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**(2000) 02 AHC CK 0166**

**Allahabad High Court**

**Case No:** Criminal Appeal No. 464 of 1987

Bhadai

APPELLANT

Vs

State Indian Penal

RESPONDENT

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**Date of Decision:** Feb. 19, 2000

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 302

**Citation:** (2001) 1 ACR 388

**Hon'ble Judges:** R.P. Nigam, J; D.K. Trivedi, J

**Bench:** Division Bench

**Advocate:** R.K. Dwivedi, Amicus Curiae, for the Appellant; G.A., for the Respondent

**Final Decision:** Allowed

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### **Judgement**

D.K. Trivedi, J.

The present criminal appeal arises out of the judgment and order dated 25.3.1987, passed by VI Additional Sessions Judge, Faizabad, in Sessions Trial No. 369 of 1985, convicting accused Bhadai u/s 302, I.P.C. and sentencing him to undergo imprisonment for life.

2. The prosecution case is that the incident took place in the night between 18/19.7.1985 at the house of Ram Awadh (deceased) in village Ashajeetpur Ahiran within police circle Bhati, district Faizabad. It is said that on the date of the incident deceased Ram Awadh was sleeping on the cot outside door of the house. It is further said that Smt. Bhagna wife of Ram Awadh deceased was also sleeping in the "osara" along with her three years child. According to the F.I.R. at about 11 p.m. complainant Pancham woke up on hearing the cries and rushed to the spot and there he saw that his brother Ram Awadh's beheaded body was lying on the cot outside of his house. It is said that several persons reached there but Ram Awadh died on the spot after some time. According to the F.I.R. Ram Awadh (deceased) was killed by some unknown persons due to some enmity. No body was named in the

F.I.R., the report was lodged by Pancham, P.W. 1 on 19.7.1985, at about 7.30 a.m. and on the basis of said report a case was registered as Case Crime No. 65 of 1985 u/s 302, I.P.C. P.W. 5 S.I. Kedar Nath Mishra started investigation in this case. He recorded, the statement of Pancham and reached the place of incident at about 12 O'clock (noon) the same day. He prepared the inquest report of the dead body of deceased Ram Awadh and other relevant papers Ext. Ka-5 to Ka-9 and sent the dead body to mortuary for post-mortem examination. The Investigating Officer further recovered the blood-stained clothes of the deceased and prepared its fard. He inspected the place of the incident and prepared site plan Ext. Ka-11 and recorded the statements of the witnesses. The Investigating Officer on the next day recorded the statement of Smt. Bhagna wife of deceased Ram Awadh and thereafter, arrested accused Bhadai on 20.7.1985 at about 7 p.m. in village Ashajeetpur Ahiran. It is said that after arrest of the accused Bhadai, on his pointing, the Investigating Officer recovered a blood-stained "banka" from the well of one Bachai Dubey. He also recovered the blood-stained "baniyan" of accused Bhadai and prepared its fard. After completing the investigation, he submitted the charge-sheet against Bhadai.

3. The autopsy on the dead body of deceased Ram Awadh was conducted on 20.7.1985 at about 9 a.m. by Dr. P. N. Singh. The doctor found the following ante-mortem injuries on the dead body of deceased Ram Awadh:

1. Incised wound 15 cm. ? 4 cm. ? 8 cm. on the anterior surface of neck just above level of larynx. Injury is mainly on the right side. Right carotid artery veins, wind pipe, oesophagus completely cut. Underlying vertebrae partially cut.

2. Abrasion 1 cm. ? 0.5 cm. on anterior surface of left shoulder.

4. On internal examination, the doctor found nothing abnormal in the skull. Brain became pulpy. Second cervical vertebrae was found partially cut at the base. Large vessels and oesophagus was cut and paste material was coming out. There was about 400 gms. undigested food in his stomach. Stool and gases were found in small and large intestines. Bladder was empty. According to the doctor the death was caused due to shock and haemorrhage. The post-mortem report is Ext. Ka-2.

