

HIGH COURT OF JAMMU AND KASHMIR  
AT JAMMU

Cr. Appeal No. 35/2008  
CrMA No. 8/2010  
&  
Confirm. No. 14/2008

Date of Order: 06.06.2013

Jai Gopal & ors.	V.	State of J&K.
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Coram:

*Hon'ble Mr. Justice Muzaffar Husain Attar-Judge*  
*Hon'ble Mr. Justice Bansi Lal Bhat-Judge*

**Appearing Counsel:**

For Appellant(s) : Ms. Sindhu Sharma, Advocate.  
For Respondent(s) : Ms. Shaista Hakim, DyAG.

i)	Whether approved for reporting in Press/Media	:	<b>Yes/No</b>
ii)	Whether to be reported in Digest/Journal	:	<b>Yes/No</b>

*Per Bansi Lal Bhat-J*

This appeal is directed against judgment of conviction dated 11.11.2008 and order of sentence dated 12.11.2008 formulated by learned Sessions Judge Reasi in Sessions File No. 16 titled *State of J&K v. Jai Gopal & ors.*, in terms whereof appellants (hereinafter referred to as **accused**) were convicted of offences punishable under Sections 302/341/34 of RPC and sentenced to:-

1. Imprisonment for life for commission of offence under Section 302 of RPC and also to pay a fine of Rs.10, 000/- each. In default to undergo further imprisonment of two months;
2. Simple imprisonment for one month for commission of offence under Section 341 of RPC.

All substantive sentences were directed to run concurrently.

Learned Sessions Judge has also made reference in terms of Section 374 of CrPC for confirmation of sentence of life imprisonment awarded to the accused. The appeal and the confirmation Reference have been heard together.

Shorn of verbosity the case set up by prosecution before the learned Trial Court was that on 14.05.2001 Head Constable Rashpal Singh recorded statement of Paras Ram (hereinafter referred to as **deceased**) at Government Hospital Pouni wherein the deceased alleged that on the same day at 8.30 am he went to his land to remove the wood of Mulberry tree which had fallen the day before. He alleged that while he was returning home carrying the wood of the said tree, the accused waylaid him and physically assaulted him landing fists and blows. He also accused them of having caused a strike on his head with a sharp-edged weapon. Alarm raised by him attracted some people on spot and the accused fled away. He was shifted to Pouni Hospital. He alleged that he was attacked by accused with intention to cause his death.

Case for commission of offence punishable under Section 307/341 of RPC was registered at Police Station Reasi and the investigation was embarked upon. Samples of soil, stained and unstained, were taken and sealed. Blood-stained shirt of injured was seized. The samples were dispatched to Forensic Science Laboratory for chemical examination. The deceased, whose condition had shown signs of deterioration, was referred

to GMC Hospital Jammu where he succumbed to injuries. Offence under Section 302 of RPC was substituted for offence under Section 307 of RPC. The accused were arrested. Allegedly accused No.1 Jai Gopal made a Disclosure Statement regarding weapon of offence which was subsequently recovered at his instance. After obtaining medical opinion and Expert opinion of chemical examiner, the investigation was concluded. On the basis of materials assembled during investigation the Investigating Officer derived the conclusion that there was enmity between the accused and the deceased in regard to a patch of land and they had been at litigation for some time. A Mulberry tree situated on the boundary of land of deceased had suffered damage due to a windstorm a day before occurrence. The deceased had pruned branches and severed wood of fallen portion of the tree and while returning to his home with the wood and pruned branches he was accosted by accused No.1 who also called his brother and father (co-accused) to the spot and the trio assaulted the deceased with intention to cause his death. The investigation culminated in filing of charge-sheet against the accused for judicial determination.

After going through the conventional process of committal proceedings, the case landed in the Trial Court which, after holding trial consequent upon the pleading of *not guilty* by accused recorded the judgment of conviction and order of sentence against the accused which have been impugned in this appeal.

Prosecution examined Gulan Devi, Kamlesh Kumari, Bablu, Chander Pal, Roop Chand, Rajinder Singh, Sat Pal Modi, Sham Lal Raina, Rachpal Singh, Dr. Ram Parkash and Dr. Sanjay Bhat to establish complicity of accused in the alleged occurrence. After closing of prosecution evidence accused were examined under Section 342 of CrPC to enable them to explain the incriminating circumstances emerging from prosecution evidence. They have simply denied their involvement in the alleged occurrence and pleaded that they have been falsely implicated on the ground of enmity. They offered to adduce evidence in defence but it emanates from record that despite availing opportunity they did not examine any witness in defence. Thus, defence was abandoned. On appreciation of evidence brought on record by prosecution, learned Trial Court found the accused guilty of commission of offences under Sections 302/341/34 of RPC and sentenced them, inter-alia, to imprisonment for life as aforesaid.

