IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No.146 of 2014

Aftab Ali .....Appellant

Vs.

State of Uttarakhand .....Respondent

Shri R.S. Sammal with Mr. Lalit Sharma, learned counsel for the appellant.
Shri J.S. Virk, learned deputy advocate general for the State of Uttarakhand.

17th December, 2020

Coram : Hon'ble Ravi Malimath, A.C.J.
Hon'ble Alok Kumar Verma, J.

Alok Kumar Verma, J. (Oral)

This present appeal has been filed by the appellant-accused against judgment dated 20.03.2014 passed by learned 1st Additional Sessions Judge, Udham Singh Nagar in Sessions Trial No.274 of 2006, "State vs. Aftab Ali and others", by which the appellant has been convicted for the offence punishable under Section 302 of the Indian Penal Code and has been sentenced to undergo imprisonment for life along with a fine of Rs.3,000/- and further for the offence punishable under Section 3 (2) (v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as, "the Act, 1989") and sentenced to undergo life imprisonment along with a fine of Rs.3,000/- with default imprisonment. Both the sentences are directed to run concurrently.

2. Briefly stated the prosecution story as it emerges from re-appreciation of the evidences on record is that an information was given by PW-1 Prem Narain, father of Km. Anita Bala, deceased, to the police station Pant Nagar, District Udham Singh Nagar through his written report, Ex.Ka-1, that his daughter was missing from his house at 6.00 a.m. on 25.07.2006. His daughter was taken by Aftab Ali, his mother Smt. Nazma and his younger brother Mehtab Ali. She was searched, but in vain. Aftab Ali's phone had come to him several times that he should marry his daughter with him, otherwise he will take his daughter and marry her. He also threatened that if he or his sons restrained him, he would kill them. When he reached Aftab Ali's house after searching for his daughter, the mother of Aftab Ali and his younger brother told him to marry his daughter to Aftab Ali, otherwise they would kill his daughter. He had informed the University Security Officer in the morning.

3. An FIR, Ex.Ka-8, was lodged under Sections 363, 366, 506 of I.P.C. against the present appellant and two other persons, namely, Smt. Nazma and Mehtab Ali on 26.07.2006 at 20.10 hrs. The investigation was started by PW-5 Sub-Inspector Trilok Singh Khati. Meanwhile, a written report Ex.K-2 was given by the informant Prem Narain to the In-charge Police Station Kotwali, District Badaun on 27.07.2006 that on 25.07.2006 at around 6.00 in the morning, his daughter was seduced by Aftab Ali. Since that time, he was searching for his daughter. Yesterday on 26.07.2006, Aftab Ali's mother told him on the telephone that his daughter was admitted to the District Hospital, Badaun. On this information, he reached to the District

Hospital, Badaun. The dead body of his daughter was kept in the morchary.

4. The informant Prem Narain again submitted a written report, Ex.Ka-3, to the police station Pant Nagar, District Udham Singh Nagar on 27.07.2006 that on 25.07.2006, it was reported by him at the police station Pant Nagar that her daughter was abducted by Aftab Ali. That statement was true and the dead body of his daughter was found in the District Hospital, Badaun. Aftab Ali murdered her and escaped leaving the dead body of his daughter in the District Hospital Badaun. Aftab Ali's mother and his brother Mehtab Ali were also involved in this incident. He (the informant) is a member of the Scheduled Caste.

5. The inquest proceedings and post-mortem of the dead body of the deceased were conducted on 27.07.2006 in Kotwali Badaun and District Hospital Badaun respectively.

6. PW-4 Dr. Ajay Kumar Verma conducted the port-mortem of the dead body of the deceased. According to the prosecution, he informed the Incharge Kotwali, Badaun through Ex.Ka-5 on 26.07.2006 that at 3.30 p.m. on 26.07.2006, a person, who told his name Aftab Ali resident of Kauwa Tola, brought the dead body of the deceased and escaped leaving her dead body. A mobile number 9719203235 was written on the hand of the deceased. That person, named Aftab Ali, told his mobile number 9758134760.

7. The case was related to the police station Pantnagar, District Udham Singh Nagar, therefore, the dead

body of the deceased was sent to the police station Pant Nagar District Udham Singh Nagar.

