

(2002) 02 AHC CK 0003
In the Allahabad High Court
Case No : Criminal Appeal No. 842 of 1981

Abdul Hafij Khan and Others (In Jail)	APPELLANT
Vs	
State of U.P.	RESPONDENT

Date of Decision : 27-02-2002

Acts Referred:

Evidence Act, 1872 — Section 105
Penal Code, 1860 (IPC) — Section 302, 307, 34, 84

Citation : (2002) 1 ACR 1016

Hon'ble Judges : U.S.Tripathi, J;J.C. Gupta, J

Bench : Division Bench

Advocate : C.S. Saran, Amar Saran, Bhagwati Prasad and Sunil Singh, for the Appellant; Pradeep Pandey, Dy. G. A, for the Respondent

Judgement

U.S. Tripathi, J.—The Appellants Abdul Hafij Khan, Smt. Shakila Bano, Smt. Sahrunnisa and Siraj Khan have preferred this appeal against the judgment and order dated 18.04.1981 passed by Sri N. S. Gahlaut, the then VI Ith Additional Sessions Judge, Allahabad in S. T. No. 257 of 1980, convicting the Appellants u/s 302 read with Section 34, Indian Penal Code and Section 307 read with Section 34, Indian Penal Code and sentencing them to undergo imprisonment for life u/s 302 read with Section 34, Indian Penal Code and R.I. for a period of three years u/s 307 read with Section 34, Indian Penal Code Both the sentences were ordered to run concurrently.

2. The prosecution story, briefly stated, was as under:

Appellant Abdul Hafij Khan was an Amin in Irrigation Department and was residing in Canal Colony situated at Kasba Koraon, P.S. Koraon, district Allahabad. Smt. Saharunnisa Appellant was wife of Appellant Abdul Hafij Khan and was also residing with him. Smt. Shakila Bano Appellant was the daughter and Siraj Khan Appellant was son-in-law of Abdul Hafij Khan. Smt. Shakila Bano and Siraj Khan had also come to the quarter of Abdul Hafij Khan Appellant and were residing there. Appellants Abdul Hafij Khan and Smt. Saharunnisa had

three sons, namely, Shamsad Ali, deceased aged about 7 years, Naushad Ali Khan deceased, aged about 4 years and Saukat Ali Khan aged about 3 years.

3. Ram Hujur Yadav (P. W. 3) was Clerk in Irrigation Department and was also residing in said colony. Shyam Mohan Airan (P. W. 1) Assistant Engineer/S.D.O. was also residing in said colony.

4. On 27.10.1978 at about 12.00 noon, an "Ajan" was announced from the quarter of Abdul Hafij Khan Appellant. Since it was not usual time of performing Namaz, Habib Ullah alias Gullhar (P. W. 4) who had gone to the house of Buddhi Ram, Overseer in the Canal Colony, reached to the house of Appellants to know why Ajan was being announced at unusual time. He peeped into the window of the house of the Appellants and saw that Smt. Shakila Bano Appellant was beating elder son of Abdul Hafij Khan with a fookani (small pipe meant for igniting fire). Abdul Hafij Khan, his wife and Siraj Khan were also present there. Abdul Hafij Khan had caught hold of the above boy and his wife and son-in-law were standing there. Abdul Hafij Khan Appellant throttled the neck of the boy and he died. Thereafter, Smt. Shakila Bano Appellant and Abdul Hafij Khan repeated same act with another boy who also died. Observing it, Habib Ullah (P. W. 4) became frightened and started running. While leaving the spot, he also heard utterance "Boy would become alive." Ram Hujur Yadav (P. W. 3) Head Clerk in the Office of Belan Canal Division observed crowd in front of the quarter of the Abdul Hafij Khan. He went there and observed that two boys have died and were lying on the charpai and one boy was lying near the daughter of Abdul Hafij Khan (Smt. Shakila Bano). Smt. Shakila Bano was uttering some thing in some unknown language and Abdul Hafij Khan Appellant was saying that two boys who have died would become alive on sacrifice of third one. Sri Shyam Mohan Airan (P. W. 1) returned from tour at about 7.00 p.m. He also observed crowd in front of quarter of Abdul Hafij Khan. He called Head Clerk Ram Hujur Yadav and enquired about the crowd. He told that some evil spirit had come on the daughter of Abdul Hafij Khan. Thereafter, Sri Shyam Mohan Airan (P.W. 1) called B. P. Singh and Sri R. R. Singh Junior Engineers and went to the house of Appellants along with them. There he observed that two boys were lying dead on the charpai and one boy was lying in veranda. The daughter of Abdul Hafij Khan had caught hold of hairs of the boy and was reciting something. Abdul Hafij Khan Appellant was saying that the two boys have been sacrificed to please the god and they would become alive after some time. Wife of Abdul Hafij Khan Appellant and his son-in-law were also present there.

