

A.F.R.

Neutral Citation No.- 2025:AHC:23009-DB

Court No. - 43

Case :- CRIMINAL APPEAL No.-2142 of 2008

Appellant :- Hari Singh @ Hari Shankar

Respondent :- State of U.P.

Counsel for Appellant :- Hemendra Pratap Singh

Counsel for Respondent :- Govt. Advocate

Hon'ble Vivek Kumar Birla,J.

Hon'ble Ms. Nand Prabha Shukla,J.

1. Heard Sri Hemendra Pratap Singh, learned counsel for the appellant, learned A.G.A. for the State, Mr. Ratan Singh and perused the record.

2. The present Criminal Appeal under Section 374(2) of the Criminal Procedure Code has been filed by the appellant against the judgment and order of conviction dated 27.03.2008 passed by learned Additional District and Sessions Judge, Fast Track Court No.2, Hathras in S.T. No. 91/1999, State vs. Hari Singh @ Hari Shankar, under Section 304 IPC, Police Station Sikandra Rau, District Hathras whereby the appellant has been convicted under section 304 IPC and sentenced to imprisonment for life with a fine of Rs.5000/- and in case of default in payment of fine, to undergo further imprisonment of two months.

3. Briefly stated the first informant, Ajay Muni lodged an FIR under Section 308 IPC at Police Station Sikandra Rau, District Hathras stating that the appellant Hari Singh a local villager had committed theft, for which he was prosecuted by the first informant. In retaliation to that incident, on 01.11.1998 at 5:45 am while the first informant was on his way to perform pooja at Hanuman Garhi and reached the road cross, the appellant Hari Singh who was ambushed there, shouted that today he would teach him a lesson and assaulted the first informant with a Farsa causing him serious injuries. When the first informant raised an alarm, Jayanti S/o Goverdhan Singh and Dinesh Kumar S/o Ajay Pal Singh, reached the spot but the appellant Hari Singh fled away.

4. During investigation, the Investigating Officer reached the spot and recorded the statement of the injured and other witnesses under section 161 Cr.P.C. The first informant/injured Ajay Muni was admitted for the treatment but he died on 03.11.1998 at 12:35 am. Thereafter, the investigation proceeded under section 304 IPC, the Inquest and Autopsy

Reports dated 03.11.1998 were collected. After the completion of investigation, the appellant was charge sheeted under section 304 IPC.

5. The case being exclusively triable by the Court of Sessions, was committed to the Sessions Court. The learned Trial Court framed the charges against the accused appellant under Section 304 IPC but the accused denied the charges and claimed to be tried.

6. The prosecution, so as to bring home the charge, examined seven witnesses.

P.W.1 Jayanti was an eye witness account but during the trial proceedings he did not support the prosecution case and was declared hostile.

P.W.2 Dinesh Kumar was also an eye witness and had supported the prosecution case. He deposed that he witnessed the incident and took the injured to the Police Station on his scooter and was also the scribe of the written report (Tehrir) dictated by the first informant/injured Ajay Muni. He was also the witness of the inquest proceeding and on his pointing, the Investigating Officer had prepared the site plan.

P.W.3 Jaiveer was the witness of Recovery Memo dated 01.11.1998 (Exhibit Ka-3) regarding the collection of plain earth and blood stained earth from the spot and had proved the said document.

P.W.4 Dr. S.K. Gupta had conducted the post mortem of the deceased Ajay Muni and prepared the autopsy report. He deposed that at the time of the post mortem, following ante mortem injuries were found on the body of the deceased.

***Injury No. 1-** 8 cm long stitched wound on the right side of head, 7. 5 cm above the right ear to which on further dissection the parietal and frontal bone of the right side of the head were found fractured.*

***Injury No. 2-** 15 cm stitched parietal wound on the back of the right forearm.*

***Injury No. 3-** Contusion on right thigh on the lower front side measuring 6 cm x 2 cm.*

He further deposed that during internal examination, the parietal and frontal bone of the right skull was found fractured. Gas and water were found in small and large intestine, urinary bladder was empty. The deceased died due to haemorrhage and shock due to ante mortem injuries. In his cross-examination, he further deposed that the stitched wounds were found and injuries 1 to 3 were old in duration. The

deceased died during treatment in the Hospital. The said witness could not give any opinion as to how and when the injuries were caused.

