
(2013) 03 AHC CK 0298

Allahabad High Court (Lucknow Bench)

Case No: Criminal Appeal No. 184 of 2006

Kullu Kumar Sonkar
and Another

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: March 7, 2013

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 428
- Penal Code, 1860 (IPC) - Section 299, 300, 302, 304, 34

Citation: (2013) 3 ACR 2680 : (2013) 5 ALJ 42

Hon'ble Judges: Surendra Vikram Singh Rathore, J; Imtiyaz Murtaza, J

Bench: Division Bench

Judgement

Surendra Vikram Singh Rathore, J.

Heard learned counsel for the appellants, learned A.G.A. for the State and perused the lower court record. This criminal appeal has been preferred against the judgment and order dated 24.1.2006 passed by the learned Additional Sessions Judge/F.T.C. No. 4, Raebareli in Sessions Trial No. 187 of 2004 (State v. Kullu Kumar and another) arising out of case crime No. 15 of 2004, u/s 304/34 IPC, police station Kotwali, District Raebareli. By the impugned judgment, both the appellants Kullu Kumar Sonkar and Jeetu Kumar Sonkar were convicted for the offence u/s 304 read with Section 34 IPC and were sentenced to imprisonment for life and they were also punished with fine of Rs. 5,000/- each.

2. Brief facts giving rise to the present appeal are that investigative police was set in motion by lodging a F.I.R. by Smt. Malti wife of deceased Prem Chandra. As per the prosecution story, deceased Prem Chandra was working at the "Aara Machine" (saw mill) of one Guddu and his wife complainant Smt. Malti in the night of 13.1.2004 at about 10:00 p.m., as usual, was going to hand over the dinner to her husband. Brother of deceased Rajesh Kumar was also with her. When these persons entered into the "Aara Machine",

then they saw that appellants Kullu Kumar Sonkar and Jeetu Kumar Sonkar, who were real brothers were beating Prem Chandra with a small wooden piece (a thin slice of wood mentioned as "Fanti"). On their raising alarm, Yakub, the clerk of the "Aara Machine" and other labourers rescued the deceased. This incident was witnessed by them in the light of the electric bulb. The deceased was taken to the hospital, where he succumbed to the injuries. Thereafter F.I.R. of this case was lodged in the same intervening night on 14.1.2004 at about 2:30 a.m. It was mentioned in the F.I.R. that two days prior to the occurrence, during light conversation, some dispute had arisen between Prem Chandra (deceased) and the appellants.

2A. The complainant got the F.I.R. (Ex. Ka-1) scribed by Rajesh Kumar and on the basis of the same, Chik Report (Ex. Ka-3) was prepared. The details of registration of the case were entered in G.D. (Ex. Ka-4). Thereafter the police inspected the place of occurrence and prepared site plan (Ex.Ka-11) and also conducted inquest proceedings and prepared the inquest report (Ex. Ka-6) and other related documents, Photo Lash (Ex. Ka-7) and Challan Lash (Ex. Ka-8), letter to C.M.O. (Ex. Ka-9) and thereafter dead body was sent for post mortem. Post mortem on the body of the deceased Was conducted on 14.1.2004 at about 3:15 p.m. On 17.1.2004, the police arrested both the appellants and on their pointing out, the alleged wooden piece, weapon of assault, was recovered and Fard and arrest (Ex. Ka-5) was prepared. According to this recovery memo, the size of wooden piece was 2.5 "Baalisht" (approximately 2 feet) and its thickness was approximately about 1 inch. After completing the investigation, charge sheet (Ex: Ka-10) was submitted against the present appellants.

3. As per the post mortem report, following two injuries were found on the body of the deceased:

(i) Lacerated wound 7 cm. x 5 cm. x bone deep on the left side head 6 cm. above the middle 6f left eyebrow.

(ii) Stitched wound 10 cm. in length 10.5 cm. behind the right ear on the right side of back head.

Cause of death, as per post mortem report, was due to coma as a result of ante mortem injuries.

