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**(2016) 09 AHC CK 0129**

**ALLAHABAD HIGH COURT (LUCKNOW BENCH)**

**Case No:** Criminal Appeal Defective No. 480 of 2012

Kamlesh Singh

APPELLANT

Vs

State of U.P.

RESPONDENT

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**Date of Decision:** Sept. 20, 2016

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 201, 302, 364

**Citation:** (2016) 97 ACrC 571 : (2016) 10 ADJ 384

**Hon'ble Judges:** Anil Kumar and Anil Kumar Srivastava-II, JJ.

**Bench:** Division Bench

**Advocate:** R.S. Tomar, Advocate, for the Appellant; Govt. Advocate, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

1. Heard Sri. R.S. Tomar, learned counsel for appellant, Sri. Izhar Husain, learned AGA and perused the record.

2. This appeal has arisen against the judgment and order dated 18.02.2008 passed by learned Sessions Judge, Lakhimpur Kheri in Sessions Trial No. 910 of 2004 (State v. Kamlesh Singh) arising out of Case Crime No. 568 of 2004 under Sections 364, 364, 302 & 201 IPC, P.s. Pradhan District Kheeri whereby accused was found guilty of the offence punishable under Sections 302, 364 & 201 IPC and was sentenced for imprisonment for life under Section 302 IPC, ten years rigorous imprisonment under Section 364 IPC and two years rigorous imprisonment under Section 201 IPC. All the sentences were directed to run concurrently.

3. According to the prosecution version, FIR was lodged by Amar Singh on 26.06.2004 stating that his son, namely, Swabhimman Singh aged about 6 years had gone in the field along with accused Kamlesh Singh on 25.06.2004 at about 10.00 a.m. Kamlesh Singh returned to the house but his son did not come back.

4. First Information report was lodged at Case Crima No. 568 of 2004, thereafter on 27.06.2004 accused-Kamlesh Singh arrested at 09.00 a.m. On pointing out the accused, the body of the deceased-Swabhiman Singh was recovered from bushes of the Rehua forest. Inquest proceedings were conducted on 27.06.2006. Postmortem of the dead body was conducted on 27.06.2006 at 04.20 p.m. and the following external injuries on the body of the deceased were found:-

(1) Abraded contusion 15 cms. X 10 cms. over both side of face just below right eye.

(2) Abraded contusion 10 cms. x 3 cms over front of neck, 3 cm below chin. ON dissection, underlying root of neck, trachea ring and hyoid bone were found fractured. Trachea found deeply congested.

(3) Contusion 15 cms. x 10 cms. over front of chest just below right clavicle. On the dissection, underlying 1st to 4th ribs on both sides found fractured. Both pleura, both lungs found lacerated and 50 ml. Clotted fluid blood was found present in chest cavity.

5. Investigating Officer prepared site plan. After concluding the investigation, charge sheet under Section 364, 302 & 201 IPC was submitted against the accused.

6. Accused was charged for offence punishable under Sections 364, 302, 201 IPC, who pleads not guilty and claimed trial.

7. In order to prove his case prosecution has produced P.W.-1/Amar Singh complainant and father of the deceased. P.W.-2/Rajendra Singh, witness of recovery of the dead body and sleepers of the deceased. P.W.-3/Rajendra Singh, his statement could not be recorded as he was aged about 6 years only and was not having mental status to depose before the court. P.W.-4/Dr. Ramesh Singh, who conducted postmortem of the dead body of the deceased. P.W.-5/Vijay Singh, who has conducted the investigation and P.W.-6/S.I. Gyaneshwar Yadav who has submitted charge sheet before the Court.

8. After appreciating the evidence on record, learned trial court has recorded a finding of conviction against the accused and convicted and sentenced accused as above.

9. The main thrust of the argument advanced by learned counsel for appellant is that in the present case the accused-appellant has been denied his valuable right of cross examination and once the valuable right of cross examination of the witnesses has been denied, it is in violation of principles of natural justice and fair-play as he is unable to put forward his case in defence in effective manner, so keeping in view the said facts, the impugned judgment passed by learned trial court is liable to be set aside.

10. Per contra, learned AGA on the other hand while supporting the impugned judgment submits that after recording of the evidence of P.W.-1/Amar Singh and P.W.-2/Rajendra Singh, the right to cross examination has been afforded to the accused but he/his counsel did not turn up to cross examine the witnesses and an application for adjournment has

been moved by his counsel which was rejected and the opportunity for cross-examination has been closed. The said order was challenged by the accused before this Court at Lucknow and this Court has given a right to cross examine the witnesses subject to condition that the accused deposits Rs. 2000 i.e. Rs. 1000/- for each payable to the witnesses for cross examination and the copy of the said order may be produced within ten days.

