

A.F.R.

Reserved on :- 07.06.2022

Pronounced on :- 05.08.2022

Court No.-1

Case :- CRIMINAL APPEAL No. - 967 of 2008

Appellant :- Ram Sajeevan Yadav And Another

Respondent :- State of U.P.

Counsel for Appellant :- S.B. Singh, Mohd. Mustafa Khan, Prabhakar Singh, Shiv Shankar Singh

Counsel for Respondent :- Govt. Advocate

with

Case :- CRIMINAL APPEAL No. - 1078 of 2008

Appellant :- Kundan Badhai

Respondent :- State of U.P.

Counsel for Appellant :- S.B. Singh, Jaleel Ahmad, Prabhakar Singh

Counsel for Respondent :- Govt. Advocate

with

Case :- CRIMINAL APPEAL No. - 1202 of 2008

Appellant :- Kicchi @ Ram Surat

Respondent :- State of U.P.

Counsel for Appellant :- S.B. Singh, Anurag Shukla (Ac), Hari Bux Singh, Prabhakar Singh

Counsel for Respondent :- Govt. Advocate

Hon'ble Ramesh Sinha, J.

Hon'ble Ajai Kumar Srivastava-I, J.

(Per :- Hon'ble Ajai Kumar Srivastava-I, J.)

1. Under challenge in these appeals is the judgment and order dated 29.03.2008 passed by the

learned Additional Sessions Judge, Fast Track Court No.29, Barabanki in Sessions Trial No.340 of 1993 arising out of Case Crime No.08 of 1993, under Sections 302/34 of Indian Penal Code (hereinafter referred to as "I.P.C.") and Sections 3(i)(x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (hereinafter referred to as "S.C./S.T. Act"), Police Station Tikait Nagar, District Barabanki whereby **the appellants, namely, Ram Sajeevan Yadav and Gaya Chamar (in Criminal Appeal No.967 of 2008)** have been convicted and sentenced to undergo life imprisonment with a fine of Rs.5,000/- each for the offence under Section 302/34 I.P.C. and in default of payment of fine, the appellants have further been directed to undergo three months' additional rigorous imprisonment. **The appellant No.1, Ram Sajeevan Yadav** has also been convicted and sentenced to undergo three months' imprisonment for the offence under Section 323/34 I.P.C. **The appellant No.1, Ram Sajeevan Yadav** has also been convicted and sentenced to undergo life imprisonment with a fine of Rs.2,000/- for the offence under Sections 3(2)(v) S.C./S.T. Act and in default of payment of fine, the

appellant No.1, Ram Sajeevan Yadav has further been directed to undergo one month's additional rigorous imprisonment. **The appellant No.1, Ram Sajeevan Yadav** has also been convicted and sentenced to undergo six months' imprisonment with a fine of Rs.1,000/- for the offence under Sections 3(i)(x) S.C./S.T. Act and in default of payment of fine, the appellant No.1, Ram Sajeevan Yadav has further been directed to undergo fifteen days' additional rigorous imprisonment. **The appellant No.2, Gaya Chamar** has also been convicted and sentenced to undergo three months' imprisonment for the offence under Section 323 I.P.C. All the sentences are directed to run concurrently.

The appellant, Kundan Badhai (in Criminal Appeal No.1078 of 2008) has been convicted and sentenced to undergo life imprisonment with a fine of Rs.5,000/- for the offence under Sections 302/34 I.P.C. and in default of payment of fine, he has further been directed to undergo three months' additional rigorous imprisonment. He has also been convicted and sentenced to undergo three months' imprisonment for the offence under Sections 323/34

I.P.C. He has also been convicted and sentenced to undergo life imprisonment with a fine of Rs.2,000/- for the offence under Sections 3(2)(v) S.C./S.T. Act and in default of payment of fine, he has further been directed to undergo one month's additional rigorous imprisonment. He has also been convicted and sentenced to undergo six months' imprisonment with a fine of Rs.1000/- for the offence under Sections 3(i)(x) S.C./S.T. Act and in default of payment of fine he has further been directed to undergo fifteen days' additional rigorous imprisonment. All the sentences are directed to run concurrently.

