

2. The facts leading to present appeal are as under:

- i. On 16th May, 1990, Police Station, Kathua ('Police Station' for short) at about 12 noon received reliable information that accused No.1-Lal Chand (since deceased) and his sons were assaulting two young persons, who were forcibly detained by them in their house situated in Jagatpur, Tehsil Kathua. An entry was made regarding the same in Daily Diary Register. On receipt of said information, Head Constable-Raj Mal accompanied by constable Chaman Lal and Tirath Singh reached the house of the accused-appellants, they found that Manjit Kumar and Jaswinder were seriously injured and were found lying unconscious in one of the rooms. They were moved to District Hospital, Kathua for providing them immediate medical aid. Sub-Inspector Basant Singh reached the hospital and recorded the statement (Exh.PW-BS) of Jaswinder in

presence of Dr Renu Jamwal, who declared him fit to give the statement. On the basis of statement of Jaswinder (EX.PW-BS) First Information Report ('FIR' for short) No. 213/90 was registered under section 307/382/342/148/149 of the Jammu and Kashmir State Ranbir Penal Code ('RPC' for short) at the Police Station. Later, Manjit Kumar and Jaswinder both succumbed to their injuries. Thereafter, Section 302 of RPC was added.

- ii. In the statement (EX.PW-BS) of deceased Jaswinder it is stated that, he and Manjit Kumar had gone to village Jagatpur to get fodder. When they were walking in the street abutting the house of the accused party, accused Lal Chand, Bias, Sant Kumar, Roshan, Madan Lal along with other sons of accused No.1-Lal Chand (since deceased) dragged them inside the house and assaulted them with iron rods (Sariya), sickle (drat) and sticks.

They were provided water which was undrinkable/tasteless. Further, accused-Sant Kumar stole Rs 300 from the deceased's pocket.

- iii. The prosecution's case, in a nutshell, is that accused No.2-Bias Raj had borrowed a sum of Rs 50 from the brother of the deceased-Jaswinder i.e. P.W.1-Praveen Kumar and P.W.1-Praveen Kumar had demanded the sum 3-4 days prior to occurrence of the incident. On the day of the incident P.W.1-Praveen Kumar had gone to village to get labourers. When he was close to the house of the Appellants, he was dragged inside and assaulted. Thereafter, they confined him to fodder room and assaulted Manjit Kumar and Jaswinder. P.W.1-Praveen Kumar managed to escape the place of occurrence. P.W.1-Praveen Kumar was also accompanied by P.W.2-Hardev Singh and the

occurrence of the above incident was narrated to P.W.3-
Chajju Ram and Krishan Chand Lambardar.

- iv. The Investigating Officer ('IO' for short) submitted final report wherein it is stated that the above-mentioned incident was preceded by assault and wrongful confinement of P.W.1-Praveen Kumar by the Appellants when he had come in search of labourers.
- v. Accused No.1-Lal Chand (since deceased), Accused No.2-Bias Raj, Accused No.3-Mohinder Pal alias Roshan, Accused No.4-Basant Kumar, Accused No.5-Om Prakash alias Doctor, Accused No.6-Kishan Chand and Accused No.7-Madan Lal were tried. Accused Nos. 2 to 6 are sons of Accused No.1-Lal Chand (since deceased). On 16th August 1990, charges came to be framed by the Sessions Judge for offences punishable under section 302, 148 and 149 of the RPC.

vi. The Appellants pleaded not guilty and claimed to be tried. The prosecution examined as many as 19 witnesses to bring home the guilt of accused-appellants. Their defence was that the Appellants exercised the right of private defence as Accused No.1-Lal Chand (since deceased) was assaulted by both the deceased who were hired as there was litigation pending between the parties. At the conclusion of the trial, the Sessions Judge acquitted Accused No.5-Om Prakash and Accused No.6-Kishan Chand and convicted Accused Nos. 1 to 4 and 7 under section 302, 148 and 149 of the RPC and sentenced them to life imprisonment with a fine of Rs. 500 each and three months simple imprisonment in case of default in payment of fine.

vii. Being aggrieved thereby, Appellants-accused filed an appeal before the High Court. Accused No.1- Lal Chand died during the pendency of the appeal. Accused No.2- Bias Raj was absconding and his presence could not be secured even after issuing Non-Bailable Warrant. On 5th June, 2009, High Court vide impugned judgment, dismissed the appeal filed by the Appellants and upheld their conviction and confirmed the sentence awarded to them by the Sessions Judge.