P.W.5 Constable 219 Ganga Ram deposed that he prepared the Chik Report No.375/1998 at around 6:45 am in his own hand writing and had registered the FIR in Case Crime No. 454 of 1998, under Section 308 IPC on the basis of the written report (Nakal Tehrir) and proved the FIR (Exhibit Ka-5). The said FIR was entered by him in the G.D. No.14 at 6:45 am on 01.11.1998 and proved it as Exhibit Ka-6.

P.W.6 I.O. Mahendra Singh the Investigating Officer of the case, deposed that he took over the investigation on 01.11.1998 after lodging of the FIR. He recorded the statement of the first informant/injured Ajay Muni under section 161 Cr.P.C. and proved it as Exhibit Ka-7 as well as the statements of C.P. Ganga Ram, Rajveer, Satpal and witness Dinesh Kumar. He deposed that a Site Plan was prepared and the Plain and Blood Stained Earth were collected from the spot and after the death of the injured, the inquest and the autopsy reports were collected and after the completion of investigation, the charge sheet was submitted against the appellant Hari Shankar @ Hari Singh, under section 304 IPC and proved it as Exhibit Ka-9.

P.W.7 Dr. S.K. Purwal deposed that on the date of incident, he was posted as Emergency Medical Officer at District Hospital, Aligarh and had examined first informant/injured Ajab Singh at 11:10 am and had found following injuries on his body.

***Injury No.1** - Incised wound 6.5 cm x 1 cm into bone deep on the right side of the skull. 10 cm above the right ear, the edges were continuous towards the side, there was clotted blood in the wound. The injury was kept under observation and X-ray was advised.*

***Injury No.2** - Incised wound 3 cm x 1/2 cm flesh deep on left and middle side of neck with continuous edges outwards. Clotted blood was present. On cleaning, fresh blood was oozing out.*

***Injury No.3** - Incised wound 5 cm x 1/2 cm into depth of flesh at back of neck near middle edge with fresh bleeding continuously towards outside on cleaning.*

***Injury No.4** - Contusion with scar 18 cm x 14 cm on right arm outside.*

***Injury No.5** - Torn wound measuring 22 cm x 3 cm into flesh deep on right arm with scar, irregular edge towards outside and fresh bleeding was oozing out on cleaning.*

***Injury No.6** - Torn wound measuring 10 cm x 2 cm into from skin to flesh deep on right leg facing outwards and in centre and edges were irregular. Fresh blood was flowing on the wound.*

According to P.W.7, injury nos.1, 2 and 3 were caused with some sharp edged weapon and other injuries were found simple in nature caused with some blunt weapon and with friction. All the injuries were found fresh and injured was admitted at the Hospital and was referred by the Surgeon. The said injuries could have been caused on 01.11.1998 at 5:45 am. Injury nos.4, 5 and 6 were caused with a blunt weapon and with friction and could not be caused with a sharp weapon. Injury nos.1, 2 and 3 were caused with a sharp edged weapon but could not give any opinion regarding the nature of the weapon. He also opined that the injuries could have been caused at about 3:30 am in the morning.

7. In support of their version, following documents were relied by the prosecution and its contents were proved, *viz*

1. FIR (**Exhibit Ka-5**)
2. Written Report (**Exhibit Ka-1**)
3. Statement of First Informant recorded U/s 161 Cr.P.C. (**Exhibit Ka-7**)
4. Recovery Memo of Blood Stained and Plain Soil (**Exhibit Ka-3**)
5. Medical Examination Report dated 01.11.1998 (**Exhibit Ka-10**)
6. Post Mortem Report (**Exhibit Ka-4**)
7. Panchayat Nama (**Exhibit Ka-2**)
8. Charge Sheet (**Exhibit Ka-9**)
9. Site Plan with Index (**Exhibit Ka-8**)
10. Copy of G.D.No.14 dated 01.11.1998 at 6:45 am (**Exhibit Ka-6**).

8. After completion of the prosecution evidence, the appellant was examined under section 313 Cr.P.C. and denied the incident and stated that he had been falsely implicated.

9. Learned Trial Court after hearing both the sides, convicted the accused appellant under section 304 IPC and sentenced accordingly. Hence, the present appeal.

