

RESERVED

Neutral Citation No. - 2025:AHC:109521-DB

Court No. - 42

Case :- CRIMINAL APPEAL No. - 221 of 1984

Appellant :- Nand Kishore And Anr.

Respondent :- State of U.P.

Counsel for Appellant :- R.B. Sahai,V.K. Baranwal

**Counsel for Respondent :- Ajeet Ray A.G.A.,Rajeev Sharma
A.G.A.**

Hon'ble Vivek Kumar Birla,J.

Hon'ble Jitendra Kumar Sinha,J.

(Per- Hon'ble Jitendra Kumar Sinha,J.

1. Heard Shri V.K. Baranwal, learned counsel for the appellants and Shri Jai Narain, learned A.G.A. for the State.

2. The appellants have preferred this criminal appeal challenging their conviction and sentence under Section 302/34 and 323/34 I.P.C. vide judgment and order dated 19.01.1984 passed by the VII-Additional Sessions Judge, Fatehpur in Sessions Trial No.400 of 1982, arising out of Case Crime No. 63 of 1979, under Sections 302/34 I.P.C. and 323/34 I.P.C., Police Station Khakhreru, District Fatehpur, whereby accused-appellants have been convicted for an offence under Sections 302/34 and sentenced to undergo imprisonment for life and further they have been convicted under Section 323/34 I.P.C. and sentenced to undergo the imprisonment for one year. Both the sentences were to run concurrently.

3. The prosecution case in brief is that P.W.-3 Chandaniya lodged a first information report (Ex. Ka-1) stating therein that on 10.02.1979 at about 7:00 AM in village Tenduwa, Police Station Khakhreru, District Fatehpur, Jagat Narain @ Nankauna

and Brij Kishore, sons of informant while going to ease themselves, the accused Nand Kishore, Santu and Bali met on the way and started beating them mercilessly by lathis (sticks). It has been further stated that elder brother of the husband of informant had executed a sale deed in favour of her four sons excluding her eldest son, accused Nand Kishore. It is further stated that on account of this accused Nand Kishore had nurtured grudge and ill will against rest of her sons. Accused Santu is the son of accused Nand Kishore.

4. Initially the first information report was lodged under Section 323 I.P.C. but after the death of injured Jagat Narain @ Nankauna the case was converted under Section 323 and 304 I.P.C. The investigation of the case was commenced and the Investigating Officer after conclusion of investigation submitted the charge-sheet against the accused-appellants on 06.05.1979 under Sections 323, 304 I.P.C. The concerned Magistrate took cognizance and committed the case to the court of Session, wherein charges have been framed under Sections 302/34 and 323/34 I.P.C. The accused persons pleaded not guilty to the charges levelled against them and claimed for trial.

5. The prosecution has produced 7 witnesses namely, P.W.-1 Smt. Kanti Devi, P.W.-2 Vipati, P.W.-3 Chandniya (first informant), P.W.-4 Braj Kishor, P.W.-5 Head Constable Achaldeen, P.W.-6 Sub-Inspector Ram Murti Mishra, P.W.-7 Lekhraj. The defence has produce D.W.-1 Deena Nath as defence witness.

6. The prosecution in order to establish the charge levelled against the accused-appellants, has relied upon following documentary evidences, which were duly proved and consequently marked as Exhibits:

“ Nakal Chik dated 10.02.1979 has been marked as Exhibit-1; Written Report dated 10.02.1979 has been marked as Exhibit-Ka-14; Injury report of Brij Kishore dated 10.02.1979 has been marked as Exhibit-Ka-6; Panchayatnama dated 11.02.1979 has been marked as Exhibit-Ka-7; P.M. Report dated 12.02.1979 has been marked as Exhibit-Ka-10; Nakal Rapat dated 13.03.1979 has been marked as Exhibit-Ka-1, Site Plan with Index dated 06.04.1979 has been marked as Exhibit-Ka-4 and Charge-sheet dated 06.05.1979 has been marked as Exhibit- Ka-5.”

7. The defence has admitted the genuineness of post-mortem of deceased Jagat Narain @ Nankauna (Ex. Ka.-10) and injury report of injured Braj Kishore (Ex. Ka.-6). After conclusion of prosecution evidence, statements of accused persons were recorded under Section 313 Cr.P.C. in which they have denied their involvement and stated that they have been roped in this case due to enmity. Learned trial court after hearing the arguments of the prosecution and defence passed the impugned judgment and order.

