

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT JAMMU**

Reserved on: 16.05.2024

Pronounced on: 04.07.2024

CRA No.04/2005

LAKHBIR SINGH & ORS **...APPELLANT(S)**

Through: - Mr. Sunil Sethi, Sr. Advocate, with
Mr. Mohsin Bhat, Advocate.

Vs.

STATE OF J&K **...RESPONDENT(S)**

Through: - Mr. Pawan Dev Singh, Dy. AG.
Mr. D. S. Saini, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The appellants have challenged judgment of conviction and sentence dated 03.02.2005 passed by learned 1st Additional Sessions Judge, Jammu. Vide the impugned judgment the appellants have been convicted of offences under Section 307, 324, 34 RPC whereas appellants Lakhbir Singh @ Goga and Jasbir Singh @ Godah have also been convicted of offence under Section 4/25 of Arms Act. In proof of offences under Section 307/34 RPC, each of the appellants has been sentenced to simple imprisonment for a period of seven years and to pay a fine of Rs.2000/ each, whereas in proof of offence under Section 323/34 RPC, they have been sentenced to simple

imprisonment of one year. Appellants Jasbir Singh @Godah and Lakhbir Singh @Goga have also been sentenced to simple imprisonment for a period of two years and a fine of Rs.2000/ each for commission of offence under Section 4/25 Arms Act.

2) Briefly stated, the prosecution case is that on 07.06.1998, complainant PW Jasbir Kour lodged a verbal report with Police Station, Satwari Jammu, alleging therein that on the said date when his son PW Surinder Singh, who is a truck driver, had come to his home, while her husband was away in connection with his duties, at about 7.00 p.m., the appellants/accused Jasbir Singh @Godah, Raghubir Singh @ Kaku, Lakhbir Singh @ Goga and another unknown person, who is a resident of Village Pindi, and is brother-in-law of appellant/accused Jasbir Singh, armed with swords and dah bargaded into their house and launched a murderous attack upon her son PW Surinder Singh. It was further alleged that accused Jasbir Singh and Lakhbir Singh were armed with swords whereas other accused were armed with dah and all the accused, with common intention, launched an attack upon the head and other parts of her son, as a result of which two fingers of his left hand were chopped off and when her mother-in-law, PW Guran Kour, tried to rescue her son, she was also

attacked by the assailants with a sword upon her right arm, which resulted in injuries to her. It was further alleged that the accused suspected that her son was having an illicit affair with the wife of accused Lakhbir Singh and due to this enmity, they launched this attack with a view to commit murder of her son.

3) On the basis of aforesaid report, the police registered FIR No.69/1998 for offences under Section 452, 307, 34 RPC and started investigation of the case. During investigation of the case, the two chopped off fingers of injured Surinder Singh were seized and the statements of witnesses including the statement of injured Surinder Singh and Guran Kour were recorded. The weapons of offence were also recovered. Blood-stained clothes of the injured were also seized and the same were sent to FSL for examination. The chopped off fingers were also sent for FSL examination after their sealing. The fourth assailant was identified as accused Makhan Singh. Thus, offences under Section 452, 307, 34 RPC and 4/25 Arms Act were established against the appellants/accused and the charge sheet was laid before the trial court.

4) Vide order dated 26.08.1998, charges for offences under Section 307, 323 read with Section 34 RPC were

framed against all the accused whereas against accused Lakhbir Singh @Goga and Jasbir Singh @Godah, charges for offences under Section 4/25 Arms Act were also framed. The accused/appellants denied the charges and claimed to be tried. Accordingly, the prosecution was directed to lead evidence in support of the charges. In order to prove the charges, the prosecution, besides examining two injured, namely, PWs Surinder Singh and Mst. Guran Kour also examined the complainant PW Jasbir Kour, eyewitness PW Rajinder Kour, PW Wazir Singh, PW Surjit Singh, PW K. K. Raina, the Scientific Officer, PW Dr. Robinder Khajuria, the medical witness and PW Choudhary Ahmad Din, the Investigating Officer. After completion of the prosecution evidence, the statements of the appellants/accused under Section 342 of J&K Cr. P. C were recorded and the incriminating circumstances appearing in the prosecution evidence was put to them for seeking their explanation. All the accused/appellants claimed that the prosecution witnesses have deposed falsehood and that due to personal enmity, they have lodged a false case against them. The accused did not enter defence and they did not lead any evidence in defence.