5. Sri Shyam Mohan Airan (P. W. 1) dictated report to Ram Hujur Yadav (P.W. 3) which was fairly drafted by Sri B. R. Singh, Junior Engineer and thereafter, Shyam Mohan Airan (P.W. 1) signed it. Taking the above report (Ext. Ka-1) Sri Shyam Mohan Airan (P.W. 1) went to P.S. Koraon by official jeep and lodged report at 7.30 p.m. The Chick F.I.R. (Ext. Ka-4) was prepared by Head Constable Sri Ram Singh (P.W. 6) who made an endorsement of the same at G.D. report (Ext. Ka-5) and registered a case under Sections 302 and 307, Indian Penal Code

against all the Appellants.

6. The investigation of the case was taken up by Sri Kamal Singh, Investigating Officer (P.W. 7). He interrogated Shyam Mohan Airan (P.W. 1) at the police station and reached the spot. Appellant Abdul Hafij Khan was present in veranda of his quarter. Two boys Shamsad Ali and Nausad Ali were lying dead on charpai. There were injuries on their person. The third boy Shaukat Ali was lying flat on the floor and Appellant Shakila Bano had caught hold of his hairs from one hand and was pressing his neck from the other hand. Siraj Ahmad and Sahrunnisha were standing on their one leg. Abdul Hafij Khan stopped the Investigating Officer from proceeding further saying "Paigambar" had come on his daughter. Two persons have been sacrificed and third one would be sacrificed. The Investigating Officer also saw some articles of worship. Lantern and petromax were also emitting light. The Investigating Officer rescued the third boy Shaukat Ali and arrested all the Appellants.

7. The Investigating Officer conducted inquest of the dead bodies of Shamsad Ali and Nausad Ali and prepared inquest reports and other relevant papers (Ext. Ka-8 to Ka-14). The dead bodies were sealed and sent to mortuary for post mortem through constables Shambhoo Narain and Chandra Bhushan (P.W. 5). The Investigating Officer interrogated Ram Hujur Yadav (P.W. 3). He inspected the place of occurrence and prepared site plan (Ext. Ka-15). He also took into possession blood stained clothes from the spot, sealed it and prepared recovery memo (Ext. Ka-16). The Investigating Officer also recovered one fookani, one chimani, two books of unknown language, earthen lamp, one packet of Agarbatti and one match box and prepared recovery memo (Ext. Ka-17). The boy Shaukat was given in supurdgi of Riyasat Husain, Patarol vide supurdginama (Ext. Ka-18). Thereafter, the Investigating Officer interrogated Habib Ullah (P.W. 4) and other witnesses.

8. Autopsy on the dead bodies of Naushad Ali and Shamsad Ali were conducted on 28.10.1978 at 4.30 p.m. and 5 p.m. respectively by Dr. R. B. Singh (P.W. 2), who found multiple patches of contusion on the neck and cause of death was due to throttling. He prepared post mortem reports (Exts. Ka-3 and Ka-2) respectively.

9. The Investigating Officer completed remaining investigation and submitted charge-sheet (Ext. Ka-19) against all the Appellants.

10. Cognizance of the case was taken by the C.J.M., Allahabad, who committed the case of the accused to the Court of Sessions.