Learned Trial Court arrived at the finding of “**guilty**” on consideration of the direct evidence of Gulan Devi, Kamlesh Kumari and Bablu, dying declaration of deceased and the recovery of weapon of offence at the instance of accused Jai Gopal. These modes of proof adopted by prosecution before the learned Trial Court are heavily relied upon by respondent-State to support the impugned judgment of conviction and order of sentence. Before making an attempt at reappraisal of prosecution evidence to arrive at findings, independent of the conclusions drawn by learned Trial Court on appreciation of

such evidence, it would be appropriate to observe that in the instant case genesis of alleged occurrence is traceable to a dispute relating to land interse the deceased and the accused. This fact is being highlighted only for purpose of grasping the context in which the evidence brought on record by prosecution is required to be appreciated.

### **Submissions of Counsel**

Learned Counsel representing the Appellants submitted that the impugned judgment rested upon the account of family members of deceased whose presence was excluded in the FIR. She has further submitted that the mental capacity of deceased has not been proved and the so called dying declaration could not be relied upon to convict the accused. It is also submitted that death in this case was not attributable to the injuries allegedly sustained by the deceased. Learned Deputy Advocate General representing the State, per contra, supported the impugned judgment.

### **Direct Evidence**

PW- Gulan Devi is widow of deceased. According to her account the accused had not taken in good stride adoption of Bablu S/o Des Raj by the deceased who was issueless. Since a portion of a Mulberry tree standing on the common boundary of lands of deceased and accused had fallen due to windstorm, the deceased went to his land to collect the wood and twigs of the fallen tree. It happened on first day of month of *Jeth*.

Accused objected to it and staked their claim to the Mulberry tree. The witness alleged that the accused Jai Gopal threatened to eliminate the deceased. All accused accosted the deceased who had reached the courtyard of his house. She has further deposed that the accused Jai Gopal was armed with a *Pathi* (a sickle like cutting instrument with a long handle generally used for cutting low-lying branches of trees). He assaulted the deceased causing strike on his head with *Pathi* while other accused beat him up with fists and blows. The deceased sustained injuries on his head which started bleeding and he fell down on the ground. She claimed that she along with her adopted son Bablu lifted the deceased and brought him to Pouni Hospital in a Matador while accused made good their escape. She also proved the recording of statement of deceased by Police in Hospital. Deceased was referred for further treatment to Jammu Hospital where he expired after eight days. From the testimony of this witness it emerges that she was cooking food or cleaning utensils in her home at the time of occurrence. Her cross-examination reveals that earlier one Krishan Lal-brother of Bablu was living with the deceased but the deceased had not adopted him. The deceased had filed a suit against Chandu in regard to land. She was not aware of execution of Will by Chandu in favour of Dewan Chand. She claimed that the Mulberry Tree had fallen at a place located about 20 mts. away from the Courtyard of her house. Accused too had been staking claim over the Mulberry Tree. Deceased was within her sight. He had gone to site of the fallen tree

alone. The witness was firm in her deposition that she had witnessed the occurrence. She was equally emphatic about handling of *Pathi* as weapon of offence by accused Jai Gopal which had been noticed by her while the said accused caused a strike over the head of deceased. It appears from her cross-examination that she had raised a hue and cry on witnessing the occurrence which attracted some people to the spot. Bablu Kumar and Kamlesh Kumari were on spot while Kamlu and Shiv Ram were attracted to the spot on hearing her cries. Bablu and Kamlesh Kumari were sitting on a cot placed in the courtyard. Police had seized the blood-stained soil from the site of occurrence. The witness denied the suggestion put to her that she had made a false statement to implicate the accused. She also denied the suggestion that she did not overhear the conversation between deceased and accused held at the site of fallen Mulberry tree as the place was at a distance of 300 mts from her house. She claimed that she had overheard the conversation while standing in her courtyard. She did not rush to the spot on noticing altercation between the two sides as there was nothing unusual about it. She maintained that she had heard accused Jai Gopal threatening the deceased with elimination but she thought that the accused would not stoop so low and go to the extent of murdering the deceased. Her deposition in cross-examination is emphatic and eloquent on the aspect of mental condition of deceased when she asserted that the deceased was in a fit state of mind when he made statement before police while admitted in Pouni Hospital. She

maintained that the condition of deceased had deteriorated later after being referred to GMC Hospital at Jammu and the deceased was not capable of making a statement. She had been staying with the deceased while he was admitted in hospital at Jammu. At that time, the deceased was not talking.

