

**High Court of Judicature at Allahabad
(Lucknow)**

Neutral Citation No. - 2023:AHC-LKO:84607-DB

Reserved on:08.11.2023

Delivered on:21.12.2023

Court No. - 9

Case :- CRIMINAL APPEAL No. - 367 of 1993

Appellant :- Sri Kant Alias Badkey Bhaiya And Another

Respondent :- The State Of U.P.

**Counsel for Appellant :- Jitendra Misra,U.P.Singh,Vijyant
Nigam,Vivek Kumar Divedi**

**Counsel for Respondent :- Govt.Advocate,Aishwarya Pratap
Singh,Deependra Pratap Singh,Lohitaksha Shukla,Sandeep
Kumar,Sunil Kumar Srivastava,Tung Nath Tiwari,Vinay Kumar Tiwari**

Hon'ble Rajan Roy,J.

Hon'ble Ajai Kumar Srivastava-I,J.

(Per : Rajan Roy, J.)

Heard Shri Vijyant Nigam, learned counsel for the sole surviving appellant, the other appellants having died, Ms. Meera Tripathi, learned A.G.A. for the State and Shri Vinay Kumar Tiwari, learned counsel for the informant.

This is a Criminal Appeal under Section 374 Cr.P.C. challenging the judgment dated 02.09.1993 passed in Sessions Trial No. 501 of 1985 (State Vs. Naval Kishore and Ors.) under Sections 302/34 IPC, Police Station - Nagram, District - Lucknow. Out of the two convicts/appellants Shrikant @ Badkey Bhaiya and Laxmikant only

appellant no. 1- Shrikant @ Badkey Bhaiya is alive, therefore, this appeal is being decided only with regard to him.

The appellant has been convicted for the offence punishable under Section 302/34 IPC and sentenced to life imprisonment.

The prosecution case in nutshell is that there was prior enmity between the deceased Anajani Kumar Mishra and accused Naval Kishore Diwedi and others. There were several cases between the parties including criminal cases. On account of effective 'pairvi' of the cases accused were not able to get the cases decided in their favour. On account of this, the accused bore a grudge and were always planning to kill the informant's father. On 05.05.1985 at about 4.30 p.m. the father of the informant along with the informant, his younger sister and one Jagjivan Gadariya had gone to the market to purchase clothes. When they reached the public road in front of house of Bhagirath Chowkidar, accused Naval Kishore, Shrikant @ Badkey Bhaiya and Laxmikant came from the back. Naval Kishor and Shrikant @ Badkey Bhaiya were carrying 'banka', whereas, Laxmikant was carrying a 'sickle' (hansia). Shrikant @ Badkey Bhaiya exhorted the other accused to kill the informant's father. When the deceased started running, the accused surrounded him. They attacked him with 'banka' and 'hansia'. On an alarm being raised by the deceased and others several people ran from the market and challenged the accused who ran away towards the South. On way, they snatched a bicycle from one Dilip Kumar and another cycle from another person and rode away. The father of the informant fell dead at the vegetable shop.

Exhibit Ka- 4 is the F.I.R. lodged on 05.05.1985 at about 06.00 p.m. i.e. within one and half hours of the incident. The distance of the police station from the scene of crime is 7 kilometers. The F.I.R. is thus reasonably prompt.

The inquest was conducted on the same day between 06.05 p.m. to 07.15 p.m. The inquest report is Ex. Ka-2.

The postmortem was conducted on the next date i.e. 06.05.1985 at 01.30 p.m. Ex. Ka-3 is the postmortem report.

After investigation charge sheet was filed by the Investigating Officer. Charge was framed by the trial Court against accused Shrikant @ Badkey Bhaiya along with others under Section 302 read with Section 34 and Section 392 read with Section 34 IPC. The accused denied the charges and demanded trial. Accordingly, they were put to trial.

Ex. Ka- 15, Ex. Ka- 17, Ex. Ka- 20 and Ex. Ka- 21 are the site plans relating to scene of crime, recovery of cycle, recovery of weapons used for commission of crime i.e. 'banka' and 'hansia'.

Ex. Ka-19 is the recovery memo pertaining to the recovery of 'banka' allegedly used by the appellant no. 1- Shrikant @ Badkey Bhaiya to commit the crime. The recovery is alleged to have been made on the pointing of the said accused/appellant Shrikant @ Badkey Bhaiya and has been proved by the police witnesses.

Ex. Ka-16 is the recovery memo pertaining to the recovery of the cycle used by the accused to run away from the scene of crime as also recovery of the clothes worn by them. This recovery has been proved by the cycle owner PW- 5 (Kanhya Lal) who has also deposed about having seen the assailants including the appellant- Shrikant @ Badkey Bhaiya snatching the cycle and running away, riding the same.

