

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

Neutral Citation No.2023:AHC-LKO:85014-DB

Reserved on 13.12.2023

Delivered on 22.12.2023

Court No.9

Case :- CRIMINAL APPEAL No. - 1568 of 2014

Appellant :- Ali Sher And Anr.

Respondent :- State of U.P.

Counsel for Appellant :- Manoj Kumar Singh, Armendra Pratap Singh, Awadhesh Kumar Singh, Dhananjay Kumar Singh, Diwakar Singh, Naveen Kumar Singh, Piyush Kumar Singh, Pradeep Kumar

Counsel for Respondent :- Govt. Advocate

Hon'ble Rajan Roy, J.

Hon'ble Ajai Kumar Srivastava-I, J.

(Per : Hon'ble Ajai Kumar Srivastava-I, J)

1. Heard learned counsel for the appellants, learned A.G.A. for the State and perused entire record.

2. By means of this appeal, the appellants assail the judgment and order dated 30.09.2014, passed by Sessions Judge, Shravasti in Sessions Trial No.102 of 2011, whereby the appellants have been convicted and sentenced to undergo life imprisonment for the offence under Section 302/34 I.P.C. with the fine of Rs.50,000/- each and in the event of default of payment of fine, they have further been directed to undergo one year's imprisonment.

3. The prosecution story, in brief, is that on April 10, 2011, a written report, Ext. Ka-3 was lodged at Police Station Sirsia, District Shravasti stating therein that on 10.04.2011, the first informant, Ramzan, son of Babu Lal, resident of village Bargadwa, P.S. Sirsia, district Shrawasti along with his children was sleeping on the roof of the house of his mother-in-law, while his wife, Akeela, and mother-in-law, Jumna alias Shakeela, were sleeping on the chabutra outside the house. At about 9:15 P.M. in the night, the first informant heard screams and came down from the roof with his torch and saw Ali Sher, son of Jalil, Shamsheer, son of the appellant, Ali Sher, and Roz Ali, son of Ali Ahmad, residents of Nirala Nagar, P.S. Sirsia, district Shravasti, brutally beating his wife Akeela and mother-in-law Shakeela with kicks, fists, and an axe. Alarmed by the situation, several local residents gathered near the place of occurrence. The first informant also reached at the scene of occurrence and saw three persons fleeing away towards the west direction of the place of the occurrence. The wife and mother-in-law of the first informant succumbed to the injuries inflicted by the accused persons.

4. The inquest proceedings for ascertaining apparent cause of death of Akeela started on 10.04.2011 at 10:15 P.M. and got concluded on 11.04.2011 at 10:00 A.M. The inquest report has been duly proved by Investigating Officer, PW-5, Radhey Shyam Pushkar as Ext. Ka-1.

5. The inquest proceedings for ascertaining apparent cause of death of Shakeela started on 10.04.2011 at 10:15 P.M. and got concluded on 11.04.2011 at 08:00 A.M. The inquest report has been duly proved by Investigating Officer, PW-5, Radhey Shyam Pushkar as Ext. Ka-2.

6. On the basis of aforesaid written report, Ext. Ka-3, First Information Report, Ext. Ka-24 was registered as Crime No.283 of 2011, under Section 302 I.P.C., Police Station Sirsia, District Shravasti.

7. After registration of the case, the Investigating Officer prepared the site plans, Ext. Ka-6 to Ext. Ka-8 and upon completion of investigation, charge-sheet, Ext. Ka-12 was also submitted against accused-appellants.

8. As per postmortem report of the deceased, Akeela, Ext. Ka-4, which has been proved by Dr. R.N. Tripathi, PW-4, following injuries were reported on the person of the deceased:-

1	Incised wound present over 12 cm x 3 cm cervical vertebrae deep on back of neck.
2	Incised wound of 7 cm x 1.5 cm x vertebrae deep on back of neck 3 cm below the injury no.1.
3	Incised wound of 5 cm x 1 cm bone deep over left side head post to left ear.
4	Incised wound of 6 cm x 2 cm bone deep over post aspect of left elbow under lying bones cut.
5	Incised wound of 6 cm x 2 cm bone deep cut to right elbow & forearm.

