the person aimed at may move aside (Jagjit Singh (1956) CrLJ 217).

However, where from the evidence, it was not possible to say that the accused fired the shots in the direction of the police party or at them and the possibility of the shots being fired in the air could not be excluded, it was held that the conviction of two of the appellant's under section 307 and the other apellants under section 307/149 could not be maintained (Hazara Sdingh 1971 SCC (Cri) 237).

In all cases in which an attempt, as distinguished from a consummated act, is a criminal offence, the existence or non-existence of the specific *mens rea* is a crucial factor. For the determination of guilt the presence of mens rea is pivotal being the sine qua non of the offence (AIR 1960 Punj 135). Therefore for constituting an attempt to murder, there must be some overt act combined with evidence of mens rea. The burden is always on the prosecution to prove, first, the actus reus, i.e. the accused had done something which in point of law marked the commission of the offence and, second, the mens rea, that is, in taking this step he was inspired by the intention to go on to reach a definite object which would constitute a specific offence (PLD 1977 Kar 726). Before a conviction can be made under section 307 it must be proved that the accused had the intention to kill (1987 PCrLJ 1212). From the mere fact that a pistol shot was fired, it cannot be said that the only inference which follows is that the intention was to kill. Such a shot may be fired in a fit of temper, it may be fired for causing merely hurt; it may even be used in self defence without any intention to kill and so on (PLD 1964 Kar 264).

One shot fired by accused alone hit both injured persons. Injured suffered injuries at breast and abdomen which showed accused's intention to kill him. Act of accused fully covered under section 307, Penal Code. Conviction and sentence upheld (Belal Vs. State 1989 PCrLJ 72).

Motive is also important in so far as it throws light on the intention of the accused,(PLD 1963 Kar 264) section 307 makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned but still there may be cases in which the culprit would be liable under section 307. If a person knows that certain result will ensued from hi act, he must be deemed to intend such result by doing the act. Further it is not necessary that the injury actually caused to the victim fo the assault should be sufficient under ordinary circumstances to cause death of the person assailed. What the court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in section 307 (AIR 1930 Lah 253).

That section clearly contemplates an act which is done with the intention of causing death but which fails to bring about the intended consequence on account of intervention of a cause operating independently of the volition of the agent (PLD 1967 Pesh 59). Thus when an attempt on the life of a person fails, for instance the victim is not killed, the crime of murder is not complete, still the offence of attempted murder is committed. As such the nature of injury caused to the victim is not a criterion to attract the provisions of section 307 (PLD 1967 Pesh 59). The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore, it is not correct to acquit an accused of the charge under section 307 merely because the injuries inflicted on the victim are in the nature of simple hurt (1984 PSC 910). The Delhi High Court has held that where the intention of the acccused to inflict injuries, sufficient enough to caused death, is established from the nature of the injuries and other circumstantial evidence, it cannot be said that there is no evidence that the injuries caused were known to the accused to be likely to cause death. Neither can it be said that the knife, by which injuries were caused, not having been produced, only an offence under section 324, is made out. In such a case conviction for offence under this sections legal (Kartar Singh Vs. State (1969) CrLJ 252).

The Prime ingredient of secction 307 is, that the accused must have the intention or knowledge that by that act which he is going to do, he may be held guilty of committing attempt to murder. So the act must be dangerous to life (Damondar Prasad Vs. State of Rajasthan 1989 (1) Cr. L.C. 686 (688) Raj).

An act though sufficient in the ordinary course of nature to cause death would not constitute an offence under section 307, Penal Code if the necessary intention or knowledge on the part of the accused is lacking (Dr. A.G. Bhagwat Vs. U.T. Chandigarh 1988 (3) Crimes 430 (P&H). Intention of committing an offence, is gauged from circumstances of the individual case (1984 PCrLJ 356). Indetermining the intention, the act done and the manner of its doing as well as the announced intention at the time may be taken into consideration (PLD 1969 Pesh 347). The accused came armed with dangs and beat the complainant with whom they had previous enmity to unconsiousness. Prior to giving him this beating they announced their intention of killing him. It was held, that the charge under section 307, was not wholly unjustified or illegal (AIR 1929 Lah 67). Where accused went fully armed with deadly weapons at dead of night to apprehend and cause injury to persons against whom they had grievance and fired at them with revolvers. Intention of causing injuries likely to result in death can reasonably be inferred. Conviction under section 307, was upheld (PLD 1982 Kar 1011). Where a person shot at close quarter causing injuries on the abdomen and left arm, knowledge of probable death resulting therefrom can be imputed to him and by the act of shooting at close quarters had the

accused caused death then he would certainly be guilty of murder and the reasonable consequences flowing from the act can be imputed to him (Liyakat Mian, AIR 1973 SC 807 = 1973 CrLJ 584).

