

(1993) 01 AHC CK 0082

Allahabad High Court

Case No: Criminal Appeal No. 1260 of 1979

Rais Uddin

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Jan. 5, 1993

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161
- Penal Code, 1860 (IPC) - Section 302, 304, 307, 323, 325

Citation: (1993) 17 ACR 41

Hon'ble Judges: S.K. Mookerji, J; A.S. Tripathi, J

Bench: Division Bench

Advocate: G.S. Chaturvedi and P.K. Tewari, for the Appellant; Keshav Sahai, for the Respondent

Final Decision: Allowed

Judgement

S.K. Mookerji, J.

This is an appeal filed by Rais Uddin against the judgment of the I Additional Sessions Judge, Agra in Sessions Trial No. 35 of 1978 dated 7-4-1979. The order co-accused Wahab Uddin and Shamim Uddin have filed their separate appeal which has been numbered as Criminal Appeal No 1261 of 1979. We propose to decide both the appeals by a common judgment.

2. The learned I Additional Sessions Judge convicted Rais Uddin u/s 302, IPC and sentenced him to undergo Rigorous Imprisonment for life. He was however, given benefit of doubt u/s 323/34, IPC. Accused-Appellants Wahab Uddin and Shamim Uddin have been convicted by the I Additional Sessions Judge, Agra u/s 325/34, IPC instead u/s 302/34, IPC and sentenced to undergo Rigorous Imprisonment for a period of five years each They were, however, given benefit of doubt u/s 323/34, IPC.

3. Appellant Rais Uddin stood charged u/s 302, IPC for having committed the murder by intentionally causing death of Ajmeri on 21-4-1977 at about 5.30 p.m. in

Mohalla Wazirpura, Police-station Hariparbut, district Agra, AS the present murder was said to have been caused in furtherance of common intention with accused Wahabuddin and Shamim Uddin they were charged u/s 302/34, IPC. Accused-Appellant Wahab Uddin was further charged u/s 323/34, IPC for having voluntarily caused hurt to Shamshuddin on the said date, time and place. As this hurt was also said to have been caused in furtherance of the common intention with accused Rais Uddin and Shamim Uddin, so they were further charged u/s 323/34, IPC.

4. The occurrence took place on 21-4-1977 at about 5.30 p.m. in Mohalla Wazirpura, Police station Hariparbat, district Agra The first information report was lodged on the same day at about 6.05 p.m. at Police station Hariparbat, district Agra, by Afzal Husain son of the deceased Ajmeri, u/s 307 IPC. Ajmeri was murdered in the present case. The post mortem examination on the body of Ajmeri deceased was conducted on 22-4-1977 at about 3.00 p.m. by PW 7. Dr. G.S. Lawania. PW 2. Shamshuddin brother of the deceased was examined on 22-4-1977 by PW 5, Dr. Rama Kant Sharma The eye witnesses in the case are PW 1, Afzal Husain, son of the deceased Ajmeri, PW 2, Shamshuddin, who is an Injured and PW 3, Maqsood Husain. The other witnesses, PW 4, Devi Prasad, is the constable, who took the dead body for post mortem examination. PW 6, Tara Chand is also a constable, who escorted the Injured for medical examination. PW1, Dr G.S. Lawania, is the witness, who conducted the post mortem examination on the body of the deceased. PW 8, Mohammad Kamil, is the Investigating Officer. PW 9, Jagdish Chandre Misra, S.I., is a witness of inquest report and PW 10, Rajvir Prasad Lawania, is the Head Constable, who registered the first information report.

5. The learned Sessions Judge, after examining the materials on record, had recorded conviction and sentence as stated above against the Appellants, hence, the present appeals.

6. We have heard learned Counsel for the Appellants Sri G. Section Chaturvedi Is appearing for the Appellant, Rais Uddin, and Sri P.N. Misra, is appearing for the Appellants Wahab Uddin and Shamim Uddin We have also heard learned Additional Government Advocate, appearing on behalf of the Respondent, Sri G.S. Chaturvedi, appearing for the Appellant Rais Uddin, vehemently urged that even if the prosecution story is accepted to be correct then the Appellant, Rais Uddin, is liable to be punished u/s 304 Part II, L.P.C. Sri P.N. Misra, appearing for the other two Appellants, namely, Wahab Uddin and Shamim Uddin, in Criminal Appeal No 1261 of 1979, submitted that there is no evidence on record against the aforesaid two Appellants, as such, their convictions under the counts, mentioned above, are wholly unwarranted in law.

