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STATE OF RAJASTHAN

v.

MEHRAM & ORS.

(Criminal Appeal No. 1894 of 2010)

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MAY 06, 2020

[A. M. KHANWILKAR AND DINESH MAHESHWARI, JJ.]

- Penal Code, 1860 – Conversion of conviction from s.302 IPC to s.326 IPC – The complainant's case that they used an old way passing through the fields of accused persons to go to their field – There was a dispute between the parties for using the fields as a passage – On the day of incident, the accused persons armed with 'Kassies' and lathies come out from the back of the bushes and surrounded the complainant when he was passing through fields – The accused tried to strike the complainant, however, the victim and other persons arrived from their fields – Thereafter, the accused No. 5/respondent no. 1 struck a 'kassi' blow on the head of the victim, due which he fell and later on died – There were beatings from both sides and after the intervention of other villagers, the accused persons ran away – The case was committed by the Sessions Court and the accused no. 5/respondent no. 1 came to be convicted u/s. 148, 302, 324/149 IPC and sentenced to undergo life imprisonment – All the five accused including accused no. 5 preferred appeal before the High Court – As regards, accused no. 5/respondent no. 1, the High Court converted the conviction u/s. 302 IPC into one under s. 326 IPC on the finding that the said accused had exceeded his right of private defence – On appeal, held: On perusal of the relevant evidence and the judgments of the Trial Court and the High Court, there is no reason to depart from the conclusion reached by the Trial Court that there were tangible circumstances and evidence to indicate that the accused party was the aggressor, who was hiding in the bushes and appeared only after the complainant party arrived on the spot – The accused party armed with lethal weapons assaulted the complainant party – The blows inflicted by the concerned accused, in particular accused No. 5, here with intention to kill the victim/deceased – The High Court proceeded on the erroneous assumption that the accused party were provoked due to the unauthorized entry of the*

complainant party on their fields and to defend their possession, they had to resort to right of private defence – In the instant case, there was no evidence produced to substantiate the plea of exercise of private defence – The incident in question occurred due to provocation and spiralled into a free fight – Further, once it is a case of accused party being the aggressors and they commenced assault on the complainant party and the accused No. 5/respondent No. 1 having been found to have assaulted victim/deceased with intention to kill him the question of invoking the right of private defence does not arise – Insofar the conviction of the accused no.5/respondent no.1 is concerned, the sequence of events would indicate that provocation was not invited by the accused party, but was obviously at the instance of the complainant party, who entered the fields unauthorisedly despite the objection taken by the complainant party in that regard on the same day earlier – The death of the victim was caused by the one fatal blow on the head, which was with the intention of causing his death or causing such bodily injury as is likely to cause death, therefore, the case would be covered by s. 304-I, IPC – Accordingly, the impugned judgment of the High Court and that of the Trial Court are modified by convicting the accused no. 5/respondent no. 1 for offence punishable u/s. 304-I and s. 148 IPC.

Disposing of the appeal, the Court

HELD: 1. After having gone through the relevant evidence and judgments of the trial Court and the appeal Court (High Court), this Court has no reason to depart from the conclusion reached by the trial Court that there were tangible circumstances and evidence to indicate that the accused party was the aggressor, who was hiding in the bushes and appeared only after the complainant party arrived on the spot. The accused party had assembled at the spot with lethal weapon(s) and all the accused were waiting for the complainant party to arrive at the spot and started assaulting the complainant party. The blows inflicted by the concerned accused, in particular accused No. 5, were with an intention to kill victim (deceased). The death of victim was caused due to the blow inflicted by accused No. 5 and was a homicidal death. There is no reason to depart from the said findings recorded by the trial Court and the same

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- A remained undisturbed by the High Court. The High Court by its cryptic judgment, proceeded on the erroneous assumption that the accused party had been provoked due to the unauthorised entry of the complainant party on their fields and to defend their possession, they had to resort to right of private defence. While doing so, the accused party, in particular, accused No. 5, exceeded his right of private defence. There was no common object because the incident in question occurred due to provocation and spiralled into a free fight, causing injuries to both sides. The fallacy in the reasoning of the High Court is palpable from the evidence of prosecution witnesses, which has been elaborately analysed and rightly accepted as truthful by the trial Court, substantiating the allegations against the accused party of being the aggressors. Once it is a case of accused party being the aggressors and they commenced assault on the complainant party and further, the accused No. 5 having been found to have assaulted victim (deceased) with intention to kill him, the question of invoking the right of private defence does not arise. In fact, no defence evidence was produced to substantiate the plea of exercise of private defence. The two theories (of being aggressors as opposed to exercise of right of private defence) are antithesis to each other. [Para 9] [249-E-H; 250-A-D]
 - 2. From the description of injuries, it is amply clear that these injuries are superficial and as rightly found by the trial Court, will have no bearing on the prosecution case, even if the same remain unexplained. The fact that some of the accused had received grievous injuries, does not belie the prosecution case that the accused were the aggressors. There was no reason for the accused to remain in hiding position equipped with lethal weapon(s), waiting for the arrival of the complainant party and on their arrival, to immediately commence attack and cause fatal injuries to the complainant party. Such being the factual matrix, it is unfathomable as to how the plea of right of private defence could be invoked by the accused. If such a plea is not available, the question of answering the plea in favour of the accused that it was a case of excessive exercise of right of private defence does not arise at all. The basis of the High Court judgment being flawed in this regard, the conclusion recorded by it cannot stand
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the test of judicial scrutiny. For the same reason, the question of converting the offence under Section 302 to one under Section 326 cannot be countenanced, both on facts and in law. [Para 11] [251-E-H; 252-A-B]