The weapon used, and the nature and seat of injury are not the only criterions to judge the gravity of the offence but it is the intention and the knowledge of the assailant and the motive behind the violence used by him which would form the basis to determien if the act of the assailant would invoke the provisions of section 307, Penal Code. In fact the motive, behind the violence used indicates the state of mind i.e. the intention of an individual is the decisive factor to judge his act (1971 PCrLJ 1222). In such cases conduct of the accused, locale of the injury and the weapon used are relevant considerations for determining the intent of the accused and not the nature of the injury alone (PLD 1984 Lah 34). But where there is no evidence of surrounding circumstances or motive, the court must rely on the nature of injuries and the weapon used to decide what the intention of the accused could have been (1969 PCrLJ 1544). If a person inflicts hurt upon another with the intention of putting his life in danger, that is the same thing as saying that the offender is trying to kill the man whom he attacks. Such person should be convicted under section 307 (AIR 1941 Mad 489).

Where injured prosecution witness was stabbed on back of his chest by accused when he stepped forward to save deceased from accused, or where respondent inflcited with full force stone injuries on head of appellant, and fractured his skull, nothing more was required to hold that accused intended to kill appellant or at least had knowledge that injuries inflicted may cause his death. He was convicted under section 307 (PLJ 1987 SC (AJ&K) 62). Where four injuries were inflcited on different parts of body and two of them were declared grievous. Measurements of cut wounds indicated use of hatchet. It could safely be concluded that accused intended to cause death, or where number and nature of injuries and fact that two of them were inflicted on head and on left part of chest which were vital parts of body. Conviction under section 307 was upheld (1987 PCrLJ 1047).

Where the accused, a prisoner in jail, jumped at the jailor and cut him on the head with a chisel without any warning. The blow passing through the edge of the jailors hat inflicted a wound in front of the left ear. The doctor stated that the place of injury was a vital part and if the injury had been a little deeper, it would have proved fatal. It was held, that the accused was guilty of an offence under section 307. Under the circustances of the case, the intention of the accused was in fact to cause an injury likely to cause death (1937 Mad W.N 556).

Where accused stabbed his victim in abdomen with a knife, courts were justified in holding petitioner having committed an offence under section 307 (AIR 1954 All 59). Similarly two incised wounds on the head and nose which were both gone deep and were caused by spear coupled with severe fractures of bones of other parts of the body would lead to the inference that it was the intention of the assailants to cause the death of the deceased (1982 SCMR 1141). But where number, nature and seat of injuries suffered by P.W.s according to medical evidence do not disclose an offence under section 307. Conviction may be altered to section 325, Penal Code (1987 PCrLJ 1557).

6. **Infliction of injury not necessary.** - Section 307 may apply even if no hurt is caused. The causing of hurt is merely an aggravating circumstance and it cannot therefore, be reasonably argued that unless an injury sufficient in the ordinary course of nature to cause death is inflicted on the victim, the intention contemplated by section 307 cannot be presumed. Under this section, the intention precedes the act

and is to be proved independently of the act, and not merely gathered from the consequences that ensue. all that is necessary to establish is the intention with which the act is done and if once that intention is established the nature of the act is immaterial (PLD 1969 Pesh 347). In a charge under section 307, Penal Code, it is not necessary that the injury inflicted should in itself be sufficient in the ordinary course of nature to cause of death. The section will apply even if no hurt is caused, if the circumstances disclose that the intention of the assailant was to cause the death of his conviction. Intention or knowledge and the nature of the circumstances are the chief factors to be looked into in determining whether a particular case comes within the mischief of section 307, Penal Code (Muhammad Vs. The Crown, 7 DLR 430; 13 DLR 466).

The intention or knowledge, which is necessary to constitute murder, may exist combined with an act which falls short of the complete commission of that offence. A murderer may do an act towards the commission of a murder but may involuntarily fail or be intercepted or prevented from consummating the crime. To justify a conviction under section 307 of the Penal Code it is not essential, that injury capable of causing death should have been inflicted. Although the nature of the injuries caused may often give considerable assistance to a court in coming to a finding as to the intention of the accused, such intention may also be deduced from other cricumstances and may even, in some cases, be ascertained without reference at all to the actual wound inflicted upon the person attacked (AIR 1935 Oudh 281).

If the injury is actually inflicted, the nature of such injury may be of considerable assistance in arriving at the finding where the accused had the intention of causing death of the victim. The liability of an accused must be limited to the act which he, in fact, did and should not be extended so as to embrace the consequences of another act which he might have done but did not do (AIR 1940 All 113). Where the appellant caused with a sharp cutting instrument several injuries on the body of a woman, one of which was grievous in nature, caused on the vital portion of the body which would ordinarily cause death; it was held, that the appellant was punishable under section 326 but not under section 307 (AIR 1959 Ori. 21).