10. Learned counsel for the appellant while arguing the appeal, submitted that the first informant Ajay Muni, who lodged the FIR, died on the third day of the incident. Therefore, the contents of the FIR were not proved. Next it was argued that P.W.1 Jayanti, who was an eye witness of the incident did not support the prosecution case and was declared hostile. The main eye witness P.W.2 Dinesh Singh in his cross-examination had deposed that he reached the spot after 2-4 minutes, after hearing the noise. The place where he stood was about 25–30 metres away and the spot was not clearly visible. He further stated that it was the month of November and during morning hours, the visibility was low. It was also argued that Jaiveer Singh P.W.1 and

Dinesh Kumar P.W.2 were the panch witnesses in the inquest proceeding and opined that some people had caused injuries to Ajay Muni on 01.11.1998 during morning hours. The two panch witnesses were stated to be the eye witnesses in the FIR but at the time of preparation of the inquest, they did not disclose the name of the accused appellant, therefore, the evidence adduced by two eyes witnesses could not be relied upon.

11. After some length of argument, learned counsel for the appellant made a request to the Court that he does not want to press for the acquittal of appellant but looking to the nature of the injuries and the intention of the appellant and the fact that the act of the appellant was not premeditated and the incident took place all of a sudden, therefore, even if the prosecution case is admitted to be true, it cannot travel beyond the scope of section 304 IPC.

12. *Per contra*, learned A.G.A. for the State has vehemently opposed the aforesaid submissions on the ground that there was a prompt FIR and the deceased, who was a first informant, died on the third day of the incident. The I.O. during the course of investigation had recorded the statement of the first informant/injured Ajay Muni under section 161 Cr.P.C. After the death of the said injured on the third day, his statement under section 161 Cr.P.C. shall be treated as a dying declaration under section 32(1) of the Indian Evidence Act. Therefore, the accused appellant is liable to be convicted under section 302 IPC.

13. While opposing the aforesaid contentions, Learned A.G.A. for the State asserted that, in the instant matter, the first informant Ajay Muni, an injured died on the third day of the incident. His statement under section 161 Cr.P.C. was recorded by the Investigating Officer on 01.11.1998, i.e. before his death on 03.11.1998, therefore, his statement under section 161 Cr.P.C. can be considered as a dying declaration under section 32 (1) of the Indian Evidence Act and can be used as an evidence during trial. It has been submitted that the Court below has erred in not relying the statement of the deceased Ajay Muni given to the Investigating Officer under section 161 Cr.P.C.(Exhibit Ka-7) which was proved by P.W. 6 I.O Mahendra Singh.

14. Upon hearing learned counsel for the parties and from perusal of the record, it is evident that P.W.1 and P.W.2 are the eye witnesses of the alleged incident. Though P.W.1 Jayanti was declared hostile but the testimony of P.W.2 Dinesh Singh, who was also the scribe of the FIR, has proved the incident. The said witness had proved the FIR (Exhibit Ka-5) and the written report (Nakal Tehrir Exhibit Ka-1) which was

written by him in his own hand writing. The said FIR also contains the thumb impression of the first informant/deceased Ajay Muni. He had also proved the inquest report (Exhibit Ka-2) and deposed that after the death of Ajay Muni, he had informed the concerned Police Station and was a panch witness.

15. In his cross-examination, P.W.2 Dinesh Kumar deposed that he went for the nature's call at around 5:30 am and reached the spot when he heard the cry of Ajay Muni, who was lamenting due to injuries. The place of incident was about 25-30 metres away from his field. He rushed to the spot and reached within 2-4 minutes and saw that Hari Shankar was assaulting Ajay Muni with a Farsa. Hari Shankar gave 4-5 blows with Farsa to Ajay Muni. The said witness also deposed that as it was the month of November, therefore, the visibility was low. Even Jayanti P.W.1 also reached to the spot and was an eye witness. Further, the said witness stated that it took about 10-15 minutes to reach the spot as there was a ditch on the way and the bajra and jowar crops were sown in his field which was about 5 feet high. Due to these reasons, he could not see the spot clearly. When he reached the spot, he found Ajay Muni lying and was in complete sense. He further deposed that the Exhibit Ka-1, i.e., the written report (Nakal Tehrir) was written by him using two pens and the names of Jayanti S/o of Goverdhan Singh and Dinesh Kumar S/o of Ajay Pal Singh were written with a different pen. He denied that the written report was prepared earlier and the names of the witnesses were added subsequently. He also denied that it is not true that the Exhibit Ka-1 was not dictated by the deceased Ajay Muni but was dictated by Jayanti and would have added his name as scribe. The said witness also admitted in his cross-examination that Ajay Muni died due to the injuries caused by some people on 01.11.1998 during morning hours. He gave this (rai panchan) opinion on the directions of the Police Officers. He even told the Police Officers that the deceased received injuries by a single person and not by several persons. He did not complain about this matter to the higher authorities. He also asserted that it is incorrect to say that he did not know the name of the person who had caused injury to the deceased Ajay Muni. The site plan was prepared on his pointing. It is also transpires that the first informant/injured Ajay Muni died on the third day. The said injured in his FIR had narrated the incident to the scribe and the investigating Officer had recorded his statement under Section 161 Cr.P.C., which was part of the case diary and was proved by the P.w.6 Mahendra Singh.