3. Indeed, the trial Court's finding of guilt recorded against accused No. 5, is unexceptionable. However, on the nature of offence, the trial Court considered the plea of the accused only in reference to offence falling under Section 304 Part II of the IPC. The trial Court rejected that argument and this Court must uphold that conclusion, because the finding of fact is that the act was done by the accused with the knowledge that it is likely to cause death, and with intention to kill victim (deceased). But before final opinion is expressed, it is necessary to examine as to whether the case in hand would be covered under the exceptions predicated in Section 300, IPC, so as to apply Section 304, IPC – be it Part I or Part II thereof. The facts of the present case would indicate that the accused, in particular accused No. 5, at the relevant time, was deprived of the power of self-control by grave and sudden provocation due to repeated unauthorised entry on the fields belonging to accused party. Further, the solitary fatal blow on the vital part of the head by accused No. 5 caused the death of victim (deceased). The provocation was not invited by the accused party, but was obviously at the instance of the complainant party, who entered the fields unauthorisedly despite the objection taken by the complainant party in that regard on the same day earlier. However, as the death of victim (deceased) was caused by the act of accused No. 5 giving one fatal blow on the head, which was with the intention of causing his death or causing such bodily injury as is likely to cause death, the case would be covered by Section 304 Part I, IPC. It is certainly not a case to simply proceed under Section 326 of the IPC, as held by the High Court. This Court disapproves that approach of the High Court. Even if the High Court had justly applied Section 326, IPC, this Court fails to appreciate as to how the High Court could have imposed sentence only for a period (about five months) undergone considering the nature and gravity of the offence and the background in which it is committed by the accused party, in particular, accused No. 5. [Para 12] [252-A-H]

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- A *Chandrakant Patil v. State through CBI (1998) 3 SCC 38 : [1998] 1 SCR 447 ; Sumer Singh v. Surajbhan Singh & Ors. (2014) 7 SCC 323 : [2014] 5 SCR 882 ; State of Rajasthan v. Ramanand (2017) 5 SCC 695 : [2017] 3 SCR 981 ; Gottipulla Venkatasiva Subbrayanam & Ors. v. the State of Andhra Pradesh & Anr. (1970) 1 SCC 235 : [1970] 3 SCR 423 ; Deo Narain v. The State of Uttar Pradesh (1973) 1 SCC 347 : [1973] 3 SCR 57 ; Subramani & Ors. v. State of Tamil Nadu (2002) 7 SCC 210 : [2002] 1 Suppl. SCR 718 ; State of Uttar Pradesh v. Gajey Singh & Anr. (2009) 11 SCC 414 : [2009] 2 SCR 998 – referred to.*
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Case Law Reference

	[1998] 1 SCR 447	referred to	Para 4
D	[2014] 5 SCR 882	referred to	Para 4
	[2017] 3 SCR 981	referred to	Para 4
	[1970] 3 SCR 423	referred to	Para 4
	[1973] 3 SCR 57	referred to	Para 4
E	[2002] 1 Suppl. SCR 718	referred to	Para 4
	[2009] 2 SCR 998	referred to	Para 4

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1894 of 2010

- F From the Judgment and Order dated 05.11.2007 of the High Court of Judicature for Rajasthan at Jodhpur in D.B. Criminal Appeal No. 271 of 1982.

Dr. Manish Singhvi, Sr. Adv., D.K. Devesh, Milind Kumar, Advs. for the Appellant.

- G Sushil Kumar Jain, Sr. Adv., H.D. Thanvi, Rishi Matoliya (for Sarad Kumar Singhania), Advs. for the Respondents.

The Judgment of the Court was delivered by

A. M. KHANWILKAR, J.

- H 1. This appeal takes exception to the judgment and order dated 5.11.2007 passed by the High Court of Judicature for Rajasthan at

Jodhpur¹ in D.B. Criminal Appeal No. 271/1982, whereby the conviction of the respondent No. 1/original accused No. 5 (Mehram S/o Mr. ChhagnaRam)under Section 302 of the Indian Penal Code² has been converted into one under Section 326, IPC and the substantive sentence awarded therefor is reduced only to the period already undergone (about five months) by the accused No. 5. At the outset, the learned counsel for the appellant-State had made it amply clear that the State was pursuing this appeal only against the accused No. 5 (Mehram S/o Chhagna Ram)for restoration of his conviction under Section 302, IPC and to award him sentence of life imprisonment.

