

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

Neutral Citation No. - 2024:AHC-LKO:61800-DB

Reserved on 17.05.2024

Delivered on 09.09.2024

Court No. - 1

Case :- CRIMINAL APPEAL No. - 2466 of 2019

Appellant :- Vijay Singh And Anr.

Respondent :- State of U.P.

Counsel for Appellant :- Ram Prakash Singh, Abhinav Srivastava, Ajay Veer Singh, Ashutosh Singh, Mohd. Azam Khan, Piyush Pandey

Counsel for Respondent :- Govt. Advocate

Hon'ble Attau Rahman Masoodi, J.

Hon'ble Ajai Kumar Srivastava-I, J.

(Per : Ajai Kumar Srivastava-I, J)

1. This appeal is at the instance of appellants, namely, **Vijay Singh & Ashok Singh @ Munna Singh** and is directed against the judgment and order dated 31.10.2019, passed by the learned Sessions Judge, Faizabad in Sessions Trial No.239 of 2018, arising out of Crime No.59 of 2018, under Section 302 I.P.C., Police Station Haiderganj, District Faizabad, whereby the appellants have been convicted and sentenced to undergo life imprisonment for the offence under Section 302 I.P.C. with a fine of Rs.20,000/- each and in default of payment of fine, they have to undergo six months' additional rigorous imprisonment.

2. The prosecution's story in brief is that the informant, Shiv Narayan Sharma is the resident of Jadavpur, Hathigo, P.S. Haiderganj, District Faizabad, who has submitted a written report Ext. Ka-1 in Police Station Haiderganj, District Faizabad on 09.05.2018 at 04.32 hours, stating therein that on 08.05.2018 at about 07.00 P.M. in the evening, his son, Prem Narayan Sharma received a call on his mobile phone made by Vijay Singh S/o Late Ram Sunder Singh R/o Babu ka Purwa, Hathigo, P.S. Haiderganj, District Faizabad, who asked him to accompany him with Magic vehicle. The informant's son, Prem Narayan refused the offer by saying that he was tired. After sometime, Vijay Singh and his brother, Ashok Singh alias Munna Singh came to his house. They persuaded Prem Narayan to accompany them whereupon he went towards Hathigo Bazaar (Azad Nagar) with Magic vehicle. The appellants forced the deceased to go somewhere with Magic vehicle. His son again refused the offer, whereupon the appellants started quarreling with him. On hearing the noise, the first informant's grandsons, namely, Amarjeet Sharma and Vishwajeet Sharma while they were come towards the Azad Nagar Chauraha, Hathigo saw that Vijay Singh and Ashok Singh alias Munna Singh armed with sharpened weapon, were assaulted his son, Prem Narayan Sharma. The appellant Ashok Singh alias Munna Singh had caught hold of arms and legs of Prem Narayan, whereas Vijay Singh was hitting on Prem Narayan's head with sharpened weapon. Due to the injuries inflicted by them, his son died on the spot. The incident took place at about 11:00 P.M. in the night. His grandsons started shouting, whereupon, both the assailants fled away towards their village after damaging

the Magic vehicle. Informant, Shiv Narayan Sharma's grandson, Amarjeet ran to his house and narrated the entire incident to the first informant.

3. On the basis of aforesaid written report, Ext. Ka-1, First Information Report, Ext. Ka-5 was registered as Crime No.59 of 2018, under Sections 302, 427 I.P.C. at Police Station Haiderganj, District Faizabad.

4. As per postmortem report of the deceased, Prem Narayan Sharma, Ext. Ka-3, which has been proved by Dr. Praveen Kumar Maurya, PW-3, following injuries were reported on the person of the deceased:-

1	Sharp injury (incised) at forehead, upper lip, lower lip, nose (ala).
2.	Sharp injury, clear cut at frontal bone, right parietal bone, left parietal bone, occipital bone.
3.	Brain material lacerated and coming out from skull.
4.	Left side multiple injury, contusion (7 x 7 cm) multiple rib fracture.

According to postmortem report of the deceased, Prem Narayan Sharma, Ext. Ka-3, the cause of death is reported to be shock and haemorrhage due to antemortem sharp incised & blunt injury (multiple).

5. After registration of the case, the Investigating Officer visited the place of occurrence and prepared the site plan and has proved the same as Ext. Ka-7 and Ext. Ka-8. He collected bloodstained soil and plain soil from the place of occurrence and sealed it accordingly, which is Material Ext.2. He recorded the statements of the

witnesses under Section 161 Cr.P.C. and upon completion of investigation, he submitted a charge-sheet, Ext. Ka-9 against accused-appellants under Sections 302 & 427 I.P.C.

