Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Government Appeal No.41 of 2012

State of Uttarakhand ….Appellant

Vs.

Babar Khan and two others ……Respondents

Present :

Mr. J.S. Virk, learned A.G.A. for the State/appellant.
Mrs. Pushpa Joshi, learned Senior Advocate assisted by Mr. Sachin Kumar Sharma, learned counsel for the respondents.

with

Criminal Appeal No.129 of 2012

Babar Khan ….Appellant

Vs.

State of Uttarakhand ……Respondent

Present :

Mrs. Pushpa Joshi, learned Senior Advocate assisted by Mr. Sachin Kumar Sharma, learned counsel for the appellant.
Mr. J.S. Virk, learned A.G.A. for the State/respondent.

Reserved on: 12.08.2020
Delivered on : 28.12.2020

Coram : Hon'ble Sudhanshu Dhulia, J.
Hon'ble Alok Kumar Verma, J.

Per : Hon'ble Alok Kumar Verma, J.

The Government Appeal No.41 of 2012 is directed against the judgment dated 20.04.2012 passed by learned VIth

Additional Sessions Judge, Haridwar in Sessions Trial No.470 of 2004, “State vs. Babar Khan and others”, whereby the accused persons/respondents are acquitted from the offences punishable under Section 302 read with Section 34, Section 307 read with Section 34 and Section 120B read with Section 302 of I.P.C.

2. The Criminal Appeal No.129 of 2012 is preferred against the above mentioned judgment dated 20.04.2012, whereby, following the provisions of Section 222 of the Code of Criminal Procedure, 1973 (hereinafter referred to as ‘Code’), the trial court convicted the appellant-Babar Khan in the offence punishable under Section 304-A of I.P.C. and sentenced him to undergo rigorous imprisonment for one and half years along with a fine of Rs.10,000/-, in default to suffer further six months simple imprisonment. He is also convicted in the offence punishable under Section 337 of the I.P.C. and sentenced to undergo rigorous imprisonment for three months along with a fine of Rs.500/-, with default imprisonment. Both the sentences are directed to run concurrently.

3. Briefly stated the prosecution story as it emerges from re-appreciation of the evidence on record is that an FIR was registered on 28.10.2003 at 11.15 p.m. on the basis of a written report lodged by the informant Masroor Khan, alleging in it that the informant and one Kalwa were having a litigation with the accused persons namely Babar, Sahjad, Rao Salim and Rao Abad Khan, regarding land. These persons had enmity with the informant and Kalwa due to this litigation. It is alleged in the FIR that today, October 28, 2003 at around 4.30 p.m., the informant was coming back to home with Kalwa on his scooter bearing No.U.P. 10 D-1578, after finishing court’s work. The informant was driving the said scooter and Kalwa was sitting behind it. When they crossed the second bridge at Chinmaya Degree College road, an Ambassador Car, bearing No.U.P. 07-1929, which was driving by the accused Babar in a rash manner and while

driving the said vehicle in a manner, with intention to kill the informant and Kalwa, he hit against the said scooter from its back and after pulling back gear on the car, the accused Babar trampled the scooter and Kalwa twice. The informant ran away and saved his life. Both, the informant and Kalwa, who was pillion rider, had sustained injuries. The remaining accused persons were sitting in that car and they all had intention to kill the informant and Kalwa. This incident was seen by one Akhtar, who was coming from his field. The accused persons ran away from the spot along with the car. The injured Kalwa was taken to Government Hospital by the informant with the help of people. The injured Kalwa was declared dead during his treatment in the hospital. The delay was caused in lodging the FIR due to treatment in the hospital. The report of the informant was written by one Naseer Ahmad.

4. The injuries of the injured Kalwa, aged about 65 years and the informant Masroor Khan, aged about 35 years, were examined at 5.20 p.m. and 5.30 p.m. respectively on 28.10.2003 at District Hospital, Haridwar.

5. Inquest proceeding was conducted on 29.10.2003. The autopsy on the dead body of Kalwa was performed on 29.10.2003 at 1.10 p.m. at District Hospital, Haridwar. The offending Ambassador car was recovered from the house of the accused Babar Khan on 29.10.2003. Technical inspection of the offending car and said scooter were conducted on 19.11.2003. Statement of the injured Masroor Khan was recorded under Section 164 of the Code on 21.11.2003. The Investigating Officer prepared site map and recorded statements of the witnesses. After completion of the investigation, the charge sheet was filed.

6. The case was committed to the Court of Session. The charges were framed under Sections 302 read with 34, 307 read with

34, 120B read with 302 of the I.P.C. The accused persons denied the charges and claimed to be tried.