8. The appellant-accused Aftab Ali and co-accused Smt. Nazma and Mehtab Ali were arrested on 27.07.2006. After completion of investigation, the Investigating Officer Dhirendra Gunjiyal, PW9, submitted the charge sheet, Ex.Ka-10, against the appellant and co-accused persons Smt. Nazma and Mehtab Ali under Sections 363, 366, 302, 376, 506, 120B of I.P.C. and Section 3(2) (v) of the Act, 1989. A separate charge sheet, Ex.Ka-7 was submitted by the Investigating Officer Sultan Singh, PW6, against co-accused Mohd. Umar and Mohd. Syed under Sections 363, 366, 302, 376, 506, 120B of I.P.C. and Section 3(2) (v) of the Act, 1989.

9. The charges were framed under Sections 363, 366, 302, 120B, 506 of I.P.C. and Section 3(2)(v) of the Act, 1989 against the appellant-accused and co-accused Mohd. Umar and Mohd. Syed and charges were framed under Sections 363, 366, 302 read with Section 34, 120B, 506 of I.P.C. and Section 3(2)(v) of the Act, 1989 against co-accused Nazma and Mehtab. The appellant and co-accused persons pleaded not guilty and claimed to be tried.

10. In order to bring home the guilt of the appellant-accused, the prosecution has examined nine witnesses.

11. The appellant-accused persons were examined under Section 313 of the Code of Criminal Procedure, 1973. The appellant filed documentary evidence in his defence. The appellant stated under Section 313 of Cr.P.C. that the

deceased wanted to marry him. He along with the deceased filed an application before the Special Marriage Officer for their marriage. Although the father of the deceased did not want to marry her daughter to him. Under the pressure of her father, that application was withdrawn. On 13.07.2006, the deceased again applied for marriage. For this reason her father was angry.

12. Learned trial court heard arguments, appreciated the evidences and held that the prosecution had successfully proved its case against the appellant under Section 302 of I.P.C. and Section 3 (2)(v) of the Act, 1989. However, learned trial court acquitted the appellant from the offence punishable under Sections 363, 366, 120B, 506 and 376 of I.P.C. Learned trial court also acquitted all the co-accused persons from all the charges. The State has not filed any appeal against the acquittal.

13. Heard Mr. R.S. Sammal and Mr. Lalit Sharma, learned counsel for the appellant-accused and Mr. J.S. Virk, learned deputy advocate general for the State through video conferencing.

14. Mr. R.S. Sammal, learned counsel for the appellant would submit that the case rests upon the circumstantial evidence; the chain of the events is not complete; no one has seen the deceased in the company of the appellant; no body has seen the appellant to commit the murder of the deceased; the appellant was named in the FIR only due to the reason that there was love relation between the deceased and the appellant; the dead body of the deceased was not brought by him to the District Hospital,

Badaun; the conviction of the appellant is based on presumption and surmises and the same is bad in the eyes of law.

15. On the other hand, learned deputy advocate general appearing for the State has supported the impugned judgment of the conviction.

16. The trial court on the basis of the available records held that the deceased, over 18 years of the age, was in love with the appellant and she had gone with the appellant voluntarily on 25.07.2006. Learned trial court held that there is no evidence that she was forcibly taken or induced by the appellant or the appellant committed rape, therefore the appellant is acquitted from the remaining charges. Learned deputy advocate general fairly submitted that the State has not filed any appeal against the acquittal.

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

18. PW-1 Prem Narain, father of the deceased and informant of the FIR, has stated that his daughter Km. Anita Bala alias Lalu was missing from his house at 6.00 a.m. on 25.07.2006. Aftab Ali wanted to marry his daughter. He and his family did not want to marry his daughter to Aftab Ali, the appellant. Aftab Ali used to threaten him and his family members that if his daughter was not married to him, he would kill the whole family. Before the abduction, Aftab Ali threatened her daughter and submitted an application on 06.07.2006 to the Special Marriage Officer to get married with her daughter. When this witness asked his daughter, she told that she had received threat from Aftab Ali and