6. The accused-appellants were charged for the offences under Sections 302/34 and 427 I.P.C., which were read over and explained to them, to which, they pleaded not guilty and claimed to be tried.

7. To bring home guilt of accused-appellants, the prosecution has examined as many as six witnesses i.e. PW-1, Shiv Narayan Sharma, who is the first informant, PW-2, Vishwajeet Sharma, PW-3, Dr. Praveen Kumar Maurya, who has conducted the postmortem of the deceased, PW-4, Constable Anil Kumar Yadav, PW-5, Amarjeet Sharma and PW-6, Inspector Ram Chandra Saroj.

8. 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 due to prior enmity.

9. No defence witness was examined by the accused-appellants in their defence.

10. The learned trial Court vide impugned judgment and order dated 31.10.2019 convicted the accused-appellants for the commission of crime, for which, the charges were framed against them.

11. Aggrieved by the impugned judgment and order dated 31.10.2019, the accused-appellants have preferred the instant criminal appeal.

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

13. Learned counsel for the appellants has submitted that the first informant in this case, Shiv Narayan Sharma, who was examined by the learned trial court as PW-1, is not an eyewitness to the alleged incident. His further submission is that the first information report, Ext. Ka-5, was lodged on the basis of information given by PW-5, Amarjeet Sharma, who is the grandson of the first informant/PW-1, Shiv Narayan Sharma. However, he submits that the presence of PW-5, Amarjeet Sharma at the place of occurrence is itself doubtful. This witness works in Mumbai as a driver for his livelihood. Even otherwise, he submits that, according to the prosecution story, this witness, PW-5, Amarjeet Sharma, witnessed the entire incident along with his brother, Vishwajeet Sharma, who has been examined in the trial court as PW-2. Their testimonies are so full of contradictions that they render their statements wholly unreliable. His further submission is that PW-2, Vishwajeet Sharma, is also a planted witness who did not actually witness the incident, which was caused by some unknown culprits. His submission is that the appellants have been falsely implicated in this case because one of the appellants, namely, Vijay Singh, had made a complaint against the deceased at the school, where the deceased was working as a driver and as a result thereof, the deceased was relieved from his job. The

appellant, Ashok Singh @ Munna, has been falsely implicated in this case because he is related to the appellant, Vijay Singh.

14. Learned counsel for the appellants, thus, submits that a careful examination of the testimonies of PW-1, Shiv Narayan Sharma, PW-2, Vishwajeet Sharma, and PW-5, Amarjeet Sharma, who are the witnesses of fact, would show that their testimonies are full of contradictions as to render them improbable and unreliable. He has also submitted that the injuries reported on the body of the deceased do not correspond to the manner of assault attributed to the appellants, having regard to the weapon(s) assigned to them. His further submission is that though, in a situation of panic, there is no set of conduct, which a witness would follow. However, the conduct of witnesses, PW-2, Vishwajeet Sharma and PW-5, Amarjeet Sharma, in not saving or trying to save the deceased, who were only two in number and not armed with deadly weapons like firearms etc., shows that they had not seen the incident and that this incident did not occur in their presence. He, thus, submits that the prosecution has failed to prove its case beyond reasonable doubt. The learned trial court recorded finding of guilt against the appellants in a mechanical manner, without appreciating the testimonies of the prosecution witnesses in the correct perspective and by ignoring material contradictions in their testimonies.

15. Learned counsel for the accused-appellants has, thus, submitted that the finding of guilt of the accused-appellants is against the weight of evidence available on record. He, therefore, prays that the conviction and

sentence awarded by the impugned judgment and order dated 31.10.2019 is liable to be set aside.

16. Per contra, learned A.G.A. has opposed the submissions made by learned counsel for the appellants. He submits that the prosecution witnesses, by means of their consistent and reliable testimonies, have proved the prosecution case beyond reasonable doubt. His further submission is that the prosecution story is based on direct ocular testimonies of PW-1, Shiv Narayan Sharma, PW-2, Vishwajeet Sharma and PW-5, Amarjeet Sharma. His further submission is that the first information report, Ext. Ka-5 came to be lodged by PW-1, Shiv Narayan Sharma on the basis of information given by one of the eye witnesses, PW-5, Amarjeet Sharma. The testimonies of prosecution witnesses are consistent and reliable, which cannot be brushed aside for the reasons stated by learned counsel for the appellants. His further submission is that there is no reason for false implication of present appellants. The prosecution witnesses, PW-2, Vishwajeet Sharma and PW-5, Amarjeet Sharma are reliable witnesses.