11. All the Appellants were charged with the offences punishable u/s 302 read with Section 34, Indian Penal Code and Section 307 read with Section 34, Indian Penal Code. The Appellants pleaded not guilty. Appellant Abdul Hafij Khan contended that police came to his house and he told the police officer that unprecedented incident had taken place and he may be detained under home arrest. The police believed it and returned. Thereafter, the police again came with

force. Naushad Ali and Shamshad Ali had not died till then. The police arrested him. Smt. Saharunisa wife of Appellant Abdul Hafij Khan contended that on the date of occurrence, her daughter and son-in-law had to come. She and her husband had gone to Bus Station to receive them. They returned along with their daughter and son-in-law to their house after 3.00 p.m. and observed that her two sons were lying dead. She started weeping. In the meantime, police came and arrested them. Observing his sons dead, her husband became mad.

12. Appellant Smt. Shakila Bano and her husband Siraj Khan contended that on the date of occurrence, they came to the house of Abdul Hafij Khan from their home district Ghazipur and found the dead bodies of two sons of Abdul Hafij Khan. They started weeping. The police came and apprehended him.

13. The prosecution to prove its case, examined Shyam Mohan Airan (P.W. 1), Dr. R. B. Singh (P.W. 2), Ram Hujur Yadav (P.W. 3), Habib Ullah (P.W. 4), Constable Chandra Bhushan (P.W. 5), Head Constable Ram Singh (P.W. 6), Kamal Singh, Investigating Officer (P.W. 7) and Constable Kalim Ullah (P.W. 8). The Appellants did not adduce any evidence in their defence.

14. The learned Sessions Judge on considering the evidence of the prosecution came to the conclusion that the prosecution has proved its case beyond doubt against the accused persons that all the accused persons planned a pooja to sacrifice three sons of Abdul Hafij Khan to satisfy Devta or Peer Paigamber. Two of the children were killed in this process and third one was going to be killed when the police arrived and foiled the attempt. Therefore, all the accused were guilty of the offences punishable u/s 302 read with Section 34 and Section 307 read with Section 34, Indian Penal Code With these findings he convicted them under said sections and sentenced them as mentioned above.

15. Aggrieved with their above conviction and sentences the Appellants have preferred this appeal.

16. We have heard Sri Sunil Singh learned Counsel for the Appellants and Sri Pradeep Pandey, Brief Holder for the State and have perused the evidence on record.

17. The death of two sons of Appellant Abdul Hafij Khan and Smt. Sahrunnisa is not disputed to the Appellants. Sri Shyam Mohan Airan (P.W. 1), Ram Hujur Yadav (P.W. 3) and Habib Ullah (P.W. 4) stated when they reached the spot the two sons of Abdul Hafij Khan namely Shamshad Ali aged about 7 years and Naushad Ali aged about 4 years respectively were lying dead. The Investigating Officer Sri Kamal Singh (P.W. 7) also stated that when he reached the spot two sons of Abdul Hafij Khan namely Shamshad and Naushad Ali were lying dead. He conducted inquest of dead bodies of above deceased persons, sealed it and sent for post mortem. Constable Chandra Bhushan (P.W. 5) and Habib Ullah (P.W. 4) stated that Constable Subh Narain took sealed dead body of two boys from the spot to mortuary and produced before the Doctor in sealed condition. Dr. R. B. Singh (P.W. 2) who conducted autopsy on the dead bodies of Naushad Ali and

Shamshad Ali found following facts:

Dead body of Naushad Ali aged about 4 years The deceased had moderately built body Rigor mortis passed off from the upper extremities and passing off from the lower extremities. Tongue protruded. Eyes open bulged. Face cyanosed veins prominent and visible over the face. Lips livid. Froth present in nostrils.

The doctor found following ante mortem injuries on the person of deceased:

- (1) Few patches of contusions and abrasions in an area of 2" on the anterior surface upper 1/3 of neck.
- (2) Contusion surrounding the whole of right forearm.
- (3) Lacerated wounds 2" x 1" on the middle of left forearm and fractured bone peeping through it.
- (4) Contusion in the post aspect of right leg 3" x 1" in the middle.
- (5) Contusion on the antero lateral aspect of left leg, middle 1/3. 2" x 1" in size.