2. Briefly stated, five accused were named in the First Information Report (FIR) registered on 14.8.1981 at P.S. Nagaur in relation to an incident at village Gowa Khurd. The case set out in the stated FIR, as noted by the trial Court, reads thus: -

“2. ...

“On 14.08.1981 at 9:30 p.m. in the evening Complainant injured Mangilal, lodged an oral report with the Officer Incharge, Police Station Nagaur to the effect that he has four fields at Village Gowa Khurd, out of which one field is situated about a distance of one km. away from the village. Complainant has further stated that for going to that field they have to use an old way passing through the fields of Heera, Chhagna and Jeevan. However, this way is not recorded in Government record. In the report, Complainant has further stated that last year sons of accused Heera obstructed the sons of the complainant party from going to their field by that unrecorded way. But upon intervention of Anna Kaka, they were pacified. Thereafter, this year after rainy season, accused Heera and Chhagna closed that way. Therefore, they had to cultivate their field having gone through Basni. In the report, complainant has further stated that at about dusk when he along with his wife were going for removing the weeds to another fields and at that time his younger brother Ghewar and Sawanta were grazing goats at a distance. At that time quarrel was taken place between accused Ramnarayan and Ghewar on account of way and they went to village. At 5 o' clock in the evening, his wife had also gone to village. Complainant has further

¹ For short, “the High Court”

² For short, “IPC”

- A stated that at the time of sunset while he alone was coming towards the village from the field. And when he reached the village near pond, then accused persons- Mehram and Baksharam, having armed with ‘Kassies’ and accused persons- Ramnarayan, Heeraram and Ramniwas, having lathies in their hands came out from the back of ‘Kai’ (bushes) and surrounded the Complainant. Accused Baksharam with the intention to kill struck ‘Kassi’ blow from the sharpen side on the head of Mangilal, but Mangilal managed to prevent it by lifting the hand, due to which Mangilal sustained injury over his palm. Accused Baksharam tried to inflict another ‘Kassi’ blow to Mangilal, whereupon Bhuraram caught hold the ‘Kassi’. And Mehram, Moti and Annaram arrived at the place of occurrence from their fields. Thereafter, accused Mehram S/o Chhagana struck a ‘Kassi’ blow from sharpen side on the head of Bhura from the backside, due to which Bhura fell down, accused Ramniwas inflicted a lathi blow over the head of Mehram S/o Annaram. Thereafter, all the accused persons gave beatings. Then Ratna, Moti and Annaram had intervened after reaching on the spot. Accused persons having assumed Bhura died ran away. Complainant has further stated that accused persons have given beatings with the intention of taking revenge on account of way dispute...”

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- F On the basis of the above complaint, investigation was commenced for offences punishable under Sections 147, 148, 149, 323, 307 and 302, IPC. The case was committed to the Sessions Court by the Chief Judicial Magistrate in February, 1982, which was numbered as Sessions Case No. 9/1982. After a full-fledged trial, in which fourteen (14) prosecution witnesses came to be examined, the trial Court, on extensive analysis of the evidence on record, vide judgment and order dated 21.7.1982, running into around 115 loosely typed pages, found the named accused guilty of the concerned offences, and passed the following order:-
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“ORDER”

Hence, accused Mehram son of Chhagna is hereby held guilty of committing offence under Section 148, 302, 324/149 Indian Penal Code.

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Accused Ramniwas is hereby held guilty of committing offence under Section 147, 323, 324/149 India Penal Code and accused persons- Heera Lal, Ramnarayan under Section 323, 324/149 Indian Penal Code and accused Baksharam is hereby convicted under Section 148, 324 I.P.C.

Accused persons Heeraram, Ramnarayan, Ramniwas and Baksharam are not found guilty of committing offence under Section 302 and 302/149 Indian Penal Code.

Hence, accused Mehram is hereby sentenced to undergo life imprisonment and to pay fine of Rs.100/- in default of payment of fine to undergo additional three months rigorous imprisonment under Section 302 Indian Penal Code.

Accused persons- Mehram and Baksharam each of them is hereby sentenced to undergo six months simple imprisonment and to pay fine of Rs.100/- in default of payment of fine to undergo 15 days additional simple imprisonment for committing offence under Section 148 and accused persons Ramnarayan and Ramniwas for committing offence under Section 147 I.P.C.

Accused Baksharam for committing offence under Section 324 and accused persons- Ramniwas, Heeraram, Ramnarayan and Mehram for committing offence under Section 324/149 I.P.C. each of them is hereby sentenced to undergo six months and to pay fine of Rs.100/- in default to undergo 15 days simple imprisonment. Accused Ramniwas is further sentenced to undergo three months simple imprisonment under Section 323 I.P.C. All the sentences shall run concurrently.

Accused persons-Heeraram, Ramnarayan, Ramniwas and Baksharam shall be entitled to get benefit under Section 428 I.P.C.

Clothes and arms (Art.1 to Art.10) shall be destroyed after the expiry of period of limitation for appeal. Copy of the judgment be made available to accused persons.”