5) The learned trial court, after appreciating the evidence on record and after hearing the parties, came to the conclusion that the charges framed against the accused/appellants stand established and, accordingly, in terms of impugned judgment dated 03.02.2005, the appellants have been convicted and sentenced in the manner indicated hereinabove.

6) The appellants have challenged the impugned judgment of conviction and sentence on the grounds that not even a single independent witness has been examined by the prosecution and that the impugned judgment is solely based upon the false testimony of the interested witnesses. It has been further contended that there are contradictions in the statements of the prosecution witnesses on the essential aspects of the matter, inasmuch as there is no unanimity among the prosecution witnesses about the type of weapons that were allegedly used by the accused at the time of alleged occurrence. It has been contended that there is also contradiction as regards the sequence of events given by various prosecution witnesses including the injured. It has been further contended that the learned trial court while passing the impugned judgment has not discussed the details and particulars of the contradictions pointed out by the defence during the

course of arguments. It has also been contended that the recovery of weapon of offence has not been proved as no disclosure statement of the accused has been recorded. It has been further contended that the manner in which PW Jasbir Kour, the complainant, has lodged the report goes on to show that she was present at the place of occurrence at the relevant time but while making her statement before the Court, she has stated that she was not present on spot at the time of the occurrence, therefore, her version of occurrence cannot be accepted.

7) I have heard learned counsel for the parties and perused record of the case. I have also gone through the impugned judgment, the grounds of appeal and the evidence available before the trial court.

8) As already stated, the charge against the appellants/accused is that on the fateful day, they barged into the house of the injured PW Surinder Singh, launched an attack upon him with swords, hockey and dah, which resulted in multiple injuries to PW Surinder Singh as also to his grandmother, PW Guran Kour, who was present on spot at the relevant time. The crucial piece of evidence in injury cases is the statement of the injured himself/herself. In the instant case, there are two injured,

PWs Surinder Singh and Guran Kour. Besides them, we have the statement of the eyewitness, PW Rajinder Kour, who happens to be the sister of injured PW Surinder Singh. Before coming to the crucial statements of these three witnesses, it would be apt to deal with the contention of learned Senior Counsel appearing for the appellants that the basis of the prosecution case becomes doubtful because the complainant PW Jasbir Kour, from the manner in which she has narrated the occurrence before the police at the time of the lodging of the report, appears to be an eyewitness but while making her statement before the Court, she has stated that she reached the place of occurrence after the occurrence had already taken place. According to the learned Senior Counsel, having regard to the fact that there was previous enmity between the complainant party and the accused, the false implication of the accused cannot be ruled out, particularly because the FIR has been lodged after about three hours of the alleged occurrence and there has been delay in submission of the FIR to the Magistrate.

9) In the above context, if we have a look at the statement of PW Jasbir Kour, she has stated that on 06.07.1998 at about 6.30 p.m., she had gone to the house of her brother and when she was coming back to her home,

she was informed that the accused had beaten up her son. She further stated that when she reached her home, she saw her son Surinder Singh lying in the compound in an injured condition and she further saw that her mother-in-law, PW Guran Kour, was also lying injured and the accused had fled away. She also stated that she saw the accused running away from the gate of her house. She went on to state that accused Jasbir Singh and Lakhbir Singh were carrying swords whereas accused Raghbir Singh was carrying a dah and accused Makhan Singh was carrying a hockey. She took the injured to hospital at Gandhi Nagar from where the injured were taken to Bakshi Nagar Hospital. She further stated that she got a report registered with Police Station, Satwari, and that the report, EXPW-JK, bears her signature. In her cross-examination she stated that the occurrence had taken place at about 6.30 p.m. and that she had gone to Police Station, Satwari, at about 12 midnight as she had to accompany the injured to the hospital. She further stated that she signed the FIR and other documents at 12 midnight and at that very time, the police had gone to her house where documents including the document relating to seizure of chopped off fingers were prepared.