5. The prosecution in support of its case examined as many as six witnesses. Out of them P.W. 1 Pancham and P.W. 2 Smt. Bhagna are the witnesses of fact. P.W. 3 Dr. P. N. Singh conducted autopsy on the dead body of deceased Ram Awadh and proved the post-mortem report Ext. Ka-2, P.W. 4 Narvadeshwar Mishra scribed the F.I.R. and proved the chik report and other G.D. entries. P.W. 5 S.I. Kedar Nath Mishra after completing investigation in this case, submitted charge-sheet against the accused. P.W. 6 Ravindra Nath Singh brought the dead body of the deceased Ram Awadh to mortuary for post-mortem examination and produced it before the doctor for post-mortem examination.

6. On the other hand, the accused denied the prosecution case and stated that he has been falsely implicated due to enmity. The accused also examined himself as

D.W. 1 in defence.

7. The learned Sessions Judge after considering the evidence on record came to the conclusion that the prosecution has successfully proved the guilt of the accused beyond reasonable doubt and therefore, he convicted and sentenced the accused Appellant as mentioned above.

8. The accused-Appellant aggrieved by the judgment and order passed by the learned trial Judge, preferred the instant criminal appeal before this Court.

9. As the present criminal appeal was filed from jail and the accused-Appellant was not represented by any counsel, therefore, this Court by order dated 7.1.2000, appointed Shri R. K. Dwivedi, advocate as amicus curiae to deal with this case.

10. We have heard the learned Counsel for the accused-Appellant as well as the learned Government advocate and have also perused the record carefully.

11. In the instant case as pointed out above, the F.I.R. was lodged by P.W. 1 Pancham against unknown person but thereafter, it is said that the Investigating Officer recorded the statement of Smt. Bhagna who named the Appellant as accused in this case. The prosecution examined Smt. Bhagna as P.W. 2. The main contention of the Appellant's counsel is that the prosecution has miserably failed to prove the guilt of the Appellant beyond reasonable doubt and further the learned court below has committed an error in relying on the statement of Smt. Bhagna which is not worth to be believable.

12. On the other hand the learned Government advocate contended that the learned court below has committed no illegality in believing the statement of P.W. 2, Smt. Bhagna and convicting and sentencing the accused in this case as mentioned above.

13. In the instant case, according to the F.I.R., P.W. 1, Pancham was sleeping in his house at about 11 p.m. in the night, he heard the cries of his "bhabhi" (Smt. Bhagna) and on hearing the said cries, he woke up and rushed to the house of Ram Awadh. It is further alleged in the F.I.R. that on the spot he found the beheaded body of his brother who died after some time. He further stated that on hearing the cries several other persons also reached there and saw the incident. In the F.I.R. it is further mentioned that his brother (Ram Awadh) was killed by some one who after committing the crime ran away. From the perusal of the F.I.R. it is evident that no one has witnessed this incident. According to the prosecution case, the Investigating Officer also reached the place of the incident on the same day and recorded the statements of the other witnesses as well as prepared the site plan and inquest report etc. The Investigating Officer in his statement only stated that on reaching the place of the incident, he found that Smt. Bhagna was very much upset and therefore, her statement was not recorded. According to the Investigating Officer, he recorded the statement of Smt. Bhagna next day and then she disclosed the

name of accused as Bhadai stating that on the date of the incident she was lying in the "osara" along with her three years" daughter. She further stated that at about 11 p.m. in the night she saw the accused in the moon-lit night standing near the cot and thereafter, he gave a blow by the weapon which was about one foot long cutting the neck of Ram Awadh. She further stated that seeing the blood, she became unconscious and she regained the consciousness only on the next day and then, she disclosed the name of the accused-Appellant. The question before us is as to whether this explanation of Smt. Bhagna, P.W. 2 is worth to be believable or not? In our opinion the above mentioned statement is not believable because the same appears to be after-thought. According to the prosecution case, the incident took place at about 11 p.m. in the night. The complainant and the other witnesses reached there hearing the cries of Smt. Bhagna the wife of Ram Awadh (deceased) but on the other hand Smt. Bhagna, P.W. 2 did not say that she raised any such cries. In her examination-in-chief she herself stated that the accused gave a blow by the weapon on the neck of her husband (Ram Awadh) and seeing the blood she became unconscious. She further stated that as she became unconscious, therefore, she could not say as to who reached the scene of the incident later on. According to her statement, she remained unconscious in the night as well as in a day. She further stated that she did not disclose these things to any other villager due to fear. If she did not raise any such hue and cry, then the story of the prosecution that the witnesses including the complainant reached there on hearing the cries of Smt. Bhagna is not believable. Again from the perusal of the F.I.R., it is evident that no one has witnessed the incident. In the F.I.R. itself nothing has been said about Smt. Bhagna or the fact that she was unconscious and was lying there in the house. According to the F.I.R. itself, the complainant reached there on hearing the cries of Smt. Bhagna and found there is beheaded body of his brother who died after some time.