The prosecution produced as many as 8 witnesses to prove the charges. Sub-Inspector Keshav Ram Verma was examined as C.W. -1 only to prove the death of accused Naval Kishore.

The Statement of appellant no. 1- Shrikant @ Badkey Bhaiya under Section 313 Cr.P.c. was recorded on 17.09.1993. He alleged false implication on account of enmity.

The trial Court after appreciating the evidence on record convicted the accused including the appellant no. -1 of the offence under Section 302 read with Section 34 IPC and sentenced them as already stated earlier. They were absolved of the charge under Section 392 and 411 IPC.

As per postmortem report the deceased had as many as 21 injuries, out of which, 18 were incise wounds and 2 were abraded contusions. The cause of death was mentioned as shock & hemorrhage as a result of multiple ante mortem injuries. The postmortem report has been proved by the Autopsy Surgeon (PW -4).

The testimony of PW- 4 (Dr. Satish Chandra) corroborates the prosecution case and testimony of witnesses with regard to the use of weapon i.e. 'banka', by the accused including appellant no. 1- Shrikant @ Badkey Bhaiya. PW- 4 has testified that injuries could have been caused by sharp edged weapon such as 'banka'. He has stated that 'banka' is a cutting weapon as also a sharp edged weapon. He has stated that injury no. 9 was sufficient in the ordinary course to cause death.

PW-1 is the informant and son of the deceased who was accompanying him at the time of incident. He was about 14 years of age at that time. PW-3 (Anuradha) is the daughter of the deceased who was also accompanying the deceased at the time of incident in the market. She was 8 years old at the relevant time. Both are eye-witnesses to the incident. PW-2 is scribe of the 'tehrir' submitted to the Police by PW-1, on the basis of which, F.I.R. was lodged. PW- 4 is the Autopsy Surgeon Dr. Satish Chandra. PW-5 (Kanhya Lal) is the owner

of the cycle which was taken away by the assailants and was used to run away from the scene after committing the crime. PW- 6 is the Head Constable who had taken body of the deceased for postmortem. PW-7 is the Head Constable who had made requisite entry in the police records and had registered the F.I.R. He has proved the submission of Ex. Ka-1 'tehrir' by PW-1 and preparation of chik report Ex. Ka- 7 as also the entries in the General Diary in this regard. PW-8 is the SI Mohar Ram who was SHO of Police Station - Nagram on 05.05.1985 and had got the inquest prepared in his presence who has proved preparation of other police documents also. He has deposed about arresting the accused on 06.05.1985 with blood stained clothes on their body. He has proved the recovery of cycle Avon from the possession of Laxmikant and another from the possession of Naval Kishore. He has also proved the recovery of weapon 'banka' used in commission of the crime on the pointing of Shrikant @ Badkey Bhaiya etc. He has proved submission of charge sheet by him on 19.05.1985.

The contention of learned counsel for the appellants was that clothes and 'banka' recovered from the accused were never sent for forensic examination. The incident took place in a busy market and prosecution witnesses have deposed about the presence of 400-500 persons there, but, no independent witness has been examined. Both the alleged eye-witnesses PW- 1 and PW- 3 are related and interested witnesses, therefore, their testimony is not reliable. Both the witnesses were child witnesses and their testimony required corroboration from other evidence, which has not been done. Jagjivan Gaderiya who is said to have witnessed the crime has not been examined, therefore, material evidence has been withheld without any explanation. According to him, for all these reasons, the trial Court has convicted the appellants on the basis of conjectures and surmises, as such, the appeal is liable to be allowed. He relied upon the decisions of Hon'ble the Supreme Court rendered in the case of *Krishnan and Anr. Vs.*

State reported in (2003) 7 SCC 56, *State of U.P. Vs. Krishna Gopal and Anr.* reported in (1988) 4 SCC 302, *Valson and Anr. Vs. State of Kerala* reported in (2008) 12 SCC 241, *Bhaskar Ramappa Mandar and Ors. Vs. State of Karnataka* reported in (2009) 11 SCC 690, *Kali Ram Vs. State of Himachal Pradesh* reported in (1979) 2 SCC 808, *State of Rajasthan Vs. Raja Ram* reported in (2003) 8 SCC 180, *Prakash Vs. State of M.P.* reported in (1992) 4 SCC 225, *Panchhi Vs. State of U.P.* reported in (1998) 7 SCC 177 and *Dalip Singh Vs. State of Punjab* reported in AIR 1953 SC 364.

