

**(2016) 10 AHC CK 0072**

**ALLAHABAD HIGH COURT**

**Case No:** Criminal Appeal No. 1727 of 1983.

Uma Shanker - Appellant @HASH  
State of U.P.

APPELLANT

Vs

RESPONDENT

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**Date of Decision:** Oct. 4, 2016

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 302, Section 34

**Citation:** (2017) 98 ACrC 105 : (2016) 97 ACrC 316 : (2017) 3 ADJ 843 : (2017) 1 AllCrIRulings 188

**Hon'ble Judges:** Arvind Kumar Tripathi and Mukhtar Ahmad, JJ.

**Bench:** Division Bench

**Advocate:** Amit Kumar, P.N. Misra, Pradeep Verma, S.Y. Shukla, Virendra Saran and Y.K. Shukla, Advocates, for the Appellant; D.G.A, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

@JUDGMENTTAG-ORDER

**Mukhtar Ahmad, J.** - Appellant of this case Umashanker and appellants of criminal appeal No.1617 of 1983 namely Indrapal and Ram Kripal were committed to trial in the court of Sessions Judge Fatehpur under section 302/34 I.P.C. All the accused persons were held guilty and each of them was punished with life imprisonment in Sessions Trial no 312 of 1982 (State v. Indra Pal and two others). During the pendency of appeal, Indra Pal and Ram Kripal have died so their aforesaid appeal has been abated vide order dated 24-3-1998.

2. The prosecution case is that the informant Girish Chand Pandey s/o Raja Ram Pandey resident of village Kulli Thana Khakreru submitted a written application dated 4.3.1982 in the police station Khakreru, stating that today in the noon hours he and his brother Krishan Kant Pandey had gone to attend the call of nature near Thandiabagh. He entered into the field of Gaya Prasad Tiwari and Krishna Kant

Pandey went towards the Arhar field of Ram Pal Tiwari, just then Umashanker s/o Indra Pal Pandey having axe in his hand, Indra Pal and Ram Kripal Pandey sons of Gajadhar Pandey having lathies in their hands came suddenly from behind the Mahua trees and encircled Krishan Kant Pandey with a view to kill him. Indra Pal and Ram Kripal exhorted to kill his brother on which Umashanker assaulted Krishan Kant Pandey by axe but it could not hit him and his brother shouted then Umashanker put down him on the ground. Hearing the cry of his brother, he, Shravan Kumar Pandey and Pacchoo Pasi, who were working in the nearby fields rushed towards the spot and saw that Umashanker was assaulting his brother and gave 2-3 axe blows on his neck, resultantly he fell down on the earth and succumbed to the injuries sustained. They challenged the accused persons but they ran away towards west. It was also asserted that about eight months ago a decoity had taken place in the house of Indra Pal in which, his wife and daughter were murdered by decoits and because of village politics Uma Shanker Pandey suspected the complicity of Krishan Kant Pandey in that incident of decoity, which was expressed by him severally in the village and some altercation had also taken place between them. It was further asserted that due to this reason, his brother was murdered. On the said information, a case was registered against the appellants under Sections 302 I.P.C. on 4.3.1982 at 02 P.M. The investigation of the case was taken over by Station Officer N.K.Singh PW-5. He recorded the statement of first informant Girish Chand Pandey at the Police Station. Thereafter he reached on the spot along with first informant. Inquest was prepared by him in the presence of the Panch witnesses, thereafter he sent the dead body for postmortem through constable Ram Shankar and village Chaukidar along with other necessary papers prepared on the spot. He also made inspection of the place of occurrence, prepared site plan and collected blood stained and simple earth from the spot along with one lota, maala, one pair havai chhappal, blood stained agonccha of the deceased and fard Ex-Ka 12 to 16 were also prepared. Post mortem on dead body of Krishan Kant Pandey was conducted by Dr. S.C.Srivastava. The Investigating Officer recorded the statements of the witnesses and after concluding the investigation charge sheet was submitted by him. The Chief Judicial Magistrate after providing necessary copies committed the case to the Sessions Judge, Fatehpur.