11. Learned AGA further submits that in spite of the said order passed by this Court, the said order has not been produced before the trial court within time rather at a belated stage in the month of November, 2005 and the accused has not been deposited the amount, so keeping in view the said fact, the application moved on behalf of the accused for cross examination in pursuance to the order passed by this Court has been rejected. Thus, keeping in view the above said facts, once again, the accused itself is of guilty then he cannot agitate the matter before this Court on the ground that his valuable right for cross-examination has been closed and on the basis of which it cannot be said that the impugned judgment dated 27.05.2005 passed by trial court thereby convicting and awarding the sentence to the accused suffer from any illegality or infirmity, so the appeal lacks merit and is liable to be dismissed.

12. We have heard learned counsel for parties and gone through the record.

13. Witness in a particular case plays a great role and importance as they are eyes and ears of the justice and on the basis of their evidence the court reaches to a correct conclusion in a particular case to give a decision in a case. Further as per the provisions of the Act which are stated herein above, it is the first right of prosecution to produce his witnesses in order to establish and prove his case, thereafter the accused got a right to cross-examine the said witness in order to establish that he is innocent in the matter. Thus, a right to cross-examination of an accused is a valuable right rather is a great role in order to defend him in the matter in issue.

14. So far as the facts of the present case are concerned, there is no quarrel or dispute between the parties. Only the bone of contention in the present case is that the right of cross-examination to the accused has not been afforded in the present case and the said point is to be considered and to be decided in the matter.

15. From the perusal of the record, the position which emerged out is that on 04.02.2005 the examination in Chief of P.W.-1/Amar Singh by the prosecution was closed, thereafter his cross-examination was deferred on the application of the accused and the witness was directed to appear for the said purpose on 17.03.2005 but on behalf of accused his counsel has not turned up to cross-examine the witness, so by an order dated 17.03.2005 the right of cross-examination of the witness P.W.-1/Amar Singh has been closed on 04.02.2005. Sri. Rajendra Singh/P.W.-2 was also cross-examined and his examination was deferred on an application of the accused and for the said purpose the next date fixed as 24.03.2005. On the said date on behalf of the accused, nobody has turned up for

cross-examination of the witness, as such on 04.05.2005 the right of cross-examination of P.W.-2/Rajendra Singh was also closed, thereafter on behalf of accused, an application has been moved for cross-examination and the date was fixed as 16.05.2005.

16. On 16.05.2005 the case was adjourned to 25.05.2005, thereafter to 27.05.2005. On the said date, the said witness, namely, P.W.-1/Amar Singh and P.W.-2/Rajendra Singh were present, however, the counsel for the accused did not turn up for cross-examination. In view of the said fact, the application moved on behalf of accused for cross-examination was rejected. Aggrieved by the said fact, the accused approached this court for redressal of his grievances and on 24.06.2005, an order was passed by this Court, relevant portion quoted herein below:-

"Looking to the seriousness of charge for which the petitioner is facing trial and also keeping in view that the witnesses must be examined and cross-examined when they are in attendance and defence should not be permitted to unnecessary delay the matter, the prayer of the learned counsel is granted on costs of Rs. 2000/- i.e. Rs. 1000/- payable to each witness for their reappearance. This is further made clear that if on the next date, the witnesses are not cross-examined, by the defence, the trial court shall be free to proceed further and discharge witnesses without cross-examining. The petitioner shall file a copy of this order before the trial court within 10 days."

17. Although by an order dated 24.06.2005, this Court has directed the accused to file the copy of said order before trial court within ten days but the same was not filed within the said period and filed on 22.11.2005 and the amount as directed by this Court i.e. Rs. 2000/-, Rs. 1000/- payable to each witness(for their reappearance) has not been deposited, so in view of the said fact, the application/request made on behalf of the accused for recall of the witnesses P.W.-1 & P.W.-2 for cross-examination were rejected on the ground that accused has also been examined under Section 313 Cr.P.C., thereafter final judgment has been passed.

18. In view of the above said factual background, in order to decide the controversy involved in the present case, it is appropriate to go through the relevant provisions provided in respect to examination of witness in the Indian Evidence Act, 1872 (hereinafter referred to as the Act) as well as Criminal Procedure Code.

Chapter 10 of the Act deals with "of the examination of witnesses".

Section 135 of the Act provides as under:-

"135-Order of production and examination of witnesses - -The order in which witnesses are produced and examined shall be regulated by the law and practise for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

Section 137 of the Act provides as under:-

"137-Examination-in-chief. Examination-in-chief. - The examination of witness by the party who calls him shall be called his examination-in-chief.

Cross-examination. - The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination. - The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination."

And Section 138 of the act provides as under:-

" 138-Order of examinations - Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination - The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

In addition to above said provisions, Section 309 of the Code of Criminal Procedure provides as under:-

"309-Power to postpone or adjourn proceedings - (1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

(2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody :

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in

writing:

[Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.]

Explanation 1. - If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2. - The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."