17. Learned A.G.A. has further submitted that the prosecution has proved its case against the appellants on the basis of cogent and reliable testimonies of prosecution witnesses. The appellants have been convicted by the impugned judgment and order dated 31.10.2019, which is well discussed and reasoned, wherein no interference by this Court is warranted.

18. Before proceeding to scrutinize the testimonies of witnesses of fact in the light of rival submission, it is relevant to mention that Investigating Officer, Inspector

Ram Chandra Saroj has been examined as PW-6, who has proved the panchayatnama as Ext. Ka-6. He had taken bloodstained earth as well as plain soil from the place of incident and had prepared a memo thereof as Material Exhibit-2. He arrested the accused appellants and on the basis of their disclosure statements, recovered the bloodstained shirt of accused-appellant, Vijay Singh and weapons *basula* and *danda* used in the alleged crime. The recovered articles were taken into possession by the Investigating Officer in a sealed cover and he prepared recovery memo thereof as Ext. Ka-2. He has also prepared the site plans of the place of incident, Ext. Ka-7 and Ext. Ka-8. He has also proved the charge sheet, Ex.Ka-9. Constable, Anil Kumar Yadav has been examined as PW-4, who has proved the first information report, Ext. Ka-5. Dr. Praveen Kumar Maurya has been examined as PW-3, who has conducted the postmortem of the deceased and he has reported that the cause of death of the deceased was shock and hemorrhage due to sharp incised & blunt injuries (multiple). He has proved the postmortem report as Ext. Ka-3.

19. Having heard learned counsel for the parties and upon perusal of the record, we find that the first information report, Ext. Ka-5 was registered on the basis of the written report, Ext. Ka-1, which was submitted by the father of the deceased, PW-1, Shiv Narayan Sharma. His testimony reveals that though he is an eye witness of the fact that his son, the deceased, was taken away by the appellants on 08.05.2018 at about 11:00 P.M., however, in his cross-examination, he has stated that he lodged the first information report regarding murder of his son by the

appellants on the basis of information received from his maternal grandson, PW-5, Amarjeet Sharma, who, during the relevant period, had come to village Jadawpur. A perusal of the testimonies of PW-2, Vishwajeet Sharma and PW-5, Amarjeet Sharma also reveals that they claimed to be eyewitnesses to this incident. If we scrutinize their testimonies carefully, it becomes apparent that although they claimed to have gone together from their maternal grandfather's home to buy some household articles in connection with the marriage of their aunt (mausi). However, their testimonies clearly indicate material discrepancies in their testimonies insofar as the fact that they saw the deceased being killed by the appellants is concerned.

20. PW-2, Vishwajeet Sharma, is another maternal grandson of the first informant and nephew (*bhanja*) of the deceased. He stated that on 08.05.2018, he, along with his brother PW-5, Amarjeet Sharma, had gone to Azad Nagar Market at about 11:00 PM to eat something. When they were returning from Azad Nagar Market on a motorcycle, they saw a four-wheeler magic vehicle parked on the way towards the south, and the appellants were assaulting his uncle, Prem Narayan Sharma, the deceased. The appellant, Vijay Singh was assaulting the deceased with a sharp-edged weapon, whereas appellant, Ashok Singh @ Munna was assaulting on the skull of the deceased with a wooden stick (*danda*) and also holding the legs of the deceased with his other arm. According to this witness, he witnessed this incident in the solar light and lights of various shops situated nearby as well as in the headlight of his motorcycle. He identified the assailants and raised

alarm. While fleeing from the spot, appellant, Ashok Singh @ Munna also damaged the magic vehicle. According to this witness, he returned home and informed his grandfather, Shiv Narayan Sharma, who, along with other villagers, returned to the place of occurrence and saw the deceased lying dead. He is also a witness of the recovery memo, Ext. Ka-2.