The internal examination showed that all the bones below injury Nos. 2, 3, 4 and 5 are fractured. Membranes and brain were congested. Pleura congested. Larynx and trachea congested. Hyoid bone fractured. Both the lungs congested and contained frothy blood. Large and small intestine were empty.

Cause of death according to the doctor was due to throttling as result of injury No. 1.

Dead body of Shamshad aged about 7 years The deceased had moderately built body. Rigor mortis passed off from upper extremities and passing off from lower extremities. Face cyanosed. Veins prominent over the face. Eyes bulged out. Lips livid. Tongue protruded between the teeth and swollen. Froth coming out from the nostrils.

The doctor found following ante mortem injuries on the person of the deceased:

- (1) Multiple small patches of contusions on the surface of neck in the upper 1/3, out of which thumb impression of both hands near the centre was easily recognizable. It was in an area of 4".
- (2) Contusion 2" x 1" on the left side front of chest in infraclavicular region.

The internal examination showed membranes, brain and pleura congested. Larynx, trachea and bronchi were congested. Hyoid bone fractured. Both lungs were congested and contained frothy blood. Pericardium congested. Stomach and small intestine were empty. Large intestine contained faecal matter.

Cause of death according to doctor was due to throttling as a result of injury No. 1.

18. The Appellants had not cross-examined the above witnesses on the above

point and had not challenged the above testimony of ocular witnesses and the medical evidence. As such, it is proved that Naushad Ali and Shamshad Ali aged about 4 and 7 years respectively, the two sons of Appellant Abdul Hafij Khan were killed by throttling.

19. It is also not disputed that occurrence took place on 27.10.1978 between 9.00 a.m. and 7.00 p.m. in the house of Appellant Abdul Hafij Khan. Habib Ullah (P.W. 4) stated that he reached the house of Appellant at 12.00 or 12.30 p.m. when he heard unusual announcement of Azan and found that Abdul Hafij Khan, first beat his two sons with fookani and thereafter, they were throttled and died. Ram Hujur Yadav (P.W. 3) stated that when he reached the house of Appellant Abdul Hafij Khan found his two sons lying dead and third one was lying on the floor whose hairs were caught hold of by Smt. Shakila Bano. Sri Shyam Mohan Airan (P.W. 1) stated that when he reached the quarter of Appellant Abdul Hafij Khan saw that his two sons lying dead and third one was lying in veranda. His hairs were caught hold of by Smt. Shakila Bano who was enchanting something. The Appellants have also admitted that the two sons of Abdul Hafij Khan were lying dead on the spot as such date, time and place of occurrence were also established.

20. The case of the prosecution was that the Appellants chalked out a plan to sacrifice the three sons of Abdul Hafij Khan to please some Peer Paigamber and they succeeded in sacrificing the two boys, namely, Naushad and Shamshad aged about 4 years and 7 years respectively and were attempting to sacrifice the third one aged about 2-1/2 years but in the meantime, the police arrived and apprehended them.

21. To prove the above case, the prosecution relied on ocular testimony of Habib Ullah (P.W. 4), Ram Hujur Yadav (P.W. 3), Shyam Mohan Airan (P.W. 1) and Kamal Singh, Investigating Officer (P.W. 7).