7. After framing the charges, the case was abetted against the co-accused Salim Khan due to his death.

8. In order to bring home the guilt of the accused persons, the prosecution examined as well as 11 witnesses.

9. Statements under Section 313 of the Code were recorded. Learned trial court heard arguments, appreciated the evidences and passed the impugned judgment.

10. Heard learned counsel for the parties.

11. It is contended on behalf of the State that the trial court had given undue weight to the minor contradictions in the evidences of the prosecution witnesses.

12. Mrs. Pushpa Joshi, learned Senior Advocate submitted that the appellant Babar Khan and other co-accused persons have been falsely implicated and wrongly convicted in the offence punishable under Sections 304A and 337 of the I.P.C. whereas he has not committed any offence. The case of the prosecution is based upon the statement of PW-3 Masroor Khan, who is an interested witness as he accepted his enmity with the appellant.

13. We have carefully assessed the evidences adduced by the prosecution.

14. According to the prosecution, PW-1 Mohd. Akhtar was eye-witness of the incident but this witness did not support the prosecution case and he was declared hostile by the prosecution. He deposed that he did not see any such incident.

15. PW-2 Constable Ramesh Saini had registered the FIR of the present case, Ext. A1. This witness stated in his cross-examination that the informant Masroor Khan did not come with his tehrir (written report). According to him, one Saddiqu Ahmad brought the tehrir.

16. PW-3 Masroor Khan is injured person. He has deposed that on 28.10.2003, he along with Kalwa and accused persons went to the court Roshanabad on the date of the trial. He gave evidence in a suit regarding a property that day. On that day, his 4-5 cases were fixed. After completion of these cases, at about 4.30 p.m. he and Kalwa were going to their house from Roshanabad court on a scooter, bearing No. U.P. 10 D-1578. When they reached near second bridge, an Ambassador car bearing No.U.P. 07-1929, which was driving by the accused Babar, who with an intention to kill them, hit his scooter. The remaining accused persons were sitting in that car. He and Kalwa fell down. He hid himself in bushes. These accused persons again pulled back gear of the car and crushed Kalwa and his scooter twice over. After this incident, the accused persons fled from the spot. He recognized accused persons while driving the vehicle back and forth. He identified accused Salim, Babar and Abad in the court. He deposed that Kalwa was very badly injured. He took Kalwa to the District Hospital, Haridwar. He and Kalwa were hospitalized. Kalwa died due to injuries at 5.30 p.m. He further stated that this incident was seen by Mohd. Akhtar, Hamid, Asgar, Ahsan, Dilsad. He stated that Nasir Ahmad wrote his report in the hospital due to his injuries. He proved his “tehrir” (written report) Ext. K3. Seeing the statement of Section 164 of the Code, he stated that he gave that statement on 21.11.2003.

17. PW-3 Masroor Khan stated in his cross-examination that since about 2000, he has enmity with accused persons. There was *marpeet* between them, then a non-cognizable report was lodged by

him in the year 2003. He stated that he has filed three revenue cases against the accused Babar Khan, which are pending. He further stated that the accused Babar Khan and the accused Sahjad filed a case against the State of Uttarakhand regarding a land of masjid in the court of S.D.M., Haridwar, in which Babar Khan and Sahjad were declared Bhumidhar with transferable right. He and Kalwa moved a restoration application that was rejected on 26.05.2004. He stated that his cases are pending against Salim and Abad regarding land. He stated in his cross-examination that he was terminated from his service after working for 14 years. A criminal case under Section 307 of the I.P.C. is pending against him in which he was in jail for 10 months.

18. PW-3 Masroor Khan said that he did not go to police station to lodge the FIR, as he was hospitalized. He was discharged on 30.10.2003. He stated that sons of the deceased Kalwa were present in the hospital and he informed Kalwa's sons about the incident. But, he does not know whether Kalwa's sons went to the police station. As long as Kalwa's sons were in hospital, nothing was decided. Kalwa's sons were remain with this witness till 10.00 p.m. This witness told them to go to the police station but they did not go to the police station. This witness stated in his cross-examination that this witness had not named the witnesses, namely, Akhtar, Aslam, Ahsan and Dilsad in his statement, recorded under Sections 161 and 164 of the Code of Criminal Procedure. This witness stated that he wore glasses of minus 2.5 to minus 3 at the time of the incident, which was broken.