21. Another witness of fact, PW-5, Amarjeet Sharma, who is the real brother of PW-2, Vishwajeet Sharma, has also stated that on 08.05.2018, he had gone to Azad Nagar Market with PW-2, Vishwajeet Sharma, where they saw the appellants assaulting his uncle, Prem Narayan Sharma, the deceased. He also stated that the appellant, Vijay Singh was assaulting on the skull of the deceased with a sharp-edged weapon, i.e. *basula*, whereas appellant Ashok Singh @ Munna assaulted the deceased with a wooden-stick (*danda*) and had caught hold of the deceased's legs and arms.

22. A carefully examination of the testimonies of PW-2, Vishwajeet Sharma and PW-5, Amarjeet Sharma together, reveals certain material discrepancies in their testimonies, which, in our considered view, cannot be said to be minor discrepancies. For example, PW-5, Amarjeet Sharma stated that at the time of the conversation between the appellants and his deceased uncle, he was not present at the spot; however, he reached the place of occurrence after hearing his uncle's voice. By the time he reached the spot, the incident had already happened and was in its last phase.

23. We find it very strange that both witnesses of fact, i.e., PW-2, Vishwajeet Sharma and PW-5, Amarjeet Sharma, who are real brothers and are also related to the deceased, state that they went to Azad Nagar Market to eat something. There is nothing in their testimonies to show that they got separated at some point while going to or coming from Azad Nagar Market. Therefore, if they remained together until they saw the appellants assaulting the deceased, we do not find any reason why PW-5, Amarjeet Sharma would reach the place of occurrence only when the alleged incident was in its last phase. To quote the precise words used by PW-5, Amarjeet Sharma in this regard are "मेरे पहुंचते पहुंचते घटना घट चुकी थी। घटना लास्ट चरण पर थी।"

24. In order to ascertain veracity of testimonies of the aforesaid related witnesses of fact we have also carefully examined the site plans, Ext. Ka-7 & 8, which have been proved by PW-6, Ram Chandra Saroj, I.O. which indicates place of occurrence as 'X'. It is needless to mention that these site plans were prepared on the information given by PW-1, Shiv Narayan Sharma. There is visible absence of any shop near the place where the dead body of the deceased was found. We also notice that this place is towards the south direction of the main road. We, therefore, find that PW-2, Vishwajeet Sharma and PW-5, Amarjeet Sharma had no occasion to witness this incident in the manner, in which, they have deposed before the learned trial Court as PW-2, Vishwajeet Sharma and PW-5, Amarjeet Sharma. One more reason which lends support to our aforesaid conclusion is that perhaps PW-2, Vishwajeet Sharma and PW-5, Amarjeet Sharma had not seen the incident; rather they were introduced as eye witnesses

because their close relative had been killed. The postmortem report of the deceased, Ext. Ka-3 has been proved by Dr. Praveen Kumar Maurya, PW-3. Specific role of assaulting the deceased by *basula* is attributed to appellant, Vijay Singh. However, in the postmortem report, Ext. Ka-3 about injury nos.3 & 4, Dr. Praveen Kumar Maurya, PW-3 stated that the margin of such injury is clean, which may be caused by sharp edged weapon like knife, farsa etc. Having regard to the shape and usual size of *basula*, it is difficult to comprehend that if the same was used from its sharp edged side, it would cause injuries with the clean edge. Therefore also, we do not find corroboration of manner of assault as stated by PW-2, Vishwajeet Sharma and PW-5, Amarjeet Sharma by the medical opinion expressed by Dr. Praveen Kumar Maurya, PW-3.

25. In **Sujit Biswas vs. State of Assam : (2013) 12 SCC 406**, Hon'ble the Supreme Court in paragraph Nos.13 and 14 has held as under :-

“13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that “may be” proved, and something that “will be proved”. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between “may be” and “must be” is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between “may be” true and “must be” true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and

golden rule must be applied. In such cases, while keeping in mind the distance between “may be” true and “must be” true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. (Vide *Hanumant Govind Nargundkar v. State of M.P.* [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1953 Cri LJ 129] , *State v. Mahender Singh Dahiya* [(2011) 3 SCC 109 : (2011) 1 SCC (Cri) 821 : AIR 2011 SC 1017] and *Ramesh Harijan v. State of U.P.* [(2012) 5 SCC 777 : (2012) 2 SCC (Cri) 905])

14. In *Kali Ram v. State of H.P.* [(1973) 2 SCC 808 : 1973 SCC (Cri) 1048 : AIR 1973 SC 2773] this Court observed as under : (SCC p. 820, para 25)

“25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence.””