3. Learned sessions Judge framed the charges against accused persons under section 302 read with section 34 IPC. The accused persons pleaded not guilty and claimed to be tried.

4. In order to substantiate the charge against accused persons, the prosecution examined as many as six witnesses, out of them PW2, PW3 and PW4 are the witnesses of fact. They have also deposed eye witness account. P.W. 1, Dr. S.C. Srivastava had conducted postmortem on the dead body of the deceased. P.W 2 the informant Girish Chandra Pandey who happens to be the real brother of the deceased. PW3, Shravan Kumar is cousin of deceased and was working in his nearby fields along with PW4 Pachchu, his labour. PW5 A.K.Sing is the Investigating Officer.

PW6 Constable Prem Chand Pandey is the witness who had transcribed the Chick FIR and made necessary entries in the G.D.

5. After concluding the prosecution evidence the statement of the accused persons under Section 313 Cr.P.C were recorded and all the incriminating circumstances were put to them which they denied. They however admitted the incident of decoity in their house but specifically denied from having any suspicion on Krishan Kant Pandey. In defence Ram Vishal Singh Law Assistant has been examined as DW1. He was summoned with register of special reports.

6. Learned Sessions Judge after appreciating the evidence on record found the prosecution case proved, convicted the accused persons and awarded the punishment as stated above. Feeling aggrieved with the order of conviction and sentence, two criminal appeals as mentioned above were preferred, but connected appeal bearing no. 1617 of 1983 has been abated. Now only surviving appellant is pursuing this appeal.

7. We have heard Mr. G.S. Bisaria, learned Amicus Curiae on behalf of the appellant and learned A.G.A. Mr Mahendra Singh Yadav and gone through the record.

8. Mr. Bisaria's initial submission is that the First Information Report is ante-timed as the crime number has not been mentioned in the inquest report. No doubt, the first information report in a criminal case and particularly in a murder case, is a vital and valuable piece of evidence for the purpose of appreciating the evidence led during trial. If the first information report is delayed or ante timed, it often results in embellishment, which is a creature of an after thought. In the matter in hand, no doubt at first page of the inquest report there is no mention of particulars of the case but in the body full and complete particulars are mentioned. In other papers prepared at the time of inquest such as photo nash, letter to CMO, namoona mohar etc. there is also mentioning of description of the case so version of learned counsel for the appellant in this regard is not acceptable.

9. Learned Amicus Curia has next contended that there is no evidence worthy of credence to establish the prosecution case. It has also been submitted that eye witnesses are close relatives of the deceased as PW2 first Informant Girish Chand Pandey is the real brother of the deceased while PW3 Shravan Kumar is his cousin. PW-4 was also working as labour in the fields of PW3 with him, so PW2 and PW3 are near relative of the deceased and PW4 being labour of PW3 is also his own man, as such all these witnesses are highly interested witnesses. It is also argued that PW-4 Pachchu was involved in a murder case so he was in pressure of local police too. Further the presence of the aforesaid witnesses on the spot and witnessing the incident is highly doubtful and their evidence contains severe discrepancies so their testimony do not inspire confidence. It is also argued that their testimony is not corroborated with medical evidence as such entire prosecution story becomes doubtful.

10. Per contra, learned A.G.A. has opposed these arguments and argued in extenso supporting the reasoning of the learned trial court and strongly pleaded for maintaining the judgment and order impugned. It has also been argued that on account of relationship and even being an interested witness, the testimony of a witness cannot be discarded. However it is also submitted that question of pressure on PW-4 is only the imagination on the part of appellant. Further minor discrepancies in the testimony of the witnesses are bound to occur which also reflects that witnesses are not tutored and have come to the court for disclosing the facts regarding the incident in their own way. Minor discrepancies not touching to the core of case cannot be the ground for rejection of prosecution evidence in entirety. It is further submitted that testimony of witnesses of the fact is also supporting to the medical evidence.