Testimony of PW-Gulan has been corroborated in material particulars by her adopted son PW-Bablu and his wife Kamlesh Kumari. Testimony of PW-Bablu reveals that the Mulberry tree was standing near his house and the windstorm had blown off a portion of it, wood and twigs whereof were lying scattered on the ground at a distance of about 15 ft. from his house. He maintained that the accused accosted and intercepted the deceased when he reached home carrying fallen wood and twigs. The witness stated that while accused Deep Kumar and Deewan Chand caught hold of deceased, Jai Gopal caused a *Pathi* blow on his head and he fell down. His cross-examination reveals that the dispute between deceased and accused related to land which was joint and undivided while Girdawari was recorded in the name of deceased. Co-owner Chandu Ram had executed a Will in favour of accused. His cross-examination further reveals that the accused were putting up in the house of Chandu Ram after the execution of Will in their favour. Chandu Ram had also cancelled his earlier Will favouring Pawan Kumar. It is also in his testimony that about half portion of the Mulberry tree had been blown off due to wind and two youths could lift the wood. However, deceased had gone there all alone. He had not lifted the fallen portion

except some wood, twigs and branches while the big chunk of it lying on the ground was removed by the accused. The deceased was empty-handed and he had not carried any axe/sickle with him. It is in cross-examination of the witness that the accused had ghearaod the deceased while on way to his home and Jai Gopal had struck him on his head. The witness stated that the land had been partitioned and the Mulberry tree was standing in the land of deceased. The dispute related to boundary of land. The witness lived in a “*Passar*” (single-roomed house). Deceased lived in another house nearby. PW’s Kamlu and Shiv Ram lived in his neighbourhood and they had witnessed the occurrence. The witness claimed that he along with his brother Chander Pal removed the deceased to Pouni Hospital from where the deceased was referred to Jammu after an hour. The Mulberry tree was standing on the boundary of land of deceased and that of the accused. The accused staked their claim to the same. On appreciation of the testimony of this witness it is manifestly clear that being adopted son of deceased he lived close to the deceased. He was the natural witness. His presence on spot at the time of alleged occurrence has neither been questioned nor has his version been shown to be tainted.

PW-Kamlesh Kumari is the wife of PW-Bablu Kumar and daughter-in-law of deceased. Her testimony, too, is corroborative in nature. She deposed in unambiguous terms that as the deceased reached the courtyard of his house with the wood of fallen Mulberry tree, the accused accosted him. While

accused Dewan Chand and Deep Kumar caught hold of the deceased, accused Jai Gopal gave a strike on his head. She claimed that her husband was brushing his teeth at that time. PW-Gulan Devi, Badamo and Bablu had raised a hue and cry which forced the accused to make good their escape. It appears from her cross-examination that she was washing utensils at the Veranda of her house at that time. The portion of Mulberry tree that had been blown off had fallen in the land of deceased. Accused had objected to removal of the wood of the fallen tree by deceased which led to an altercation. However, there was no exchange of abuses. Mulberry tree had grown on the common boundary of land(s) of deceased and accused. Both staked claims to the tree to the exclusion of each other. She claimed that the deceased had not carried any instrument of cutting with him and he was empty-handed. Her testimony also discloses that the accused had ghearaod the deceased as he reached home carrying wood of Mulberry tree. She has also nominated her brother-in-law Chander Pal as the person who reached there and lifted the deceased. The deceased was removed to Pouni Hospital. It also appears from her cross-examination that accused Jai Gopal had caused 3/4 strikes while other accused were holding the deceased. She denied the suggestion that the deceased was carrying a sickle with which he tried to assault the accused. Besides the family members of deceased, only Kamlu had reached the spot. However, Ganesh was not there. Other residents lived at a distance. It appears from her testimony that this witness too has corroborated the

version of PW-Gulan Devi in all material particulars of the alleged occurrence clearly attributing specific roles to the accused in the occurrence which happened in the Courtyard of deceased while he was on way to his house carrying the wood of the fallen Mulberry tree.

The above-named three eye-witnesses have stood the test of cross-examination. Presence of these witnesses at the time and venue of occurrence can hardly be doubted. The evidence tendered by these witnesses establishes that the son and daughter-in-law of deceased namely PW's Bablu Kumar and Kamlesh Kumari were living apart from the deceased in the house close to the site of occurrence while the deceased lived in another house located nearby. Presence of widow, son and daughter-in-law of deceased on spot at the relevant time has not been disputed by putting suggestions in their cross-examination that they were away from home at that time or that their presence on spot at the relevant time was improbable. In absence of these witnesses being shown as having been planted or their evidence being tainted on account of enmity harbored against the accused ***the same cannot be discarded***. *It is well settled that a witness cannot be termed interested merely because he is related to the deceased. Related is not equivalent to interested. Witnesses who are related to deceased may comprise of family members living with him, accompanying him or putting up in or about the dwelling place of the deceased. They are the natural witnesses and it is not their presence but that of the strangers that would raise*

*eyebrows to question presence of such witnesses on spot at the time of alleged occurrence. Relatives, more particularly the family members would not spare the real culprit and make allegations against an innocent person. Of course the testimony of a related witness interested in securing conviction of accused has to be approached with caution but such testimonies cannot be discarded merely on ground of interestedness. Dwelling upon this aspect the Hon'ble Apex Court observed in **Dalip Singh & ors. Vs. The State of Punjab** reported in **AIR 1953 SC 364** as under:*

“26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.”