(emphasis supplied by us)

26. We, thus, find that prosecution has bitterly failed to establish that the present appellants killed the deceased. However, the fact remains that the prosecution case, in very clear terms, is that it is the appellants who on 08.05.2018 had come to the house of the deceased and took the deceased with them to Azad Nagar Market. The deceased is stated to have been taken away by the appellants in the presence of PW-1, Shiv Narayan Sharma, who is none other than the father of the deceased. His testimony in this regard has remained intact. It is also not in dispute that after having been taken away by none other than the present appellants, the deceased was found dead on 08.05.2018. As discussed above, though the prosecution has failed to establish the charge levelled against the present appellants for the offence under Section 302 I.P.C. for the reason that suspicion, howsoever grave, cannot take the place of proof as held by Hon'ble the Supreme Court in **Sujit Biswas (Supra)**. However, we have been able to notice some conspicuous facts and proof thereof in respect of abduction of the deceased by the appellants. In the written report, Ext. Ka-1, it is mentioned that it is the appellants who took away the deceased to Azad Nagar Market and thereafter the dead body of the deceased was recovered on 09.05.2018. PW-1, Shiv Narayan Sharma, who is the father of the deceased, has deposed that the appellants had taken away his son, the deceased, on 08.05.2018 at about 7:00 P.M. His testimony to this effect has remained unshaken. This fact was also put to the appellants in their statements recorded under Section 313 Cr.P.C. in form of question no.2 to which the appellants gave an evasive reply. They did not specifically deny that they had not gone to the house of

the first informant and had not taken away the deceased with them on 08.05.2018. Therefore, in such circumstances we find that even in absence of specific charge for the lesser offence under Section 365 I.P.C., the appellants deserved to be convicted for the offence under Section 365 I.P.C., keeping in view the clear, cogent and reliable testimony of PW-1, Shiv Narayan Sharma in this regard and having regard to the provision contained in Section 222 Cr.P.C. and also the law laid down by Hon'ble the Supreme Court in **Tarkeshwar Sahu vs. State of Bihar : (2006) 8 SCC 560**.

27. In the aforesaid view of the matter, the present appellants deserved to be convicted under Section 365 I.P.C. and their conviction under Section 302 I.P.C. recorded by the learned trial Court deserves to be set aside.

28. For the aforesaid overall reasons, the present criminal appeal is **partly allowed**. The conviction of the present appellants for the offence under Section 302 I.P.C. and sentence of life imprisonment awarded therefor vide impugned judgment and order dated 31.10.2019 is hereby set aside. The present appellants are hereby convicted for the offence under Section 365 I.P.C., for which, the appellants are awarded seven years' rigorous imprisonment each with a fine of Rs.25,000/- each and in default of payment of fine, they shall undergo six months' additional rigorous imprisonment.

29. The accused-appellant, Vijay Singh is in jail. In case, he has already served out the sentence awarded to him for the offence under Section 365 I.P.C., he will be released forthwith, if he is not wanted in any other case.

30. The accused-appellant, Ashok Singh @ Munna Singh is on bail. His bail bonds are cancelled. Sureties are discharged. The accused-appellant, Ashok Singh @ Munna Singh is directed to surrender before the concerned Court to serve out the remaining sentence awarded by this Court for the offence under Section 365 I.P.C. as aforesaid within six weeks from today, failing which, learned trial Court concerned shall issue warrant for his arrest for serving out the remaining sentence.

31. It is also directed that the period already undergone by the accused-appellants, Vijay Singh and Ashok Singh @ Munna Singh, in the aforesaid Sessions Trial Nos.239 of 2018, either as under trial or post-conviction, shall be adjusted towards the sentence awarded by this Court in terms of Section 428 Cr.P.C.

32. The aforesaid amount of fine shall be deposited by the accused-appellants within a period of eight weeks from the date of their release. After the deposit of the aforesaid amount of fine, the same shall be given to the father of the deceased as compensation.

33. In the eventuality of release of the appellants for the reason that they have already served out the sentence awarded to them for the offence under Section 365 I.P.C. by this Court, it is directed that the accused-appellants shall furnish personal bonds and two sureties each in the like amount to the satisfaction of the court concerned within four weeks from the date of their release from jail in compliance with the provisions of Section 437A Cr.P.C.

34. Let the record of trial court along with a copy of this order be transmitted forthwith to the learned trial court concerned for necessary information and compliance.

(Ajai Kumar Srivastava-I, J) (Attau Rahman Masoodi,J)

Order Date :- 09.09.2024

A.Dewal