10) A similar statement has been made by the aforesaid witness during investigation of the case. So, one thing is clear that at no point of time PW Jasbir Kour is claimed to have witnessed the occurrence with her own eyes. Merely because she has narrated vivid details of the occurrence at the time of lodging the report with the police does not mean that she had actually seen the occurrence. What she narrated to the police was the version which she heard from the injured and other people who had witnessed the occurrence. There may be contradictions in her statement vis-à-vis the type of weapons that were being carried by the accused but having regard to the fact that she is not an eyewitness, these contradictions do not go to the root of the case. PW Jasbir Kour has only narrated what she had heard from others. There may have been communication gap between what was narrated to her by the injured and what she actually recollected but that does not make the prosecution case doubtful.

11) Similarly, the contention of learned Senior Counsel that there has been delay in lodging of FIR is also without any substance because the FIR has been lodged within three hours of the occurrence and obviously the first priority for the complainant was to provide medical aid to the injured and it is only thereafter that she could report

the matter to the police. It is true that in her cross-examination, the complainant stated that she signed the FIR and other documents at 12 midnight but that does not mean that she had lodged the report at 12 midnight. From her statement it appears that she signed the FIR and other documents relating to seizure of chopped off fingers later on. Similarly, there has been absolutely no delay in forwarding the FIR to the Magistrate as the same has been received by the Magistrate on 8th June, 1998 and the FIR has been registered on 7th June, 1998 at 10.00 p.m. Thus, there is no delay in sending the FIR to the concerned Magistrate. The argument of the learned Senior Counsel in this regard is without any substance.

12) That takes us to the statements of the injured. Before appreciating the statements of the injured, it would be apt to notice the legal principles that have been evolved over a period of time for appreciating the oral evidence. The Supreme Court in the case of **Balu Sudam Khalde and another vs. State of Maharashtra** (AIR 2023 SC 1736) has enumerated the judicially evolved principles for appreciation of ocular evidence in a criminal case in the following manner:

25. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially

evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:

I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.

II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

III. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.

IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI. *By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*

VII. *Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*

VIII. *The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.*

IX. *By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.*

X. *In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.*

XI. *Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.*

XII. *A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.*

XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness.”
[See Bharwada Bhoginbhai Hirjibhai v. State of Gujarat 1983 Cri LJ 1096 : (AIR 1983 SC 753) Leela Ram v. State of Haryana AIR 1995 SC 3717 and Tahsildar Singh v. State of UP (AIR 1959 SC 1012)].

13) In the same judgment, the Supreme Court has enunciated the principles for appreciation of evidence of an injured eyewitness and held that the following factors need to be kept in mind while appreciating the evidence of an injured eyewitness:

(a) The presence of an injured eye-witness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.

(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.

(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.

(f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded.

14) After evolving the aforesaid principles, the Supreme Court in the aforesaid judgment has held that in assessing the value of the evidence of the eyewitnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence.

15) In the backdrop of aforesaid legal principles, let us now test the veracity of testimony of PWs Surinder Singh and Guran Kour. PW Surinder Singh has stated that on 7th June, 1998, while he was coming back to his home, accused Lakhbir Singh and Raghubir Singh tried to intercept his tanker which he was driving but he straightway proceeded to his home. He further stated that he was feeling tired and he went inside his home to take rest while his grandmother Guran Kour and younger sister Rajinder Kour was in the house and his mother had gone