8(B). The cause of death of the deceased, Akeela, according to postmortem report, Ext. Ka-4, was reported to be shock and hemorrhage as a result of antemortem injury.

9. As per postmortem report of the deceased, Shakeela, Ext. Ka-5, which has been proved by Dr. R.N. Tripathi, PW-4, following injuries were reported on the person of the deceased:-

1	Incised wound 12 cm x 2.4 cm x cervical vertebrae deep on the front of neck just below chin. Tailing towards left side through out present underlying muscles, membrane, bone trachea and C3 Vertabrea cut.
2	A five incised wound of vary size just on the front of left side of neck in area of 8 cm x 6 cm size 3 cm x 1 cm to 1.5 cm x 0.5 cm muscle to bone deep. Margin clean cut.
3	Incised wound 3 cm x 0.2 cm x muscle deep just over medial aspect of middle left forarm. 6 cm above the chest part.
4	Incised wound 2 cm x 0.2 cm x muscle deep on the base of left index finger present.

9(B). The cause of death of the deceased, Shakeela, according to postmortem report, Ext. Ka-5, was reported to be shock and hemorrhage as a result of antemortem injury.

10. The accused-appellants were charged for the offences under Sections 302/34 I.P.C., which was read over and explained to them, to which, they pleaded not guilty and claimed to be tried.

11. To bring home guilt of accused-appellants, the prosecution has examined as many as six prosecution witnesses i.e. PW-1, Hamid, PW-2, Nan Babu, PW-3, Ramzan, PW-4, Dr. Ravi Nandan Tripathi, PW-5, Inspector Civil Police Radhey Shyam Pushkar and PW-6, C.P. Sayedul Hasan.

12. After conclusion of prosecution evidence, statements of accused-appellants were recorded under Section 313 Cr.P.C. The accused-appellants have stated the prosecution case to be false, claimed themselves to be innocent and also stated to have been falsely implicated.

13. Accused-appellants produced two defence witnesses i.e. D.W-1, Aishya, who is daughter of Ramzan, the complainant and D.W.-2, Anjum, daughter of Naseem.

14. The learned trial Court, after appreciating the evidence available on record, passed the impugned judgment and order dated 30.09.2014, whereby the accused-appellants came to be convicted as aforesaid.

15. Aggrieved by the impugned judgment and order dated 30.09.2014, the accused-appellants have preferred the instant criminal appeal.

16. Learned counsel for the accused-appellants has submitted that the appellants are innocent, who have been falsely implicated in this case. His further submission is that there is no evidence on record to warrant conviction of the appellants as aforesaid, therefore, the finding of guilt of accused-appellants is against the weight of evidence. Therefore, the conviction and sentence awarded

by the impugned judgment and order dated 30.09.2014 is not sustainable in law.

17. It has also been contended that the prosecution case is based on the sole testimony of PW-3, Ramzan, the first informant, who is wholly unreliable and who did not see this incident, therefore, holding appellants guilty on the basis of such wholly unreliable testimony is unsustainable. He has also submitted that the learned trial Court erred in not accepting the defence witnesses. DW-1, Ayesha and DW-2, Anjum were natural witnesses, who were present on the date of incident on roof of the house. Therefore, it was not proper for the learned trial Court to disbelieve their testimonies. He has also submitted that injuries reported on the body of the deceased persons do not corroborate the manner of assault as narrated by the first informant/eye witness, PW-3, Ramzan, which shows that he had not seen the incident.

18. Per contra, learned A.G.A. has opposed the submissions made by learned counsel for the appellants. He submits that the accused-appellants have been convicted by the learned trial Court after proper appreciation of evidence available against them.

19. Learned A.G.A. has further submitted that the prosecution has proved its case against the appellants on the basis of cogent testimonies of prosecution witness. The appellants have been convicted by the impugned judgment and order dated 30.09.2014 which is well discussed and reasoned, wherein no interference by this Court is warranted.