11. Admittedly the relationship of PW2 and PW3 is not disputed. It is also not disputed that PW4 Pachchu as per prosecution version was working in the fields with PW3 but merely on these grounds their evidence can not be discarded in entirety. However, scrutiny of their evidence shall require great caution.

12. Now we have to test their oral testimony, deposed before the trial Court with regard to their presence on the place of incident and witnessing the occurrence.

13. Firstly, we take Girish Chandra Pandey (PW-2). He is the brother of deceased and informant of the case. He says that on hearing the cry of his brother Krishan Kant Pandey, he rushed to the spot. He in his oral testimony at page 32 of the paper book says that Uma Shankar assaulted Krishan Kant by axe but he escaped unhurt and cried. Thereafter Uma Shankar put him on earth then caused injuries by axe. On hearing the cry he, Pachchu and Shravan Kumar also rushed to the spot where accused persons on their challenge went therefrom and could not be caught. After chasing the accused persons, he returned and saw that his brother had succumbed to the injuries. In para 5 of his oral testimony he says that : eSaus eqyfteku dks yydkjk tc lquk ml le; eSa vkonLr ys jgk FkKA ml le; esjk Qklyk eqyfteku ls djhc rhl dne FkKA "He further says that" dqy ?kVuk esa eqf"dy ls Ms<+&nks feuV yxs gksaxsA In Para number 5 he further says that eSaus viuk ykSVk ekSds ij gh NksM+ fn;k Fkk eqyfteku ds Hkkx tkus ds ckn eSa vius HkkbZ ds ikl [ksr ij igqWapk FkKA meaning there that by, this witness was about 30 steps away from the place of occurrence when he heard the cry of his brother in that situation this version that first assault of axe caused by the appellant did not hit his brother is not believable as he had no opportunity to watch the same. Further witnessing the entire incident happened in the field of Arhar from a distance of 30 steps was also very doubtful .

14. Now we consider the evidence of PW-3 Shravan Kumar and PW-4 Pachchu. PW-3 says that he along with Pachchu (PW-4) was harvesting the mustard crop in his field situated nearby the place of incident, rushed to the spot after hearing the cries of the deceased. In para 2 he says that "esjh igys igy tc d".k dkUr ij utj iM+h rc og [ksr esa iM+s FksA vkSj ?kk;y gksdj ej pqds FksA" in the same para he further submitted that"yk" k ds pkjksa rjQ vjgj dh Qly FkhA ?kVuk okys [ksr dh pkjksa esMs+ iqjkuh pyh vk jgh gSA nf{k.kh esM+ Ms<+ ohrk pkSM+h vkSj ,d ohrk ls de maph gSA

yk" k ds ikl tehu ij [kwu Fk kA eSa yk" k okys [ksr ds nf{k.kh esM+ ls 30&40 dne nfD[ku vius [ksr ij cSBk Fk kA" As per site plan from the dead body the southern boundary of the field was about 12 steps meaning there that by this witness is saying that he watched the incident from the distance of 45 steps.

15. PW-4 Pachchu in his statement in para 2 has stated that the distance of field where he was harvesting the crop from the place where the dead body was found was about 100 steps towards the south. He further says that Shravan Kumar PW-3 was about 8-10 steps away from him towards south. He further stated that when he came about 50 steps then he saw that Uma Shankar was assaulting the deceased Krishan Kant. PW-5 in his oral testimony in para number 2 shows the distance of field where PW-3 and PW-4 were working as about 125-150 yards away from the field where the incident took place.

16. Now the contradictions in respect of the injuries is to be looked into. It would be proper to mention here that at the time of inquest only three injuries were noted on the neck of the deceased. In FIR it was specifically mentioned that appellant Umashanker had caused 2-3 axe blows on the neck of deceased but when post mortem was conducted by Dr.S.C. Srivastava, he found following five injuries on the body of deceased :-

1. Incised wound 3 x 2 x 2 over the right side on the lateral aspect of the neck 2 below the right tragus of the ear. The margins were clean cut and inverted and well defined tap-ring at both the ends. This wound was placed vertically.

