
(2017) 02 AHC CK 0220
In the Allahabad High Court
Case No : 151 of 1998

Babu

APPELLANT

Vs

State Of U.P.

RESPONDENT

Date of Decision : 06-02-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#) - Power to examine the accused
[Indian Penal Code, 1860](#), [Section 304](#), [Section 34](#), [Section 323](#), [Section 504](#), [Section 304\(1\)](#), [Section 304\(2\)](#) - Punishment for culpable homicide not amounting to murder - Acts done by several persons in furtherance of common intention - Punishment for voluntarily causing hurt - Intentional insult with intent to provoke breach of the peace - Punishment for culpable homicide not amounting to murder - Punishment for culpable homicide not amounting to murder
[Evidence Act, 1872](#), [Section 32\(1\)](#) - Case in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant

Citation : (2017) 02 AHC CK 0220

Hon'ble Judges : Anil Kumar Srivastava-Ii

Bench : Single Bench

Advocate : A.K.Shukla, Santosh Kumar Kanaujia

Final Decision : Allowed

Judgement

1. The appellants have preferred this appeal against the judgment and order dated 28.2.1998 passed by the First Additional Sessions Judge, Lakhimpur Kheri in Sessions Trial No.267/1993 (State v. Babu and Ram Prasad) arising out of Case Crime No.60/1991 under Sections 304,323, 504 I.P.C., P.S.Kotwali, District Lakhimpur Kheri whereby the learned trial court has convicted the appellants under Section 304 Part II read with Section 34 I.P.C. and sentenced them to five years" rigorous imprisonment with a fine of Rs.2,000/- each. In default of payment of fine, six months" simple imprisonment was awarded. Out of the deposited fine, Rs.3000/- was to be paid to Smt.Gopita, widow of the deceased.

2. According to the prosecution version, an N.C.R. No.251 was lodged by Shyam Bihari on 19.9.1991 at 8:30 a.m. stating that accused Babu and Ram Prasad have beaten him by ""Lathi" and ""Danda"on the dispute of the way. They have also criminally intimidated him. The N.C.R. was registered under Section 323, 504 I.P.C. Thereafter, the injured was medically examined on 19.9.1991 at 9:30 a.m. wherein the doctor found an abrasion 1.5 c.m. x 0.5 c.m. at left side of scalp. X-ray of skull was advised. The complainant succumbed to his injuries and the case was converted under Section 304 I.P.C. vide G.P. No.35 dated 28.11.1991 and the case was registered at Crime No.60/91 under Sections 304, 504 I.P.C. The investigation was handed over to the Investigating Officer. The postmortem on body of the deceased was conducted on 26.9.1991 wherein one ante mortem injury was found. The cause of death was due to coma as a result of ante mortem head injury.

3. The inquest proceedings were conducted on 26.9.1991. The Investigating Officer recorded the statements of witnesses and submitted the charge sheet against the accused appellants.

4. The accused were charged under Sections 323 read with Section 34 I.P.C. and 304 Part-I I.P.C. They denied the charges and claimed trial.

5. In order to prove its case, the prosecution produced P.W.1 Gopita, wife of the deceased; P.W.2 Dr.G.K.Singh, who medico-legally examined the injured on 19.9.1991 at 9:30 a.m. and found the following injury on his body: -

An abrasion 1.5 c.m. x 0.5 c.m. on left side of scalp 3 c.m. above the left ear. X-ray of skull was advised. The injury was fresh in nature and could have been caused by any blunt weapon. The victim was vomiting blood.

P.W.3 S.I. Ram Sahodar Singh, who conducted the investigation and P.W.4 H.M. 66 CP Nakchhed Singh, formal witness.

6. In their statements under Section 313 Cr.P.C., the accused have denied the statements of witnesses.

7. After appreciating the evidence on record, the learned trial court has held that the accused have not committed preplanned murder of the deceased, rather a single blow was given on head of the deceased on the dispute of the way. The learned trial court has held that there was no intention to kill the deceased but the accused were having the knowledge of the fact that death could have been caused by the injury. Consequently, the learned trial court convicted the accused under Section 304 Part-II I.P.C.