22. Habib Ullah (P.W. 4) stated that on the date of occurrence, i.e., 27.10.1978, he had gone to the house of Buddhi Ram Singh, Overseer situated in Canal Colony in Kasba Koraon. The house of Buddhi Ram Singh was situated at a distance of 20 paces towards west of the house of Abdul Hafij Khan. Buddhi Ram Singh was not present at his house and, therefore, he was waiting for him at his house. At about 12.00-12.30 noon, he heard announcement of Azan from the house of Abdul Hafij Khan. Since it was unusual time for announcement of Azan he came to the house of Appellant Abdul Hafij Khan to enquire about it. He peeped into the house of Appellant Abdul Hafij Khan through the window and saw that Smt. Shakila Bano daughter of Appellant Abdul Hafij Khan was beating a boy with a fookani. Abdul Hafij Khan, Siraj and wife of Abdul Hafij Khan were also present there. Abdul Hafij Khan had caught hold of the said boy and remaining two were standing there. Thereafter, Appellant Abdul Hafij Khan throttled the neck of the boy. The boy died. Same act was repeated with the second boy and he also died. Observing it he started running. While he was running he heard voice "Jinda kar Denge, Jinda kar Denge" (would make alive,

would make alive).

23. Learned Counsel for the Appellants contended that presence of the witness on the spot is doubtful, as according to his evidence he had gone to the house of Buddhi Ram Singh Overseer at about 9.30 a.m. and Buddhi Ram Singh was not present at his house. Then he had no occasion to remain there till 12.00 noon. But the witness had clarified in his cross-examination that he was a labour and had gone to the house of Buddhi Ram Singh for some work as he had to engage some labourer. That when Buddhi Ram Singh did not meet at his house he was waiting for him. It was not unusual for the witness if he waited for the Overseer for some time as he had to obtain work from him.

24. The presence of witness was again challenged on the ground that according to evidence of the witness he saw the occurrence from the window of the house of Abdul Hafij Khan, but the situation of window shown at place 6 in the site plan (Ext. Ka-15) was such that a wall of room was intervening between the room of occurrence and the window and therefore, he could not see the occurrence. This argument has no force as the witness stated that the place of sacrifice in the room was visible from the window. It was not got clarified from the witness that western wall of the room of the occurrence was obstructing and place of sacrifice was not visible from the window. The Investigating Officer had shown the place of window in sketch map and it was not on scale. Therefore, there appears no force in the above contention that the place of sacrifice was not visible from the window in the western wall of the house of Appellant.

25. The testimony of the witness was again criticised on the ground that the witness had told before the Investigating Officer that occurrence took place at 9.30 a.m. but the witness stated that he reached the house of Appellant at 12.00-12.30 p.m. Having gone through the entire evidence of the witness we find that the witness reached the house of Buddhi Ram Singh at 9.00-9.03 a.m. and waited for Buddhi Ram till 12.00 noon and thereafter, went to the house of Appellant Abdul Hafij Khan. It is true that according to the evidence of Kamal Singh (P.W. 7) the witness told before him that occurrence took place at about 9.30 a.m. The witness might have stated said time as time of his arrival to the house of Buddhi Ram Singh. Therefore, this aspect does not falsify the evidence of the witness.

26. It was further contended that the witness had no any occasion to know the Appellant nor was knowing them. The witness stated that his house was at a distance of about one Km. from the Canal Colony and he was knowing the Appellants from before. However, he stated that he was knowing Abdul Hafij Khan by his name and was not knowing the names of other Appellants nor had any occasion to know the name of other Appellants. But it is clear from evidence on record that when the witness reached the house of Appellants there was a crowd. He was knowing Abdul Hafij Khan by his name. If he was not knowing the other Appellants by their respective names, he would have no difficulty in knowing their names by enquiring from the persons present on the spot.

Therefore, he was in a position to know the name of Appellants.

27. It was further contended that that witness admitted that he had appeared as a witness in one other case from the side of police and therefore, he was a professional witness. By appearing as a witness in one case, a person does not become a professional witness unless it was so held by the Court. Moreover, it was also not got clarified as to what was the case and why he became witness in the said case. Therefore, the witness cannot be said a professional or got up witness.