7. **Evidence and proof.**- For liability under section 307 the prosecution has to prove the following facts - (1) that the accused did an act, and (2) that the act was done with such intention or knowledge and under such circumstnces that if he by that act caused death he would be guilty of murder. If hurt is caused by such act, the offender becomes liable to imprisonment for life, otherwise the maximum term of imprisonment prescribed is ten years. Thus the section itself does not take into consideration the effect of the act of the accused except as a measure of sentence to be imposed upon him (AIR 1932 Bom 279, Rel on; 1958 CrLJ 1112 = AIR 1958 All 677). The prosecution must prove that there was an attempt to cause death or an intention to kill. Mere evidence of the doctor that "but for the prompt medical aid and the patient would have died" could hardly establish the offence under secction 307 (AIR 1978 Bom 367). Where in a case under secction 307 read with section 149 all that could be established by the prosecution was that the accused fired their guns or pistol in the direction of victims from a close range of about 18 paces at a time when their victims were trying to run away and the injuries caused were on the back part of the things of both the victims, i.e. all the injuries were caused persons who were armed with fire arms, did not intend to cause any injury on any vital part of the bodies of their victims, could not be ruled out. They could, therefore, in the circumstances of the case be convicted only under section 324 read with section 34, Penal Code (1968 All WR (HC) 590 = 1966 All Cr R 356 = 1967 All LJ 638 = 1967 CrLJ 1588 = ILR (1967) 2 All 150 = AIR 1967 All 580).

The prosecution must prove that when the accused fired his gun, it was intended to be fired at some one because it may be that the shots were fired in the air or in some direction only with a view to create confusion and not to kill (1971) 1 SCC 529). When at the time of the occurrence all the five accused were armed with sharp edged weapons but none of them caused any injury on the vital part of the bodies of their respective victims, case falls under section 326, Penal Code and not under section 307 of the Code (Kaka Singh Vs. Leela Singh and ors. 1992 (3) Crimes 967).

The accused charged under section 307 was alleged to have fired a gun. He herself was found to have sustained several injuries in the same transaction and was examined by doctor. In the two FIR on behalf of th accused and the person shot at, the injuries suffered by the other side were not mentioned. The medical and other evidence showed that both had received injuries during the same incident. It was held that the prosecution should have satisfactorily explained the injuries on the accused. this lacuna in the prosecution evidence was held to be fatal (1984 CrLJ 1164 (All). Where informant as well as investigator were not examined, it was held that withholding of such witnesses had matrially prejudiced the accused and conviction was quashed (1984 CrLJ (NOC) 95 (All).

In the present case, one of the accused struck the injured with his bhala on the upper portion of the leg, and as a result of farsa blow on the head by other accused, the injured fell down and thereupon another accused struck the injured with his bhala on the right side of his chest. Out of the four injures which the medical officer noted, one injury was of a grievous nature while the other three injuries were simple in nature. It was held that where four or five persons attack a man with deadly weapons it may well be presumed that the intention is to cause death. In the present cause, however, three injuries are of a simple nature though deadly weapons were used and the fouth injury though endangering life could not be deemed to be an injury which would have necessarily caused death but for timely medical aid. The benefit of doubt must, therefore, be given to the accused causing chest injury with regard to the injury intended to be caused and the offence is not one under section 370, Penal Code, but section 326, Penal Code (Jai Narain Mishra Vs. State of Bihar, AIR 1972 SC 1764 (1765, 1766). An attempt to commit a crime is an act done with an intention to commit that crime and forming part of a series of acts constituting its actual commission. The distinction between preparation and attempt to commit a crime is whether the last act if interrupted and successful, would constitute crime (Om Prakash, AIR 1961 SC 1782; Abhayanad Misra, AIR 1961 SC 1968).

A conviction cannot be sustained even if the Court is satisfied that the prosecution story may be true. It must be proved that the prosecution story must be true. There is a wide gap between "may" and "must" from "may" (AIR 1957 SC 637 = 1957 CrLJ 198; Brajabandhu Naik, 1975 CrLJ 1933). If the evidence shows that the accused was responsible for the injury on the head which he had given with a farsa, which is described as a simple injury it is obvious that though a farsa had been used, the sharp edge of the said weapon may not have been used. But since this injury is caused by an instrument which, used as a weapon of offence, is likely to cause death the offence would be one under section 324, Penal Code, and not under this section (Jai Narain Mishra Vs. State of Bihar, AIR 1972 SC 1764 (1765, 1766).

Evidence produced by parties was found equally balanced and defence version, as such, had to be preferred and accepted. No implicit reliance on prosecution evidence particularly on eye witnesses could be placed. Statement of accused as a whole which revealed commission of offence under section 308, Penal Code and not 307, Penal Code was thus accepted. Accused was convicted and sentenced

accordingly with benefit of section 382-B, Cr. P.C. (Muhammad Arshad Vs. State 1990 PCrLJ 1012).