The appellant, Kicchi @ Ram Surat (in Criminal Appeal No.1202 of 2008) has been convicted and sentenced to undergo life imprisonment with a fine of Rs.10,000/- for the offence under Section 302 I.P.C. and in default of payment of fine, he has further been directed to undergo six months' additional rigorous imprisonment. He has also been convicted and sentenced to undergo three months' imprisonment for the offence under Section 323/34 I.P.C. He has also been convicted and sentenced to undergo life

imprisonment with a fine of Rs.2,000/- for the offence under Sections 3(2)(v) S.C./S.T. Act and in default of payment of fine, he has further been directed to undergo one month's additional rigorous imprisonment. He has also been convicted and sentenced to undergo six months' imprisonment with a fine of Rs.1,000/- for the offence under Sections 3(i)(x) S.C./S.T. Act and in default of payment of fine, he has further been directed to undergo fifteen days' additional rigorous imprisonment. All the sentences are directed to run concurrently.

2. Since the aforesaid criminal appeals have been preferred against the judgment and order dated 29.03.2008 passed by the learned Additional Sessions Judge, Fast Track Court No.29, Barabanki in Sessions Trial No.340 of 1993 arising out of Case Crime No.08 of 1993, under Sections 302/34 of Indian Penal Code and Sections 3(i)(x) S.C./S.T. Act, Police Station Tikait Nagar, District Barabanki, therefore, they have been heard together and are being decided by a common judgment.

3. The prosecution story as culled out from the first information report, Ex. Ka-3 is that the first informant, Mansharam submitted a written report, Ex. Ka-1 to Police Station Tikaitnagar, District Barabanki stating therein that road levelling work was being done in his village. This work was being got done by the Gram Pradhan. The accused/appellants, namely, Kicchi @ Ram Surat (in Criminal Appeal No.1202 of 2008) and Gaya Chamar (in Criminal Appeal No.967 of 2008) wanted that the excavation of earth for levelling of road should be done from the east side of existing road. The son of the first informant, namely, Auhardeen insisted that he would do the excavation work on the west side of the road and he would also not allow excavation of east side of the road. Being annoyed, the accused/appellant, Kicchi @ Ram Surat had a scuffle with first informant's son, Auhardeen. Some villagers intervened and got the matter subsided.

4. On 27.01.1993 at about 03:30 PM, all of a sudden, the accused/appellant, Kicchi @ Ram Surat armed with ballam, Kundan Badhai armed with lathi along with Gaya Chamar and Ram Sajeewan Yadav came

to the house of the first informant, Manshraram. The accused/appellant, Kicchi @ Ram Surat gave a blow from ballam on the chest of Auhardeen, son of the first informant who fell on the ground. The other co-accused, namely, Gaya Chamar, Ram Sajeevan Yadav and Kundan Badhai exhorted to kill Auhardeen. When the first informant, Mansharam and his other sons, namely, Adalatdeen and Ramu tried to save their injured brother, Auhardeen, the co-accused, Gaya Chamar, Ram Sajeevan Yadav and Kundan Badhai assaulted Ramu and Adalatdeen. The villagers, namely, Rajendra Prasad, Alkoo, Buddhai etc. reached on the spot who snatched ballam from the accused/appellant, Kicchi @ Ram Surat. All the accused thereafter fled toward their houses. The injured, Auhardeen was being taken to police station who breathed last near Tikaitnagar police station.

5. On the basis of aforesaid written report, Ex. Ka-1, the first information report, Ex. Ka-3 came to be lodged at Police Station Tikaitnagar, District Barabanki against the accused/appellants as Case Crime No.08 of 1993, under Section 302 I.P.C.