Ms. Meera Tripathi, learned A.G.A. has opposed the aforesaid contention and submitted that the ocular testimony is consistent and free from contradictions which by itself is sufficient to convict the appellant- Shrikant @ Badkey Bhaiya. Ocular testimony is corroborated by medical evidence. The fact that no witness from the market was examined, is immaterial, as, it is common knowledge that people are afraid to come forward and depose in a case of murder. She referred to the testimony of PW- 5 who has identified the assailants as the one who snatched the cycle, as also the cycle as being his, which supports the prosecution case. PW- 4 the Autopsy Surgeon has proved the postmortem report. The motive for the crime, though it is not relevant in a case of direct evidence, has also been proved by ocular testimony, which is prior enmity. There is recovery of the weapon used by appellant- Shrikant @ Badkey Bhaiya to commit the crime as also the cycle on which he along with other accused ran away from the scene of crime. The evidence on record clearly points towards the guilt of appellant- Shrikant @ Badkey Bhaiya in murdering the deceased and the trial Court has rightly convicted him.

The case of the prosecution is based on direct evidence. PW-1 is the son of the deceased and he accompanied the deceased to the market along with his sister PW-3 and one Jagjivan Gaderia. Jagjivan Gaderia

has not been examined but this does not materially affect the prosecution case. It is the quality and not quantity of witnesses that is material in the eyes of law. The legal position in this regard is well settled. The presence of PW-1 at the scene of crime, being the son of the deceased, is quite natural and probable. The defence has not been able to bring out anything in his cross examination so as to make his presence improbable. No doubt, PW-1 was a minor aged about 14 years at the time of commission of the crime but, from his testimony and extensive cross-examination by the defence, there is nothing to show that he did not understand the situation and could not depose fairly and truthfully. His stand throughout his testimony is consistent. He has clearly stated that he accompanied his father along with his elder sister and Jagjivan Gaderia to the market to purchase clothes when they were accosted by the accused, who were armed with 'banka', 'hansia' etc. Shrikant @ Badkey Bhaiya the appellant no. 1 herein exhorted the other accused to kill the deceased whereupon they attacked him with 'banka' and 'hansia'. Appellant- Shrikant @ Badkey Bhaiya himself was carrying a 'banka'. The injuries on the body of the deceased as mentioned in the postmortem report most of which are incise wounds corroborate the testimony of PW- 1. Such injuries could have been caused by 'banka' as has been deposed by PW - 4 the Autopsy Surgeon and as is also apparent in our assessment based on the facts and evidence on record.

PW-1 has further stated that on being challenged the accused ran towards South and in this process they took away the cycle of one Dilip Kumar and Kanhiya Lal which they rode to flee. He has stated that at the time of writing of F.I.R. he did not remember the name of Kanhiya Lal and therefore, it was not mentioned, which is understandable as this is quite a possibility in a situation involving murder. He has vividly described commission of the crime by the assailants. He has deposed about blows being struck on the neck with

the 'hansia', as also, on the right side of the head which is corroborated by medical evidence on record, as, most of the injuries are on the said part. He has clearly deposed that the accused struck 6 or 7 blows each, which tallies with the number of injuries on the body of the deceased which are 21 and the accused being three in number. He has stated that the deceased was struck blows when he was standing and also when he fell down.

As already stated the description of the manner of committing the crime and the events which took place, is consistent, free from embellishments and contradictions. It is natural. The defence has not been able to impeach the credibility of this witness in any manner so as to make it unreliable. Merely because no other witness from the market has been examined does not materially prejudice the prosecution case, as, it is common knowledge that in a case of murder members of the public are reluctant to come forward to dispose.

The evidence of PW- 1, even though he is the son, is reliable and proves the commission of crime by Shrikant @ Badkey Bhaiya. His statement that the accused snatched the cycle of Dilip Kumar and Kanhiya Lal in the process of running away, is corroborated by the testimony of PW - 5 (cycle owner). The recovery of cycle which has been proved by the police witnesses and identification of cycle of PW- 5 as also the assailants clearly corroborates the testimony of PW - 1, therefore, the fact that he was only 14 years of age at the time of commission of crime and was about 16 years of at the time time of recording of his statement, is inconsequential. He has also deposed about prior enmity and cases between the deceased and accused and also that in one of the cases the deceased was to be cross-examined on 12.05.1985 and the accused was pressurising the deceased to change his statement given in examination-in-chief in the said case which was

the immediate cause for the crime being committed apart from the old enmity. His testimony is reliable.

PW - 2 is the scribe who has proved the 'tehrir' written by him.