28. Ram Hujur Yadav (P.W. 3) head clerk in the Canal Division, resided in the Canal Colony, Koraon. He stated that at about 6.30 p.m. on 27.10.1978 he observed crowd in front of the house of Abdul Hafij Khan went there and observed the two sons of Abdul Hafij Khan were lying dead on the charpai and third one was lying on floor near the daughter of Abdul Hafij Khan who was enchanting something in unknown language. Abdul Hafij Khan was saying that two boys had died but they would become alive. He also said pointing out the third son that on his sacrifice all the three sons would become alive. Thereafter, he came back. On enquiry, he also told this fact to Sri Shyam Mohan Airan, S.D.O. Thereafter, he again came to the spot in the company of Sri Shyam Mohan Airan, S.D.O., B. P. Singh and B. R. Singh. He prepared report on the dictation of Sri Airan.

29. It is not disputed that the witness was residing in the same Colony and was head clerk in the Canal Department. Observing crowd in front of the house of Appellant Abdul Hafij Khan, it was but natural for him to go there and to know the reason of crowd. There was nothing in the cross-examination of the witness to disbelieve him. The learned Counsel for the Appellant could not show any ground by which the testimony of witness could not be relied on.

30. Sri Shyam Mohan Airan (P.W. 1) was Assistant Engineer/S.D.O. in the Canal Department and was residing in the Canal Colony, Koraon. According to his evidence, on the evening of 27.10.1978 he returned from tour at about 7.00 p.m. and observed crowd in front of the house of Abdul Hafij Khan, Amin. He called Ram Hujur Yadav (P.W. 3) head clerk and enquired about the crowd. He told that some evil Spirit had come on the daughter of Abdul Hafij Khan and, therefore, crowd had collected. He also called Junior Engineer B. P. Singh and R. R. Singh and in their company went to the house of Abdul Hafij Khan where he observed that two sons of Abdul Hafij Khan were lying dead on the charpai and the third son was lying in the veranda and daughter of Abdul Hafij Khan had caught hold of his hairs and was enchanting something. Abdul Hafij Khan was saying that two boys had been sacrificed to Devta and they would become alive after some time. Smt. Shakila Bano daughter of Abdul Hafij Khan, his son-in-law and his wife were also present there. The witness had recognized all the Appellants inside the Court.

31. The witness is admittedly superior officer of the Appellant Abdul Hafij Khan

and probably he was the highest officer in the Canal Colony. Therefore, it was but natural for him to reach the spot observing crowd there. The witness had also dictated the report and had gone to police station by his jeep where he reached at 9.30 p.m.

32. The learned Counsel for the Appellants contended that on his own showing, the witness reached Canal Colony at 7.00 p.m., thereafter, went to the house of the Appellant Abdul Hafij Khan, returned from there, dictated F.I.R. and still claimed that he reached the police station at 7.30 p.m. which was not possible. This argument has no force as the police station is only at a distance of one and half km. from the Canal Colony and the witness went to police station in the official jeep. He could reach the police station within 5 or 10 minutes and he could see the occurrence and dictate the report within remaining 20-25 minutes.

33. The witness had no grudge or ill-will with the Appellants and there is nothing in his cross-examination to disbelieve his testimony.

34. Sri Kamal Singh, Investigating Officer (P.W. 7) stated that after registration of case, he interrogated Sri Airan (P.W. 1) at the police station and then reached at the house of Abdul Hafij Khan. There he observed that two boys Shamshad Ali and Naushad Ali were lying dead on the charpai and third boy Shaukat Ali was lying flat on the floor. Shakila Bano had caught hold of his hairs from one hand and was pressing his neck from other hand. Wife and son-in-law of Abdul Hafij Khan were standing on their one leg. When he proceeded towards them, Abdul Hafij Khan stopped him saying that Paigamer had come on his daughter. He had sacrificed two and would sacrifice third one. Then he arrested all the Appellants.

35. The witness was investigating the case and reached the spot after registration of the case. The fact which was observed by the witness on the spot is his direct evidence. There is nothing in the cross-examination of the witness to disbelieve him. The learned Counsel for the Appellant could not show any discrepancy or infirmity in the evidence of the Investigating Officer. The evidence of the Investigating Officer was thus very natural.