Evidence of the post-mortem doctor (P.W. 8) shows that the death resulted from four incised wounds, particularly the injuries at the abdomen and the chest, which cut both the lungs. The trial Court accordingly held them guilty of murder. On appeal the learned Judges of the High Court Division, in spite of the medical evidence, expressed doubt as to whether the death resulted from these injuries or from two surgical operations which were performed on the injured person at the hospital after he was admitted there in injured condition and observed that "at least some doubt remains that the injured Shantu might perhaps have survived in the absence of the said two major operations or would have been cured in the event of any successful operation. However faint the doubt may be, benefit must in all fairness go to the respondents". In this view of the matter,the learned Judges found the accused guilty under sections 307/34, instead of section 302/34, of the Penal Code. The Appellate Division observed :

"Surgical operations are sometimes resorted to for saving the life of an injured person when brought to hospital. If death of the injured is blamed on the Surgeon performing the operation the persons responsible for the fatal injuries will easily escape punishment" (The State Vs. Tayeb Ali; (1988) 40 DLR (AD) 7).

Where J had during the course of dacoity fired a gun shot at B thereby causing him injuries on the abdomen and left arm and it was contended that no offencce under section 307, Penal Code, can be considered on the evidence to have been made but, it was held that by this act of shoting at B from such close quarters, had J caused B's death, then he would certaily have been guilty of murder. His guilt was thus quite clearly established on the plain language of section 307 and on the reasonable consequences which must be assumed to flow from the act of shooting indulged in by him. Knowledge to this effect could legitimately be imputed to him. This submission was, therefore, wholly unacceptable (Liyakat Mian Vs. State of Bihar AIR 1973 SC 807 (808, 810). Where four or five persons using deadly weapons caused three simple and one grievous hurt, it was held that conviction under secction 307 was not justified (Jai Narain Mishra, AIR 1972 SC 1764 = 1972 rLJ 469 = 1972 UJ (SC) 183).

Where the story of the victim was untrustworthy conviction under section 307 was held to be illegal (Sher Singh, 1979 Cr LJ 642 = AIR 1979 SC 699). In case of attempt to commit murder by fire-arm, the act amounting to an attempt to commit murder is bound to be the only and the last act to be done by the culprit. Till he fires, he does not do any act towards the commission of the offence and once he fires and something happens to prevent the shot taking effect, the offence under section 307 is made out. Expressions, in such cases, indicate that one commits an attempt to murder only when one has committed the last act necessary to commit murder. Such expressions, however, are not to be taken as precise exposition of the law, though the statements in the context of the case are correct (Om Prakash Vs. State of Punjab, AIR 1961 SC 1782 (1787).

It has been held in Abhayanand Mishra Vs. State of Bihar, (AIR 1961 SC 1698), that a person commits the offence of attempting to commit a particular offence, when he intends to commit that particular offence and, having made preparations and with the intention to commit that offence does an act towards its commission and that such an act need not be penultimate act towards the commission of that offence, but must be an act during the course of committing such offence. It follows therefore that a person commits an offence under section 308 when he has an intention to commit culpable homicide not amounting to murder and in pursuance of

that intention does an act towards the commission of that offence whether that act be the penultimate act or not (Om Prakash Vs. State of Punjab, AIR 1961 SC 1782 (1785).

The relations between the appellant and his wife Bimla Devi got strained. She was denied food for days together and used to be given gram husk mixed in water after five or six days. She managed to go out of the house, but the brother of the appellant caught hold of her and forcibly dragged her inside the house where she was severely beaten. Thereafter, she was kept locked inside a room. On one day, she happened to find her room unlocked, her mother in-law and husband away and availing of the opportunity, went out of the house and managed to reach the civil hospital, where she met lady doctor and told her of her sufferings. The appellant and his mother went to the hospital and tried their best to take her back to the house, but were not allowed to do so by the lady doctor. On the facts, it was held by the Supreme Court that the course of conduct adopted by the appellant in regularly starving his wife comprised a series of acts, and therefore, acts falling short of completing the series, and would therefore come within the purivew of section 307 of the Code (Om Prakash Vs. State of Punjab, AIR 1961 SC 1782 (1783, 1784, 1786).

If the complainant actually knew and indentified the appellants, there was no reason for him not to name them before the police. The fact that the complainant did not name the appelants clearly shows that he was not able to identify the appellants. The possibility of mistake in identifying the assailants cannot be reasonable excluded (Dharam Pal Vs. State of Uttar Pradesh, 1981 CrLR 304 (306) (SC). In the undernoted case the testimony of the doctor however shows that the injuries were of a simple nature and were not likely to cause death. That being so, the accused could only be convicted under section 324 of the Penal Code (Narendra Kumar alias Makiya Vs. State of Rajasthan, 1988 CrLR 763 (763) SC).