6. The Investigating Officer, S.I Sher Bahadur Singh, PW-11 recorded the statements of witnesses under Section 161 Cr.P.C. He visited the place of occurrence and prepared a site plan, Ex. Ka-17. He has also collected bloodstained earth from the place of occurrence and prepared a recovery memo, Ex. Ka-18. Upon conclusion of investigation, he has submitted a charge sheet, Ex. Ka-19 against the appellants. He has also submitted a supplementary charge sheet, Ex. Ka-20 against some of the appellants.

7. The appellants, Ram Sajeevan Yadav, Gaya Chamar, Kundan Badhai and Kicchi @ Ram Surat were charged for the offences under Sections 302 read with Section 34 I.P.C. and Section 323 read with Section 34 I.P.C. Except the appellant, Gaya Chamar, the appellants, Ram Sajeevan Yadav, Kundai Badhai and Kicchi @ Ram Surat were also charged for the offences under Sections 3(2)(v) and 3(i)(x) S.C./S.T. Act. The appellants denied the charges and claimed to be tried.

8. In order to prove its case, the prosecution has examined the first informant, Mansharam as PW-1, injured, Adalatdeen as PW-2, S.I. Ramdev Dwivedi as

PW-3 who has prepared recovery memo, Ex. Ka-2 in respect of weapon of assault, ballam. Dr. G.P. Shukla has been examined as PW-4 who examined injured persons, Ramu and Adalatdeen and proved their injury reports as Ex. Ka-7 and Ex. Ka-8 respectively. Dr. Devendra Kumar Singh has been examined as PW-5 who conducted postmortem on the cadaver of the deceased, Auhardeen and prepared and proved the postmortem report as Ex. Ka-9. Retired C.P. Ravindra Nath Tripathi has been examined as PW-6. Constable No.1704 Sripal Verma has been examined as PW-7. S.I. Amar Singh has been examined as PW-8. Injured, Ramu has been examined as PW-9. Ambar Prasad has been examined as PW-10 who was an independent witness of incident. The Investigating Officer, S.I. Sher Bahadur Singh has been examined as PW-11.

9. After the conclusion of prosecution evidence, statements of appellants under Section 313 Cr.P.C. were recorded. The appellants have stated that they have been falsely implicated in this case. According to them, The prosecution witnesses have deposed against them due to enmity. They have also stated that in fact the

deceased, Auhardeen was having criminal antecedents who wanted to illegally grab the land belonging to Gaon Sabha. The deceased, Auhardeen was killed in a dispute with labourers during road levelling work.

10. DW-1, Mata Prasad has been examined by the appellants in their defence.

11. PW-4, Dr. G.P. Shukla has examined the injured, Ramu, who prepared an injury report of the injured, Ramu, and has proved the same as Ex. Ka-7. According to which, following injuries were reported on the person of the injured, Ramu:-

"1. Abrasion 0.5 cm x 0.5 cm, skin deep on the left lower arm 04 cm above the left wrist joint.

2. Contusion 3.00 cm x 2.00 cm on the right upper arm ten (10) cm below the right shoulder joint. Colour reddish."

12. PW-4, Dr. G.P. Shukla has also examined the injured, Adalatdeen who prepared an injury report of the injured, Adalatdeen and has proved the same as Ex. Ka-8. According to which, following injuries were reported on the person of the injured:-

"1. Abrasion 3.00 cm x 0.5 cm, skin deep on the root of the left thumb five (05) cm away from the left wrist joint."

13. PW-5, Dr. Devendra Kumar Singh has conducted the postmortem on the cadaver of the deceased on 28.01.1993 and has proved the same as Ex. Ka-9. According to postmortem report, Ex. Ka-9 following ante mortem injuries and cause of death of the deceased were reported as under:-

Oval Shaped punctured wound measuring size 2 cm x 1 cm cavity deep on the chest 15 sternal region, lower part 8 cm medial to the Rt. nipple at 2'0 clock position. Sternum ruptured and the cause of death was reported to be shock and haemorrhage as a result of ante-mortem injury.