3. Being aggrieved thereby the present Appeal was filed by Accused No.3-Mohinder Pal, Accused No.7-Madan Lal and Accused No.4-Basant Kumar.

4. We have heard Mr. Tripurari Ray, learned counsel appearing for the Appellants-Accused and Mr. Shailesh Madiyal, learned counsel appearing on behalf of respondent-State of Jammu and Kashmir.

5. Mr. Tripurari Ray submits that the High Court and the Sessions Judge have grossly erred in convicting the appellants-accused. Mr. Ray submits that it was the deceased-Manjeet Kumar and Jaswinder who trespassed into the house of the Appellants and assaulted Accused No.1- Lal Chand (since deceased). Thereafter, the appellants exercised their right of private defence and assaulted the deceased. Further, most of the injuries that were caused to the deceased were on their legs and not with an intention to cause severe harm.

6. Mr. Ray further submits that on a perusal of the dying declaration i.e. statement of deceased Jaswinder it would reveal that Dr. Renu Jamwal stated that the patient was not in a condition to sign the statement due to swelling. The said statement does not state any details regarding the mental/physical state of the patient whether he is of sound mind and consciousness. Further, Dr. Renu Jamwal admitted

that the patient was 'minimum conscious and not fully oriented to place'.

7. Mr. Ray urged that the evidence of P.W.1-Praveen Kumar and P.W.3-Chhajju Ram contradict the dying declaration on several points. The dying declaration does not state that P.W.1-Praveen Kumar was assaulted and confined in the house of the Appellants which is why both the deceased went to the house of the Appellants instead it just states that they were finishing their work and were assaulted by the Appellants.

8. Mr. Shailesh Madiyal appearing on behalf of the respondent-state submits that the Sessions Judge and High Court have concurrently held that dying declaration is a substantive piece of evidence. The same is attested by PW-SI Basant Singh and Dr. Renu Jamwal. It is also corroborated by the evidence of the P.W.1-Praveen Kumar and P.W.2-Hardev Singh. Thus, it cannot be simply brushed aside.

9. Mr. Madiyal further submitted that the right of private defence should be exercised in reasonable manner. The nature of injuries would reveal multiple fractures and the weapons used would indicate that the Appellants assaulted the deceased with intention to kill them.

10. We have perused the materials placed on record. From the materials placed on record, particularly, the Post-Mortem Report, it cannot be disputed that the death of the deceased was homicidal.

11. Insofar as the incident is concerned, the prosecution mainly relies on the dying declaration of deceased-Jaswinder as well as the oral testimony of P.W.1- Praveen Kumar, the brother of deceased-Jaswinder and P.W.2-Hardev Singh. The dying declaration of deceased-Jaswinder implicates accused No.1-Lal Chand (since deceased) as well as the accused-appellants. It is to be noted that though in the dying declaration it is stated that there was no previous enmity between deceased-Jaswinder and

the accused appellants, from the evidence of P.W.1-Praveen Kumar, it would reveal that an amount of Rs.50/- was taken by accused Bias from P.W.1-Praveen Kumar and the dispute was with regard to non-payment of the same.

12. Though P.W.1-Praveen Kumar states that he went to village Jagatpur to fetch labourers and the accused appellants caught him and started beating him and thereafter tied him and confined him in a verandah, there is no mention with regard to the same in the dying declaration of deceased-Jaswinder. P.W.1-Praveen Kumar states in his evidence that after some time, when his brothers Manjit and Jaswinder were going in the lane abutting the house of accused persons, the accused persons assaulted them with *Drat* and Iron rod. According to him, when they, on account of injuries, became unconscious, the accused persons dragged them into the house. He states that he untied the rope and managed to escape. He further states that when he reached Teli More, he revealed the

occurrence of the incident to Kewal Krishna and thereafter they went to Police chowki to lodge a report.

13. P.W.2- Hardev Singh in his evidence states that on the day of the incident he was working on thresher, which was set near Jagatpur and when he was going to buy *bidis*, he met P.W.1- Praveen Kumar on the way. He states that when they reached in *Gali* near the house of accused persons, accused Omprakash, Mahendra, Madi, Bias, Sant, Kashi and Gar caught P.W.1-Praveen Kumar and took him into the house by giving him beatings. It is however to be noted that in the evidence of P.W.1-Praveen Kumar, there is no mention with regard to the presence of P.W.2-Hardev Singh.