out. According to him at about 7.30 p.m., he heard the cries of his sister that his grandmother is being beaten up, he came out of his room into veranda and found accused Lakhbir Singh, Jasbir Singh, Raghubir Singh and Makhan Singh armed with swords, hockey and dah. He further stated that the aforesaid accused launched a murderous attack upon him. Accused Lakhbir Singh attacked him with a sword. He tried to save himself but two fingers of his hand got chopped off. The other accused also launched an attack upon his head and other parts of the body with swords and hockey, which resulted in grievous injuries to his arms, head, legs and feet. He further stated that accused Lakhbir Singh suspected that he was having illicit relation with his wife and because of this reason, the accused were inimical to him. He further stated that accused went away after the occurrence thinking that he had died. In his cross-examination he stated that the occurrence took place on the veranda and not inside his room. He further stated that he had not gone unconscious, but he had suffered severe injuries.

16) PW Guran Kour has stated that on the day of occurrence at about 7.00 PM accused bargaged into their house challenging PW Surinder Kour who came out of his room and was subjected to attack by the accused.

According to her, accused Jasbir Singh launched an attack upon PW Surinder Singh on his head and he tried to save himself but he received injuries on his head. She further stated that PW Surinder Singh received a blow of sword on his head and he was brought down by the accused and attacked by them. She pleaded with the accused to leave PW Surinder Singh alone, but they did not relent. She further stated that accused Lakhbir Singh launched an attack on her arm which resulted in injuries to her. She further stated that accused Lakhbir Singh and Raghubir Singh were carrying swords whereas accused Makhan Singh was carrying a hockey. She has stated that the occurrence lasted for about five minutes whereafter the assailants went away. She further stated that her grand-daughter Rajinder Kour was present on spot. She clarified in her cross-examination that at the time of the occurrence, besides her and Rajinder Kour, nobody else was present on spot.

17) PW Rajinder Kour, who is a child witness, has stated that the accused, on coming to their house, challenged PW Surinder Singh who came out of his room and accused launched an attack upon him. According to her, accused Lakhbir Singh and Jasbir Singh were carrying swords, accused Raghubir Singh was carrying a dah whereas

accused Makhan Singh was carrying a hockey. She stated that PW Surinder Singh was beaten up inside the compound and as a result of the assault launched upon him, two fingers of his left hand got chopped off and he received injuries all over his body whereafter he fell down unconscious. She also stated that her grandmother pleaded with the accused but they did not relent. She stated that accused Jasbir Singh gave a blow of sword upon the right arm of her grandmother which resulted in injuries to her. In her cross-examination she stated that in the first instance the accused launched an attack upon PW Surinder Singh whereafter his grandmother tried to rescue him and she was also given a blow of sword by accused Jasbir Singh. She further stated that her mother had gone to the house of her maternal uncle who resides in the same village.

18) The contradictions that have been pointed out by learned Senior Counsel appearing for the appellants in the testimony of the aforesaid three witnesses are as under:

- (I) According to PW Surinder Singh accused Lakhbir Singh was carrying a sword whereas accused Makhan Singh was carrying a hockey and accused Jasvir Singh was carrying dah but according to PW

Guran Kour accused Jasbir Singh was carrying a sword;

(II) According to PW Surinder Singh, accused Lakhbir Singh was responsible for giving a blow of sword which resulted in chopping off of his fingers whereas according to PW Guran Kour, it was accused Jasbir Singh who had given the blow which resulted in chopping off of fingers of PW Surinder Singh;

(III) According to PW Guran Kour and PW Rajinder Kour, accused launched an attack upon PW Surinder Singh and it is only when PW Guran Kour tried to rescue him that one of them gave a blow of sword on her arm resulting in injuries to her but according to PW Surinder Singh, the accused launched attack upon PW Guran Kour in the first instance and thereafter when he came out of his room, he was also attacked by the accused.

19) On the basis of aforesaid contradictions, learned Senior Counsel appearing for the appellants has contended that because these contradictions pertain to the essential aspects of the case, therefore, it would be

unsafe to rely upon the testimony of the injured and the eyewitness.