19. According to the prosecution, PW-4 Asgar Ali was eye-witness of the incident. He stated that he was going to his house from Roshanabad at about 4.30 p.m. on 28.10.2003. Akhtar son of Hamid (PW-1) was with him. When he reached near the bridge, he saw that an Ambassador Car bearing No.1929, which was driving by the

accused Babar rashly, with an intention to cause harm to them. It hit the Scooter No.1578, which was driving by Masroor and Kalwa was sitting on the back of the scooter. The brother of the accused Babar accused Sahjad was sitting beside him. Kalwa fell down on right side and Masroor fell down on left side. The accused Babar put the back gear of the car and trampled Kalwa. After this incident, the accused persons fled from the spot. Masroor and Kalwa were taken to the hospital by a Auto. He could not see the other persons who were sitting in the said car.

20. PW-5 Mohd. Iqbal is the witness of inquest. He stated in his cross-examination that he signed the inquest report on the instruction of the police officer, therefore, he could not say what was written in the inquest report.

21. PW-6 B.S. Bhakuni and PW-11 Vijay Kumar are Investigating Officer. After transfer of the witness PW-6, PW-11 Vijay Kumar has filed charge-sheet, Ex.Ka.15, on the basis of the investigation conducted by PW-6 B.S. Bhakuni.

22. PW-7 Dr. K.K. Karoli examined the injured Kalwa, aged about 65 years, and Masroor Khan on 28.10.2003 at 5.20 p.m. and 5.30 p.m. respectively.

23. PW-8 Nawab Khan did not support the prosecution story. He was declared hostile by the prosecution.

24. PW-9 Dr. Manish Dutt conducted the post-mortem of the dead body of Kalwa on 29.10.2003 at about 1.10 p.m.

25. PW-10 Balbeer Singh is a witness of technical inspection report of the ambassador and the scooter. According to him, he did

not examine the said ambassador and scooter himself. The technical inspection was conducted by Ram Niwas Yadav.

26. The entire case of the prosecution is based on the statement of PW-3 Masroor Khan and PW-4 Asgar Ali. According to these two witnesses, an Ambassador Car bearing No.UP07-1929, which was driven by the accused Babar Khan in a rash manner, with an intention to kill, hit the scooter of the injured Masroor Khan, bearing No.UP10D-1578 on 28.10.2003 at about 4.30 p.m. and at that time PW-3 Masroor Khan was driving the said scooter whereas the deceased Kalwa was a pillion rider. The remaining accused persons were sitting in that car. These accused persons again pulled back gear on the car and crashed Kalwa and scooter twice. The injured Masroor Khan and Kalwa were taken to the hospital, where Kalwa died at 5.30 p.m. PW-3 Masroor Khan has deposed that at that time, Kalwa wore white kurta payjama and this witness wore glasses of minus 2.5 to minus 3 at that time, which was broken in this incident.

27. The question is whether these statements are believable as there is no evidence on record which shows that there was any mark of tire of any car over the white kurta or payjama of the deceased Kalwa. PW-7 Dr. K.K. Karoli has stated in his cross-examination that there was no mark of tire on the injuries of Kalwa and no cut or torn were found on the cloth of the deceased Kalwa. Injury which may be produced when the vehicle wheels pass over there should be stripping loose of the skin from a limb or the torso. Such an injury is due to the rotating action of the wheel as the wheel passes over the body. PW-9 Dr. Manish Dutt, who conducted the post-mortem of the dead body of Kalwa stated that fracture of the forehead bone and ribs of the deceased Kalwa were found broken and according to the doctor the forehead bone and ribs can break on a fall from the scooter.

28. According to PW-7 Dr. K. K. Karoli, PW-3 Masroor Khan informed him that the injuries were caused by an accident. This witness stated that most of the injuries of both the injured were on the right side which was possible to fall down from the scooter. In these circumstances, this possibility cannot be ruled out that the said injuries were caused in the accident and the deceased Kalwa had died as a result of fatal accident. PW-7 further stated that a person having minus 2.5 to minus 3 of glasses is unable to identified persons sitting in a car from the distance of 15 feets.

29. In the FIR, there was no mention about PW-4 Asgar Ali having witnessed the occurrence. Even he was not mentioned as a witness in the statements of the informant Masroor Khan, recorded under Sections 161 and 164 of the Code and in the complaint to the higher police authorities made by the informant PW-3 Masroor Khan. PW-3 Masroor Khan could not clarify in his statement regarding delay of mentioning the name of PW-4 Asgar Ali as witness of the incident. According to PW-3 Masroor Khan, the witness Asgar Ali was coming from his field (Agriculture) at the time of the incident, whereas, the witness PW-4 Asgar Ali stated in his cross-examination that there was no agriculture land in his name. In these circumstances, it is apparent that Asgar Ali has been introduced by the informant at a later stage just to fill the lacuna of independent eye-witness. His testimony is not wholly reliable. Therefore, we have no hesitation in coming to the conclusion that PW-4 Asgar Ali is not actually eye-witness nor he witnessed any occurrence. PW-1 Mohd. Akhtar who is considered to be an eye-witness has turned hostile.