8. Shri V.K. Baranwal, learned counsel for the appellants has submitted that initially the first-information-report was lodged under Section 323 I.P.C. and on death of injured Jagat Narain @ Nankauna Section 304 I.P.C. was added. He has further submitted that there was no justification for the trial court to frame charge against the appellants under Sections 302/34 I.P.C. instead of Section 304/34 I.P.C. It is submitted that motive is double edged weapon, it can be used in

commission of offence and it can also be used to falsely implicate someone. It is also submitted that P.W.-1 Smt. Kanti Devi, P.W.-2 Vipati have turned hostile and have not supported the prosecution case. He has next submitted that P.W.-3 Chandaniya who is said to be an eye-witness was suffering from cataracts and she was not in a position to see the incident and identify the accused persons.

9. It is contended by learned counsel for the accused-appellants that there are material improvements in the testimony of PW.-3 and P.W.-4, which corrodes their evidentiary value and render them wholly unreliable. It is further contented that the incident occurred on 10.02.1979; whereas the injured Jagat Narain @ Nankauna died on 11.02.1979 i.e. after two days of the incident, which shows that immediate cause of death of the deceased Jagat Narain @ Nankauna is not the result of assault rather some intervening circumstances like septicemia is the immediate cause of death. It is also contended that D.W.-1 Deena Nath has stated that at the time of occurrence when he reached the place of occurrence, on hearing the noise, he found that Jagat Narain and Braj Kishore were lying on earth and when he asked as to what had happened then the injured told that they were beaten by some unidentified criminals. It is also contended that the judgment of conviction and sentence passed by learned trial court is erroneous and is not the result of correct appreciation of evidence available on record. Further contention of the learned counsel for the accused-appellants is that at best an offence under Section 304 Part II I.P.C. can be said to be

proved against the accused-appellants and not the offence under Section 302/34 I.P.C., as intention of causing death can not be gathered from the attending facts and circumstances of the case.

10. Learned counsel for the accused-appellants submits that the weapon used in the incident is lathi and whose lathi blow was fatal is not proved by the prosecution, as three persons were indulging in beating the injured persons by lathies. It is further submitted that the incident is of the year 1979 and the appellant no.1 Nand Kishore was 52 years of age whereas appellant Santu was 25 years of age when their statements were recorded under Section 313 Cr.P.C. and now they are more than 90 years and 65 years of age, respectively. Lastly, learned counsel for the accused-appellants submits that in the facts and circumstances of the case it is a fit case where appellants are liable to be acquitted of the charges leveled against them or in the alternative if the prosecution case is believed to be proved, at best their conviction under section 304 Part II I.P.C. is established and the sentence of the period which they have already undergone is sufficient.

11. On the other hand Shri Jai Narain, learned A.G.A. for the State submits that P.W.-3 and P.W.-4 are the eye-witnesses of the incident and their testimony is wholly reliable. He further submits that P.W.-4 is an injured witness and it is well settled law that testimony of an injured witness is treated on greater weight than any other witness. He further submits that though there might be some contradiction or improvement in their statements but they are not of such nature which goes to the

root and erode their credibility. He has also submitted that the testimony of P.W.-3 and P.W.-4 are corroborated by the post-mortem report of the deceased Jagat Narain @ Nankauna (Ex.Ka-10) and injury report of Braj Kishore (Ex. Ka.6), respectively. Lastly he has submitted that the judgment and order passed by the trial court is fully justified and does not call for any interference by this Court in appeal.

12. Faced with the above, learned counsel for the appellants has placed reliance upon the judgments of Hon'ble Supreme Court in the cases of *Virsa Singh Vs. State of Punjab: 1958 AIR (SC) 465*, *Tukaram and Others Vs. State of Maharashtra (2011) 14 Supreme Court Cases 250*, *Abani K Debnath Vs. State of Tripura: 2005 LawSuit(SC) 1549*, *B.N. Kavatakar And Another Vs. State of Karnataka: 1994 Supp (1) Supreme Court Cases 304*, *Veeran & Ors. Vs. State of MP: 2011 LawSuit(SC) 391*, *Veeran & Ors. Vs. State of MP: 2011 LawSuit(SC) 391*. He has further relied upon the judgment of High Court of Delhi in the case of *Suresh Chand Vs. State of Delhi: 1971 LawSuit(Del)108*. Lastly he has relied upon the judgment of this Court in the case of *Aflatoon Vs. State of U.P. in Criminal Appeal No. 2108 of 2003*.