20) It is true that there is some contradiction between the statements of aforementioned three witnesses as regards the type of weapons that were being carried by the appellants/accused at the time of the occurrence, but having regard to the insignificant nature of these contradictions and inconsistencies in the statement of these witnesses, particularly the injured, their testimony cannot be disbelieved. As has been already noted while discussing the principles for appreciation of ocular evidence in a criminal case, it is not expected from the witnesses to possess a photographic memory to recall each and every detail of an incident. It has to be borne in mind while appreciating the evidence of an eyewitness or an injured that occurrence is never anticipated and, therefore, a witness is generally overtaken by events and observations of an event differ from person to person. An object may emboss its image in a person's mind whereas it may go unnoticed by any other person. Therefore, PW Surinder Singh while recollecting the events, it may have appeared to him that accused Jasvir Singh was carrying a dah, but PW Guran Kour and PW Rajinder Kour may have perceived that he was carrying a sword. Similarly, when

PW Surinder Singh was being attacked by all the four accused, which fact is supported by the evidence on record, it may have appeared to him that the blow, which resulted in chopping off of his fingers of his hand, was given by accused Lakhbir Singh, but PW Guran Kour may have perceived that the said blow was given by accused Jasbir Singh. One thing is clearly established from the evidence on record that all the four accused/appellants actively participated in the commission of the crime, so it is immaterial as to which of the accused/appellants gave the blow resulting in chopping off of the fingers of PW Surinder Singh.

21) Similar is the case with regard to perception of sequence of events by the injured and the eyewitness. PW Surinder Singh has nowhere stated that he has seen his grandmother being attacked in the first instance by the assailants. He has only stated that he heard his sister crying that his grandmother is being attacked but when he came out of his room, he saw the accused armed with swords and hocky whereafter they launched an attack upon him. So, the consistent version of all the three witnesses, two injured and one eyewitness PW Rajinder Kour, is that in the first instance PW Surinder Singh was attacked by the accused and when PW Guran Kour tried

to rescue him, she was also attacked. There is no contradiction between the testimonies of these three witnesses on this aspect of the matter.

22) One thing which is clear from the statements of aforementioned two injured and eyewitness is that they have proved the presence of all the accused on the site of occurrence at the relevant time. There is not even a suggestion from the defence to these witnesses that the accused were not present on spot at the relevant time. It is also proved from the statements of these three witnesses that both PW Surinder Singh as well as PW Guran Kour were attacked by the accused and they received injuries. These statements are corroborated by the medical evidence on record. As per the statement of Dr. Robinder Khajuria, PW Surinder Singh had received as many as fifteen injuries all over his body from head to toe. Out of these injuries, the injury relating to amputation of distal phalynx of left ring finger and incised wound on ulnar aspect of right arm and elbow posterior of PW Surinder Singh have been termed as grievous injuries. He had also received a fracture of lateral epicondyle on the right side of his temporal region which is also a grievous injury. Similarly, PW Guran Kour, as per the report of the doctor, has received a simple injury (incised wound on right

forearm). The injuries received by both the injured are possible by sharp edged weapons and some of these injuries are also possible by blunt object, which means that the version of the injured that they were attacked by swords and hockey sticks corroborated by the medical evidence on record. There is also corroborative evidence in the shape of seizure of blood-stained clothes of injured which has been proved in this case.

23) It has been contended by learned Senior Counsel appearing for the appellants that in the instant case the recovery of weapons of offence has not been proved. According to learned Senior Counsel, the weapon of offence "dah" has not been recovered at all whereas the seizure memos in respect of weapon of offence hockey (EXPW-VS) and weapons of offence swords (EXPW-VS-I and EXPW-VS-II) are not admissible in evidence as the weapons have not been recovered/seized pursuant to any disclosure statement of the accused but the same, as per the prosecution case, have been produced by the accused before the police which is inadmissible in evidence.