As regards theaccused No. 5 (Mehram S/o Chhagna Ram), he came to be convicted for offences punishable under Sections 148, 302, 324/149, IPC and sentenced to undergo life imprisonment with fine of Rs.100/- for the offence punishable under Section 302, six months’

- A simple imprisonment with fine of Rs.100/- for offence punishable under Section 148, IPC and six months' simple imprisonment with fine of Rs.100/- for offence punishable under Section 324/149, IPC.
- 3. All the five accused preferred appeal before the High Court being D.B. Criminal Appeal No. 271/1982. The appeal filed by Ram
- B Niwas (respondent No. 2/original accused No. 3), Heera Ram (respondent No. 3/original accused No. 1), Ram Narayan (respondent No. 4/original accused No. 2) and Laxa Ram(respondent No. 5/original accused No. 4) came to be partly allowed and their conviction under Section 149, IPC was set aside, but under Sections 323, 324, 147 and 148, IPC, the conviction was maintained. They were sentenced for the period already undergone for the stated offences. As regards Mehram S/o Chhagna Ram (respondent No. 1/accused No. 5), the High Court converted the conviction under Section 302, IPC into one under Section 326, IPC on the finding that the said accused had exceeded his right of private defence. Additionally, the High Court confirmed his conviction under Section 148, IPC. Despite the charge of murder and intentionally causing death of Bhura Ram (deceased), the High Court awarded sentence of period already undergone (around five months) by the accused No. 5 and directed him to pay compensation of Rs.50,000/- (Rupees fifty thousand only) to the next of kin of the deceased –Bhura Ram.
- E 4. As aforesaid, even though the State has filed the present appeal against all the five accused persons, at the outset, it was made clear by the counsel for the State that the appeal is being pursued only against the respondent No. 1/accused No. 5 (Mehram S/o Chhagna Ram) in respect of nature of offence and on the point of sentence. The
- F counsel for accused No. 5, however, urged that the said accused had a right to challenge the finding of guilt and conviction under Section 326 and 148, IPC, recorded against him, even though the said accused had not preferred a formal appeal against the impugned judgment. To make good this submission, reliance is placed on ***Chandrakant Patil vs. State through CBI³, Sumer Singh vs. Surajbhan Singh & Ors.⁴***,
- G ***State of Rajasthan vs. Ramanand⁵*** and Section 377(3) of the Code of Criminal Procedure, 1973⁶. According to him, the accused No. 5

³(1998) 3 SCC 38

⁴(2014) 7 SCC 323

⁵(2017) 5 SCC 695

H ⁶ For short, "Cr.P.C."

was entitled to acquittal, as the prosecution had failed to substantiate the charges framed against him. In any case, in the alternative it is submitted, that the incident had occurred on the spur of the moment due to provocation given to the accused No. 5 and the said accused in retaliation and in exercise of his right of private defence, ended up in causing single injury to the deceased (Bhura Ram) without any intention to cause his death. Even for that reason, the accused No. 5 was entitled to benefit of doubt and it was not a fit case for conviction even under Section 326/148, IPC. It is urged that the accused No. 5 is a senior citizen (aged about 70-75 years) and suffering from various old age diseases and due to efflux of time, the Court ought not to entertain this appeal filed by the State. Learned counsel contends that even if it is a case of excessive exercise of right of private defence, the benefit should be given to the accused. In support of the said contention, the learned counsel has placed reliance on the decisions of this Court in **Gottipulla Venkatasiva Subbrayanam & Ors. vs. the State of Andhra Pradesh & Anr.**⁷, **Deo Narain vs. The State of Uttar Pradesh**⁸, **Subramani & Ors. vs. State of Tamil Nadu**⁹ and **State of Uttar Pradesh vs. Gajey Singh & Anr.**¹⁰.

5. We have heard Dr. Manish Singhvi, learned senior counsel for the appellant and Mr. Sushil Kumar Jain, learned senior counsel for the respondent.

6. The accused No. 5 (Mehram S/o Chhagna Ram) is justified in contending that it is open to the said accused to challenge the finding and order of conviction under Section 326/148, IPC recorded against him in the appeal filed by the State, assailing the impugned judgment of the High Court. That being the settled legal position, as expounded in **Chandrakant Patil** (supra), **Sumer Singh** (supra) and **Ramanand** (supra) including Section 377(3) of the Cr.P.C., which predicates that in the appeal filed against the sentence on the ground of its inadequacy, the accused may plead for his acquittal or for reduction of the sentence. Resultantly, we may have to consider the correctness of the finding of fact recorded by the trial Court and the appeal Court (High Court) against the accused No. 5 (Mehram S/o Chhagna Ram).