The proposition of law enunciated hereinabove finds reiteration in **State vs. Sarvanandan and anr** reported in **AIR 2009 SC 152** as under:

“8. Before the High Court the stand taken by the respondents was that the evidence of P.W. 1, 2, 3, 4 and 5 should not have been relied upon as they were closely related to the deceased and were interested witnesses. The law is long settled that relationship is not a factor to affect the credibility of a witness, for the mere reason that an eye witness can be said to be an interested witness, his/her testimony need not be rejected. Most of the times, eyewitnesses happen to be family members or close associates because unless a crime is committed in a public place, strangers are not likely to be present at the time of occurrence. It is more often than not that a relation would not conceal actual culprit and make allegation against an innocent person.

Whenever any plea is taken by the accused persons about the interestedness of witnesses, materials have to be placed in that regard. In such cases, the Court has to adopt a careful approach and analyze evidence to find out whether it is cogent and credible.”

In the backdrop of the legal position stated hereinabove we are of the considered opinion that in absence of any motive for false implication of accused evidence tendered by PW(s) Gulan Devi, Bablu Kumar and Kamlesh Kumari is worthy of credit and faith being reposed therein. It is not even hinted in their cross-examination that somebody else is the perpetrator of murder of deceased and these witnesses have falsely implicated the accused to shield the real culprit. From the suggestions put in cross-examination of these witnesses it transpires that feeble attempts have been made to challenge testimonies of these witnesses by introducing a version depicting the deceased as an assailant. However, such suggestion to the effect that the deceased was carrying a sickle for pruning of the branches and twigs of the fallen mulberry tree and the same was used to assault the accused who objected to removal of wood by deceased. The witness consistently maintained that the deceased was empty-handed and he carried no sickle with him. This suggestion, on the face of it, is unfounded, baseless and without any substance. It is not shown that any of the accused had sustained injuries by use of sickle. In fact this suggestion, adopted as line of defense in cross-examination of the above-named prosecution witnesses does not find reflection in the examination of accused under Section 342 of CrPC. No specific defence has been adopted in this

regard and no defence evidence has been adduced to establish the probable defence plea. It is accordingly held that the three above-named eye-witnesses are reliable and their testimonies inspire confidence.

Testimony of PW-Gulan Devi brings it to fore that as the deceased went to his land to collect the wood of fallen Mulberry tree, the accused objected to it and Jai Gopal exhorted the co-accused to settle the score once for all. Her testimony establishes that the occurrence took place at about 8.30 am in broad day-light. The altercation initially took place at the site where the portion of Mulberry tree had fallen which was at a distance of 20 mts from the courtyard of her house. Her testimony establishes that she overheard the conversation and exchange of hot words between her husband and the accused. The threats extended by accused Jai Gopal to settle the score once for all demonstrating the intention and conduct of accused immediately prior to occurrence is admissible on the principle of '*res gestae*' under Section 6 of the Evidence Act. She offered explanation for not rushing to the spot as she thought that the accused would not stoop so low as to eliminate the deceased. She has withstood the test of cross-examination and stayed *unfaltered*. ***We find no reason to disbelieve her.***

Testimony of PW- Gulan Devi reveals that when the accused accosted the deceased and assaulted him in the courtyard of his house with Jai Gopal striking his head with a Pathi, the deceased sustained head injury, started bleeding and fell down on the ground. She along with her son Bablu lifted

the deceased and carried him to Pouni Hospital in a Matador. PW- Bablu Kumar has corroborated her version in this regard. He has also nominated Chander Pal who assisted him in removing the deceased to Hospital. Therefore, no fault can be found with the testimony of PW-Kamlesh Kumari when she nominates Chander Pal as the person who lifted the deceased when he fell down after sustaining injuries. Testimony of PW-Bablu Kumar is emphatic and unambiguous on the point that the deceased was removed to Hospital by his brother Chander Pal and himself. It is, however, not in the testimonies of PW(s) Gulan Devi, Bablu Kumar and Kamlesh Kumari that Chander Pal had witnessed the occurrence. PW- Gulan devi has stated in clear terms that PW(s) Kamlu and Shiv Ram arrived on spot only after she raised hue and cry. Thus, she excludes their presence at the time of alleged occurrence. PW- Bal Krishan has stated that Kamlu and Shiv Kumar arrived only after the deceased had sustained injuries and they had not witnessed the occurrence. Pw- Kamalesh Kumari too has not spoken about the presence of any other witness who had witnessed the occurrence.