24) Without going into the question whether the seizure of weapons of offence sword and hockey is admissible in evidence and even if it is assumed that seizure of weapons

of offence is not proved in the instant case, the same cannot negate the direct testimony of the injured and the eyewitness which, as already stated, has proved the occurrence beyond any reasonable beyond. The Supreme Court in the case of **State through the Inspector of Police vs. Laly @ Manikandan and another** (AIR 2022 SC 5034), has held that even if recovery of the weapon used in the occurrence is not established or proved, it cannot be a ground to acquit the accused when there is direct evidence of the eyewitnesses. The Supreme Court further held that recovery of the weapon used in the commission of the offence is not a *sine quo non* to convict the accused if there is direct evidence in the form of eyewitness and even in the absence of recovery of weapon of offence, the accused can be convicted. The argument of learned Senior Counsel for the appellants is, therefore, without any merit.

25) It has been further contended that there is inconsistency in the evidence on record as regards the site of occurrence. Learned Senior Counsel for the appellants has contended that according to the site map, EXPW-AD, the occurrence has taken place on the veranda whereas, as per the statement of eyewitness PW Rajinder Kour, the occurrence has taken place in the compound.

26) In the above context, it has to be noted that injured PW Surinder Singh has clearly stated that the occurrence took place outside his room on the veranda. Though PW Rajinder Kour has stated that the occurrence has taken place in the compound, but the said contradiction may not be of much significance because the injured and the Investigating Officer have testified that the place of occurrence is veranda which is just adjacent to the compound. It is also to be kept in mind that PW Rajinder Kour is a child witness, who was aged about ten years at the time of occurrence, as such, she may not be even knowing difference between compound and the veranda and, therefore, merely because she has stated that the occurrence had taken place in the compound would not falsify the prosecution case.

27) Lastly, it has been contended by learned Senior Counsel appearing for the appellants that offence under Section 4/25 Arms Act is not proved against accused Jasbir Singh and Lakhbir Singh.

28) There appears to be some merit in the aforesaid submission of learned Senior Counsel. In the instant case, even if it is assumed that the prosecution has been able to establish the recovery of the weapon of offence i.e. sword

from accused Jasbir Singh and Lakhbir Singh, which to my mind is doubtful, still then the dimensions of the sword, particularly the width of their blade, is not mentioned in the seizure memos EXPW-VS-I and EXPW-VS-II. As per the notification/SRO 175 dated 23rd April, 1974 of the Government of Jammu and Kashmir, copy whereof has been placed on record, carrying of sharp-edged weapon with dimensions six inches in length and two inches in width has been prohibited in terms of Section 4 of the Arms Act. Since the width of the allegedly recovered swords has not been proved, therefore, it cannot be stated that the aforesaid notification would get attracted to the present case. Thus, conviction of the aforementioned two appellants/accused for offence under Section 4/25 of the Arms Act is not sustainable in law and the same deserves to be set aside.

29) Learned Senior Counsel for the appellants has further contended that in the case of appellant/accused Lakhbir Singh, who is serving in Armed Forces, it was incumbent upon the learned trial court to consider his case for grant of probation in terms of Section 4 of the Probation of Offenders Act. The learned Senior Counsel has submitted that even at this stage this Court can consider the case of appellant/accused Lakhbir Singh for

grant of benefit under the aforesaid Act having regard to the fact that he has served the Country in his capacity as a member of the Armed Forces.

30) In the above context, the provisions contained in section 4(1) of the J&K Probation of Offenders Act, which is applicable to the present case, needs to be noticed. It reads as under:

4. Power of Court to release certain offenders on probation of good conduct. —(1) When any person is found guilty of having committed an offence and not punishable with death or imprisonment for life and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the Court may direct, and in the meantime to keep the peace and be of good behaviour :

Provided that the Court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the Court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

31) From a perusal of the aforesaid provision, it is clear that the benefit of Probation of Offenders Act can be extended to a person who is found guilty of having committed an offence which is not punishable with death or imprisonment for life, meaning thereby that any person

who has been convicted of an offence which is punishable with death or imprisonment for life cannot claim benefit of the said Act. In this regard, I am supported by the judgment of the Supreme Court in the case of **Jugal Kishore Prasad vs. State of Bihar** (AIR 1972 SC 2522).