8. Heard Sri S.K.Kannaujia, learned counsel for the appellants and the learned A.G.A.

9. Learned counsel for the appellants submits that no independent witness has been produced by the prosecution. Only P.W.1 Gopita has been produced, who is wife of the deceased and an interested witness. It is further submitted that it

could not be proved from the evidence that the place of occurrence can be seen from the house of P.W.1 Gopita. The investigation is defective. It is further submitted that the doctor has found only one injury on body of the deceased. According to P.W.1 Gopita, more than one blow were given by the accused but it could not be established as to who gave the fatal blow which resulted in death of the deceased. It is further submitted that it could not be established from the evidence that the act was committed by the accused with intention to kill the victim, rather during certain altercation, the incident happened for which the accused cannot be held guilty.

10. Per contra, the learned A.G.A. submits that the accused have committed the murder of the deceased. The deceased died due to the fatal blow given to him by the accused. No eye witness was present at the spot, hence, could not be produced. It could not be presumed that absence of eye witness could, in any manner, affect the prosecution version.

11. The occurrence took place on 19.9.1991 at 7:30 a.m. A non-cognizable report of the incident was registered at NCR 251 under Sections 323, 504 I.P.C. on 19.9.1991 at 8:30 a.m. This report was lodged orally by injured Shyam Behari, who subsequently succumbed due to the injuries caused to him. In the report he has stated that accused Babu and Ram Prasad have beaten him by ""Lathi" and ""Danda". The deceased died on 26.9.1991, i.e. after about a week from the date of the incident. This information given by the deceased shall be treated as dying declaration of the deceased.

12. Section 32(1) of Indian Evidence Act reads as under :-

"Section 32 - Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant - Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured, without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:--

(1) when it relates to cause of death.-When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

13. At the time when the N.C.R. was lodged, deceased Shyam Behari was in an injured condition, who lodged a report under Section 323, 504 I.P.C. At that time, he was not in danger of life but, at the same time, he narrated the story to

the Head Moharrir, who recorded the statement of Shyam Behari. P.W.4 H.M. 66 CP Nakchhed Singh has stated that on 19.9.1991 Shyam Behari along with Narendra son of Surendra Nath came at the police Station where N.C.R. was lodged and recorded by him on the dictation of Shyam Behari. Endorsement of the non-cognizable report was also made in the G.D. as Ext. ""Ka"-5. Statement of P.W.4 H.M. 66 CP Nakchhed Singh establishes that the statement was made by the deceased Shyam Behari regarding the incident wherein he has specifically stated that accused Babu and Ram Prasad have beaten him by ""Lathi" and ""Danda". It is also stated that on the issue of a way, he had been beaten. This statement of Shyam Behari is a dying declaration which is to be seen coupled with other evidence on record.

14. Learned counsel for the appellant submits that the prosecution has produced only P.W.1 Gopita, who is wife of the deceased and is an interested relative witness. It is further submitted that except P.W. 1 Gopita, no other independent witness has been produced while P.W.1 Gopita has stated that Siya Ram has also seen the occurrence.

15. In Nagappan v. State (by Inspector of Police, Tamil Nadu) reported in (2014) 3 SCC (Cri) 660 Hon"ble the Apex Court in paragraph no. 10 has observed as under :-

"10. As regards the first contention about the admissibility of the evidence of PW 1 and PW 3 being closely related to each other and the deceased, first of all, there is no bar in considering the evidence of relatives. It is true that in the case on hand, other witnesses turned hostile and have not supported the case of the prosecution. The prosecution heavily relied on the evidence of PW 1, PW 3 and PW 10. The trial court and the High Court, in view of their relationship, closely analysed their statements and ultimately found that their evidence is clear, cogent and without considerable contradiction as claimed by their counsel. This Court, in a series of decisions, has held that where the evidence of "interested witnesses" is consistent and duly corroborated by medical evidence, it is not possible to discard the same merely on the ground that they were interested witnesses. In other words, relationship is not a factor to affect the credibility of a witness. " (emphasis added)

16. In Vikram Singh and others V. State of Punjab reported in (2010) 3 SCC 56 Hon"ble the Supreme Court has cited paragraph 3 of its earlier pronouncement in the case of Rana Pratap and Others V. State of Haryana reported in 1983 (3) SCC 327 which reads as under:-

"There were three eye witnesses. One was the brother of the deceased and the other two were a milk vendor of a neighbouring village, who was carrying milk to the dairy and a vegetable and fruit hawker, who was pushing his laden cart along the road. The learned Sessions Judge and the learned Counsel described both the independent witnesses as chance witnesses implying thereby that their evidence was suspicious and their presence at the scene doubtful. We do not understand

the expression "chance witnesses". Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere chance witnesses". The expression "chance witnesses" is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are "chance witnesses" even where murder is committed in a street is to abandon good sense and take too shallow a view of the evidence."(Emphasis added)

17. In *Sheesh Ram and others v. State of Rajasthan* reported in (2014) 3 SCC 689 Hon"ble the Apex Court in paragraph no. 10 has observed as under:-

"10. It is submitted that all these witnesses are related and therefore their evidence cannot be relied upon. Assuming they are related to each other and, hence, interested witnesses, it is well settled that the evidence of interested witnesses is not always suspect. It has to be scrutinised with caution and can be accepted if it is found reliable."