4. Prosecution in order to prove its case had examined PW-1 Smt. Malti, the complainant, PW-2 Rajesh Kumar Sonkar as witnesses of fact, PW-3 is Dr. Rajiv Singh, who conducted the post mortem on the body of the deceased, PW-4 Constable Anil Srivastava, who has prepared Chik report and G.D. and registration of the case. PW-5 Mahendra Pratap Singh is the Investigating Officer.

5. The case of the defence was of total denial. On behalf of the appellants, DW-1 Munna was also examined on the point that the accused persons, the complainant and the alleged witnesses were not present on the scene of occurrence. However, he has

supported the incident, and has stated that he heard the cries of the deceased.

6. Both the witnesses of fact have fully corroborated the prosecution case and have explained the reason how and why, they were present on the place of occurrence. The other witnesses are formal in nature.

7. Learned trial court, after considering the evidence of prosecution, convicted the appellants for the offence u/s 304 read with 34 IPC and sentenced them as above. Hence, the instant appeal has been filed.

8. Learned counsel for the appellants submits that only two witnesses of fact have been examined by the prosecution. Both are related and chance witness, therefore, their evidence could not have been acted upon. There were other witnesses present at the "Aara Machine". None of the said workers of said "Aara Machine" was examined in support of the prosecution. In the alternative, it has been argued that keeping in mind the manner in which the occurrence has taken place, the appellants cannot be attributed with the intention of causing the death of the deceased and the case does not exceed beyond the purview of section 304 Part II, IPC.

9. On the other hand, learned A.G.A. submitted that in this case prompt F.I.R. was lodged. The presence of the witness at the place of occurrence was natural and there is no reason for the witnesses to falsely implicate the appellants. The version of the appellant was fully corroborated by the medical evidence, therefore, the trial court has not committed any illegality in convicting the appellants.

10. We have gone through the evidence available on record. Both the witnesses have fully corroborated the prosecution version. It is true that PW-1 is the wife of the deceased and PW-2 is the brother of the deceased, hence they are related witnesses. But there is no law, which provides that the evidence of related witnesses cannot be acted upon.

11. Hon"ble the Apex Court in the case of [Himmat Sukhadeo Wahurwagh and Others Vs. State of Maharashtra](#), has discussed that "nowadays, the query is not as to why he should be believed but now the query is why he shall spare the real assailant." The defence has nowhere alleged that there was any enmity between the deceased and the family of the appellants.

12. Again Hon"ble the Apex Court in the case of [Mano Dutt and Another Vs. State of U.P.](#), has observed regarding the evidence of the related witnesses and has held that if the statement of such witness is found to be credible, reliable, trustworthy, admissible under law and corroborated with witness or documentary evidence of the prosecution, the court cannot reject such evidence merely on the ground that the witness was family member or interested witness or person known to affected parties.

13. In the case of [Parsan and Others Vs. State of U.P.](#), the Division Bench of this Court has held that the evidence of chance witness cannot be viewed with suspicion merely on

the ground that he is a chance witness.

14. In the facts of this case, PW-1 and PW-2 cannot be said to be the interested witness. Interested person is one, who is interested in the conviction of the accused persons for his/her own benefit. But in the facts of this case, there is not even such a whisper or circumstance from the side of the defence that PW-1 and PW-2 were in any manner had any personal purpose to serve by the conviction of the appellants. Therefore, they cannot be termed as interested witness. The presence of the witnesses at the place of occurrence was very natural as the witnesses had gone to deliver the dinner of the deceased at his working place. Since it was late in the night, therefore, the brother of the deceased was also accompanying the wife of the deceased and it cannot by any stretch of imagination be said to be unnatural. When these persons reached the spot, they saw the incident. Immediately after the incident they rushed to the hospital where the deceased died and just after that the F.I.R. of this case was lodged in the same night at about 2:00 a.m. i.e. only after about 4:00 hours of the occurrence. During this period the deceased was taken in an injured condition to the hospital where he was treated and ultimately succumbed to the injuries at 1:55 a.m. There after F.I.R. was lodged. Hence, F.I.R. of this case was lodged with utmost promptness. A prompt F.I.R. gives assurance of veracity and gives first hand account of occurrence and persons responsible therefor. To insist upon prompt F.I.R. is to obtain information regarding circumstances in which crime was committed, names of the persons responsible therefor, part played by them as well as the other eyewitnesses if any present there.