16. Recently, in **Dharmendra Kumar @ Dhamma vs. State of Madhya Pradesh (2024) 7 SCR 218**, the Hon'ble Supreme Court has observed that:

“Section 161 Cr.P.C. empowers the police to examine orally any person who is acquainted with the facts and circumstances under investigation. The police may reduce such statement into writing also. Section 162 (1) Cr.P.C., nonetheless mandates that no statement made by any person to a police officer, if reduced to writing, be signed by the person making it, nor shall such statement be used in evidence except to contradict a witness in the manner provided by section 145 of the Indian Evidence Act. However, sub section 2 of section 162 Cr.P.C. carves out an exception to sub section 1 as it explicitly provides that nothing in section 162 Cr.P.C. shall be deemed to apply to any statement falling within the ambit of clause 1 of section 32 of the Indian Evidence Act. In other words, a statement made by a person who is dead, as to cause of his death or to the circumstances of the transactions, which resulted in his death, to a police officer and which has been recorded under section 161 Cr.P.C. shall be relevant and admissible, notwithstanding the express bar against use of such statement in evidence contained therein. In such eventuality, the statement recorded under section 161 Cr.P.C. assumes the character of a dying declaration, the Court ought to be extremely careful and cautious in placing reliance thereupon.”

17. A similar view was expressed in **Sri Bhagwan vs. State of U.P. (2013) 12 SCC 237**, wherein the Hon'ble Apex Court had the occasion to consider section 161 Cr.P.C. and section 32 of the Indian Evidence Act. The Court dealt with a statement under Section 161 Cr.P.C. subsequent to death of the victim. In para-20 to 24, the following has been held:

“While keeping the above prescription in mind, when we test the submission of the learned counsel for the appellant in the case on hand at the time when 161 Cr.P.C. statement of the deceased was recorded, the offence registered was under [Section 326](#), IPC having regard to the grievous injuries sustained by the victim. PW-4 was not contemplating to record the dying declaration of the victim inasmuch as the victim was seriously injured and immediately needed medical aid. Before sending him to the hospital for proper treatment PW-4 thought it fit to get the version about the occurrence recorded from the victim himself that had taken place and that is how Exhibit Ka-2 came to be recorded. Undoubtedly, the statement was recorded as one under [Section 161](#) Cr.P.C. Subsequent development resulted in the death of the victim on the next day and the law empowered the prosecution to rely on the said statement by treating it as a dying declaration, the question for consideration is whether the submission put forth on behalf of the respondent counsel merits acceptance.

18. Mr. Ratnakar Dash, learned senior counsel made a specific reference to [Section 162 \(2\) Cr.P.C.](#) in support of his submission that the said section carves out an exception and credence that can be given to a 161 statement by leaving it like a declaration under [Section](#)

32(1) of the Evidence Act under certain exceptional circumstances. Section 162 (2) Cr.P.C. reads as under:

“162. (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act.”

19. Under Section 32(1) of the Evidence Act it has been provided as under:-

“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.”

20. Going by Section 32(1) Evidence Act, it is quite clear that such statement would be relevant even if the person who made the statement was or was not at the time when he made it was under the expectation of death. Having regard to the extraordinary credence attached to such statement fall under Section 32(1) of the India Evidence Act, time and again this Court has cautioned as to the extreme care and caution to be taken while relying upon such evidence recorded as a dying declaration.