In Kunwar Bahadur Vs. State of Uttar Pradesh, (1980 CrLJ 831(831)=AIR 1979 SCC 1509), the evidence of P.W. proves clearly two facts against this appellant. Firstly, the appellant before the occurrence exhorted the other assailants of the deceased persons and the injured to open the assault by guns and other weapons. Secondly, that this appellant was also armed with a gun and there is consistent evidence of the eye-witnesses that all the three guns were fired though only one fire hit Nathu. The mere fact that only one person was hit by the gun cannot exclude the possibility of the other guns having been fired because it may be that even though the other guns were also fired their bullets did not hit anybody. In this view of the matter the High Court was not justified in holding that Raja Ram was armed with a lathi. Moreover, Raja Ram in his statement under section 342 has not denied his presence at the spot but has admitted his presence there and has even stated in his statement under section 342. Before the committing Magistrate that he had also assaulted the prosecution party with lathi. In this vew of the matter there is absolutely no reason to acquit Raja Ram of the charges framed against him.

When shots were fired taking aim at the members of the police party, it was held that the accused was rightly convicted under section 307, Penal Code (Mahendra Singh Vs. State of Rajasthan, 1977 Raj Cr. C 333 (334). Where the accused was acting in exercise of his right of private defence, conviction under section 307 cannot be sustained (Ladiya, 1978 CrLR (Raj) 481). Where a rifle shot of the appellant hit the deceased but not knowing precisely where, and there was firing by others also not identified the offence is not under section 302, Penal Code but under section 307, Part II, Penal Code (Bhupendra Singh and others Vs. State of Uttar Pradesh 1991 (2) Crimes 222 (SC).

8. **Section 307 read with section 34.**- The appellant was convicted under sections 307/34, Penal Code. There were two others accused. The appellant incited the accused Deochand to shot Lallu. Thereupon the accused Deochand took out his pistol from the folds of his dhoti and fired at Lallu. Lallu in order to protect himself raised his left palm as a result of which he received injuries. In these circumstances, it was held that the evidence unmistakably shows that the appellant shared a common intention with Deochand to attempt to kill Lallu (Rauf Vs. State of Uttar Pradesh, AIR 1978 SC 1604 (1604, 1605). Under section 34, the act committed by a number of persons in furtherance of common intention shall be deemed to be the act of every one and each of them shall be held to have committed the offence even if the act is only an attempt to murder (Matiullah Sheika, AIR 1965 SC 132=(1965) 1 CrLJ 126).

Where in a case was found that all the four appellants along with two others were members of an unlawful assembly, each one being armed with a deadly weapon and accused NO. 1 alone is shown to have fired shots which resulted in injuries covered by section 307 of the Penal Code and no overt act apart from membership of the unlawful assembly has been brought home to any of the appellants except that they were also armed with deadly weaons at the time of the occurrence, it was held that their conviction for an offence under section 307 read with section 149 of the Penal Code was thus well founded (Tukaram Dnyanu Gurav Vs. State of Maharashtra, 1982 CrLJ 199 (199, 200).

Where an accused was aware that his companion had a pistol and the accused incited him to shot the victim, it was held that common intention under section 34 to kill was made out (Rauf, 1978 CrLJ 1474=AIR 1978 SC 1604). If the instigation is to 'assault the rascal' and the instigation is to assault with deadly weapons, the proper conviction would be under section 34, Penal Code, read with section 109, Penal Code, instead of one under section 307, read with section 109, Penal Code (Jai Naraim Mishra Vs. State of Bihar, AIR 1972 SC 1764 (1767).

If there is only one injured and the injuries had been inflicted in course of the same transaction, the simpler offence gets merged in the graver one. In this case, the charge should have been only under section 307/34, Penal Code for that covers sections 326/34, Penal Code and there should not have been an independent charge much less a conviction under both the counts (Brajabandhu Naik Vs. State 1975, CrLJ 1933 (1937) (Ori); 41 Cut LT 496; ILR (1975) Cut 450).

9. **Section 307 read with section 149, Penal Code.**- Where the courts below found that all the four appellants along with two others were members of an unlawful assembly, each one being armed with a deadly weapon. Accused No. 1 alone is shown to have fired shots which resulted in injuries covered by section 307 of the Penal Code. No overt act apart from membership of the unlawful assembly has been brought home to any of the appellants except that they were also armed with deadly weapons at the time of the occurrence. Their conviction for an offence under section 307 read with section 149 of the Penal Code was thus well founded but the fact that it was not proved that any of them actually used their respective weapons during the assault was certainly a mitigating circumstances. Held, that the sentence awarded to them by the Courts below was excessive. It was reduced in the case of each of them to rigorous imprisonment for two years (Tukaram Dhyanu Guray and others Vs. State of Maharashtra, AIR 1982 SC 59(59, 60).