15. It is true that F.I.R. though valuable piece of evidence, it is not substantive evidence. Hon"ble the Apex Court in the case of [Jai Prakash Singh Vs. State of Bihar and Another etc.](#), has discussed the value of prompt F.I.R.

16. No other infirmity in the prosecution evidence was pointed out by the learned counsel for the appellants. The evidence of both the eyewitnesses was found to be wholly reliable. It was supported by medical evidence. It transpires from the perusal of impugned judgment that a ground of defective investigation was also raised before the trial court and the same has been considered and decided in correct perspective. Mere defective investigation cannot be a ground to throwaway the otherwise reliable testimony of the prosecution witnesses.

17. Hon"ble the Apex Court in the case of [State of Karnataka Vs. K. Yarappa Reddy](#), has held that "even if the investigation is illegal or suspect, the rest of the evidence must be scrutinized independently of the impact of it.

18. The aforesaid view was again followed by the Hon"ble Apex Court in a recent judgment in the case of [Abu Thakir and Others Vs. State rep. by Inspector of Police, Tamil Nadu](#), wherein Hon"ble Apex Court has held that if defective investigation is made a ground to discard the otherwise reliable evidence of the prosecution then the criminal justice shall be made result for the wrongs committed by the Investigating Officer in the

case. Therefore, the ultimate result in the criminal trial would be in the hands of such erring officials and that cannot be the intention of the legislature.

19. It has also been argued in this case that no other independent witness has been examined. This is settled rule of appreciation of evidence that the court must appreciate the evidence of the witnesses, keeping in view the ground realities.

20. In the present day-world, people avoid to become a witness in a crime and the reasons for the same are obvious. Hon"ble the Apex Court in the case of [Hiralal Pandey and Others Vs. State of U.P.](#), has considered the effect of non-examination of the other witnesses and held that mere non examination of the other witnesses cannot be a ground to discard the otherwise reliable testimony of the witnesses produced by the prosecution.

21. In view of the aforementioned discussion, the evidence of two eyewitnesses falls within the category of wholly reliable their evidence finds support by prompt F.I.R. Medical evidence also support their testimony. Their presence on the scene was natural. Grounds raised to discard their testimony have no force.

22. After careful examination of the entire prosecution evidence, we are of the considered view that finding of guilt of the accused need not to be interfered with. Now the second point is to be considered whether the conviction of the appellants u/s 304/34 IPC is justified and whether the sentence of life imprisonment, awarded to the appellants u/s 304 IPC is appropriate, in the facts and circumstances of the present case.

Section 304 IPC reads as under:--

304. Punishment for culpable homicide not amounting to murder.--

Whoever commits culpable homicide not amounting to murder shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done 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.

23. Now the second limb of argument is to be considered, which is regarding the offence and the sentence inflicted therefor. Hon"ble the Apex Court in the case of [Gurmukh Singh Vs. State of Haryana](#), has discussed the factors to be considered while awarding appropriate sentence and has held in paragraph No. 23 as under:

23. These are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen from its special perspective. The

relevant factors are as under:

- (a) Motive or previous enmity;
- (b) Whether the incident had taken place on the spur of the moment;
- (c) The intention/knowledge of the accused while inflicting the blow or injury;
- (d) Whether the death ensued instantaneously or the victim died after several days;
- (e) The gravity, dimension and nature of injury;
- (f) The age and general health condition of the accused;
- (g) Whether the injury was caused without pre-meditation in a sudden fight;
- (h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;
- (i) The criminal background and adverse history of the accused;
- (j) Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of shock;
- (k) Number of other criminal cases pending against the accused;
- (l) Incident occurred within the family members or close relations;
- (m) The conduct and behavior of the accused after the incident. Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment?

These are some of the factors which can be taken into consideration while granting an appropriate sentence of the accused.