14. Apart from this, it has clearly been stated in the F.I.R. that some unknown person has committed this crime. If Smt. Bhagna, P.W. 2 was an eye-witness and became unconscious just after the incident then, this fact must have been mentioned in the F.I.R. Apart from this, the report was lodged on the next day. If Smt. Bhagna was lying there unconscious and remained lying unconscious in the night then, she must have been taken to the hospital or given some medical aid on the next day, but admittedly no medical aid was given to her. The Investigating Officer reached the place of the incident, the same day i.e. on 19.7.1985, and he started investigation in this case. Surprisingly enough that he also did not say that Smt. Bhagna was found unconscious and lying in her house. He gave an explanation for not recording the statement of Smt. Bhagna on the same day by saying that she was not in a fit position to give her statement. On the other hand Smt. Bhagna stated that she remained unconscious in the night as well as on the next day, meaning thereby, that she was not conscious even on 18.7.1985. If this statement of Smt. Bhagna is believed then, the Investigating Officer could not record her statement on

19.7.1985. It is also not believable that after regaining consciousness she did not disclose these facts to her relation or other villagers. She stated that after regaining consciousness and after arrival of "Daroga Ji" she disclosed the identity of the accused-Appellant to him (the Investigating Officer). From the perusal of the cross-examination, it appears that she regained consciousness on the next day at about 11 a.m. and at that time she was informed that the report has already been lodged and the police is reaching very soon.

15. In view of these infirmities, it is not possible to believe that Smt. Bhagna has witnessed the incident or after seeing the incident she became unconscious and only on the next day she regained consciousness and then she disclosed the name of the accused-Appellant. It appears that the incident took place in the night by some unknown persons and after seeing the dead body of Ram Awadh a report was lodged by Pancham (P.W. 1) saying that Ram Awadh was killed by some unknown person but afterwards the case was concocted and Appellant was implicated in this case with the help of Smt. Bhagna (P.W. 2). The main evidence against this Appellant is the evidence of Smt. Bhagna (P.W. 2) which was believed by the learned Sessions Judge, but in our opinion the learned Sessions Judge has committed an error in believing the testimony of Smt. Bhagna (P.W. 2) which was not worth to be believable. If the above circumstance goes then, in our opinion the whole case will fall and it cannot be said that the prosecution has successfully proved the guilt of the Appellant beyond reasonable doubt.

16. The above-mentioned facts itself show that the investigation is not free from doubt and during investigation the Investigating Officer tried to introduce an eye-witness account and in these circumstances, the recovery of "banka" on the pointing of the accused also becomes doubtful.

17. In the F.I.R. itself, it is alleged by the complainant that on hearing the alarm several persons including Appellant Bhadai also reached the spot. If the above-mentioned fact is correct then it is not possible to believe that Bhadai who was arrested after two days was found wearing blood stained "baniyan". Apart from this if Bhadai had committed this crime and he was identified by the wife of the deceased, then he would not reach on the spot just after the incident. The above-mentioned facts also make the prosecution case doubtful.

Accordingly, the present criminal appeal is hereby allowed. The judgment and order dated 25.3.1987, convicting and sentencing the Appellant Bhadai u/s 302, I.P.C. is hereby set aside. Appellant Bhadai is in jail. Let he be set at liberty forthwith unless wanted in any other case.