14. The learned trial court vide impugned judgment and order dated 29.03.2008 convicted the appellants and sentenced them as aforesaid. Hence this appeal.

15. We have heard Shri Shiv Shankar Singh, learned counsel for the appellants (in Criminal Appeal No.967 of 2008), Shri Jaleel Ahmad, learned counsel for

the appellant (in Criminal Appeal No.1078 of 2008), Shri Anurag Shukla, learned *amicus curiae* for the appellant (in Criminal Appeal No.1202 of 2008), Sri Chandra Shekhar Pandey, learned Additional Government Advocate appearing for the State-respondent and have perused the entire record available before us.

16. Learned counsel for all the appellants have submitted that the appellants are innocent who have been falsely implicated in this case due to prior enmity with the first informant, Mansharam.

17. Their further submission is that a scuffle took place during levelling of the road with the labourers who are resident of different places. The deceased, Auhardeen and other injured persons, Ramu and Adalatdeen received injuries in the aforesaid scuffle. The appellants were not involved in the incident.

18. Learned counsel for all the appellants have also submitted that the learned trial court has recorded the finding of guilt of the appellants against the weight of evidence which is not sustainable.

19. Shri Anurag Shukla, learned *amicus curiae* for the appellant, Kicchi @ Ram Surat (in Criminal Appeal No.1202 of 2008) has submitted that admittedly, only one blow is said to have been given by the accused/appellant, Kicchi @ Ram Surat to the deceased. This fact stands corroborated by the postmortem report, Ex. Ka-9 of the deceased, Auhardeen. There is nothing on record to show that the incident was premeditated either. Therefore, at most, the appellant, Kicchi @ Ram Surat could be convicted for the offence under Section 304 part-II I.P.C. No case under Section 302 I.P.C. is made out against the appellant, Kicchi @ Ram Surat. To substantiate his arguments, learned *amicus curiae* for the appellant, Kicchi @ Ram Surat has placed reliance upon the judgments rendered by the Hon'ble Supreme Court in **Kishan Singh vs. State of Uttaranchal and others**¹ and **The State of Madhya Pradesh vs. Mohar Singh**² wherein the Hon'ble Apex Court has modified the conviction of the accused from Section 302 I.P.C. to Section 304 Part-II I.P.C. and has sentenced accordingly.

1 MANU/SC/0333/2019

2 MANU/SC/1065/2019

20. Shri Shiv Shankar Singh, learned counsel for the appellants (in Criminal Appeal No.967 of 2008), Shri Jaleel Ahmad, learned counsel for the appellant (in Criminal Appeal No.1078 of 2008) have submitted that the appellants, Ram Sajeevan Yadav, Gaya Chamar and Kundan Badhai have been convicted with the aid of Section 34 I.P.C. There is nothing on record to show that these appellants were sharing common intention with the appellant, Kicchi @ Ram Surat to kill the deceased. Therefore, their conviction under Section 302 read with Section 34 I.P.C. is not sustainable. Learned counsel for these appellants contend that the appeal deserves to be allowed by setting aside the impugned judgment and order dated 29.03.2008 insofar as it relates to conviction of the appellants under section 302 read with Section 34 I.P.C.

21. Learned counsel for the appellants, namely, Ram Sajeevan Yadav, Kundan Badhai and Ram Surat @ Kicchi have also submitted that there is nothing in the testimonies of prosecution witnesses to show that alleged offence under Sections 3(i)(x) and 3(2)(v) S.C./ S.T. Act was committed by these appellants only

because the deceased, Auhardeen and injured persons, Ramu and Adalatdeen belonged to scheduled caste community. The alleged offence was not committed in public view also. Therefore, their conviction and sentences under Sections 3(2)(v) and 3(i)(x) S.C./S.T. Act are not sustainable.