18. Hence, statement of a relative or interested witness could not be thrown out only on the ground that the witness is relative or interested witness, rather, such statement is to be scrutinized with caution.

19. Hon"ble the Apex Court in *Gopal Singh Vs. State of U.P.* reported in (1978) 3 SCC 327 has observed in paragraph no. 11 as under:-

"11. True, they were interested witnesses, related to the deceased. Far from undermining the circumstances of the case, it guaranteed the truth of their testimony. Being relations, they would be the least disposed to falsely implicate the appellant, or substitute him in place of the real culprit. In short, the murder charges had been proved to the hilt against the appellant."

20. It is clear that a relative or interested witness would never like to save the real assailant and implicate falsely some other person.

21. In the backdrop of the legal situation, now it is to be seen as to whether the prosecution has been successful to prove the charges against the accused.

22. Before dealing with the factual aspect regarding P.W.1 Gopita, it would be appropriate to deal with the medical evidence in this case.

23. After the incident, the injured was examined by P.W. 2 Girjesh Kumar Singh who was posted at the District Hospital. He examined Shyam Behari (deceased) in injured condition at 9:30 a.m. and found an abrasion on left side of the scalp.

A.P. and Lateral view X-ray of skull was advised by him. The injured was vomiting blood at that time. Thereafter, the deceased died and his postmortem was conducted on 26.9.1991 by Dr.K.S. Srivastava at Lucknow wherein he also found the same injury. When he opened the wound, fracture of the left parietal bone of the skull was found. There was a large haematoma present under the skull underneath the wound. As per statement of P.W. 2, Dr. G.K.Singh the injury could have been caused by a blunt weapon which was fresh in nature and could have been caused by ""Lathi" and ""Danda". This statement coupled with the postmortem report supports the prosecution version that the deceased got injury by ""Lathi" and ""Danda" at 7:30 a.m. on 19.9.1991.

24. Now it is to be seen as to whether the injury was caused by the accused ? Whether the prosecution has been able to prove the same by cogent evidence ?

25. The N.C.R. was lodged at 8:30 a.m. After death of Shyam Behari, the case was altered under Section 304 I.P.C. and investigation started. But the initial report was lodged on the very same day of incident at 8:30 a.m., which is a prompt report. The incident occurred at 7:30 a.m. just after one hour, the N.C.R. was lodged. P.W.1 Gopita has stated that after the incident, she took her husband to the police station Kotwali where a report was dictated by her husband.

26. It is held in *Jitendra Kumar v. State of Haryana*, reported in (2012) 6 SCC 204 that the first information report is not an encyclopedia, rather, it is an information about commission of an offence.

27. In light of the decisions of Hon'ble the Supreme Court referred to herein above it may be observed that a prompt F.I.R. negates the possibility of manipulation by the complainant. A prompt F.I.R. overrules the possibility of consultation because if there is consultation by the complainant with other persons, there may be possibility of manipulations or false implication. When the first information report is lodged promptly without unnecessary delay, it inspires confidence. In the present case, P.W. 1 Gopita has stated that she took her husband with help of one Narendra to Police Station where her husband Shyam Behari dictated the report. Hence, there cannot be any doubt that there was a possibility of consultation or manipulations, rather it is a prompt F.I.R.

28. No doubt, P.W.1 Gopita is wife of the deceased, who is an interested and related witness but, as has been held in the earlier part of the judgment, mere relationship could not be a ground to throw out the evidence of this witness. It is to be scrutinized with caution.

29. P.W.1 Gopita has stated that at the time of the incident, her husband, Shyam Behari had gone to ease himself. When her husband was coming back after easing himself, some altercation took place between the accused and the deceased on the ground of deceased Shyam Behari's coming from ""MERH" of the accused. This was the reason for the fight. She also reached at the spot and saw the accused beating her husband.

30. According to the site plan, the place of occurrence is shown by letter ""A", which is field of accused Babu. Witnesses have seen the occurrence at point ""B" which is about twenty paces from the place of occurrence. Point ""B" is at about 15 paces from the wall of Siya Ram. House of the deceased is towards north-west side of place of the incident. In between, there is a way for bullock cart.