Testimony of PW- Chander Pal is limited to his visit to Hospital at Jammu when deceased was undergoing treatment there. He is witness to Seizure Memo of dead body of deceased and has received the dead body of deceased. Thus he is not an eye-witness to the alleged occurrence.

PW-Roop Chand identified the body of deceased in Mortuary of Government Medical College Hospital, Jammu.

He also proved the receipt of dead body of deceased. PW-Kamlu has been given up at the trial. Thus, it is the eye-witness account of PW(s) Gulan Devi, Bablu and Kamlesh Kumari upon which rests the edifice of prosecution case that the deceased was murdered by accused, sharing common intention, by causing injuries on his head which were inflicted by accused Jai Gopal with *Pathi*.

Pw-Dr. Sanjay Bhat has conducted post mortem on the person of deceased. He proved the post mortem report marked EXPW-SB. In his opinion the cause of death of deceased was intra cranial hemorrhage as a result of cranio cerebral damage as given by Neuro surgeon GMC Jammu where post mortem was performed. The following injuries were noticed during post mortem examination of deceased:

- 1) A stitched wound 20 cms in length present over his left half of frontal region of scalp extending backwards upto his upper border of Lt. half of occipital region. Upon opening in stitches, the margins of the wound were incised and it was bone deep and cavity deep at places (Surgical-Craniotomy done as per hospital records).
- 2) A stitched wound 12 cms in length present over his Lt parietal region, obliquely placed going upto Rt. Half of frontal region. Upon opening in stitches, margins of the wound were incised and it was cavity deep at places. (Surgical Craniotomy done as per hospital record. Bone removed over the Lt. Fronto parietal region).
- 3) Effusion of blood present under the scalp over the left half of the skull.
- 4) Cranial bone missing over the left fronto parietal region forming a round window 8 cms in diameter. (Surgical-craniotomy done as per hospital records).
- 5) Multiple fissured fractures radiating from the bone window described under column (4) towards frontal and occipital regions.
- 6) Swelling of Rt. Hand present.

PW-Ram Parkash, before whom the seized *Pathi* was produced to elicit his opinion, opined that the injuries noticed on the person of deceased could be caused by the seized *Pathi*. He proved the certificate marked EXPW-RP and his opinion marked on post mortem report is EXPW-RP/1 in this regard. He was of the view that such injuries could also be possible by fall on a sharp edged object which is not the defence version in the instant case. It appears that no Neuro-Surgeon was examined in the case. The nature of injuries could not be proved due to surgical wounds.

### **Dying Declaration**

Ms. Sindhu Sharma representing the Appellants seriously criticized testimony of these eye-witnesses on the score that in statement dated 14.05.2001 attributed to the deceased, which became the basis for registration of First Information Report (FIR) in the instant case, presence of these witnesses is excluded. The argument rests on the following statement in FIR:-

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According to prosecution case ASI Rash Pal Singh posted at Police Post Pouni visited Government Hospital at Pouni and recorded the statement of injured Paras Ram who had been admitted in Hospital on 14.05.2001. Statement has been proved by ASI Rash Pal Singh examined as prosecution witness at the trial. It has been exhibited as EXPW-RS. This statement of deceased is the last statement made under

expectation of death immediately after the deceased was removed to Pouni Hospital with critical head injuries. It constitutes the only dying declaration in the case. Admittedly, the FIR is based on such declaration. It would, therefore, be appropriate to dwell upon the aspect of dying declaration and consider its probative value before dealing with the arguments raised by learned counsel for Appellants.

It is well settled that a dying declaration being a statement neither recorded in presence of accused nor subjected to cross-examination and falling within the category of hearsay evidence, is admissible in evidence on the principle of necessity and it can form the basis for conviction provided it is found to be reliable. The Hon'ble Apex Court, dealing with the subject in case titled *Padma Ben Shaymal Bhai Patel vs. State of Gujrat reported in 1991 SCC (1) 744* observed as under:

“In order that a dying declaration may form the sole basis for conviction without the need for independent corroboration it must be shown that the person making it had the opportunity of identifying the person implicated and is thoroughly reliable and free from blemish. If, in the facts and circumstances of the case, it is found that the maker of the statement was in a fit statement of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the Court on strict scrutiny finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence- neither extra strong nor weak- and can be acted upon without corroboration if it is found to be otherwise true and reliable.”