22. Learned counsel for the appellants have also vehemently argued that in order to prove its case against the appellants, the prosecution has examined Mansharam as PW-1 who is the father of the deceased, Auhardeen and injured persons, namely, Adalatdeen and Ramu have been examined as PW-2 and PW-9 respectively. Thus, only three witnesses of fact have been examined by the prosecution. PW-10, Ambar Prasad is a neighbour of the first informant, Mansharam, therefore, he was also an interested witness. Therefore, the three prosecution witnesses being related to the deceased and one being interested witness are not reliable. The learned trial court erred in placing reliance upon testimonies of such related/ interested witnesses.

23. Per contra, learned A.G.A. has refuted the submissions made by learned counsel for the appellants

and has submitted that the appellants are named in the first information report, Ex. Ka-3. They have been assigned specific role in the first information report. The first information report, Ex. Ka-3 is prompt. There is nothing on record to show that the first information report, Ex. Ka-3 or written report, Ex. Ka-1 came to be lodged after consultation with someone else in order to falsely rope in the appellants. The prompt lodging of first information report itself rules out any possibility of false implication of the appellants. Therefore, they have rightly been convicted by means of impugned judgment and order dated 29.03.2008.

24. His further submission is that the appellant, Kicchi @ Ram Surat was armed with a deadly weapon, ballam and the other co-convicts were accompanying him. The appellant, Kicchi @ Ram Surat has given a blow from the ballam on the chest of the deceased, Auhardeen. The offence was committed near the house of the first informant, Mansharam where the appellants had gone to commit this offence. Therefore, their conviction and sentences therefor are just and proper.

25. Learned A.G.A. has also submitted that the impugned judgment and order dated 29.03.2008 is based on proper analysis and appreciation of prosecution evidence. It is a reasoned and well discussed judgment wherein no interference in exercise of power under Section 386 Cr.P.C. by this Court is warranted.

26. Having heard the learned counsel for the parties and upon survey of prosecution evidence, we are able to notice that the alleged incident occurred on 27.01.1993 at about 03:30 PM. A written report, Ex. Ka-1 in respect of this occurrence was submitted to the Police Station Tikaitnagar, District Barabanki and a first information report, Ex. Ka-3 came to be lodged on 27.01.1993 i.e., on the day of the incident itself, at Police Station Tikaitnagar, District Barabanki within a period of approximately two hours. The first information report, Ex. Ka-3 is, thus, found to be prompt.

27. The Hon'ble Supreme Court in **Meharaj Singh (L/Nk.) vs. State of U.P.**³ in para-12 has held as under:-

³ (1994) 5 SCC 188

"12. FIR 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 at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report,

prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW 8.”

28. We are also able to notice that the first informant, Mansharam who has been examined as PW-1 has stated in his testimony that road levelling work was being done in his village. This work was being got done by the Gram Pradhan. The accused/appellants, namely, Kicchi @ Ram Surat and Gaya Chamar wanted that the excavation of earth for levelling of road should be done from the east side of existing road. The son of the first informant, namely, Auhardeen said that he would do the excavation work on the west side of the road and he would also not allow excavation of east side of the road.

Annoyed by this, the accused/ appellant, Kicchi @ Ram Surat had a scuffle with first informant's son, Auhardeen. Some villagers intervened and got the matter subsided. PW-2, Adalatdeen is not only an eye witness, he is an injured witness also who has also supported the prosecution case in its entirety. His injury report, Ex. Ka-8 which has been proved by PW-4, Dr. G.P. Shukla reveals that there was one injury on his person which was an abrasion. The duration of injury was reported to be fresh which corresponds to the time of occurrence i.e. on 27.01.1993 at about 03:30 P.M. PW-9, Ramu is another injured witness in this incident who, in his testimony, has also supported the prosecution case.

29. PW-10, Ambar Prasad is an independent witness of the incident who, in his testimony, has stated that on the date of incident, he was present on the spot and had seen the accused/appellant, Kicchi @ Ram Surat giving a blow on the chest of the deceased, Auhardeen from ballam. He, being, a neighbour of the first informant, Mansharam, his presence on the spot on the date of incident appears to be natural. The other

prosecution witnesses, namely, PW-3, S.I. Ramdev Dwivedi, PW-7, Constable No.1704 Sripal Verma, PW-8, S.I. Amar Singh and PW-11, S.I. Sher Bahadur Singh have proved various other prosecution papers.