hence she had submitted that application before the Special Marriage Officer, however, she did not want to marry Aftab Ali. Then, this witness threatened Aftab Ali and his family members. After this, Aftab Ali and his daughter jointly submitted an application to the Special Marriage Officer on 12.07.2006 with request to return their application for marriage. Aftab Ali was angry at this and took his daughter with him on 25.07.2006. Thereafter, he had threatened several times through phone calls that if his daughter is not married to him, he will kill his daughter. At around 9.00 p.m. on 26.07.2006, Aftab Ali's mother informed him on phone that his daughter was admitted in District Hospital, Badaun. He reached the District Hospital of Badaun at around 2.00 a.m., where he saw his daughter's dead body was kept in morchary. He was informed by the police that Aftab Ali had brought his daughter and he left her in the hospital. This witness further stated that later he came to know that Aftab Ali took his daughter to his brother-in-law Mohd. Umar's house. Aftab Ali wanted to marry his daughter. His daughter refused to marry, therefore, she was beaten up. After this, his daughter was taken to Badaun at the house of Mohd. Saeed, the brother-in-law of Mohd. Umar. There too, his daughter was forced to marry. She was beaten and strangled to death when she refused. This witness has proved his written report Ex.Ka-1, Ex.Ka-2 and Ex.Ka-3. He submitted a photocopy of caste certificate to the Investigating Officer, which was issued by Tehsildar, Kichha, District Udham Singh Nagar. At the time of examination-in-chief of this witness, he filed an original caste certificate. According to him, he is a member of Scheduled Caste community.

19. PW-2 Dr. Kranti Kumar is a elder brother of the deceased. He stated that the deceased was a student of B.com. The date of incident was 25.07.2006. He stated that 15-20 days before this incident, one Chandan Goswami and Uttam Prasad, Jija (brother-in-law) of this witness told him that they had seen the deceased talking to Aftab Ali in Rudrapur. The deceased had told this witness that she did not submit any application for marriage with her free will. She received threat, therefore, she signed on the plain paper. In the morning of 25.07.2006, when he woke up, he noticed that the deceased was not in the house. She was searched. While searching, he reached near Pant Nagar Guest House, found one Asharafi Lal who told him that he saw the deceased who was going with two men and a woman. This witness went to Aftab Ali's house on 25.07.2006, but, no one was found there at that time. On 26.07.2006, he again went to Aftab Ali's house where he met with his mother Smt. Nazma. He asked about the deceased, she told that the deceased was taken by his son Aftab, who wanted to marry her. She further told that if the family members of Anita are not ready for marriage, then Aftab Ali can also harm Anita. The father of this witness told him that the mother of Aftab Ali informed on phone in the evening that Anita was admitted in District Hospital, Badaun. Thereafter, he along with other persons reached the District Hospital, Badaun. The dead body of Km. Anita was kept in the hospital. Entry of the hospital register revealed that a person named Aftab Ali had brought Anita in a dead state and left her in the hospital. According to this witness, he suspected that the deceased was murdered by Aftab Ali, who took her with him and wanted to marry her.

20. PW-3 Smt. Rajni Bala is elder sister of the deceased. At the time of the incident, she was unmarried. She stated that Aftab Ali used to come to her house. She believed that Aftab Ali was his brother's friend. This witness further stated that Aftab Ali's mother came to her house about 20-25 days before Anita's death. At that time, only she and her sister Anita were at their house. Anita went to Rudrapur with Aftab Ali's mother at her behest. According to this witness, his sister Anita had told her that she had signed the paper for marriage due to the threat given by Aftab Ali. On the morning of 25.07.2006, she noticed that her sister Anita was not in the house. Later, it was revealed that Aftab Ali , his mother and his brother had taken Anita with them for marriage. But Anita did not want to marry Aftab Ali. Aftab Ali's mother informed in the evening on 26.07.2006 on phone that Anita was admitted in the District Hospital of Badaun.

21. PW-4 Dr. Ajay Kumar Verma conducted the post-mortem examination on 27.07.2006. In the autopsy report nine ante-mortem injuries were found on the dead body of the deceased. According to the doctor, the deceased had died due to strangulation and the death of the deceased may be occurred between 12 O' clock to 2 p.m on 26.07.2006.

22. PW-4 Dr. Ajay Kumar Verma proved his signature on Ex.Ka-5. According to Ex.Ka-5, one person who identified himself as Aftab Ali resident of Kauwan Tolla brought a woman, aged about 18 years, in the dead state at around 3.30 p.m. on 26.07.2006 and he left her in the hospital. According to the prosecution, a mobile number 9719203235 was written on the hand of the said woman and that person told his phone number 9758134760. According to PW-4,

Ex.Ka-5 was written by Sakir Ali, Pharmacist, and Ex.Ka-5 was addressed to Incharge Kotwali, Badaun.