And Section 311 of the Code of Criminal Procedure provides for power to summon the material witness or examine the person which reads as under:-

"311. Power to summon material witness, or examine person present. - Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. Recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

19. A bare reading of the above said sections as indicated by the legislature in the Act as well as Code of Criminal Procedure, 1973, the position which exists is to the effect that the object underlying the said section is that there may not be a failure of justice on account of mistake or either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. So keeping in view the above said facts in the instant matter no doubt the opportunity has been given to the accused for re-examination of the witnesses, namely P.W.-1/Amar Singh and P.W.-2/Rajendra Singh, initially by the trial court and thereafter by the High Court and thereafter some fault/lacunae of first part is not applying the direction as given by the trial court and by this Court by an order dated 24.06.2005 even then his valuable right to cross-examine the witnesses which were produced on behalf of the prosecution in order to prove his case cannot be denied as by denying him the right to cross-examine his defence in the present case cannot be considered rather will not come into light which will against this well settled principles of natural justice.

20. Natural justice is a parameter of all the modern constitution of the world. I find that Black J has most aptly described it as "Natural justice understandably meant no more than justice without the adjective" (**Green v. Blake, (1948) IR 242**). Justice Krishna Iyer in **Mohinder Singh Gill v. The Chief Election Commissioner, (1978) 1 SCC 405** has traced its root in Kautilya's Arthashastra in following terms,

"Indeed, from the legendary days of Adam -- and of Kautilya's Arthashastra -- the rule of law has had this stamp of natural justice which makes it social justice. We need not go into these depths for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case-law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system."

In the case of **Bhagwan Shukla v. Union of India and others 1994 (6) SCC 154** wherein paragraph no.3 (relevant portion) held as under:-

"The appellant has obviously been visited with civil consequence but he had been granted no opportunity to show cause against the reduction of his basic pay. He was not even put on notice before his pay was reduced by the department and the order came to be made behind his back without following any procedure known to law. There, has, thus been a flagrant violation of the principles of natural justice and the appellant has been made to suffer huge financial loss without being heard. Fair play in action warrants that no such order which has the effect of an employee suffering civil consequence should be passed without putting the employee concerned to notice and giving him a hearing in the matter. Since, that was not done, the order (memorandum) dated 25.7.1991, which was impugned before the Tribunal could not certainly be sustained and the Central Administrative Tribunal fell in error in dismissing the petition of the appellant."

In the case of **Union of India v. Sandur Manganese & Iron Ores Ltd. & Ors. JT 2012 (10) SC 476**, Hon<sup>ble</sup> the Supreme Court in paragraph no.3 held as under:-

"The principles of natural justice embody the right to every person to represent his interest to the court of justice. Pronouncing a judgment which adversely affects the interest of the party to the proceedings who was not given a chance to represent his/its case is unacceptable under the principles of natural justice."

21. In the case of **Munna Lal Gautam v. State of U.P., 2007 (3) ACR 3231**, this Court has held that it was a right of accused to cross-examine a witness to put his defence and it is not proper order to close his right of cross-examination and proceed to an order against him and further held in order to meet the ends of justice to protect the right of cross-examination of the accused to cross-examination to be provided to be provided to an appellant.

22. In the case of **Hari Om Sharma v. State of U.P. and Anr., 2011 (1) ACR 569**, wherein it was held that it is established principle of law that no one should be condemned unheard. It the opportunity for cross-examination of accused-appellant it would prejudice to him, so his valuable rights should not be curtailed and he may be afforded an opportunity to cross-examine the witnesses (See. **Jawahar Singh s/o Mishri Lal v. State of U.P., 2004 Cri. LJ 2413**)

23. Thus, keeping in view the above said fact we are of the considered opinion that even if there is some fault on the part of accused for not taking appropriate steps for cross-examining P.W.-1/Amar Singh and P.W.-2/Rajendra Singh, thereafter when the opportunity was granted to him by way of recall the said witnesses for re-cross-examination he had failed to do so even in that facility his right to cross-examination cannot be curtailed down in any manner and the same is in contravention of principles of natural justice and fair-play.

24. For the foregoing reasons, we are of the opinion that the matter should be remanded back to the trial court for reconsideration after giving opportunity to the accused for cross-examination of the prosecution witnesses.

25. Accordingly, the appeal is allowed. Order dated 18.02.2008 passed by trial court is set aside and the trial court is directed to allow the accused/Kamlesh Singh to cross-examine the prosecution witnesses, namely, P.W.-1/Amar Singh and P.W.-2/Rajendra Singh and P.W.-5/Vijay Singh subject to payment of Rs. 9,000/- i.e. Rs. 3000/- each to the prosecution witnesses and the trial court is further directed to conduct trial of the case on day to day basis without giving unnecessary adjournment. Further as the appellant is in jail, so he will remain in jail subject to outcome of the decision of the trial court.

26. Office is hereby directed to certify this order to the court concerned immediately for compliance.

27. Record of the trial court should also be returned back immediately.