36. Sri Shyam Mohan Airan (P.W. 1) had also stated that when he reached the spot, Abdul Hafij Khan Appellant was saying, "These two boys had been killed to sacrifice Devta and would become alive after some time." Ram Hujur Yadav (P.W. 3) and Habib Ullah (P.W. 4) also stated that Abdul Hafij Khan had said so before them. This was an extra judicial confession of Abdul Hafij Khan before above witnesses and finds support from medical evidence and other evidence referred to above.

37. The learned Counsel for the Appellant contended that the conduct and behaviour of Abdul Hafij Khan showed that he was not in his senses and he was suffering from some sort of insanity or was of unsound mind. Therefore, Appellant Abdul Hafij Khan is entitled to get the benefit of Section 84, Indian Penal Code There is no such plea that Appellant Abdul Hafij Khan or any other member of his family was suffering from insanity and they did the act under

influence of insanity.

38. The Apex Court in the case of State of Madhya Pradesh Vs. Ahmadullah, , held that the burden of proof that the mental condition of the accused was, at the crucial point of time, such as is described by Section 84, Indian Penal Code, lies on the accused, who claims the benefit of this exception vide Section 105 of the Evidence Act (Ill. a). The settled position of law is that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for acts unless the contrary is proved. Mere ipsi dixit of the accused is not enough for availing the benefit of the exceptions under Chapter IV.

39. In Dahyabhai Chhangalihal Thakur v. State of Gujarat (II)1965 ACC 93, the Apex Court after referring to various Text books and the earlier pronouncements of the Court held:

The doctrine of burden of proof in context of the plea of insanity may be stated in the following propositions:

(1) The prosecution must prove beyond reasonable doubt that the accused has committed the offence with the requisite mens rea and the burden of proving that always rests on the prosecution from the beginning to the end of the trial.

(2) There is a rebuttable presumption that the accused may not be insane when he committed crime, be in the sense laid down by Section 84, Indian Penal Code, the accused may rebut it by placing before the Court all the relevant evidence-oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rest upon a party to civil proceeding.

(3) Even if the accused is not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution must raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged.

40. To the same effect is the judgment of Bhikari Vs. State of Uttar Pradesh,

41. In the case of T. N. Laxmaiah v. State of Karnataka 2001 (3) ACR 2766 ; (XLIII) 2001 ACC 1129, the Apex Court considering previous decision held that under Evidence Act the onus of proving any exception mentioned in Chapter IV lies on the accused though the requisite standard of proof is not the same as expected from the prosecution. It is sufficient if an accused is able to bring his case within the ambit of any of the general exceptions by the standard of preponderance of probabilities, as a result of which he may succeed not because that he proves his case to the hilt but because of the version given by him casts a doubt on the prosecution case.

42. The Appellants in this case have not led any evidence in proof of the plea of

insanity. There is nothing on the record to infer that the accused was of unsound mind at or about the time of occurrence. His behaviour at the time and subsequent to the commission of the offence clearly indicates that he knew and was capable of knowing the nature of the act done by him. It had also not been suggested to the witnesses that Appellants Abdul Hafij Khan or Shakila Bano had any history of mental case, or they were ever diagnosed or treated for the same. Sri Shyam Mohan Airan (P.W. 1) and Ram Hujur Yadav (P.W. 3), who were immediate officers of the Appellant Abdul Hafij Khan had not indicated any such mental disorder of above Appellants. Contrary to it, Shyam Mohan Airan (P.W. 1) stated that when he reached the spot, Abdul Hafij Khan was mentally fit and he had also talk with him for about five minutes.