32) In the instant case, the appellants have been convicted, *inter-alia*, of offence under Section 307 RPC and it has been proved that as a consequence of the acts of the appellants, PW Surinder Singh and PW Guran Kour have received grievous/simple injuries. Section 307 RPC makes the offence of attempt to murder punishable and according to it, if hurt is caused to any person by an act which amounts to attempt to murder, the offender is liable to be punished, either to imprisonment for life or to punishment with imprisonment of either description for a term which may extend to ten years. Thus, the offence under Section 307 RPC, which results in hurt to some person, carries the maximum punishment of life imprisonment. Therefore, the provisions of Section 4 of the Probation of Offenders Act would not come into play in the instant case. The contention of the learned Senior Counsel for the appellants is, therefore, rejected.

33) In view of what has been discussed hereinbefore, it is clear that the prosecution in the instant case has proved beyond any reasonable doubt that the appellants with a pre-meditated design bargaged into the house of the injured so as to finish him off. It has also been proved that there was previous enmity between the parties as it was being suspected by the appellants that PW Surinder Singh was having illicit relations with the wife of accused Lakhbir Singh. The evidence on record shows that the appellants with a common intention launched a murderous attack upon PW Surinder Singh and while doing so, they used sharp-edged weapons like swords and inflicted as many as fifteen injuries upon him. One of the injuries resulted in chopping off of his two fingers and another, which landed on his head, resulted in fracture. There were multiple incised wounds found on the body of PW Surinder Singh from head to toe, details whereof are given in the injury certificate. This clearly shows that but for some divine intervention, PW Surinder Singh could not have survived the attack that was launched by the appellants upon him. The charge for offences under Section 307/323/34 RPC is proved against the appellants.

34) Coming to the question of sentence, it has to be taken into account that the appellants have faced trial

before the trial court for about seven years and this appeal is pending before this Court for about 19 years. This is a factor which is required to be taken into account while imposing sentence upon the appellants. It is also to be noted that at the time when the occurrence had taken place, the appellants were in their youth and presently appellants Lakhbir Singh and Jasbir Singh are senior citizens. There is nothing on record to show that the appellants have any criminal antecedents. It also appears from the evidence on record that the appellants are closely related to the injured and it appears that only because of some suspicion about the conduct of injured PW Surinder Singh, the unfortunate incident has taken place and it does not appear to be a case of rivalry between hardened criminals. Therefore, while imposing sentence upon the appellants, some leniency has to be shown.

35) In view of what has been discussed hereinabove, the appeal is partly allowed and the same is disposed of by extending the following directions:

- (I) The conviction of the appellants for offences under Section 323/307/34 RPC is upheld whereas the conviction of appellants Jasbir Singh @Godah and Lakhbir Singh @Goga for offences under Section 4/25 of Arms Act is set aside.

- (II) The substantive sentence of imprisonment of the appellants in proof of offence under Section 307 RPC is reduced from seven years to three years. The period of custody undergone by the appellants during investigation, trial and pendency of the appeal shall be set off against the substantive sentence.
- (III) The sentence of fine imposed upon the appellants in proof of offence under Section 307 RPC and the substantive sentence in proof of offence under Section 323 RPC is maintained.
- (IV) Bail and surety bonds of the appellants are cancelled and they are directed to surrender before the trial court within a period of fifteen days from the date of this judgment. Upon their surrender before the trial court, the appellants shall be sent to the prison for serving the sentence and in case they do not surrender before the trial court within the aforesaid period, appropriate coercive measures shall be taken by the trial court for securing their presence in accordance with law.

36) Trial court record along a copy of this judgment be sent back.

(Sanjay Dhar)
Judge

Srinagar
04.07.2024
“Bhat Altaf-Secy”

Whether the order is reportable: Yes/No