10. **Sentence.**- Where the accused was labouring under a great mental strain as a result of punishment inflicted on him and when he has already been in detention for some period, the sentence was reduced (AIR 1941 Pat 51=42 CrLJ 303). Where

the accused committed a murderous attack on his own brother, but subsequently the quarrel between the brothers was made up, his sentence was reduced on the request of the injured brother (AIR 1944 Pat 37=44 CrLJ 336).

Where a skilled artisan became permanently disabled on account of the dastardly attack of the accused, nothing less than 5 years rigorous imprisonment would meet the ends of justice (1971) 1 CWR 711). Having regard to the age of the accused on the date of the offences and looking to the circumstances in which the offence was committed and the nature of the injury and the harm caused to the victim, the sentence already undergone was held to meet the ends of justice (1982 CrLJ 1945=1982 CrLR (SC) 445).

In the case of Bishna Vs. State (1988 CrLR (SC) 95(96), it was contended that so far as the appellant is concerned he had given a blow on the blunt side of an axe and part of the body which was injured was the thigh of the victim lady. Reliance is placed on the medical evidence in support of the plea that no grievous injury was intended to be inflicted. It is contended that in the facts of the case so far as the appellant is concerned the appropriate section under which the appellant should have been convicted was secton 324 instead of section 326 of the Penal Code. Mr. Rangarajan further says that the appellant has already suffered imprisonment of more than four months in all and should reduce the sentence to the period already undergone. In the facts of the case the Court agreed with the submission that the conviction should be under section 324 of the Penal Code, and so far as the sentence is concerned it was reduced to the period already undergone, but enhanced the sentence of fine from Rs. 100 to Rs. 3000 and in default of payment of fine, directed the appellant to suffer six months simple imprisonment.

The accused in the instant case on the date of the offence was aged 16 years 3 months and 23 days. It appears that the petitioner caused one injury to Nathu Lal which according to the medical evidence was dangerous to life. That provides that the genesis for his conviction under section 307, Penal Code. Having regard to the age of the petitioner on the date of the offence and looking to the circumstances in which the offence was committed and the nature of the injury and the harm caused to the victim, it is clear that it is a fit case in which sentence deserves to be modified. The petitioner has already suffered imprisonment for one year and nine months. This is a case in which if the sentence of the petitioners is reduced to the sentence already undergone it would meet the ends of justice (Munna @ Vijay Kant Vs. State of Rajasthan, AIR 1982 SC 1465(1465)= 1983 (1) Crimes 41). Where two inferences are possible the accused should be convicted for the lesser sentence under section 326 and not under section 307 (Gulab Singh, AIR 1978 Bom 367).

Where prosecution took place after 14 years of an offence under section 307, a sentence of 2 years, R.I. was held sufficient to meet the ends of justice (1977 CrLR (SC) 361).

In a conviction under section 307, Penal Code, when the accused is 70 years of age without any other offence committed by him and had already remained in jail for more than a months sentence of imprisonment for period already undergone with fine would meet the ends of justice (Shankar Lal Vs. State of Rajasthan 1992 (3) Crimes 411). Where there is no definite evidence to show that the accused caused hurt to ay of the victims, by their rifles, the sentence of imprisonment for life passed against the appellants cannot be sustained and may be reduced to five years rigorous imprisonment and a fine of Rs. 500 (Bakhatawar Singh Vs. State 1975 CrLJ 986 (972) Raj).

The circumstances of the case are very sad and touching. A desolate woman jumped into a well with her two children. She was charged under sections 307 and 309 of the Penal Code. She has been released on admonition for the offence under section 309 of the Penal Code and has been sentenced to imprisonment for three months for the offence under section 307. There was no valid reason for maintaining this distinction and, therefore, direct that she shall be released on admonition for the offence under section 307 also. She need not surrender to her bail (Radharani Vs. The State of Madhya Pradesh, AIR 1981 SC 1776, 1777). In the instant case, the appellant had caused grievous injuries to the injured in order to finish her life and was sentenced to three and half years rigorous imprisonment by the Sessions Judge. The High Court reduced the sentence to two and half years rigorous imprisonment (Darshan Singh Vs. State 1974 CrLJ 1082 (1082-86) Delhi).

Having regard to the age of the accused on the date of the offences and looking to the circumstances in which the offence was committed and the nature of the injury and the harm caused to the victim it was a fit case in which sentence deserved to be modified. Therefore, that was a case in which if the sentence of the accused was reduced to the sentence already undergone it would met the ends of justice (Munna alias Vijay Kant Vs. State of Rajashthan, 1982 CrLJ 1945=1982 CrLR (SC) 445). In Shanabhai Dhulabhai Parmar Vs. State of Gujarat, (1977 CrLJ 1007 (1008) (SC), the case reported a having regard to the peculiar facts and circumstances of the case, as also the fact that the appellant was prosecuted for the offence after a period of about 14 years, the Supreme Court thought it would meet the ends of justice if the sentence is reduced from five years rigorous imprisonment to two years rigorous imprisonment.