⁷ (1970) 1 SCC 235 (paragraphs 17 and 18)

⁸ (1973) 1 SCC 347 (paragraph 5)

⁹ (2002) 7 SCC 210 (paragraphs 19 to 27)

¹⁰ (2009) 11 SCC 414 (paragraph 30)

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- A 7. Reverting to the judgment of the trial Court, it is noticed that the trial Court vide judgment and order dated 21.7.1982, extensively analysed the evidence of each witness and the stand taken by the rival parties. On the basis of that analysis, the trial Court proceeded to hold that the prosecution had succeeded in substantiating the allegation that B the accused party was hiding behind the ‘Kair’bushes and on arrival of the complainant party at the scene of occurrence, came out of the bushes and assaulted the complainant party including Bhura Ram (deceased). The trial Court recorded the following finding: -

- C “24. ...Hence, it is established that place of occurrence was the ‘Kair’ bushes land, the height of ‘Kair’ bushes was 5 to 6 ft. and by the depositions of witness Mangilal (PW-11) and spot inspection report (Ex. P-21) and accused persons were hiding behind the ‘Kair’ bushes. Accordingly, the fact of accused persons duly armed with weapons hiding behind the ‘Kair’ bushes has also been established and that accused persons were the D assailants, otherwise they would not have hidden behind the ‘Kair’ bushes.”

- E It then proceeded to find that before the incident, some quarrel had taken place between accused No. 2 – Ram Narayan, Ghewar and Motaram on account of grazing goats, in which Ram Narayan had assaulted Ghewar, who belonged to complainant side. The circumstances clearly indicate that the accused persons intended to take revenge and due to which they had arrived at the place of occurrence from the village armed with lethal weapon(s) for assaulting the complainant party at an opportune moment. The trial Court then found that the accused persons had not been able to give any explanation for F coming together at the place of incident nor about the bringing of lethal weapon(s) like “kassi” at the site. The trial Court in that context observed thus: -

- G “25. ... Fourthly, accused persons have not been able to give any explanation of coming all the five accused persons altogether. Nor they have given any explanation of bringing lethal weapon like – ‘Kassi’ with them. Therefore, by the fact viz. going of accused persons from village, having armed with deadly weapons, giving beatings to Ghewarram belonging to complainant side by Ramnarayan amongst accused persons prior to the occurrence, it has been fully established that accused persons in H

order to take revenge, duly armed with lathies and ‘Kassies’ had arrived at the place of occurrence, therefore, accused persons are proved to be the aggressor.

26. In my opinion, the arguments of learned counsel appearing for the accused persons to the effect that by the prosecution evidence, revolving lathi by Mangilal is proved and, therefore, Complainant side was the assailant, does not appear having any substance. Firstly, in view of the aforesaid discussion, accused persons have been proved to be the aggressor, therefore, first revolving lathi by Mangilal after having surrounded, it cannot be said that Mangilal was assailants. Secondly, by the depositions of prosecution witnesses viz. Ramratan (PW-5), Motiram (PW-6), Annaram (PW-7), Mehram (PW-8) and Mangilal (PW-11), it has been established that Mangilal was revolving lathi while he was surrounded and was raising alarm that ‘Maare Marre’. Therefore, revolving lathi by the complainant side after assaulting was in defence and, therefore, accused persons do not get the right of private defence.”

The trial Court then went on to find that the complainant side and accused persons, both, had sustained injuries in the incident in question. The trial Court, however, opined that in the present case, non-explanation of injuries sustained by accused persons by the prosecution had no vital impact on the prosecution case, and observed thus: –

“28. ... Firstly, in the present case it has been established that accused persons were the aggressor. It has also been established that accused persons have started the occurrence. Therefore, prosecution side has given explicit evidence with regard to the genesis of the occurrence. The prosecution evidence is unambiguous and, therefore, non-submission of explanation of the injuries sustained by accused persons, does not have any effect on the prosecution case. ...”

The trial Court unambiguously noted that the injuries sustained by the accused persons are superficial and minor. After analysing the medical and ocular evidence, the trial Court found that during the scuffle, deceased Bhura Ram had caught hold of “kassi” blow inflicted by Laxa Ram (accused No. 4) and thereafter, Mehram S/o Chhagna Ram (accused No. 5) inflicted “kassi” blow from the sharpen side on the

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- A head of Bhura Ram (deceased) with intention to kill him, which blow struck on the vital part of his head. And as per the medical evidence, that injury was sufficient to cause death of Bhura Ram. The trial Court then proceeded to analyse the evidence on record and noted as follows: -
- B "39. Hence, depositions of witness Mangilal (PW-11) gets corroboration by the depositions of eyewitnesses- PW-5, 6, 7 and 8, Injury Reports Ex.P-9, 10 and PW-11 Post mortem report of deceased Bhura, Report (Ex.P-13) lodged by Mangilal immediately after the incident, spot condition memo (Ex.P-1), site-plan of the place of occurrence (Ex.P-14), recovery of blood stained lathi (Article-8) from the possession of accused Ramniwas, recovery of clothes of injured and deceased which have been found to be stained with human blood and accused persons being the aggressor and by giving beatings by accused Ramnarayan to Ghewar and Motaram belong to complainant side, prior to the occurrence and by the depositions of PW-1 it is also proved that on 14.08.81 in the evening time at village Gowa Khurd, accused persons-Heeraram, Ramnarayan, Ramniwas, Baksharam and Mehram formed an unlawful assembly and at that time accused Baksharam and Mehram were duly armed with lethal weapons like 'Kassies' and amongst the accused persons, in furtherance to their common object, accused Baksharam intentionally inflicted simple injuries with 'Kassi' from sharpen side on the hand of Mangilal and when Bhura came to rescue, then accused Mehram inflicted a 'Kassi' blow from sharpen side over the head of Bhura. It is also established that when Mehram came to rescue Bhura, then Ramniwas caused injuries with lathi over the head and shoulder of Mehram.
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- G 40. Learned Advocate for the accused persons has also contended that Bhura was come to rescue, suddenly he sustained this injury, therefore, by the act of accused Mehram, it cannot be said that he was having any motive to kill and at the most the case of the accused falls within the purview of Section 304 Clause II I.P.C. and, therefore, accused shall be acquitted of the charge under Section 302 Indian Penal Code.
- H 41. In my opinion, no substance appears in the contention raised by learned defence counsel, because by the depositions of Dr.