24. In the facts of that case, a single lathi blow was given on the spur of moment resulting into death of the deceased. There was no attempt to cause other injury to the deceased. There was no intention or premeditation in the mind of the appellant to inflict such injuries to the deceased as were likely to cause death in the ordinary course of nature. Considering the evidence of the witnesses and medical evidence, the Hon"ble Apex Court has held that accused ought to have been convicted under Sections 304-II IPC instead of u/s 302 IPC.

25. Hon"ble the Apex Court in the case of [Daya Nand Vs. State of Haryana](#), has considered the difference between murder and culpable homicidal not amounting to murder and has observed in paragraph Nos. 19 and 20 as under:--

19. Thus, according to the rule laid down in Virsa Singh's case, even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would not be murder. Illustration (c) appended to Section 300 clearly brings out this point.

20. Clause (c) of Section 299 and Clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that Clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

26. The argument of learned counsel for the appellants is that from the attending circumstances in this case, it cannot be said that the accused persons inflicted the injury with the intention to cause death. It is submitted that the injuries were caused by a small wooden piece and it only caused lacerated wound. It was only because of the internal damage, Prem Chandra (deceased) succumbed to the injuries. Our considered view is that in the argument of learned counsel for the appellants has substance.

27. According to the prosecution story, there is no evidence as to how, the incident started? When both these persons, PW-1 and PW-2 reached there, they found that the occurrence was going on.

28. When we examined the facts of this case at the touchstone of the above-mentioned principle of law, then the natural conclusion is that the instant case falls within the purview of Section 304 Part II of IPC. There was no previous enmity between the deceased and the accused appellants. The occurrence must have taken place on the spur of moment. The deceased and the accused persons were labourers on the same "Aara Machine" as stated by DW-1. In the facts of this case a small wooden piece was used as a weapon of offence. It also reflects that there was no intention to kill and occurrence took place on the spur of moment. Whatever object came in their hand, they used the same as weapon of assault. They had no deadly weapon. They are two accused persons and only two injuries were found on the body of the deceased, which establish that no effort was made to repeat the blow. There was no underlying fracture, which reflects that the blow was not given with such force, which could have resulted in the fracture of the underlying skull bone. It is true that doctor has opined that injuries were sufficient in the ordinary course of nature to cause death but this opinion of the doctor has been given keeping in view the actual internal damage caused by the injury and not keeping in view the nature of actual external injury caused to the deceased, which was only a lacerated wound. Every lacerated wound on the head cannot by any stretch of imagination be said to be sufficient

in the ordinary course of nature to caused death, that too when it has not been caused by any deadly weapon.

29. In another decision Hon"ble the Apex Court in the case of Chhotu Giri v. State of Rajasthan reported in [(2007) 15 SCC 735] has converged the conviction of the appellant from Section, 302 IPC to 304-II IPC. In the facts of that case a single lathi blow was given by a small lathi during quarrel, which proved fatal. In that case Hon"ble the Apex Court has held that sentence of eight year of rigorous imprisonment will meet the ends of justice.

30. Keeping in view the aforementioned legal position and guidelines as quoted above, the conviction of the accused persons u/s 304/34 IPC and awarding them the punishment with imprisonment for life was not proper. There is nothing on record to indicate the appellants had any intention or knowledge to cause such injury as is likely to cause death in the ordinary course of nature. The weapon alleged to have been used by the accused persons also reflects that they had absolutely no intention to cause death but the injury was caused on the head, which caused internal damage due to which, Prem Chandra (deceased) succumbed to the injuries. Therefore, the case of the accused appellants squarely falls within the purview of Section 304-II IPC.

31. In view of the discussion made above, the instant appeal deserves to be partly allowed and is hereby partly allowed. The conviction of the accused/appellants is hereby altered from Section 304/34 IPC to Section 304-II IPC. The sentence of the accused appellants is modified and reduced for a period of eight years and fine is also reduced to Rs. 2,000/-. In default of payment of fine, they will have to undergo further rigorous imprisonment for a period of one month. The period of detention already undergone by the appellants in this case shall be set off in their sentence in accordance with the provisions of Section 428 Cr.P.C. Registry is directed to send back lower court record forthwith to the court concerned.