20. Having heard learned counsel for the parties and having perused the record, we find that, in order to prove its case beyond reasonable doubt, the prosecution has, as stated above, examined six prosecution witnesses. PW-1, Hamid, is a witness of panchayatnama, who has not supported the prosecution case and has been declared hostile. PW-2, Nan Babu, is also a witness of the panchayatnama, and has also been declared hostile. PW-2, Nan Babu has stated that the content of the panchayatnama was not read over and explained to him. The dead bodies of the deceased persons were sealed, which were not shown to this witness. PW-4, Dr. Ravi Nandan Tripathi, is the doctor who conducted the autopsy, prepared and proved the postmortem reports of the deceased, namely, Akeela and Shakeela as Ext. Ka-4 & Ext. Ka-5. The investigating officer, PW-5 has proved Ext. Ka-6 to Ext. Ka-11, which are the site plan of the place of recovery of gandas, the site plan of the place of recovery of an axe, the site plan of the place of occurrence, the memo of recovery of the axe, the memo of blood stained and earth and the memo of recovery of gandas, respectively. This witness has also proved the charge sheet, Ext. Ka-12. PW-6, Constable C.P. Syedul Hasan, has proved the first information report, Ext. Ka-24, and the copy of G.D., Ext. Ka-25.

21. As stated above, on behalf of accused-appellants, two defence witnesses, DW-1, Aisha, daughter of Ramzan and DW-2, Anjum have been produced.

22. It appears to us that the entire prosecution story rests upon the testimony of sole prosecution witness of fact, PW-3, Ramzan, who, in his testimony, has stated that on the date of the incident, he was present in the house of his mother-in-law. Beside him, two children, his wife and his mother-in-law were also present in the house. This witness was sleeping on the roof of the house along with his two children, while his mother-in-law and his wife, the deceased, were sleeping on the *chabutra* outside the house. At about 9:15 P.M. in the night, he heard noise. Upon hearing the commotion, this witness woke up and in the light of a torch saw that the accused-appellants were assaulting his wife and his mother-in-law with kicks, fists, and an axe. This witness raised alarm, whereupon various residents of nearby houses came to the place of occurrence. According to this witness, by the time he came down to the stairs, the accused-appellants had killed his wife and mother-in-law by slitting their necks. Thereafter, the accused-appellants fled away from the scene of the occurrence towards west direction. This witness has proved the written report, Ext. Ka-3.

23. Admittedly, PW-3, Ramzan is the sole witness of fact, who claims himself to be an eye witness. He also claims to be husband of the deceased, Akeela and son-in-law of the deceased, Shakeela, therefore, being related witness his testimony needs to be examined carefully as held by Hon'ble the Supreme Court in the case of **Shyam Babu v. State of U.P., (2012) 8 SCC 651.**

24. According to PW-3, Ramzan, he resides in Village Bargadwa, Police Station Sirsia, District Shravasti whereas the place of occurrence lies in Village Nirala Nagar, Police Station Sirsia, District Shravasti. According to him, he had come to the house of his mother-in-law on the date of the incident in the morning because one of the deceased, Shakeela, his mother-in-law, was unwell. According to PW-3, Ramzan, on the date of incident, he was sleeping on the roof and his daughter, DW-1, Ayesha and another child, DW-2, Anjum were also sleeping on the roof, whereas the deceased, Akeela, his wife and another deceased, Shakeela, his mother-in-law, were sleeping on the chabutra outside of the house. The fact that the place of occurrence is Village Nirala Nagar, Police Station Sirsia, District Shravasti, which is a rural area, it lends support to the submission advanced by learned counsel for the appellants that in rural areas, generally, muslim women do not sleep outside their houses, especially when there is no dearth of other places like rooms and the roof of the house to sleep.