Ghodawat (PW-9) it is proved that in the ordinary course of nature injury No.1 on the head of Bhura was sufficient to cause death and due to this injury Bhura died. Beneath this injury the complete bone was cut in thickness. All the membranes over the brain were cut. Accordingly, it is proved that injury No.1 was sufficient to cause death in the ordinary course of nature, injury No.1 placed over the vital part of body like head, causing injury with a lethal weapon like ‘Kassi’ from the sharpen side, arriving of Bhura to rescue from backside, engaging of accused persons in giving beatings and causing very deep injuries, by which it is proved that accused have forcefully inflicted injuries and falling of Bhura immediately after sustaining injuries, by these facts, it is proved that accused Mehram was having intention to kill Bhura and he has caused head injury to Bhura with the intention to kill, due to which Bhura died. Therefore, accused Mehram S/o Chhagna caused injury to Bhura with the intention to kill. Thus, he has committed offence of homicidal death by committing murder of Bhura and, therefore, charge of committing offence under Section 302 Indian Penal Code has been fully established against accused Mehram son of Chhagna.

42. In my opinion, no substance appears in the argument of learned Advocate for the accused persons that the act of accused falls within the purview of Section 304 Part II I.P.C. Firstly, Mehram was already assailant, secondly accused Mehram has given beatings with weapon, he was standing there after making preparations and, therefore, it cannot be said that killing of Bhura by accused Mehram S/o Chhagna was sudden. Rather, it is proved that Mehram S/o Chhagna has caused injury to Bhura with the intention to kill, therefore, his case falls within Section 302 I.P.C.”

Indeed, the trial Court went on to hold that the prosecution had not succeeded in substantiating common object of committing murder of the person concerned and acquitted the accused of charge under Section 149, IPC.

8. When the matter travelled to the High Court at the instance of the accused persons by way of appeal, the Division bench of the High Court partly allowed the appeal and, if we may say so, by a cryptic judgment, which reads thus: -

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We have heard the learned counsel for the parties and have given our thoughtful consideration to the material available on record.

B Admittedly the way to field which is being claimed by the complainant party, is not a sanctioned way, so much so that it is not even recorded in the revenue record. The complainant party is claiming it through prescription. If prescription has such maturity in it that it got converted into an actionable right, the complainant party could have sought a declaration to that effect. Without taking recourse to the lawful measures, the complainant party insisted on sing that way by courtesy only. This puts the complainant party on the offensive, and in that way the complainants stand on a weaker footing when they assert that the accused assaulted them. There were enough provocations created by the complainants to the accused persons by asserting a right, which was not a legally recognized right. In that background when the complainants and the accused, entered into a conflict, then the question of common object stands ruled out. Both the parties have quarrelled, and have inflicted injuries to each other. It was almost a case of free fight and in that view of the matter, invoking Section 149 IPC is not considered proper by us and, therefore, Section 149 IPC deserves to be excluded from consideration.

C When Section 149 IPC is taken out then individual participation has to be seen to the deceased it was only accused Meh Ram, who is said to have caused injuries. All other accused persons were held guilty with the aid [sic] of Section 149 IPC. Conviction with the aid of Section 149 IPC, therefore, deserves to be set aside. After setting aside the conviction of other accused persons except Meh Ram under Section 302 IPC they stand convicted under Sections 323, 324, 147 and 148 IPC. For those offences whatever period they have already undergone can be considered sufficient and in that view of the matter, the appeal of the accused Ram Niwas, Heera Ram, Ram Narayan and Baxa Ram is allowed to the extent that the conviction under Section 302/149 IPC is set aside. Their conviction under Sections 323, 324, 147 and 148 IPC is maintained and the period already undergone which is more than 5½ month is considered sufficient to meet out the ends of justice.

Now we take up the case of accused Meh Ram. He is said to have caused the total blow. But that was in the background that both the parties fought a free fight. Meh Ram himself has sustained injuries and in that view of the matter it can be said that he cannot have the intention of causing death of the deceased. It may be said that he had exceeded his right of private defence. At best a case under Section 326 IPC can be said to be made out against him.