7. In the present case it is necessary to state the correct facts, as narrated in the first information report lodged by PW 1, Afzal Husain. The first information report in question, has been lodged by PW 1- Afzal Husain son of the deceased Ajmeri, on the

allegation that on 21-4-1977, at about 5 30 p.m. the small children of Wahab Uddin came in front of his house and eased themselves. Thereafter, his father, Ajmeri scolded the children. On the above happening, Wahab Uddin son of Shahabuddin and of Wahab Uddin, came there armed with Shahabuddin, younger brother of Wahab Uddin, came there armed with lathis and Rais Uddin using abusive language that he (Ajmeri) has been considering himself to be great and has been scolding their children and so he should be seen. Rais Uddin, Appellant, thereafter, wielded one lathi blow on the head of Ajmeri, who fell down on receiving the Injury. This occurrence was witnessed by Shamshuddin, Maqsood, Mubarak, Shafat Ali and some other persons of the locality, who were standing near his father, Ajmeri. They intervened in the matter. Ajmeri was sent to hospital with Aslam as his condition was bad. A reading of the first information report will show that no active part of role was assigned to the Appellants Wahab Uddin and Shamim Uddin except that they came armed with lathis. It is also necessary to point out that the injuries of accused-Appellant Shamim Uddin were also not mentioned in the first Information report.

8. However, from the evidence on record the case of the prosecution is that accused Rais Uddin and Wahab Uddin are brothers and accused Shamim Uddin is the son of accused Wahab Uddin. They were residing in the same bouse in Mohalla Wazirpura. The prosecution case further is that the children of accused Wahab Uddin were easing themselves in front of the Baithak of the complainant on the drain by the side of the road at about 5.30 p.m. on 21-4-1977. The father of the complainant, Ajmeri, saw these children and scolded them and complained about it to the three accused persons, who had come out from their house. The accused persons became in fighting mood and went inside their bouse and brought lathi and began to say that Ajmeri was considering himself to be great and has been scolding their children and so he should be seen. Hearing this Ajmeri started for his house but the accused persons went behind him and accused Rais Uddin gave a lathi blow on the head of Ajmeri in front of his house. Accused Wahab Uddin and Shamimuddin were also coming forward to strike Ajmeri but they were prevented by Shamshuddin, PW 2, Masood Husain, PW 3 and others. In doing this, lathi of accused Wahab Uddin struck Shamshuddin, PW 2, causing him injury. After receiving the lathi blow Ajmeri fell down on the ground and became unconscious. Thereafter, the accused persons ran away. Aslam, brother of the complainant, took Ajmeri to the hospital. PW 1, Afzal Husain, the complainant, wrote a written report and went to the Police station Hariparbat and delivered the same at about 6.05 p.m. on the same day. A chick report was prepared and case was registered in the general diary.

9. However, the case was investigated by PW 8, Mohammad Kami I, who was S.H.O., Police Station Hariparbat district Agra. He interrogated the complainant, Afzal Husain at the police station and went to the spot and inspected the scene of the occurrence and got prepared a site-plan. He searched the house of the accused persons but they were not found there nor any incriminating article was found

there. Thereafter, he interrogated PW 3. Maqsood Husain and other witnesses at the spot. The entry in the general diary No. 41, dated 21-4-1977 written at 6-30 p.m. shows that information about the death of the deceased, Ajmeri, was received at the Police station Hariparbat at 6 30 p.m. on the day of incident by telephone and thereafter this case was converted into a case u/s 304, IPC. PW 8, Mohammad Kamil, however, came to know about the death of Ajmeri at about 8,30 p.m. at the spot on the day of incident from Aslam, who is the son of the deceased Ajmeri PW 8, Mohammad Kamil, interrogated PW 2, Shamshuddin at the police station at 10.00 a.m. on 22-4-1977. Since PW 2, Shamshuddin had received injury on his hand so he was sent to the District Hospital, Agra for medical examination through PW 6, constable Tara Chand Shamshuddin PW 2. was medically examined by PW 5, Dr. R.K. Sharma at 11.15 am. on 22-4-1977. He prepared Injury report, Ext. Ka 2 the injuries received by PW 2, Shamshuddin, are as under.