25. In the written report, Ext. Ka-3, though this fact has been mentioned that when the first informant raised alarm several residents of nearby houses also come to the spot, however, name of any such witness was not mentioned in the written report nor any such witness was interrogated during the investigation nor was made any witness in the charge-sheet, submitted by Investigating Officer.

26. PW-3, Ramzan has himself mentioned that on the date of incident he was sleeping on the roof of the house of deceased, Shakeela, his mother-in-law, along with his two children whose names are not mentioned in the written report, Ext. Ka-3. However, we find that DW-1 Aisha, aged about 14 years and DW-2, Anjum, aged about 7 years have been produced as defence witnesses. DW-1, Aisha is daughter of first informant, PW-3, Ramzan, whereas DW-2, Anjum, who is daughter of Naseem. They have stated that on the date of incident they were sleeping on the roof of the house of their maternal grandmother, deceased, Shakeela. They woke up when they heard some commotion and saw in the light of street lamp that 3-4 person were assaulting their mother and maternal grandmother. They saw those people assaulting and running away from the spot. However, they have clearly ruled out the suggestion advanced by the prosecution that their mother and maternal grandmother were killed by the present appellants.

27. The most important and striking feature in the testimony of DW-1 and DW-2 appears to be the fact that both of them have not stated that PW-3, Ramzan was also present with them on the date of incident on the roof of the house. On being asked, DW-1, Ayesha has rather clearly stated that her father i.e. PW-3, Ramzan was at Village Bargadwa, Police Station Sirsia, District Shravasti who was informed about this incident who came at 6:00 A.M. in the morning. The time of registration of case, according to first information report, is 10:15 P.M. in the night of 10.04.2011. Considering the fact that DW-1,

Ayesha and DW-2, Anjum are young children aged about 14 and 7 years old, one of whom is the grandchild of the deceased, Shakeela and other is daughter of another deceased, Akeela, who were related with the deceased persons, we find the presence of defense witnesses on the roof of the house on the date of the incident to be natural. DW-1, Ayesha and DW-2, Anjum are young children, whose mother and maternal grandmother have been killed in this incident. Therefore, we do not find any plausible reason as to why would they shield real culprits. Therefore, the testimonies of DW-1 and DW-2 in respect of incident having been seen by them, which, according to them, was committed by some unknown persons on 10.04.2023 at about 9:15 P.M. when they were sleeping on the roof of the house and when PW-3, Ramzan was not present with them appears us to be reliable.

28. We have also noticed that no independent witness of the recovery of the alleged weapon of assault has been examined by the prosecution. The explanation offered by prosecution in this regard is quite vague and casual as the investigating officer, PW-5 has stated in his testimony that though there were various people present at the time of recovery, however, no one agreed to become a witness thereof. In view of this, we do not find the same to be reliable.

29. Hon'ble the Supreme Court in the case of **Devi Lal vs. State of Rajasthan, (2019) 19 SCC 447** in para no.18 has held as under :-

*"18. On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. **Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.**"*

(Emphasis supplied by us)

30. In view of the aforesaid overall discussion and keeping in view the law laid down by Hon'ble the Supreme Court in **Shyam Babu (Supra) & Devi Lal (Supra)** we do not find testimony of sole prosecution witness, PW-3, Ramzan to be wholly reliable. Therefore, despite the fact that it is a case of double murder, we do not find it safe to convict the accused-appellants.

31. In view of the aforesaid overall discussion, we are of the considered view that the finding of conviction of accused-appellants recorded by learned trial Court by means of impugned judgment and order dated 30.09.2014 is unsustainable, which deserves to be set aside and is accordingly, set aside.

32. Accordingly, the appeal is **allowed**.

33. The appellants are in jail. Let the appellants be released from jail forthwith, if they are not wanted in any other case.

34. In compliance with the provision contained in Section 437-A Cr.P.C. the appellants are directed to furnish personal bond and two sureties each to the satisfaction of the court concerned within a period of ten weeks from today.

35. Let the lower court record along with a copy of this judgment be transmitted forthwith to the learned trial Court for information and necessary compliance.

Order Date :- 22.12.2023

A.Dewal

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