11. **Compromise.**- Where the accused is charged with the offence of attempt to murder the offence cannot be compounded. But the fact of compromise can be taken into account while awarding the sentence (Santram & another Vs. State of MP 1988 (2) Crimes 450 (MP).

12. **Alteration conviction.**- Lathi and Inara (grass cutting agricultural implement) blows were inflicted on the parties. There was no evidence of the accused intended to kill the victim. The accused took the plea age of 21 years for the first time in the High Court. Held, it could not be heard when it was not urged in appeal before the appellate Court. Simply because the father of the accused had filed a petition suit earlier, it would not render him as partisan or interested witness. Offence was converted into section 304/34, Penal Code (1984 CrLJ 29 Cal).

None of the injuries on the person of victim was declared as dangerous to life. All injuries were simple in nature and mostly on non-vital parts of body. Conviction under section 307/34, Penal Code was not justified.. Conviction was altered to one under sections 323 @ 324/34, Penal Code in circumstances (Muhammad Abbas Vs. State 1991 PCrLJ 2075).

Injuries were kept under observation by the doctor who later declared them to be simple in nature. None of the injuries was dangerous to life. Conviction under section 307/34, Penal Code could not be maintained and was altered to one under section 324, Penal Code in circumstances (Muhammad Tanvir Vs. State 1991 PCrLJ 2063). Injuries were not declared dangerous to life. Grievous injury was on a non-vital part of body. Radiologist was not produced to prove fracture of bond. Accused could not be convicted under section 307, Penal Code nor under section 325, Penal Code. Conviction was therefore, altered to one under section 323, Penal Code in circumstances (Nusrat Vs. State 1991 PCrLJ 1621).

Accused can be convicted for the offence causing a single injury on shoulder under section 324/34, Penal Code and not under section 307/34, Penal Code.

Parties are allowed to compound the offence (1982 CrLR (SC) 316=(1982) 2 SCC 149). Injuries in the instant case were simple. There was no motive or intention to cause death. Held, conviction of the accused under section 323, should be maintained (1985) 1 Crimes 606 (Raj).

Where only one grievous and one simple injury was caused to the victim and the victim could not specify which injury was caused by the accused, conviction under section 324 was proper (Tameshwar Sahi, AIR 1976 SC 59=1976 CrLJ 6).

Appellant was a young accused with a clear record in the past. He was sentenced for an offence of an attempt to commit a murder to 4 years R.I. In appeal it was prayed that a lenient should be taken. Held, the manner of causing injuries was such that they were likely to prove fatal. There was no case of leniency (1984) 1 Crimes 101 MP). One person cannot be convicted under section 302 for murder and under section 307 for attempt to murder simultaneously. Conviction under section 302 confirmed hence conviction under section 307 set aside (1993 CrLJ 2886 SC).

In the undernoted case the intention of the accused not to kill Gurudayal Singh. He was unarmed when he came from his house. That shows, the offence was not premeditated. He obtained the lathi at the spot itself from Pratap Singh. His intention can at the most be held to cause grievous injury to Gurudayal Singh were simple. In these circumstances the accused can be held guilty only for the offence under section 325, Penal Code. The result is that his conviction for the offence under section 307, Penal Code, requires to be altered to that under section 325, Penal Code (Banwari Lal Vs. State of Rajasthan, 1989 (1) Crimes 497 (498) Raj).

The point to be seen is whether the injury was so dangerous that it could be sufficient to cause death in the ordinary course of nature, and whether now looking to the dimension of the stab wound, it can be said that the injury was sufficient in the ordinary course of nature to caused death. It cannot be said that the injury was sufficient in the ordinary course of nature to cause death. Therefore, a case under section 307, Penal Code is not established. The accused had used a sharp edged weapon, a dangerous weapon but, without any provocation voluntarily. A case under section 326, Penal Code, is made out instead of section 307, Penal Code (Khattan Vs. State of Rajasthan, 1989 (1) Crimes 257 (258) Raj).

13. **Charge.**- The charge should run thus :

"I (name and office of the Sessions Judge, etc.) hereby charge you (name of the accused), as follows :

"That on or about the ..... day of ..... at ..... you..... did an act, to wit ..... with such intention (or knowledge) and under such circumstances that if by that act you had caused the death of AB you would have been guilty of murder, (and that you thereby caused hurt tothe said A B (then under sentence of imprisonment for life) and thereby committed an offence punishable under section 307 of the Penal Code, and wthin my cognizance.

"And I hereby direct that you be tried on the said charge".

14. **Practice and procedure**.- Pauper accused punishable with capital sentence is to be given legal assistance. Offences punishable with death are those under sections 121, 132, 194, 302, 303, 307 and 396 of the Penal Code. When two or more pauper accused of murder in the same trial put forward mutual antagonistic defence, arrangement should be made for separate representation of the accused by different advocates at the expense of government (The State Vs. Purna Chandra Mandal, 22 DLR 289).