1. Lacerated wound 1/2" x 1/10" x muscle deep on the back of left hand beneath little finger with swelling 2" x 1 1/2". Wound is dry. No scab seen. Advised X-ray.
2. Two scabbed abrasions 2/10" x 2/10" each part 3/4" over back of left little finger Upper nailbase other at middle dorsum tenderness was seen around abrasion scabbed. Advised X-ray.

The injuries were reported to have been caused by blunt object and within a day old.

At this stage it is relevant to point out that injuries of Shamshuddin were not at all mentioned in the first Information report nor he got himself examined on the day of incident. The injuries have, however, been explained by the prosecution witnesses in their depositions. We have no doubt in our mind that the explanation given in respect of the injuries of PW 2, Shamshuddin, is an improvement in the case which goes to the root of the case.

10. PW 9, S.I. Jagdish Chand Misra, came to the hospital on 22-4-1977 on the direction of PW 8, Mohammad Kamil and prepared an inquest report on the dead body of the deceased Ajmeri, Ext. Ka 6. He also prepared photo lash and challan lash, Ext. Ka 7 and Ext. Ka 8 and delivered the dead body in the custody of PW 4, Constable Devi Prasad and one more for getting the post mortem examination done. The post mortem examination on the dead body of Ajmeri was conducted by PW 7, Dr. G.S. Lawania at 3 p.m. on 22-4-1977. He prepared the post mortem examination report, Ext. Ka 3, which shows following ante mortem Injuries on his body.

1. Lacerated wound 2" x 4/10" x bone deep on the left side of the skull 4 1/2" above the ear left.
2. Swelling 4 1/2" x 2 1/2" on the left side of skull 1" above the left ear.

The doctor further reported that the deceased was about 55 years old and might have died about one day before. On internal examination he found that there was a

fracture of left temporal and" occipital bones under injury No. 1, coagulated blood was found present under the skin corresponding to injuries Nos. 1 and 2 in an area of 4" x 3". Left side brain was found completely covered with coagulated blood. Left side middle fosse was also found fractured and coagulated blood was present. In the opinion of the doctor the death was caused due to shock and hemorrhage as a result of head injury.

11. The accused persons surrendered in the court and thereafter a charge-sheet, Ext. Ka 5. was submitted against the Appellants on 31-5-1977 by the Investigating Officer.

12. The accused persons pleaded not guilty. They have not led any oral evidence in their defence.

13. The court below, after examining the materials on record, held that the first information report of the incident was lodged on the date of the incident at 6.05 p.m. and, thus, there was no delay in lodging the first information report. This finding has not been challenged by the learned Counsel appearing on behalf of the Appellants and we fully agree with the same. The court below further held that the evidence of the prosecution was that only one lathi blow was given on the head of Almeri. The postmortem examination report. Ex. Ka 3, however, shows that the deceased had one lacerated wound 4-1/2" above the left ear on the left side of skull and also swelling on this side 1" above the left ear. PW 7, Dr. G.S. Lawania, has deposed that the injury No. 1, which is a lacerated wound, could be caused by a lathi and injury No. 2, which is a swelling, could be caused by a fall on a hard substance. In the cross examination he has stated that the injury No. 2 of the deceased could also be caused by a lathi. According to the case of the prosecution Ajmeri fell down after receiving lathi blow on his head and so injury No. 2, which is a swelling could also be caused to him by a fall. The court below also pointed out that again the two injuries of the left side of skull of the deceased. Ajmeri, were quite close to each other and so these injuries could also because by a single blow of lathi. In this way, the court below held that both the injuries on the head of the deceased, Ajmeri, were explained and, therefore, the medical evidence produced in the case supports the case of the prosecution. The above reasonings of the court below have not been assailed before us. After examining the materials on record we fully agree with the court below on this point.