14. P.W.2-Hardev Singh submitted that thereafter he went back and when he reached near Jagatpur canal, he met Manjit alias Babi and Jaswinder and he informed them about the incident of P.W.1-Praveen Kumar meeting him and being assaulted. He stated that thereafter he along with both Manjit

and Jaswinder went to the place of occurrence. He stated that he was at a short distance from them. He stated that when they reached in the *Gali* of house of the accused persons, the accused persons caught both the deceased as well and started giving beatings. From there, he went to Lakhanpur and made a telephone call to Parshotam Lal that deceased persons have been detained in the house by accused persons. He states that when they reached the house of accused persons, Police had already reached there.

15. P.W.3-Chhajju Ram, who resides near the house of accused persons has turned hostile.

16. It is to be noted that the place of occurrence is the house of accused persons. The versions as to why the deceased-Jaswinder and Manjit as well as P.W.1-Praveen Kumar went to the house of the accused persons are varying. As per the version of P.W.1-Praveen Kumar, he had gone there in search of

labourers and thereafter he was caught by the accused persons since there was a dispute with regard to loan amount of Rs.50/.

17. As per the dying declaration of deceased Jaswinder, deceased Jaswinder and Manjit had gone there to collect grass (fodder). Whereas as per the evidence of P.W.2-Hardev Singh, when he was going to Jagatpur to buy *bidis* he met P.W.1-Praveen Kumar and both of them went to the *Gali* of the accused persons. He admitted that *bidi* shop was not in the same *Gali*. According to him, after P.W.1-Praveen was assaulted by the accused persons, he went from there and on the way deceased Jaswinder and Manjit met him and he informed them about the incident of P.W.1-Praveen Kumar being assaulted and tied. After that, all three of them went to the *Gali* where the house of the accused persons was situated. There the accused persons assaulted Jaswinder and Manjit and he went away from there. It is further to be noted that accused No.1-Lal Chand (since deceased) had also received injuries in

the said incident. The prosecution has failed to explain the same. The I.O. has admitted that he did not make investigation as to how accused No.1-Lal Chand (since deceased) had received injuries. It is the specific defence taken by accused No.1-Lal Chand (since deceased) that while he was lying on the bed in his room, two persons entered his room and one of them gave a lathi blow on his head as a result of which he started bleeding and became unconscious because of the fracture.

18. From the materials placed on record, it appears that the prosecution has not come with clean hands and has attempted to suppress the genesis of the incident. There are contradictions in the dying declaration as well as in the evidence of P.W.1-Praveen Kumar and P.W.2-Hardev Singh as to in what circumstances the deceased Jaswinder and Manjit went to the house of the accused persons. The prosecution has failed to explain the injury sustained by accused No.1-Lal Chand (since deceased). A suggestion was also given by the

accused persons that the accused were having enmity with Mohan Lal and Kewal Krishna and deceased as well as P.W. 1-Praveen Kumar and P.W.2-Hardev Singh were sent by them to assault accused No.1-Lal Chand (since deceased). No doubt that this is denied.

19. The defence of the accused appears to be that the deceased-Jaswinder and Manjit as well as P.W.1-Praveen Kumar and P.W.2-Hardev Singh were engaged by Mohan Lal and Kewal Krishna to take revenge on account of previous enmity.

20. As already discussed herein above, the place of occurrence is the house of accused No.1-Lal Chand (since deceased). Out of six remaining accused, 5 are his sons. There are material contradictions as to how and in what circumstances the deceased Jaswinder and Manjit went to the house of the appellants. The version given in the dying declaration as well as in the evidence of P.W.1-Praveen Kumar and P.W.2-Hardev

Singh are totally different. The prosecution has failed to prove the injuries sustained by the accused No.1-Lal Chand (since deceased). It is the specific case of the accused No.1-Lal Chand (since deceased) that two persons had come to his house and they assaulted him with a *lathi*. The possibility that the accused persons enraged by the assault on accused No.1-Lal Chand (since deceased) whilst deprived of the power of self-control, by grave and sudden provocation, attacked the deceased-Jaswinder and Manjit resulting in their death cannot be ruled out. We find that the appellants are entitled to benefit of doubt in view of Exception I of Section 300 of the RPC. As such, we are of the considered view that the prosecution has failed to prove the case under Section 302 of the RPC beyond reasonable doubt.

21. The conviction and sentence imposed upon the appellants under Section 302 RPC is converted to the one under Part-I of Section 304 of the RPC. The appellants have already served a

sentence of about ten years, we, therefore, find that the sentence already undergone would serve the purpose. The bail bonds of the appellants shall stand discharged.

22. The appeal is partly allowed in the above terms.

.....**J.**
[B.R. GAVAI]

.....**J.**
[M.M. SUNDRESH]

NEW DELHI;
JANUARY 12, 2023