31. P.W.3 I.O. Ram Sahodar Singh stated that he has prepared the site plan on the pointing out of wife of the injured. This witness has not been cross-examined on this point that there was no possibility for witness P.W.1 Gopita to see the occurrence from her house. Although P.W.3 I.O. Ram Sahodar Singh has not been examined on this point but, at the same time P.W.1 Gopita has stated that she was at her home. She reached at the spot on hearing the cries of her husband and saw the occurrence. The place of presence of witnesses is shown by letter ""B" in the site plan, which is about 15 paces from the place of occurrence. P.W.3 I.O. Ram Sahodar Singh has not been cross-examined on this point. Hence, it cannot be accepted that witness P.W.1 Gopita was not present at point ""B" from where she has seen the occurrence.

32. So far as the manner of the incident is concerned, P.W.1 Gopita is the sole witness who has stated the manner and mode of the incident. It is stated by her that her husband was coming back after easing himself. Some altercation took place between him and the accused on the point of the way, which resulted in the beating of deceased by the accused. It is pertinent to mention here that P.W. 2 Dr. G.K.Singh has found only one injury on body of the deceased but P.W. 1 Gopita has stated that both the accused had given 2 to 4 blows by ""Lathi" and ""Danda". Learned counsel for the appellant submits that if this was the situation then the deceased must have received more than one injury which is belied by the injury report. I do not find any force in the argument.

33. P.W.1 Gopita is a rustic Villager who has stated the manner of the incident. A rustic Villager, generally, exaggerates the incident in order to make it more reliable. At the time of the incident, practically, it is not possible for a witness to count the number of blows being inflicted by accused upon body of a person. Hence, even if only one injury was found on body of the deceased, it does not make any difference that P.W.1 Gopita had stated that 2 to 4 blows were given by the accused.

34. The first information report was lodged promptly. Medico-legal examination of the injured was also conducted promptly. Investigation took place in the right direction. The finding recorded by the learned trial court has not been challenged by the prosecution - it is under Section 304 Part-II read with Section 34 I.P.C. At this stage, if we examine the nature of injury to find out as to what was the intention of the accused, we find that only one injury was found on head of the deceased. It could not be established as to who has inflicted the fatal blow but, at the same time, statement of P.W. 1 Gopita establishes that both the accused were present at the time of incident. The deceased died after seven days of the incident. According to P.W. 1 both the accused were armed with ""Lathi" and

""Danda". If they had any intention to kill the deceased, then they could have inflicted more injuries but only one injury has been found on body of the deceased. The cause of the incident is also very much relevant as the accused have no grudge or enmity against the deceased, rather, the incident took place on the ground of passing of deceased from the ""MERH" of accused. Hence, there could not have been any intention on part of the accused to cause such bodily injuries intentionally so as to cause death of the deceased. Hence, the learned trial court has rightly held the accused-appellants guilty for the offence punishable under Section 304 Part-II read with Section 34 I.P.C.

35. Prosecution has successfully proved the charges levelled against the appellants beyond reasonable doubts. Learned trial court has also rightly recorded the finding of guilt against the appellants and sentenced them. I do not find any illegality in the impugned judgment and order. The learned trial court has rightly appreciated the evidence on record.

36. So far as sentence is concerned, it is an incident of the year 1991 wherein only one injury was caused to deceased which proved to be fatal for his life. Intention of the accused was not to commit culpable homicide amounting to murder. Incident had taken place all of a sudden. There was no premeditated plan to commit the crime. In such circumstances it would be appropriate if the sentence of five years" rigorous imprisonment is reduced to three years" rigorous imprisonment and fine of Rs.2000/- each. Accordingly, conviction of appellants under Section 304 Part II read with Section 34 I.P.C. and fine of Rs.2000/- each is maintained but sentence is reduced to rigorous imprisonment for three years and in default of payment of fine imprisonment of one month each under Section 304 Part II read with Section 34 I.P.C. Out of the fine realized, Rs.3000/- shall be paid to the widow of the deceased.

37. The appeal is partly allowed to the above extent.

38. The appellants are on bail. Their personal bonds and bail bonds are cancelled. The appellants should be taken into custody to serve out the sentence imposed by this Court. The learned trial court shall ensure compliance of this order.

39. Office is hereby directed to certify this order to the learned trial court immediately. The lower court record should also be transmitted forthwith.