30. From a perusal of record, we find that no such contradiction or anything adverse could be elicited in their detailed cross-examination of prosecution witnesses which, in any manner, adversely affects the case of prosecution. PW-1, Mansharam being father of the deceased, PW-2, Adalatdeen and PW-9, Ramu being brothers of the deceased and PW-10, Ambar Prasad being neighbour of the deceased, their presence on the spot appears to us to be natural whose testimonies too are consistent, cogent and believable.

31. The Hon'ble Supreme Court in **S. Sudershan Reddy and others vs. State of A.P.**⁴ in paras-12 to 14. has held as under:-

"12. We shall first deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal the

4 (2006) 10 SCC 163

actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

13. *In Dalip Singh v. State of Punjab [1954 SCR 145 : AIR 1953 SC 364 : 1953 Cri LJ 1465] it has been laid down as under : (SCR p. 152)*

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our

observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

14. The above decision has since been followed in Guli Chand v. State of Rajasthan [(1974) 3 SCC 698 : 1974 SCC (Cri) 222] in which Vadivelu Thevar v. State of Madras [1957 SCR 981 : AIR 1957 SC 614 : 1957 Cri LJ 1000] was also relied upon."

32. We, therefore, do not find substance in submissions of learned counsel for the appellants that the learned trial court has erred in placing reliance on testimonies of PW-1, Mansharam and PW-2, Adalatdeen, PW-9, Ramu and PW-10, Ambar Prasad while holding the appellants guilty.

33. The postmortem on the cadaver of deceased, Auhardeen was conducted by PW-5, Dr. Devendra Kumar Singh who has proved his postmortem report as Ex. Ka-9 which reveals following ante-mortem injuries on the body of the deceased:-

"Oval Shaped punctured wound measuring size 2 cm x 1 cm cavity deep

***on the chest 15 sternal region, lower part
8 cm medial to the Rt. nipple at 2'0 clock
position. Sternum ruptured"***

34. The cause of death according to postmortem report, Ex. Ka-9 is stated to be shock and haemorrhage due to aforesaid ante-mortem injury.

35. Thus, having regard to the aforesaid consistent and reliable testimonies of PW-1, Mansharam, PW-2, Adalatdeen, PW-9, Ramu and PW-10, Ambar Prasad, we find that on the date of incident, the appellant, Kicchi @ Ram Surat, who was armed with a ballam, inflicted only one blow on the chest of the deceased, Auhardeen from ballam which, according to postmortem report, Ex. Ka-9 ultimately proved to be cause of his death. The other co-accused, namely, Kundan Badhai along with Gaya Chamar and Ram Sajeevan Yadav have inflicted injuries to the injured persons, namely, Adalatdeen and Ramu by lathi only.

36. The injury report of Adalatdeen has been proved by PW-4, Dr. G.P. Shukla as Ex. Ka-8 which reveals that there was one injury on his person which was an abrasion on the date of occurrence whereas the

injury report of injured, Ramu was prepared and proved by Dr. G.P. Shukla as Ex. Ka-7. According to injury report of injured, Ramu, he had also sustained an abrasion and a contusion on his person.

37. Thus, surveyed together, from the consistent and cogent testimonies of the first informant, PW-1, Mansharam and two injured, namely, PW-2, Adalatdeen and PW-9, Ramu and independent witness, PW-10, Ambar Prasad, in our considered view, the prosecution has been successful in proving the fact that on 27.01.1993, the accused/appellants came on the spot. The appellant, Kichchi gave a blow from ballam in the chest of the deceased, Auhardeen which according to postmortem report, Ex. Ka-9 caused death of the deceased, Auhardeen. The other co-appellants, namely, Kundan Badhai armed with lathi along with Gaya Chamar and Ram Sajeevan Yadav also came to the house of the first informant, Mansharam and they also inflicted injuries to the injured, namely, Adalatdeen and Ramu who were present on the spot.