43. Learned Counsel for the Appellants further contended that the Appellant Abdul Hafij Khan might be a paranoid and he could lose his normal frame of mind and, therefore, he cannot be held liable for his act. Paranoid is not only a person of unsound mind but a paranoid suffers from special and peculiar ideas and visions which are different from other persons of unsound mind. As a result, a paranoid within moments may completely lose his normal frame of mind and be seized of special emotions thereby impelled to behave wildly and such sudden fit on emotions may also vanish within moment. For a paranoid, there is no lucid interval as may be found in other cases of insanity or in persons afflicted by unsound mind. But there is also nothing on record to show that the Appellant Abdul Hafij Khan or Smt. Shakila Bano were paranoid persons and were ever diagnosed as paranoid. There is no evidence that they were ever treated for such mental disease. Contrary to it Appellant Abdul Hafij Khan was an Amin in Canal Department and there is nothing on record to show or suggest that he was ever diagnosed as patient of paranoid or behaved so. The fact that Abdul Hafij Khan was in active servie and discharging his official duties completely rules out of his being a paranoid. The evidence on record shows that Abdul Hafij Khan Appellant told to Ram Hujur Yadav (P.W. 3) and Shyam Mohan Airan (P.W. 1) that the two boys had been sacrificed to please Devta and when third one would be sacrificed, then all would become alive. Some articles for Pooja were also found on the spot and were recovered by the Investigating Officer. At that time, the Appellant Abdul Hafij Khan was neither in any sort of insanity nor under influence or control of insanity and he was doing the act of sacrifice knowingly and consciously to please the Devta. The act of Appellant Abdul Hafij Khan done before the above named witnesses and what he told them demonstrated that at the time of commission of offence, he could explain his intended action with logic. Therefore, in the facts and circumstances of the case, it has been clearly established by the prosecution that the Appellants Abdul Hafij Khan and Smt. Shakila Bano were not incapable of understanding the implication of their acts. We are, therefore, satisfied that the Appellants Abdul Hafij Khan and Smt. Shakila Bano were sane and fully understood the implications of the act done by them and in no case were of unsound mind within the meaning of Section 84, Indian Penal Code at the relevant time. The requisite mens rea is thus not

missing in the instant case.

44. From the evidence discussed above, we are satisfied that the prosecution has successfully established the guilt of Abdul Hafij Khan and Smt. Shakila Bano for the offences punishable u/s 302 read with Section 34, Indian Penal Code for murdering the two boys, Naushad Ali and Shamshad Ali and for the offence punishable u/s 307 read with Section 34, Indian Penal Code for attempt to murder Shaukat Ali.

45. Regarding culpability of Smt. Saharunnisa and Siraj Khan, the evidence of the prosecution was that they were present on the spot and were standing on their one leg. No overt act or role had been assigned to either of them. There is also no evidence on record to show that the above two Appellants had shared the common intention of Abdul Hafij Khan and Smt. Shakila Bano in sacrificing the two boys. It was argued by the learned State counsel that the fact that these two Appellants did not raise any objection to the unlawful acts of the remaining Appellants nor stopped them from doing so, therefore, it could be inferred that they shared their common intention. We are not impressed by this submission. It is true that common intention may be presumed from circumstances but that presumption is also subject to the same restrictions as other presumptions and it should not take the form of a surmise or conjecture. It is well established that inference of common intention should never be drawn unless it is a necessary inference deducible from the circumstances of the case. There should be clear and clinching circumstances to show prior meeting of mind. In the present case, no such circumstances exist. Their silence might be due to fear of Abdul Hafij Khan. In the absence of any clear evidence regarding their specific role, we are of the view that by way of abundant caution, they are entitled to the benefit of doubt and acquittal.

46. The appeal is partly allowed and partly dismissed. Conviction and sentence of the Appellants Smt. Saharunnisa and Siraj Khan are set aside and they are acquitted of the offences punishable u/s 302 read with Section 34, Indian Penal Code and Section 307 read with Section 34, Indian Penal Code. They are on bail. They need not surrender. Their bail bonds are cancelled and sureties are discharged.

47. The conviction and sentence of the Appellants Abdul Hafij Khan and Smt. Shakila Bano are confirmed and the appeal preferred by them is, accordingly, dismissed. They shall surrender before the C.J.M., Allahabad, to serve out the sentences. The C.J.M., Allahabad, is also directed to secure arrest of the Appellants Abdul Hafij Khan and Smt. Shakila Bano by issuing non-bailable warrants and send them jail to serve out the sentences and submit compliance report within a month.

48. Office is directed to send a copy of this order to C.J.M., Allahabad, for information and necessary action.