308. **Attempt to commit culpable homicide.**-Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Illustration

A, on grave and sudden provocation, fires a pistol at Z, under such cirumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section.

Comments

Conviction is sustainable for the offence under section 308, Penal Code, when no intention can be attributed to the accused to cause the death of the victim when it is on account of altercation which ensured that the accused was led to inflict cut injuries (A. Thiagarajan Vs. State 1988 (2) crimes 823 (Mad).

309. **Attempt to commit suicide.**-Whoever attempts to commit suicide and does any act towards the commission of such offences, shall be punished with simple imprisonment for a term which may extend to one year, [1][or with fine, or with both].

310. **Thug.**-Whoever, at any time after the passing of this Act, shall have been habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of or accompanied with murder, is a thug.

311. **Punishment.**-Whoever is thug, shall be punished with [2][imprisonment] for life, and shall also be liable to fine.

Of the Causing of Miscarriage, of Injuries to unborn Children, of the Exposure of Infants, and of the Concealment of Births.

312. **Causing miscarriage.**-Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.-A woman who causes herself to miscarry, is within the meaning of this section.

Comments

A young girl, not quite fifteen years of age, was pregnant as the result of rape. A surgeon, of the highest skill, openly, in one of the London Hospitals, without fee, performed the operation of abortion. He was charged under the offences against the Person Act, 1861, with unlawfully procuring the abortion of the girl. The jury were

1. Subs. by the Indian Penal Code Amendment Act, 1882 (VIII of 1882), section 7, for "and shall also be liable to fine".
2. Subs. by Ordinance No. XLI of 1985, for "transportation".

directed that it was for the prosecution to prove beyond reasonable doubt that the operation was not performed in good faith for the purpose only of preserving the life of the girl. The surgeon had not got to wait until the patient was in peril of immediate death, but it was his duty to perform the operation if, on reasonable grounds, and with adequate knowledge, he was of opinion that the probable consequence of the continuance of the pregnancy would be to make the patient a physical and mental wreck. The surgeon was found not guilty (Bourne (1938) 3 All ER 615).

Charge.- The charge should run thus :

I (Name and office of Magistrate, etc.), hereby charged you (Name of the accused) as follows :-

That you, on or about the ..... day of ....., at ..... voluntarily caused (name of the woman) then being with child to miscarry, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said..... and thereby committed an offence punishable under section 312 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by the said court on the said charge.

313. **Causing miscarriage without woman's consent.**-Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not , shall be punished with [1][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Comments

Where the accused, not connected with any offence, carried the woman lodging report of commission of rape on her, with her active consent to certain hospital for purpose of abortion, the accused could not be said to have committed an offence under section 313 or section 201 (State Vs. Tabarak Hussain 1983 CrLJ (NOC) 192 (Pat).

The only allegation in the complaint was that on hearing that the woman was pregnant the petitioner took her to a doctor who caused the abortion and to which she consented. She willingly submitted herself to abortion and even thereafter she had sexual intercourse with the petitioner. There was nothing to show that abortion was at his instance. Whether he was only accompanying the lady at her request and whether he even made a request to the doctor to have abortion, were not clear from the allegations. The doctor who conducted the abortion was not made in accused meaning thereby that she had no complaint against him. It was clear that an offence under section 313 was not made out from the allegations (Moideenkutty Haji Vs. Kunhikoya 1987 CrLJ 1106 (Ker).

Charge.- The charge should run thus :

I (name of the office of Magistrate) hereby charge you (name of accused) as follows :-

That you, on or about the ..... day of ....., at ....., voluntarily caused AB (the woman who miscarried) then being with child to miscarry without her consent, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said AB, and thereby committed an offence punishable under section 313 of the Penal Code and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the said Court on the said charge.

1. Subs. by Ordinance No. XLI of 1985, for "transportation".

314. **Death caused by act done with intent to cause miscarriage-** Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;

If act done without woman's consent.-and if the act is done without the consent of the woman, shall be punished either with [1][imprisonment] for life, or with the punishment above-mentioned.

Explanation.-It is not essential to this offence that the offender should know that the act is likely to cause death.

315. **Act done with intent to prevent child being born alive or to cause it to die after birth.**-Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

316. **Causing death of quick unborn child by act amounting to culpable homicide.**-Whoever does any act under such circumstances, that if he therby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Illustration

A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured but does not die; but the death of an unborn quick child with which she is pregnant thereby caused. A is guilty of the offence defined in this section.

317. **Exposure and abandonment of child under twelve years, by parent or person having care of it.**-Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation.-This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure.

318. **Concealment of birth by secret disposal of dead body.**-Whoever, by secretly burying or otherwise disposing of the dead body of a child whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

1. Subs. by Ordinance No. XLI of 1985, for "transportation".