23. PW-5 Sub-Inspector Trilok Singh Khati was first Investigating Officer. He stated that he added the offence punishable under Sections 302 and 120B of the I.P.C.

24. PW-6 Sultan Singh Rai was Circle Officer of police. He further investigated the case. He submitted charge sheet against the co-accued Mohd. Umar and Mohd. Saeed.

25. PW-7 Sub-Inspector Kulendra Singh was posted as a constable on 26.07.2006. He is scriber of chick report, Ex.Ka-8.

26. PW-8 Dr. Harpal Singh examined vaginal smear slide.

27. PW-9 Dhirendra Gunjyal received the investigation of this case from the Investigating Officer Trilok Singh Khati. Section 376 of the I.P.C. was added by this witness. After investigation, he filed charge sheet Ex.Ka-10.

28. The issues involved in this matter are that whether the prosecution has been able to prove its case against the appellant under Section 302 of I.P.C. and Section 3(2)(v) of the Act, 1989 beyond all reasonable doubts.

29. There are no eye-witnesses to the occurrence. According to the prosecution, its case under Section 302 of I.P.C. and Section 3(2)(v) of the Act, 1989 is based on the following circumstantial evidence:-

(1) The appellant wanted to marry the deceased. The father and family members of the deceased did not want to marry his daughter to the appellant. Therefore, the appellant abducted the deceased on 25.07.2006. The deceased refused to marry. Then, she was beaten and strangled to death by the appellant.

(2) The appellant had brought the deceased in a dead state and left her in the hospital.

30. The present case rests on circumstantial evidence and when a case rests on circumstantial evidence, such evidence must satisfy these tests:-

(i) The circumstances from which the conclusion of guilt is to be drawn, should be fully established.
(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, he should not be explainable on any other hypothesis except that the accused is guilty.
(iii) The circumstances should be of a conclusive nature.
(iv) There must be a chain of evidence to show complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probabilities, the act must have been done by the accused.

31. The principle of circumstantial evidence has been reiterated by the Hon'ble Supreme Court in a plethora of cases. In *C. Chenga Reddy vs. State of A.P., (1996) 10 SCC 193*, the Hon'ble Supreme Court observed, "In a case based on circumstantial evidence, the settled law is that the

circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances, must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence." The same principles were reiterated by the Hon'ble Supreme Court in *Trimukh Maroti Kirkan vs. State of Maharashtra, (2006) 10 SCC 681, Mohd. Arif alias Ashfaq vs. State (N.C.T. of Delhi), (2011) 13 SCC 621, Sunil Clifford Daniel vs. State of Punjab, (2012) 11 SCC 205* and a number of other decisions.

32. According to PW-1, father, PW-2, elder brother and PW-3, elder sister of the deceased, they had not seen the appellant and the deceased going together. They stated that on the morning of 25.07.2006, they noticed that the deceased was not in the house. PW-2, the brother of the deceased, stated that while searching for the deceased, he reached near Pantnagar guest house, found one Asharfi Lal, who told that he saw that the deceased was going with two men and a woman. This evidence is hearsay. Whereas, PW-9 Dhirendra Gunjiyal stated in his cross-examination that he did not take the statement of someone named Asharfi Lal. PW-3 elder sister of the deceased stated that it was revealed that Aftab Ali, his mother and brother had taken the deceased with them, but, no basis is found for this statement. Therefore, there is no positive evidence on record to show that the appellant as well as the deceased were together from the morning of 25.07.2006 and the deceased was last seen together with the appellant. In the

absence of definite evidence that the appellant and the deceased were together, it would be dangerous to come to the conclusion that the appellant was responsible for the murder of the deceased.

33. PW-1 father of the deceased stated that when he went to the hospital, he was informed by the police that Aftab Ali had brought his daughter and he left her in the hospital. This statement is hearsay. PW-2 brother of the deceased stated that the entry of the hospital register revealed that a person named Aftab Ali had brought the deceased in a dead state and he left her in the hospital. But, no such entry of the hospital register has been produced by the prosecution nor has any reason been given by the prosecution for not producing it. In these circumstances, adverse inference may be drawn for non-production of best evidence and it may be presumed that had such evidence been produced it would have gone against the prosecution.