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In the result, the appeal of accused Ram Niwas, Heera Ram, Ram Narayan and Boxa Ram accused is partly allowed. Their conviction and sentence under Section 149 IPC is set aside and their conviction under Sections 323, 324, 147 and 148 IPC is maintained. As regards the sentence, the period already undergone is considered sufficient to meet the ends of justice.

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So far as accused Meh Ram is concerned, his conviction under Section 302 IPC is converted into one under Section 326 IPC and his conviction under Section 148 IPC is maintained. However, he is sentenced to the period already undergone. Meh Ram is directed to pay compensation to the tune of Rs.50,000/- to the next of kin of the deceased.”

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9. After having gone through the relevant evidence and judgments of the trial Court and the appeal Court (High Court), we have no reason to depart from the conclusion reached by the trial Court that there were tangible circumstances and evidence to indicate that the accused party was the aggressor, who was hiding in the bushes and appeared only after the complainant party arrived on the spot. The accused party had assembled at the spot with lethal weapon(s) and all the accused were waiting for the complainant party to arrive at the spot and started assaulting the complainant party. The blows inflicted by the concerned accused, in particular accused No. 5, were with an intention to kill Bhura Ram (deceased). The death of Bhura Ram was caused due to the blow inflicted by accused No. 5 and was a homicidal death. We have no reason to depart from the said findings recorded by the trial Court and if we may say so, the same remained undisturbed by the High Court. The High Court by its cryptic judgment, proceeded on the erroneous assumption that the accused party had been provoked due to the unauthorised entry of the complainant party on their fields and to defend their possession, they had to resort to right of private

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- A defence. While doing so, the accused party, in particular, accused No. 5 (Mehram S/o Chhagna Ram), exceeded his right of private defence. There was no common object because the incident in question occurred due to provocation and spiralled into a free fight, causing injuries to both sides. The fallacy in the reasoning of the High Court is palpable from the evidence of prosecution witnesses, which has been elaborately analysed and rightly accepted as truthful by the trial Court, substantiating the allegations against the accused party of being the aggressors. Once it is a case of accused party being the aggressors and they commenced assault on the complainant party and further, the accused No. 5 (Mehram S/o Chhagna Ram) having been found to have assaulted Bhura Ram (deceased) with intention to kill him, the question of invoking the right of private defence does not arise. In fact, no defence evidence was produced to substantiate the plea of exercise of private defence. The two theories (of being aggressors as opposed to exercise of right of private defence) are antithesis to each other.
- D 10. Had it been a case of complainant party being the aggressor, the accused party and accused No. 5 (Mehram S/o Chhagna Ram) in particular, could be heard on the factum of right of private defence. The nature of injuries caused to the complainant party and to the accused party are also indicative of the fact that the accused party was the aggressor. As regards the injuries caused to the deceased (Bhura Ram) due to the assault by the accused No. 5 (Mehram S/o Chhagna Ram), as noted in the post-mortem examination (Exhibit P-11) by Dr. Ghodawat, the same reads thus:-
 - F “1. Incised wound of size 5.1 cm. x bone deep. **This injury was in the middle parietal region of head. Underneath which bone was fully cut in obesity. All membranes covering brain were cut. Brain matter was appearing from the deepness of wound.**
 - G 2. One bruise of size 3.x2 cm. which was in the middle of left foot on front portion. Injury was ante mortem in nature. Brain matter was also cut parallel to the deepness of wound, which was cut up to half cm.”
- H In the opinion of the doctor, the cause of death of Bhura Ram (deceased) was brain injury and due to the injury No. 1. The fact that

(emphasis supplied)

the death was caused by the injury No. 1 alone, does not mean that it was not a case of homicidal death. Nor there can be presumption that there was no intention to cause death by inflicting such injury. The evidence on record has been duly analysed by the trial Court and it has been held that accused No. 5 (Mehram S/o Chhagna Ram) had caused injury No. 1 with intention to cause death of Bhura Ram (deceased) to teach lesson to the complainant party for their repeated unauthorised entry on the fields belonging to the accused party despite warnings and obstructions caused in that behalf in the past.

11. We may now usefully refer to the injury report (Exhibit D-7) of accused No. 5 (Mehram S/o Chhagna Ram), who had suffered simple injuries on his person caused by blunt weapon. The description of injuries therein reads thus: -

- “1. Abrasion 1 x 1 cm which was in the middle posterior region of left fore-finger;
2. Abrasion 1 x .3 cm. in the middle top portion of left index finger;
3. Bruise 6 x 1 cm. over Rt. Shoulder oblique placed.
4. Two abrasions 1.5 x 4 cm. in the lower portion of Rt. Thigh, both were placed at a distance of 0.5 cm. each other.
5. Injured was complaining pain in his left foot.”