2. Incised wound 3 x 1 x 1 over the right side of the front of the neck 1 below the lower border of the right mandible placed horizontally.

3. Incised wound 3 x 2 x 2 over the left side of the neck just below the lower border of the mandible. The margins were clean cut and well defined. This wound was placed horizontally.

4. Incised wound 3 x 2 x bone deep over the left side of the skull 3 above the left tragus of the ear and 4 above the lateral border of the left eye brow. The margins were clear cut and well defined. The underlying bone is fractured. N.B. This injury was not mentioned in the police papers.

5. Incised wound 2 x 2 x bone deep over the left side of the skull just adjoining to the injury no.4 in the middle part and its tip 3 above the occipital protuberance. The margins were clean cut and well defined. The underlying bones e.g. left parietal and the occipital bones fractured. N.B. This injury is not mentioned in the police papers.

17. In the opinion of the doctor, the death of Krishan Kant Pandey had taken place due to shock and hemorrhage as a result of anti mortem injuries.

18. It was specifically mentioned by the Doctor that injuries no 4 and 5 found on the skull of the deceased were not shown in inquest report. This fact really puts a great

suspicion on the presence and watching the incident by eye witnesses, more particularly when PW4 was also a witness of inquest. We have also noted that after post mortem report, the prosecution tried to fill up these lacuna. It was the reason that when PW2 came in the witness box that it was not so that three axe injuries were caused on the neck of the deceased. He also denied his statement under section 161 Cr.P.C. in this context given to Investigation stating three injuries. He further says that he could not counted the blows, which is nothing but improvement in his version with a view to justify the head injuries. His this version that "fjiksVZ esa eSaus xnZu ij okj yxus dh ckr HkbbZ ds xnZu dh pksVs ns[kdj fy[kh FkhA eSaus fjiksVZ fy[kus ds le; tkfgjk pksVs ns[kh Fkh yk" k dks Nw ugha ldrk Fkka blfy;s iwjh rkSj ls pksVs ugha ns[kk Fkka" It is again a grave contradiction that when he had seen the entire incident then why it was stated by him that injuries were mentioned in the FIR after seeing them on the head. In this context it is an important point to be noted that PW4 Pachchu was also a witness of inquest .When he had seen the incident and blood oozing from head of the deceased, as stated by him in his oral testimony then non mentioning of head injuries in inquest report put a serious doubt not only of his presence on spot at the time of incident but also put a question mark on the presence of PW2 and PW3 too. One more thing has also been noted by us that in the inquest report in the last, description of three neck injuries, it is added "lj ds ckyksa dh otg ls dksbZ tkfgjk pksV ugha fn[krh gSA" which is easily perceivable by naked eyes due to difference of darkness of the ink. But in the case diary, the inquest report is further noted down at parcha no 1 page 3 where no such mentioning is there, which is not only a grave improvement but an attempt of manipulation.

19. A combine reading of the evidence of the witnesses and our independent analysis coupled with the infirmities which we have noted above has created an impression in our mind that it was a blind murder and none of the eye witnesses were actually present at the scene and prosecution has not been able to bring home the guilt to the appellant beyond reasonable doubt. Consequently the appellant is entitled for benefit of doubt.

20. Accordingly appeal succeeds and is hereby allowed. The conviction and sentence awarded against the appellant by learned Session Judge, Fatehpur in Sessions Trial No. 312/1982 (State v. Indra Pal and ors.) arising out of Case Crime No. 33 of 1982 under Section 302/34 I.P.C. is set aside. The bail bonds are cancelled and sureties are discharged, provided he furnishes fresh bail bonds and sureties in compliance of the provisions under Section 437 A Cr.P.C. before the trial Court. The Court concerned shall ensure the compliance of the order.

21. Let this order be communicated to the Court concerned at the earliest.