34. PW-9 Investigating Officer stated that the statements of the staff of the district hospital Badaun were recorded by him and according to the staff of the hospital, they did not personally know Aftab Ali. The Investigating Officer stated that a Ward Boy of the hospital had told that the person who had left the deceased had identified himself as Aftab. The said Ward Boy has not been examined by the prosecution.

35. PW-9 Investigating Officer stated that Aftab Ali was not identified by any of these witnesses of the hospital. PW-4 doctor stated that Ext.Ka-5 was written by Sakir Ali, Pharmacist. According to Ext.Ka-5, one person who identified himself as Aftab Ali brought a woman in the dead

state on 26.07.2006 and left her in the hospital. The prosecution did not produce the said Sakir Ali.

36. According to PW-4 doctor, he did not know that person, who brought the deceased. The said person was not identified by him. PW-4 failed to identify the appellant before the court. Therefore, the identity of that person, who brought the deceased in the hospital, is not clearly established at all. There is no positive material on record to show that the deceased was brought by the appellant in the hospital, therefore, it will be hazardous to come to a conclusion that the appellant was responsible for the murder of the deceased.

37. According to the prosecution, a mobile number 9719203235 was written on the hand of the deceased. PW-9 Investigating Officer stated in his cross-examination that the said mobile number belonged to one Namit Papneja and there was a talk between Namit Papneja and the deceased on the day the deceased was murdered. The said Namit Papneja has not been examined by the prosecution. According to Ext.Ka-5, the person who brought the deceased to the hospital told his mobile phone number 9758134760. There is no positive evidence on record to show that the said mobile phone number belonged to the appellant.

38. PW-1 father of the deceased is stated that he came to know that the appellant took the deceased with him to his brother-in-law's house and from there, she was taken to Badaun where she was beaten and strangled to death. But, no basis is found for these statements. PW-1 has not disclosed what was the source of this information.

39. PW-2 brother of the deceased stated that he suspected that the deceased was murdered by the appellant who took her with him and wanted to marry her. It is a basic rule of the criminal jurisprudence that suspicion, however, strong cannot take place of proof.

40. 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.

41. In a case of circumstantial evidence, the onus is on the prosecution to prove that the circumstances from which the conclusion of guilt is to be drawn, are fully established. Something more than mere suspicion is needed to convict the accused in a circumstantial evidence.

42. Although, according to the doctor, the deceased was strangled, the prosecution has to prove that the death

of the deceased was caused by the appellant and in all human probabilities, the act must have been done by the appellant only. PW-1 father, PW-2 brother and PW-3 sister of the deceased are not only interested witnesses but their evidences are also hearsay. The possibility of the appellant-accused having been wrongly roped in cannot be totally excluded. There is no positive evidence placed on record against the appellant by the prosecution to prove its case that the appellant was responsible for the murder of the deceased and was guilty of committing murder of the deceased.

43. So far as conviction under Section 3(2)(v) of the Act, 1989 is concerned, no punishment can be awarded under this provision merely because the deceased was a member of the Scheduled Caste. This is not a case of the prosecution that as the deceased belonged to a particular caste, she was murdered. In *Dinesh @ Buddha vs. State of Rajasthan, AIR 2006 SC 1267,* the Hon'ble Supreme Court held that *sine qua non* for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of Scheduled Castes and Scheduled Tribes.

44. Since it has already been held that there is no positive evidence placed on record against the appellant by the prosecution to prove that the appellant is guilty of committing murder of the deceased, the question of his conviction under Section 3(2)(v) of the Act, 1989 does not arise.

45. As a result, we accept the case of the appellant. Accordingly, the appeal is allowed. The impugned conviction and sentence dated 20.03.2014, passed by learned 1st Additional Sessions Judge, Udham Singh Nagar in Sessions Trial No.274 of 2006, “State vs. Aftab Ali and others”, in so far as it pertains to the conviction and sentence of the appellant under Section 302 of I.P.C. and Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 are concerned, is set aside. The appellant is acquitted of the charge under Section 302 I.P.C. and Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. His bail bond is cancelled and the sureties are discharged.

46. The appeal is, accordingly, allowed.

(Alok Kumar Verma, J.) **(Ravi Malimath)**
A.C.J.

JKJ/SK