14. The case of the prosecution further was that PW 2, Shamshuddin, also received injury on his little finger at the time of the present occurrence. It was further argued by the learned Counsel for the Appellants that the injuries shown in Ext. Ka. 2 were not received by this witness in the same incident. The court below in its judgment has stated "Complainant Afzai Husain did not mention anything about the injuries of Shamshuddin PW 2 in the written report, Ext. Ka 2, Afzai Husain, PW 1, admitted that he could not see the injuries of Shamshuddin on the day of the incident. Shamshuddin PW 2 has stated that he caught hold of the lathi of accused

Wahabuddin at the time of the incident but the accused gave him a jerk which resulted in the injuries on his left hand. No such statement was given by him on these lines to the Investigating Officer that the deceased had said at that time that the children had been easing in front of his baithak. Since the western door of the Baithak is also the door of the house of the deceased and so this discrepancy, if any, can be safely ignored. In view of all this, the evidence of the complainant and other witnesses about the origination of this incident is quite reliable and is to be believed." We have examined the materials on record and we fully agree with the prosecution story regarding the origin of the occurrence. The court below further pointed out that in view of the omission about the injuries of PW 2, Shamshuddin, in the said incident in the first information report and in the statement recorded u/s 161, Code of Criminal Procedure it became doubtful that he received the said injuries on his little finger in the said incident. Learned Counsel for the State has not argued anything against the above finding. However, on examining the materials on record we fully agree with the finding recorded by the court below, on this aspect.

15. We have examined the prosecution witnesses and there is evidence to the effect that accused Rais Uddin only gave fatal blow on the head of the deceased, Ajmeri. It is also clear from the evidence on record that other two Appellants also did not hit or repeat any blow on the deceased, Ajmeri. It is also clear that the Appellant Rais Uddin also did not repeat Lathi blow on the deceased, Ajmeri. Thus, we are clear in our mind that Rais Uddin caused fatal lathi blow on the head of the deceased Ajmeri. PW 1, Afzai Husain, has clearly stated that Rais Uddin gave one lathi blow on the head of his father, Ajmeri. No doubt, he further has stated that accused Wahabuddin and Shamim Uddin also wanted to assault his father but they were stopped from doing so by the persons of the locality. The role assigned to the Appellants Wahabuddin and Shamim Uddin of beating Ajmeri is definitely an improvement in the prosecution case, as disclosed in the first information report. It is also clear from his statement that these facts were narrated by PW 1, Afzai Husain, to the Investigating Officer u/s 161, Code of Criminal Procedure. Similarly, PW 2, Shamshuddin, also made similar statement. He also did not make any statement, as indicated above, u/s 161, Code of Criminal Procedure to the Investigating Officer. Thus, it will not be safe to rely upon the evidence of PW 1, Afzal Hussain and PW 2, Shamshuddin, as far as their deposition is concerned in respect of Wahab Uddin and Shamimuddin. PW 2, Shamshuddin, injured did not get himself examined even on the same day. He was examined next day. PW 8, Mohammad Kamil, has stated in para 12 of his deposition that the witness Shamshuddin. PW 2, did not tell him that any injury was caused to him by Jerk of lathi of accused-Appellant Wahab Uddin at the time he held the same. After examining the materials on record we are of the opinion that PW 2. Shamshuddin, cannot be relied upon in respect of the role assigned to the aforesaid Appellants Wahab Uddin and Shamimuddin in the present case.

16. However, the prosecution has also examined PW 3, Maqsood Husain. He has also corroborated the prosecution case as far as the head injuries caused to the deceased Ajmeri, by the Appellant Rais Uddin. Thus, as far as Rais Uddin is concerned his complicity in the present crime in assaulting the deceased Ajmeri has been fully proved beyond all reasonable doubt by the prosecution. The prosecution has proved that accused-Appellant Rais Uddin had inflicted a single lathi blow on the head of the deceased Ajmeri, which resulted into his death. In the present case, accused Rais Uddin has been convicted u/s 302, IPC and sentenced to life Imprisonment. He has, however, been acquitted u/s 323/34, IPC by the court below. The acquittal of accused Rais Uddin u/s 323/34, IPC has not been challenged before us. We, therefore, upheld the acquittal of accused Rais Uddin u/s 323/34 IPC.