In the instant case occurrence is alleged to have happened on 14.05.2001 at 8.30 am, i.e., in broad day light. Deceased knew the accused as they were his co-villagers with whose land(s) he shared common boundary. He had sufficient

interaction with accused when they objected to his removing of wood of the fallen Mulberry tree and thereafter also when they ghearaod him in the courtyard of his house and assaulted him inflicting serious injuries. The deceased knew his tormentors well. They lived in his neighbourhood. Their land(s) were located in the vicinage of his land. They were inimical towards him on account of dispute related to land. Thus, we find no reason to discard the dying declaration of deceased marked EXPW-RS which is proved to have been recorded by PW-Rash Pal Singh, ASI within three hours of the alleged occurrence. The evidence brought on record by prosecution does not reveal presence of any member of family or relative of deceased by his side to tutor him and influence his statement to falsely implicate the accused. It appears that PW-Bablu Kumar-adopted son of deceased and his brother Chander Pal had removed the deceased to Pouni Hospital where the deceased had a brief stay for about an hour. It was during this period that he was examined. There is nothing in cross- examination of ASI Rash Pal Singh to suggest that when he recorded the dying declaration of deceased, any family member or friend of deceased was around to influence the deceased or tutor him. According to PW Rash Pal Singh the dying declaration was recorded in presence of Doctor who attested the same. However, from perusal of dying declaration of deceased it emerges that there is only a signature with endorsement "seen" on EXPW-RS without recording the particulars of the signatory and a certificate to the effect that a declaration was

made in his presence. There is considerable force in the arguments advanced by learned counsel for appellants when she contends that **the investigation has been conducted recklessly oblivious of the consequences that would ensue.** It is true that in the instant case the investigation has been found lacking on certain aspects of significance. There are lapses attributable to I.O. as also the Public Prosecutor. Though the I.O. has obtained an opinion from Doctor regarding mental fitness of deceased to make statement but the P.P. has taken no steps to get it proved. I.O. had also to ensure that the statement was recorded in presence of Doctor and that he got the statement attested by him. The investigating officer is found wanting and his professional efficiency is questionable. However it is the settled law of the land that no illegalities or irregularities in investigation can be a ground to throw out the prosecution case. Two relevant questions would arise for determination:

- 1) *Was the deceased mentally fit to make a dying declaration?*
- 2) *Was there any possibility of deceased being tutored?*

Insofar as the first question is concerned, to our dismay, the certificate of Doctor on docket of investigating officer certifying that the deceased was fit to make a statement has not been proved at the trial. Neither the Investigating Officer has been examined to establish authorship of docket in his handwriting for eliciting opinion of Doctor, nor certificate appended at the foot of the docket been proved to be in the

handwriting of the Doctor whose signatures appear to be comparable to the endorsement made on EXPW-RS. As if the inefficiency exhibited by Investigating Officer was not enough, the learned Public Prosecutor too has not been left behind in contributing to the inept handling of case at the trial. Conduct of the Investigator as well as the Prosecutor raises eyebrows and the same is deprecated.

Be that as it may, there is positive evidence on record to answer the first question in affirmative. PW-Chander Pal who visited deceased at Pouni Hospital stated that the deceased was in senses at that time. PW-Gulan Devi has asserted that the deceased when removed to Pouni Hospital made statement before the Police. Obviously she has referred to dying declaration which is the only statement attributed to him. It is in her cross examination that the deceased was conscious and in senses when his statement was recorded in Pouni Hospital. However, when he was removed to Jammu Hospital and the witness looked after him at Jammu, he was unable to speak. The assertion on the part of PW(s) Gulan Devi and Chander Pal in regard to mental capacity of deceased goes un-assailed, un-controverted and un-rebutted. It is, therefore, held that the deceased, who is not proved to have been suffering from any mental ailment or impairment of cognitive faculties, was mentally fit to make a statement when the dying declaration in question was recorded.

Adverting to the second test for placing reliance on dying declaration of deceased, be it seen that the evidence brought on

record by prosecution establishes beyond any shadow of doubt that the deceased, who sustained injuries at the hands of accused at about 8.30 am, was removed to Pouni Hospital immediately where his dying declaration was recorded by ASI Rash Pal Singh in presence of Doctor In-Charge within three hours of the occurrence. This conclusion is deducible from the fact that the certificate bearing endorsement of Doctor about mental fitness of deceased records 10 am as the time when opinion was elicited from him whereas the FIR has been registered at Police Station Reasi at 7.15 pm on the basis of Daily Diary Report No. 7 dated 14.05.2001 of Police Post Pouni recorded at 11.30 am. Entry in *Roznamcha* at 11.30 am refers to the dying declaration of deceased and such entry in *Roznamcha* is basis of FIR recorded at Police Station Reasi. Endorsement on FIR by learned Judicial Magistrate Ist Class, Reasi reveals that the copy of FIR was received by *Illaq Magistrate* on 15.05.2001 at 11.15 am, i.e., immediately on the day following the date of registration of the case. It appears that the recording of dying declaration of deceased followed by recording of report in *Roznamcha*, recording of FIR on the basis of entry in *Roznamcha* followed by receipt of copy of FIR by Magistrate in the forenoon of the following day was attended by promptitude as the sequence of events demonstrates. These rules out any scope for tutoring, fabricating or concoction, it having already been found that there was nobody around the deceased at the time of recording of dying declaration to influence him. The dying declaration in