PW - 3 (Anuradha) is daughter of the deceased. Her presence at the scene of crime which is a market where she had gone with her father and brother to purchase clothes, is also probable and natural. The trial Court has clearly recorded its opinion that the child understands what is God and one who speaks lie is punished by God, therefore, merely because she was 10 years of age at the time of recording of her testimony, does not make her statement unreliable. She has stated that they had reached the market when the accused including appellant- Shrikant @ Badkey Bhaiya came armed with 'banka' etc. She has stated that she knew the accused since prior to the incident. She has mentioned that her father was attacked by the accused who were armed with 'hansia' and 'banka'. She has also mentioned about presence of her brother Amrish (PW -1). She has mentioned that she had gone to the market at 4.00 p.m. She has also mentioned about the assailants escaping on cycle. She has stated that on being injured her father fell down on a sack of vegetables (bhindi) which tallies with the testimony of PW -1. She has vividly described the scene of crime as also the manner of commission of crime by the assailants. She has stated that the accused struck blows on the neck and head of the deceased with 'hansia' and 'banka'. She has truthfully stated that she could not say as to whose blow had struck and on which part. The defence has not been able to impeach her credibility in any manner. There are no major contradictions in her testimony so as to make it unreliable.

The ocular evidence of PW - 1 and PW - 3 clearly proves the charge against the appellant of having committed the offence punishable under Section 302 read with 34 IPC.

As already stated PW- 4 Autopsy Surgeon has proved the postmortem report. He has opined that the injuries on the body of the deceased had been caused by a sharp edged weapon such as 'banka' or 'hansia'. Injury No. 9 was sufficient in the ordinary course to cause death. He has stated that injuries which are multiple abraded contusions could be caused by a fall which is quite probable in view of the circumstances narrated hereinabove, as, three assailants were striking blows on the deceased and it has come in the testimony of PW - 1 and PW - 3 that he fell down. Medical evidence clearly proves murder and it corroborates the ocular testimony of PW-1 and PW-3 who have proved beyond reasonable doubt that the murder was committed by the assailants including appellant no. 1- Shrikant @ Badkey Bhaiya.

PW - 5 (Kanhya Lal), owner of the bicycle which was snatched and used by the assailants to ride away from the scene of crime, has deposed about his presence in the market at the relevant date and time. He has stated that he was talking to a relative in the market when three or four persons came running and snatched his cycle and rode away. He identified the three assailants who were present in Court. It is worthwhile to mention that Naval Kishore had not died by then and he was present in Court. He has stated that he tried to resist but he was threatened with the 'banka' with dire consequences. The assailants ran towards the South. This corroborates the testimony of PW -1 and PW - 3 who have stated that assailants ran towards the South. He has identified the cycle and moved an application for release of the same before the Court. He has proved the signatures on the application/vakalatnama submitted in this regard before the Court. He

was shown the cycle but was not able to identify it clearly, for the reason as stated by him that the cycle was new at the time of incident but at the time of being shown the same it did not have any 'gaddi', stand and ghanti' on it, which is quite understandable, as, his testimony was being recorded on 03.11.1987, whereas, the incident took place on 05.05.1985 and all this while the cycle was lying with the police or in the 'malkhana'. In cross-examination he has stated that the items which are missing from his cycle were the ones which would be the basis for its identification. If those items were there he would have identified the cycle. In cross-examination he has stated that he was called by the police station one month after the incident to identify the cycle. The defence has not been able to prove that PW - 5 (Kanhya Lal) was in any manner related or known to the informant and that he was a planted witness. He has deposed about having submitted a receipt regarding purchase of new cycle and he had produced the same before the police after it had been recovered. He has clearly stated in cross-examination that he had seen the assailants snatching the cycle and had also seen them in the market a few times but did not know their names. The testimony of PW- 5 is also reliable.

In view of the above discussion, we are of the opinion that based on the ocular testimony of PW -1, PW- 3 and PW- 5 the commission of crime by the appellant- Shrikant @ Badkey Bhaiya along with other accused is proved beyond reasonable doubt. Their testimony is corroborated by medical evidence and the testimony of PW- 4 the Autopsy Surgeon. The recovery of 'banka' at the pointing of appellant- Shrikant @ Badkey Bhaiya as also cycle from the possession of other accused is also proved. Motive for the crime, though, it is not very relevant in a case of direct evidence, is also proved from the testimony of PW -1. All these clearly prove the guilt of appellant- Shrikant @ Badkey Bhaiya beyond reasonable doubt. We are, therefore, of the opinion that trial Court has rightly convicted him of the offence under

Section 302/34 IPC. The sentence of life imprisonment has also been rightly imposed as that is the minimum sentence for the said offence. There is no merit in the submissions made by the learned counsel for the appellant. The decisions relied upon by appellant's counsel as referred hereinabove also do not help his cause.

The appeal is **dismissed**.

The appellant- Shrikant @ Badkey Bhaiya is on bail. He shall be taken into custody forthwith and sent to jail to serve out the sentence. The Chief Judicial Magistrate concerned shall ensure compliance of the same.

The original records shall be remitted back to the trial Court for necessary action as per law.

(Ajai Kumar Srivastava-I,J.) (Rajan Roy, J.)

Order Date :-21.12.2023

R.K.P.