17. Sri G.S. Chaturvedi, learned Counsel for the Appellant Rais Uddin, has vehemently urged that no case u/s 302, IPC has been made out against the Appellant, Rais Uddin. In fact, in the alternative, accused Rais Uddin, could only be convicted u/s 304. Part II. IPC. Learned Counsel for the Appellant further submitted that in case, he is convicted u/s 304, Part H, IPC he should be let off by imposing a heavy fine only. He have also heard on this point the learned State counsel. Sri G.S. Chaturvedi, learned Counsel for the Appellant, submitted that there is no evidence on record to show that there was any plan hatched by the Appellants for committing the murder of Ajmeri. This is a case of single blow by lathi on the head of the deceased. Ajmeri, by the Appellant Rais Uddin. A single lathi blow was caused to the deceased Ajmeri by accused Rais Uddin with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death. Therefore, the case will squarely fall u/s 304 Part II, IPC. It was further submitted that accused Rais Uddin did not repeat lathi blow on the deceased, Ajmeri, The occurrence had taken place on a sudden quarrel. Sri G. Section Chaturvedi, learned Counsel for the Appellant therefore, also submitted that with the aid of Section 34, IPC the other two Appellants, besides Rais Uddin, could not be convicted. After examining the materials on record and hearing learned Counsels for the parties we find that there was no pre-meditation and in the course of sudden quarrel accused Rais Uddin had given only one lathi blow to the deceased, Ajmeri, which resulted into his death. We, therefore, hold that the offence falls u/s 304 part II, IPC and not u/s 302 IPC against the Appellant Rais Uddin. We, therefore, set aside the conviction of the Appellant. Rais Uddin u/s 302 IPC and the sentence of life imprisonment awarded thereunder, instead we convict Rais Uddin u/s 304 Part II, IPC We have heard earned counsel for the Appellants on the question of sentences and we do not agree that this is a fit case for imposing fine only on the Appellants. We are of the opinion that the interest of justice shall be served In case the Appellant Rais Uddin is sentenced to undergo Rigorous Imprisonment for four years u/s 304 Part II, IPC

18. We have also heard Sri P.N. Misra, learned Counsel for the Appellants, Wahab Uddin and Shamimuddin. He has submitted that there is no evidence on record for

convicting the said Appellants u/s 325/34, IPC. In the present case these two Appellants have been given benefit of doubt u/s 323/34, IPC. We have examined the materials on record very closely and we find not a single iota of evidence by which it could be inferred that there was any meeting of mind of the three Appellants for committing the present offence. Neither there is any evidence to show that the Appellants Wahab Uddin and Shamim Uddin have assaulted any body for which conviction against them u/s 325/34 IPC could be maintained. The court below has clearly held that it is doubtful that Shamshuddin PW 2 received injury on his finger in the said incident. In view of the omission in the FIR and the statement u/s 161 Code of Criminal Procedure reliance may not be placed on the statement of the complainant that Shamshuddin had caught hold of these two accused persons and then at that time the lathi of accused Wahabuddin had struck this witness. It is clear that there is no evidence on record by which it may be inferred that the Appellants Wahab Uddin and Shamim Uddin had come to know that accused Rais Uddin will cause injury to the deceased, Ajmeri on his head with intention either to cause his death or grievous hurt. Further there is no evidence on record to show that Wahab Uddin and Shamimuddin actually took part in the assault. In the first information report there is no averments against them as far as assault is concerned. The prosecution has tried to improve the case against Wahab Uddin and Shamim Uddin by leading some evidence, as stated above, for getting them convicted but they have been acquitted u/s 323/34, IPC. The court below convicted them u/s 325 IPC and not u/s 302/34, IPC as grievous injuries have been caused to the deceased, Ajmeri. The process of reasoning of the Court below convicting the Appellants Wahab Uddin and Shamim Uddin is wholly incorrect in law. Once we have already come to the conclusion that there was no premeditation or plan or meeting of mind amongst the appellants there was absolutely no question for convicting the Appellants Wahab Uddin and Shamim Uddin with the aid of Section 34, IPC. In this view of the matter, we set aside the conviction recorded by the court below against Wahab Uddin and Shamim Uddin u/s 325/34 IPC. We further set aside the sentence of Rigorous Imprisonment for a period of five years each against Wahab Uddin and Shamim Uddin recorded by the court below u/s 325/34 IPC.

19. In view of the above facts and circumstances we allow Criminal Appeal No 1260 of 1979 in part Appellant Rais Uddin is convicted u/s 304 Part II, IPC and sentenced to undergo Rigorous Imprisonment for a period of four years. He is on bail, therefore, he shall be taken into custody forthwith and serve out the sentence awarded to him in accordance with law.

20. We further allow Criminal Appeal No 1261 of 1979 and set aside the conviction of the Appellants Wahab Uddin and Shamim Uddin u/s 325/34 IPC and also the sentence of Rigorous Imprisonment for a period of five years each and they are acquitted. They are already on bail and therefore, they are not required to surrender in the court. The sureties are discharged.