From the description of injuries, it is amply clear that these injuries are superficial and as rightly found by the trial Court, will have no bearing on the prosecution case, even if the same remain unexplained. The fact that some of the accused had received grievous injuries, does not belie the prosecution case that the accused were the aggressors. There was no reason for the accused to remain in hiding position equipped with lethal weapon(s), waiting for the arrival of the complainant party and on their arrival, to immediately commence attack and cause fatal injuries to the complainant party. Such being the factual matrix, it is unfathomable as to how the plea of right of private defence could be invoked by the accused. If such a plea is not available, the question of answering the plea in favour of the accused that it was a case of excessive exercise of right of private defence does not arise at all. The basis of the High Court judgment being flawed in this regard, the

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- A conclusion recorded by it cannot stand the test of judicial scrutiny. For the same reason, the question of converting the offence under Section 302 to one under Section 326 cannot be countenanced, both on facts and in law.
12. Indeed, the trial Court's finding of guilt recorded against accused No. 5 (Mehram S/o Chhagna Ram), is unexceptionable. However, on the nature of offence, the trial Court considered the plea of the accused only in reference to offence falling under Section 304 Part II of the IPC. The trial Court rejected that argument and we must uphold that conclusion, because the finding of fact is that the act was done by the accused with the knowledge that it is likely to cause death, and with intention to kill Bhura Ram (deceased). But before we express our final opinion, it is necessary to examine as to whether the case in hand would be covered under the exceptions predicated in Section 300, IPC, so as to apply Section 304, IPC – be it Part I or Part II thereof. The facts of the present case would indicate that the accused, in particular accused No. 5, at the relevant time, was deprived of the power of self-control by grave and sudden provocation due to repeated unauthorised entry on the fields belonging to accused party. Further, the solitary fatal blow on the vital part of the head by accused No. 5 caused the death of Bhura Ram (deceased). The provocation was not invited by the accused party, but was obviously at the instance of the complainant party, who entered the fields unauthorisedly despite the objection taken by the complainant party in that regard on the same day earlier. However, as the death of Bhura Ram (deceased) was caused by the act of accused No. 5 giving one fatal blow on the head, which was with the intention of causing his death or causing such bodily injury as is likely to cause death, the case would be covered by Section 304 Part I, IPC. It is certainly not a case to simply proceed under Section 326 of the IPC, as held by the High Court. We disapprove that approach of the High Court. Even if the High Court had justly applied Section 326, IPC, we fail to appreciate as to how the High Court could have imposed sentence only for a period (about five months) undergone considering the nature and gravity of the offence and the background in which it is committed by the accused party, in particular, accused No. 5.
13. The learned counsel for the accused No. 5 was at pains to persuade us that the said accused is now about 70-75 years of age and at this distance of time, it may not be appropriate to send him back

to jail. Taking overall view of the matter, we are not impressed by this submission. Even in case of offence under Section 326, IPC, which commended to the High Court, the same was punishable with imprisonment for life or with imprisonment of either description which may extend to ten years and also liable to fine. Had it been a conviction under Section 326, as aforesaid, the sentence of only about five months in the facts of the present case, by no stretch of imagination, was adequate.

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14. Be that as it may, in our considered opinion, the accused No. 5 (Mehram S/o Chhagna Ram) deserves to be convicted for the offence punishable under Section 304 Part I of the IPC. For the reasons already recorded, it is unnecessary for us to dilate on the decisions of this Court pressed into service regarding approach to be adopted by the Court in respect of cases pertaining to accused exceeding his right of private defence.

15. Taking overall view of the matter, we are of the considered opinion that in this case, the accused No. 5 (Mehram S/o Chhagna Ram) deserves to be awarded sentence of ten (10) years of simple imprisonment and he must pay compensation to the tune of Rs.50,000/- (Rupees fifty thousand only) to the next kin of the deceased, if it is yet to be paid in terms of order of the High Court.

16. Accordingly, we partly allow this appeal. The impugned judgment of the High Court and that of the trial Court are modified by convicting the accused No. 5 (Mehram S/o Chhagna Ram) for offence punishable under Section 304 Part I and Section 148, IPC. He is sentenced to undergo simple imprisonment for ten (10) years for offence punishable under Section 304 Part I and six (6) months' simple imprisonment for offence punishable under Section 148 and fine of Rs.100/- on each count, in default to undergo fifteen (15) days' additional simple imprisonment. Both sentences to run concurrently. Further, the period already undergone by accused No. 5 (Mehram S/o Chhagna Ram) shall be adjusted by giving the benefit under Section 428, Cr.P.C. In addition, the accused No. 5 (Mehram S/o Chhagna Ram) is directed to pay compensation to the tune of Rs.50,000/- (Rupees fifty thousand only) to the next of kin of the deceased (Bhura Ram), if already not paid. The bail bonds stand cancelled and the accused No. 5 (Mehram S/o Chhagna Ram) is directed to surrender within six weeks from the date on which lockdownin the country due to pandemic COVID-19

A including in the State of Rajasthan is relaxed, to undergo the remaining sentence period.

17. The appeal is disposed of in the above terms. Pending interlocutory applications, if any, shall stand disposed of.

Ankit Gyan

Appeal disposed of.