38. Now, we propose to delve upon the issues as to whether conviction of appellant, Kicchi @ Ram Surat

under Section 302 I.P.C. and conviction and sentences awarded to the other appellants, namely, Ram Sajeevan Yadav, Gaya Chamar, Kundan Badhai under Section 302 read with Section 34 I.P.C. and conviction and sentences awarded to the appellants, Ram Sajeevan Yadav, Kundan Badhai, Kicchi @ Ram Surat under Sections 3(i)(x) and 3(2)(v) S.C./S.T. Act were proper in the facts of the case at hand.

39. We find from the record that the deceased, Auhardeen was hit on his chest by the appellant, Kicchi @ Ram Surat only once. This is the case of prosecution also. This fact stands corroborated by the postmortem report of the deceased, Ex. Ka-9 wherein only one punctured wound has been reported on the body of the deceased. We also find that there is nothing on record to show and establish that the appellants, namely, Ram Sajeevan Yadav, Gaya Chamar and Kundan Badhai had any prior meeting of mind with the appellant, Kicchi @ Ram Surat who had given fatal blow on the chest of the deceased, Auhardeen to kill the deceased. There is nothing on record to suggest that common intention

amongst appellants developed on the place of occurrence.

40. It is trite law that suspicion, howsoever grave, cannot take place of legal proof as held by the Hon'ble Supreme Court in **Upendra Pradhan vs. State of Orissa**⁵ in para-14 has held as under:-

"14. Taking the first question for consideration, we are of the view that in case there are two views which can be culled out from the perusal of evidence and application of law, the view which favours the accused should be taken. It has been recognised as a human right by this Court. In Narendra Singh v. State of M.P., [(2004) 10 SCC 699 : 2004 SCC (Cri) 1893], this Court has recognised presumption of innocence as a human right and has gone on to say that: (SCC pp. 708 & 709, paras 30-31 & 33)

"30. It is now well settled that benefit of doubt belonged to the accused. It is further trite that suspicion, however grave may be, cannot take place of a proof. It is equally well settled that there is a long distance between 'may be' and 'must be'.

XXXX XXXX XXXX XXXX XXXX

5 (2015) 11 SCC 124

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XXXX XXXX XXXX XXXX XXXX”

(emphasized supplied by us)

41. Thus, in want of any evidence, whatsoever, to the effect that the appellants, namely, Ram Sajeevan Yadav, Gaya Chamar and Kundan Badhai shared common intention to kill the deceased, Auhardeen with the appellant, Kicchi @ Ram Surat, it cannot be presumed that the appellants, namely, Ram Sajeevan Yadav, Gaya Chamar and Kundan Badhai were sharing common intention with the other appellant, Kicchi @ Ram Surat to kill the deceased, Auhardeen.

42. It is also pertinent to refer to paras-22, 24 and 30 of a judgment rendered by the Hon’ble Supreme Court in **Ajmal vs. The State of Kerala**⁶, which are as under:-

"22. Having considered the submissions and having perused the material on record, we do not find any infirmity in the prosecution establishing the incident as set up in the First Information Report. For the said conclusion, we have taken note of the following:

⁶ 2022 SCC OnLine SC 842

(i) First Information Report was promptly lodged.

(ii) The prosecution story as set up in the FIR appears to be probable.

(iii) The medical evidence fully corroborates the prosecution story.

(iv) PW-1, PW-2 and PW-4, the three eye-witnesses have fully supported the prosecution story and have narrated the same incident as it occurred.

(v) Formal witnesses have discharged their burden by proving the police papers and other documentary evidence placed on record by the prosecution.

(vi) The material objects recovered have also been duly proved.

(vii) According to the medical evidence, the material objects alleged to have been used in the commission of crime could have been actually used in causing the injuries.