21. As far as the implication of 162 (2) of Cr.P.C. is concerned, as a proposition of law, unlike the excepted circumstances under which 161 statement could be relied upon, as rightly contended by learned senior counsel for the respondent, once the said statement though recorded under Section 161 Cr.P.C. assumes the character of dying declaration falling within the four corners of Section 32(1) of Evidence Act, then whatever credence that would apply to a declaration governed by Section 32 (1) should automatically deemed to apply in all force to such a statement though was once recorded under Section 161 Cr.P.C. The above statement of law would result in a position that a purported recorded statement under Section 161 of a victim having regard to the subsequent event of the death of the person making the statement who was a victim would enable the prosecuting authority to rely upon the said statement having regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under Section 32(1) of Evidence Act and thereby commend all the

credence that would be applicable to a dying declaration recorded and claimed as such.

18. In the matter in hand, the first informant Ajay Muni who had received injuries in the incident, had lodged the FIR and then his statement under section 161 Cr.P.C. was recorded by the Investigating Officer goes to indicate that though injuries caused to Ajay Muni was serious in nature but he was able to speak and convey his statement properly to the Investigating Officer. The Investigating Officer P.W.6 in his testimony has proved the first information report and the statement of the first informant/deceased recorded under section 161 Cr.P.C. (Exhibit Ka-7) was recorded in his own hand writing wherein the accused appellant was specifically named of assaulting him with a Farsa. The inquest report and post mortem report corroborate with the statement of the first informant/injured Ajay Muni who died on the third day of the incident.

19. Thus, it is manifested that even if no medical/fitness certificate was found, the Court can consider the statement of the deceased recorded under section 161 Cr.P.C. as a dying declaration.

20. For the reasons above, we are of the view that accused appellant has been rightly convicted under section 304 IPC. However, as far as the quantum of punishment is concerned, the period of sentence should be in conformity with the gravity of the offence.

21. In **Mohd. Giasuddin vs. State of A.P. (AIR 1977 Sc 1926)**, explaining the rehabilitation and reformatory aspects while sentencing, it has been observed by the Supreme Court that:

“Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behavior has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology is in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an ‘in terrorem’ outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must inure him. If you are to reform him, you must improve him and, men are not improved by injuries.”

22. ‘Proper Sentence’ was explained in **Deo Narain Mandal vs. State of U.P. (2004) 7 SCC 257** by observing that sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the ‘Principle of proportionality’. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of the Court in awarding sentence cannot be exercised arbitrarily or whimsically. In **Ravada Sasikala vs. State of A.P., AIR 2017 SC 1166**, the Supreme Court referred the judgment in **Jameel vs. State of UP ((2010) 12 SCC 532)**, **Guru Basavraj vs. State of Karnatak, (2012) 8 SCC 374**, **Sumer Singh vs. Surajbhan Singh, (2014) 7 SCC 323**, **State of Punjab vs. Bawa Singh, ((2015) 3 SCC 441)** and **Raj Bala vs. State of Haryana, (2016) 1 SCC 463** and has reiterated that operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances and relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensation and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The Supreme Court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the county has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society cannot long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformatory and corrective. At the same time, under harshness should also be avoided keeping in view the reformatory approach underlying in our criminal justice system.

23. Keeping in view the facts and circumstance of the case and also keeping in view criminal jurisprudence in our country which is reformatory and corrective and not retributive, this Court considers that

no accused person is incapable of being reformed and therefore, all measures should be applied to give them opportunity of reformation in order to bring them in the social stream.

24. Since the learned counsel for the appellant has not pressed the appeal on its merit, however, after perusal of entire evidence on record and judgment of the Trial Court, we consider that the appeal is devoid of merit and is liable to be dismissed. Hence, the conviction of the appellant is affirmed.

25. As discussed above, '*reformatory theory of punishment*' is to be adopted and for that reasons, it is necessary to impose punishment keeping in view the '*doctrine of proportionality*'. It appears from perusal of impugned judgment that sentence awarded by learned Trial Court for life term is very harsh keeping in view the entirety of facts and circumstance of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformatory approach underlying in criminal justice system.

26. As the accused has already served out the actual sentence of more than 19 years as per the Custody Certificate dated 07.04.2024 issued by Senior Superintendent, Central Jail, Agra, we deem it proper to award the punishment of sentence already undergone by the appellant.

27. The fine of Rs.5,000/- is hereby waived as it would be ruinous to the convict.

28. Accordingly, the appeal is **partly allowed** with the modification of the sentence as above.

29. Let the appellant-Hari Singh @ Hari Shankar be released forthwith.

30. Office is hereby directed to communicate the judgment and order of this Court to the Trial Court as well as the District Jail concerned for necessary compliance. The Trial Court Record be also sent back.

Order Date :- 22.1.2025
Monika