question gives a vivid account of the incident with all necessary details attributing specific roles to the accused in assaulting the deceased and inflicting injuries on him. In the backdrop of direct evidence brought on record by prosecution we are of the considered opinion that the *dying declaration in question implicating the accused is reliable and worthy of credit.*

Learned counsel for the Appellant has vehemently assailed the dying declaration on two counts:-

- a) *that it does not disclose the identity of witnesses which implies that the family members of deceased did not witness the occurrence;*
- b) *that it does not specify the type of weapon of offence.*

The argument advanced, though appearing to be attractive, is bereft of substance. It appears that in EXPW-RS deceased has stated that when he was assaulted with a sharp-edged weapon after being subjected to kicks and blows, he raised an alarm which attracted ‘**some people**’ on spot and on noticing their arrival the accused made good their escape. Given the venue of occurrence, presence of family members of deceased on spot was natural and there was no need to specify or nominate them as eye-witnesses. The statement does not exclude the presence of family members of deceased though it does not nominate them as eye-witnesses. The statement clearly specifies that the deceased was returning home with wood of fallen Mulberry tree when he was waylaid and

assaulted. The site-plan proved by Investigating Officer and marked EXPW-RS-I clearly specifies the place of occurrence close to both houses of deceased, the distance being 40 ft. from one house and 60 ft. from the second house. The Mulberry tree was shown to be standing at a distance of 20 ft. from the site of occurrence. The residential house of deceased being just 40 ft. away from the site of occurrence, the presence of his family members at the venue of assault was natural and same has been established by evidence on record. So far as reference to ‘**some people**’ is concerned, evidence brought on record by prosecution reveals that PW(s) Kamlu and Shiv Kumar had arrived on spot after the occurrence and they had not witnessed the incident. This is clearly borne out by the testimony of PW-Bablu Kumar. Testimony of PW-Gulan Devi is emphatic on the point that these witnesses namely Kamlu and Shiv Ram had been attracted to the site on hearing hue and cry raised by the witness. Thus, the statement in dying declaration making reference to presence of “some” persons does not in any way reflect upon the direct evidence adduced in the case.

Insofar as the weapon of offence is concerned, the deceased specified it as a sharp-edged weapon. He did not specify the type of weapon used. The deceased was an agriculturist well acquainted with the agricultural implements and instruments used for pruning of branches of trees by the villagers. How it escaped his attention to specify *Pathi* as weapon of offence is the question for which no difficulty arises in finding an answer. The evidence on record depicts that the

deceased was ghearaod by accused. Fists and blows were landed on him. Meanwhile, accused Jai Gopal caused a strike on his head with *Pathi*. He sustained injuries and started screaming for help. He was an elderly man and the sudden attack by three accused persons might have blurred his vision as he was overpowered and subjected to thrashing before being hit on the head. That is the explanation for his inability to specify the exact nature of weapon of offence used in the occurrence.

### **Disclosure and Recovery**

It is well settled that Section 27 of Evidence Act makes information emanating from accused in custody relevant to the extent the same distinctly leads to discovery of fact hitherto unknown, irrespective of the fact whether such information amounts to a confession or not. In the instant case, prosecution is also banking upon recovery of *Pathi* at the instance of accused Jai Gopal which has been used in the commission of offence. PW(s) - Bablu Kumar and Kamlu are witnesses to Disclosure Statement attributed to accused which has been marked EXPW-4. The recovery-memo has been marked EXPW-5. PW-Kamlu has been given up at the trial as being hostile to prosecution. PW-Bablu Kumar has testified to recovery of *Pathi* as weapon of offence which was made at the instance of accused Jai Gopal in his presence. He identified the seized *Pathi* in the open Court. His testimony goes along the deposition of Investigation Officer-Inspector Sat Pal Modi, who proved the disclosure-memo and recovery-memo besides