13. Initially the first-information report was lodged under Section 323 I.P.C. but after the death of injured Jagat Narain @ Nankauna the case was converted under Section 304 I.P.C. However, the trial judge framed the charge against the appellants under Section 323/34 and 302/34 I.P.C. P.W.-1 and P.W.-2 have turned hostile and have not supported the prosecution case. They have denied to have made any

statement to the Investigating Officer under Section 161 Cr.P.C. Nothing has emerged in the cross-examination which can go to support the prosecution case. The prosecution case rested only on the testimony of P.W.-3 and P.W.-4. P.W.-3 (first informant) is the mother of the deceased Jagat Narain @ Nankauna and accused Nand Kishore. P.W.-3 is consistent in her statement given before the trial court regarding the incident. The defence has failed to extract any benefit from the cross-examination of this witness. Moreover, she is the mother of accused-appellant no.1 as well as the deceased, so it is unlikely that she will tell a lie before the trial court. Similarly, P.W.-4 the injured witness Braj Kishor brother of both deceased and appellant no.1 is also consistent in his testimony before the trial court and has given a very vivid account of the incident, which took place before him in which he has also received injuries. It is well settled law that an injured witness is highly reliable witness as compared with any other witness. P.W.-5 has prepared the chick F.I.R. and P.W.-6 is the Investigating Officer of the case; whereas P.W.-7 is the scribe of the first information report. They are formal witnesses.

14. The defence has admitted the genuineness of post-mortem of deceased Jagat Narain @ Nankauna (Ex. Ka.-10) and injury report of injured Braj Kishore (Ex. Ka.-6). As per post-mortem report of the deceased Jagat Narain @ Nankauna 7 injuries are said to be on his person which reads as under:-

“1. Stretched wound 10 cm long (obliquely) on the head 8 cm above the left eye-brow.

2. Stretched wound 9 cm long on ... head 14 cm above the Rt. Ear. The right side of the Inj No.1 on the mid region....
 3. Stretched wound 7 cm long on the top of .. 13 cm above the left ear.
 4. Two lacerated wound, 3 cm x ½ cm, 2cm x scalp deep, 2 cm above on the back ear, 7 cm below the left ear. Both side empty.
 5. Contusion 4 cm swelling in the ear of 27x 15 cm on the front+outer side of left arm.
 6. Stretched wound 2 cm long on the back of left forearm. Middle
 7. Contusion Swelling 14 cm x 7 cm on the right outer side of the left..... lower part+....”
15. The injury report (Ex. Ka-6)of injured Brij Kishore reads as below:-
- “1. A lacerated wound 1½” x 1/4” scalp deep over right parietal region. 4½” from tragu of ® ear. Clots present around wound. No fresh bleeding present.
 2. A lacerated wound 2”x...x bone deep over top of scalp in midline 5” from root of nose. No fresh bleeding.
 3. A lacerated wound 1¼”x 1/4” scalp deep over posterior of left parietal region 6” from beginning of left ear. Fresh bleeding absent.
- Opinion: All injuries are caused by blunt object.
Duration about half day”
16. D.W.-1 Deena Nath has been produced by the defence in its support, who has not denied the facts that he saw Jagat Narain @ Nankauna and Braj Kishore in an injured condition lying on the earth. The only thing that D.W.-1 has stated that the injured had told that they were beaten by some unidentified criminals. In light of the appreciation of evidence of P.W.-3 and 4, statement of D.W.-1 that deceased and

injured were beaten by some unidentified criminals, is not trustworthy and deserves to be discarded out right.

17. From the appreciation of evidence of P.W.3 and P.W.-4 and medical evidence Ex. Ka-10 and Ex. Ka-6, the prosecution has been able to prove the incident as it occurred. Now the question arises as to for which offence the accused-appellants are liable to be convicted. Though the prosecution has come out with a motive but the motive was not the immediate cause as the sale deed has been executed some time ago and the enmity was not recent one. Moreover, the intention of the accused-appellants which can be gauged from the attending facts and circumstances in the manner in which the offence was committed, the weapon used and the nature of the injuries sustained.