30. PW-3 Masroor Khan stated that he saved his life hiding himself in bushes, but, no bush is shown in the site plan, Ext. Ka-9, prepared by PW-6 B.S. Bhakuni, Investigating Officer, on the pointing of PW-3 Masroor Khan. PW-3 Masroor Khan stated that sons of the deceased Kalwa were present in the hospital and he informed them

about the incident, but, they had not lodged any FIR. The Investigating Officer did not record the statements of the sons of Kalwa to know the truth of the case, which makes doubtful the prosecution story. PW-3 Masroor Khan stated that he was hospitalized and he was discharged on 30.10.2003, whereas, PW-6 Investigating Officer stated in his cross-examination that Masroor Khan was not hospitalized and 400-500 people came to lodged FIR. These circumstances make it clear that the FIR was lodged under the pressure of those 400-500 people.

31. There is no evidence on record to show that any of the accused was the owner of the said Ambassador Car and no evidence is produced by the prosecution that any of the accused took the said car from its owner. PW-6 Investigating Officer stated that he took possession of the said Ambassador Car from the house of the accused Babar Khan but he did not see the registration certificate of the said car. He did not make any inquiry regarding ownership of the said car and no fard recovery was prepared for taking possession of the said car.

32. Technical inspection reports also do not support the version of PW-3 Masroor Khan. Photographs of both vehicles are on record and from the perusal of these photographs it is clear that only scooter’s number plate and stepney were slightly bent. Both the vehicles were in good working conditions.

33. Learned counsel appearing for the State contended that the appellant Babar Khan had enmity with PW-3 Masroor Khan and both were involved in various litigations and due to the previous enmity, the appellant Babar Khan wanted to kill Masroor Khan. No doubt, previous enmity between the parties may be a ground to take revenge but simultaneously previous enmity may also be a ground to falsely implicate the accused. In the present matter, it is doubtful that

due to previous enmity, the alleged incident was committed by the appellant Babar Khan and co-accused persons. If the appellant Babar Khan and co-accused persons wanted to kill Masroor Khan then why they did not make any attempt to kill him by coming out from the car.

34. The Government Appeal No.41 of 2012, is filed against the acquittal of the accused persons. The law is well settled that order of acquittal strengthens the presumption of innocence of the accused persons. In administration of criminal justice an accused is presumed to be innocent unless such a presumption is rebutted by the prosecution by producing positive evidence to show him to be guilty of the offence with which he is charged and if two views are possible on the evidence produced, the view favorable to the accused is to be accepted. In **Bhagwan Singh and others vs. State of M.P., (2002) 4 SCC 85,** the Hon'ble Supreme Court observed that the golden thread which runs through the web of administration of justice in criminal case 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 of his innocence, the view which is favorable to the accused should be adopted.

35. It is also a basic rule of the criminal jurisprudence that suspicion, however, strong cannot take place of proof. In **Sujit Biswas vs. State of Assam, AIR 2013 SC 3817***,* the Hon'ble Supreme Court held that 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.

36. There is no positive and conclusive evidence placed on record against the respondents in Government Appeal No.41 of 2012 by the prosecution to prove its case that the respondents were guilty of committing murder of the deceased and attempt to murder of Masroor Khan. The prosecution has also not been able to prove its case beyond all reasonable doubts against the appellant Babar Khan that the death of Kalwa and injuries to Masroor Khan were caused by his any rash or negligent act.

37. As a result, we accept the case of the appellant Babar Khan. Accordingly, Criminal Appeal No.129 of 2012 is allowed. The Government Appeal No.41 of 2012 is dismissed. The impugned conviction and sentence dated 20.04.2012, passed by learned VIth Additional Sessions Judge, Haridwar in Sessions Trial No.470 of 2004, "State vs. Babar Khan and others", in so far as it pertains to the conviction and sentence of the appellant Babar Khan under Section 304-A and Section 337 of IPC are concerned, is set aside. The appellant Babar is acquitted of the charge under Section 304-A and Section 337 of IPC. His bail bond is cancelled and the sureties are discharged.

38. All the respondents in Government Appeal No.41 of 2012 are directed to make compliance of Section 437-A of the Code within two weeks from the date of this order by appearing before the court concerned and execute a personal bond and two reliable sureties each in the like amount to the satisfaction of the court concerned, which shall be effective for a period of six months.

39. Let a copy of this order be sent to the concerned court for intimation and compliance.

(Alok Kumar Verma, J.) **(Sudhanshu Dhulia, J.)**

28.12.2020

JKJ/Sanjay