the site-plan of venue of recovery of Pathi marked EXPW-SB. In absence of any material brought on record by accused to even suggest that the recovered weapon of offence was planted to frame the accused or that the same was recovered not in consequence of information exclusively emanating from accused Jai Gopal, there is no reason to exclude this mode of proof from consideration. It is significant to notice that according to opinion evidence tendered by PW – Dr. Ram Parkash, injuries noticed on the person of deceased could be caused by *Pathi* recovered at the instance of accused Jai Gopal. This lends further credence to the prosecution case. The postmortem report exhibited at the trial EXPW-SB reveals that the deceased had sustained six injuries on head. According to Expert opinion the deceased died due to intracranial haemorrhage as a result of cranio-cerebral damage. The Expert opinion lends support to oral evidence brought on record by prosecution, the eye-witness account of PW(s) – Gulan Devi, Bablu and Kamlesh Kumari being perfectly compatible with the opinion tendered by Medical Expert. This further strengthens the conclusion arrived at on marshalling of prosecution evidence tendered at the trial that the accused are authors of crime alleged against them.

The contentions raised by learned counsel for appellants having been repelled, the only question arising for consideration is in regard to nature of offence committed by accused. The FIR tendered in evidence under Section 32(1) of Evidence Act as to the cause of death of deceased coupled with

dying declaration having been found reliable and made in a fit state of mind with *Pathi* recovered as weapon of offence at the instance of accused Jai Gopal pursuant to his disclosure statement made before Investigating Officer during investigation further read together with oral evidence of eye-witnesses sufficiently establish complicity of accused in being the tormentors who ghearaod the deceased pursuant to exhortation of accused Jai Gopal and physically assaulted him causing a strike on his head with a *Pathi*. The evidence unmistakably shows that accused Dewan Chand and Deep Kumar were unarmed and they only beat up the deceased using fists and blows. It is only Jai Gopal who caused strike on head of deceased. The *Pathi* used as weapon of offence in the instant case is generally used by agriculturists in rural areas to collect leaves for consumption of livestock. The agricultural implements of such type are freely available and one can lay hand thereon to use it for offensive or defensive purposes at the slightest provocation. In the instant case admittedly accused Deewan Chand and Deep Kumar were not armed with any instrument of cutting, shooting or stabbing. They did not even make an attempt to procure any weapon to inflict injuries on the person of deceased. However, these accused joined Jai Gopal in assaulting deceased, responding to his Lalkara thus manifestly sharing common intention with Jai Gopal to settle scores with the deceased. There is no evidence on record to hold that even accused Jai Gopal had repeatedly struck the deceased on his head using the sharp edged part of *Pathi*.

Though it is true that deceased was struck on his head which is a vital part of body. However, absence of repeated strikes by the assailant would only demonstrate that the intention was only to chastise and teach a lesson to the deceased and not to do away with him. The genesis of occurrence lies in a petty dispute regarding removal of the fallen portion of Mulberry tree which gave way to the windstorm scattering the broken portion in the land of deceased. A dispute of trivial nature snowballed into a monster, given the previous enmity between the accused and the deceased on account of dispute relating to land. Bearing in mind the nature of dispute leading to occurrence manifesting in tragic death of deceased, the fact that two assailants were unarmed and accused Jai Gopal did not attack the deceased repeatedly coupled with the fact that the prosecution has not been able to establish the nature of injury sustained by the deceased as emanating from the evidence of Medical Experts brought on record, we are of the considered opinion that the acts of commission attributed to accused, sharing common intention, is covered by Penal provision engrafted under Section 304(1) of RPC in addition to offence u/s Section 341 of RPC. We hold so because we are convinced on reappraisal of evidence that there is no cogent proof on record to hold that the accused intended to cause death of deceased or to cause such bodily injuries as would be sufficient in ordinary course of nature to cause death. The case falls within Clause (b) of Section 299 but does not fall within Clause (3) of Section 300 of RPC. Resultantly, conviction

under Section 302 of RPC has to be set aside and accused are to be convicted under Section 304 Part-I of RPC and 341 of RPC with the aid of Section 34 of RPC.

The appeal is *allowed* to the extent indicated hereinabove. Conviction of accused under *Section 302 of RPC is set aside* and the Confirmation Reference is **rejected**. The accused are convicted of offence under Sections 304 Part-I/341/34 of RPC and sentenced to ten years rigorous imprisonment for conviction under Section 304 Part-I of RPC. No change is proposed in regard to award of sentence for conviction of accused under Section 341 of RPC.

The accused were arrested on 07.06.2001 and since then they are facing incarceration. They were not enlarged on bail during trial or at the post-conviction stage. They have already served the sentence awarded. ***They be set at liberty forthwith.***

Result of Appeal and the Confirmation Reference be certified to learned Trial Court. Superintendent Central Jail, Jammu be also informed of this order and directed ***to comply with the terms.***

Record be remitted back to Trial Court.

**(Bansi Lal Bhat)**  
**Judge**

**(Muzaffar Hussain Attar)**  
**Judge**

Jammu:  
***Sunita.***  
06.06.2013