18. From the facts of the case, since the deceased succumbed to his injuries two days after the incident and the weapon used in the offence was lathi and it is uncertain as to which assault proved fatal and the incident occurred at the spur of moment and without pre-meditation, it cannot be said that the accused-appellants had intention to cause death of the deceased Jagat Narain @ Nankauna rather it can be said that they had knowledge that the injuries which they were inflicting is likely to cause death of Jagat Narain @ Nankauna. Further there is no evidence to show that the injuries received by the injured which resulted in death of Jagat Narain was sufficient in the ordinary course of nature to cause his death. In this regard, Hon'ble Supreme Court in the case of Virsa Singh Vs. State of Punjab 1958 AIR (SC) 465 has held as under:-

“(9) This is a favourite argument in this kind of case but is fallacious. If there is an intention to inflict an injury that is sufficient to cause death in the ordinary course of nature, then the intention is to kill and in that event, the "thirdly " would be unnecessary because the act would fall under the first part of the section, namely-

" If the act by which the death is caused is done with the intention of causing death."

In our opinion, the two clauses are disjunctive and separate. The first is subjective to the offender:

"If it is done with the intention of causing bodily injury to any person."

It must, of course, first be found that bodily injury was caused and the nature of the injury must be established, that is to say, whether the injury is on the leg or the arm or the stomach, how deep it penetrated, whether any vital organs were cut and so forth. These are purely objective facts and leave no room for inference or deduction: to that extent the enquiry is objective; but when it comes to the question of intention, that is subjective to the offender and it must be proved that he had an intention to cause the bodily injury that is found to be present.

(10) Once that is found, the enquiry shifts to the next clause-

" and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

The first part of this is descriptive of the earlier part of the section, namely, the infliction of bodily injury with the intention to inflict it, that is to say, if the circumstances justify an inference that a man's intention was only to inflict a blow on the lower part of the leg, or some lesser blow, and it can be shown that the blow landed in the region of the heart by accident, then, though all injury to the heart is shown to be present, the intention to inflict ail injury in that region, or of that nature, is not proved. In that case, the first part of the clause does not come into play. But once it is proved that there was an intention to inflict the injury that is found to be present, then

the earlier part of the clause we are now examining-

“and the bodily injury intended to be inflicted ”

is merely descriptive. All it means is that it is not enough to prove that the injury found to be present is sufficient to cause death in the ordinary course of nature; it must in addition be shown that the injury is of the kind that falls within the earlier clause, namely, that the injury found to be present was the injury that was intended to be inflicted. Whether it was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury and has nothing to do with the question of intention.

(11) In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broadbased and simple and based on common sense: the kind of enquiry that " twelve good men and true could readily appreciate and understand.

(12) To put it shortly, the prosecution must prove the following facts before it can bring a case under S. 300 “thirdly ” ;

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

(13) Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under S,300 “thirdly”. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional.”

19. In the facts and circumstances of the present case, the prosecution has not been able to bring home the above pre-conditions regarding conviction under Section 302/34 I.P.C. of the appellants, as it has failed to prove that the injuries inflicted by the appellants on the person of the deceased were sufficient in the ordinary course of nature to cause his death.

20. In view of the deliberations and discussions made herein above, we find that the prosecution has failed to prove that the charge under Section 302/34 I.P.C. is made out against the appellants, instead the accused-appellants are liable to be

convicted under Section 304 part II read with 34 I.P.C. and 323/34 I.P.C.

21. The incident took place in the year 1979 and about 45 years have passed and now the appellant Nand Kishore is more than 90 years of age; whereas appellant Santu is about 65 years.

22. Accordingly, conviction of the accused-appellants, namely, Nand Kishore and Santu under Section 302/34 I.P.C. is modified as conviction under Section 304 Part-II read with 34 I.P.C.

23. As per custody certificate issued by Jail Superintendent, Fatehpur, both the appellants have already undergone sentence of three months and nine days.

24. Considering the above facts and circumstances of the case, we are of the view that the punishment of life imprisonment be modified and be substituted with the period of incarceration already undergone by the accused-appellants, they are also directed to pay fine of Rs.25,000/- each, out of which Rs.40,000/- shall be paid to the legal heirs of the deceased Jagat Narain @ Nankauna within a period of one month. In default of payment of fine, the appellants shall undergo simple imprisonment of six months in lieu thereof.

25. With the aforesaid observation and directions this criminal appeal is partly allowed.

26. Let a copy of this order be transmitted to the Chief Judicial Magistrate, Fatehpur for necessary compliance henceforth and submit a report to this Court within two months.

Order Date: 10.07.2025

Abhishek Singh /RKM