24. The distinctive features and the considerations relevant for determining a culpable homicide amounting to murder and distinguishing it from the culpable homicide not amounting to murder has been a matter of debate in large number of cases. Instead of referring to several decisions on the point reference is being made to a recent decision in the case of Mohd. Rafiq v. State of M.P., (2021) 10 SCC 706, wherein Justice Ravindra Bhatt,

speaking for the Bench, relied upon two previous judgments dealing with the issue as narrated in paragraph nos. 11, 12 and 13 of the report which are reproduced below:—

"11. The question of whether in a given case, a homicide is murder 3, punishable under section 302 IPC, or culpable homicide, of either description, punishable under section 304 IPC has engaged the attention of courts in this country for over one and a half century, since the enactment of the IPC; a welter of case law, on this aspect exists, including perhaps several hundred rulings by this court. The use of the term "likely" in several places in respect of culpable homicide, highlights the element of uncertainty that the act of the accused may or may not have killed the person. Section 300 IPC which defines murder, however refrains from the use of the term likely, which reveals absence of ambiguity left on behalf of the accused. The accused is for sure that his act will definitely cause death. It is often difficult to distinguish between culpable homicide and murder as both involve death. Yet, there is a subtle distinction of intention and knowledge involved in both the crimes. This difference lies in the degree of the act. There is a very wide variance of degree of intention and knowledge among both the crimes.

12. The decision in *State of Andhra Pradesh v. Rayavarapu Punnayya*, (1976) 4 SCC 382 notes the important distinction between the two provisions, and their differing, but subtle distinction. The court pertinently pointed out that: "12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of section 304.. 13. The academic distinction between "murder"

and "culpable homicide not amounting to murder" has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of sections 299 and 300."

13. The considerations that should weigh with courts, in discerning whether an act is punishable as murder, or culpable homicide, not amounting to murder, were outlined in Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh, (2006) 11 SCC 444. This court observed that:"29. Therefore, the Court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such

cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under section 302, are not converted into offences punishable under section 304 Part I/II, or cases of culpable homicide not amounting to murder are treated as murder punishable under section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances; (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body;(iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger;(viii) whether there was any grave and sudden provocation, and if so, the cause for

such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.”

30. Thus, for all the reasons stated above, we are of the view that the appellants would be entitled for acquittal under section 302 IPC but would be liable to be convicted under section 304 Part-II IPC. Rest of the conviction upheld by the High Court and the sentence for the charges under sections 341, 323, 324 and 427 read with section 34 IPC is maintained. It is ordered accordingly.”

43. Likewise, in **Mavila Thamban Nambiar vs. State of Kerala**⁷ in para 10, the Hon'ble Supreme Court has held as under:-

"10. Mr Lalit then, seriously challenged the conviction of the appellant under Section 302 of the Penal Code. He urged that the appellant had neither intention nor knowledge that such an injury would result into the death of Madhavan. He, therefore, urged that the appellant at the most could be convicted for any other minor

⁷ (2009) 17 SCC 441

*offence. Mr George, appearing for the State of Kerala urged that the appellant was rightly convicted under Section 302 of the Penal Code and no interference was called for. **After giving our careful thought to the nature of offence, we are of the considered view that the offence of the appellant would more appropriately fall under Section 304 Part II of the Penal Code. The appellant had given one blow with a pair of scissors on the vital part of the body of Madhavan and, therefore, it would be reasonable to infer that he (appellant) had knowledge that any injury with pair of scissors on the vital part would cause death though he may not have intended to commit the murder. We accordingly alter the conviction of the appellant from Section 302 IPC to one under Section 304 Part II IPC.***

(emphasized supplied by us)

44. The Hon'ble Supreme Court in **Takhaji Hiraji vs. Thakore Kubersing Chamansing and others**⁸ in para 24 has held as under:-

"24. Dr Varvadia, PW 2, who examined Sabuji Viraji on 24-3-1980 at 12.15 a.m. found him to have sustained 3 injuries of which the incised wound on the left side of the upper part of the abdomen was 1" × 1/4" × 1/4". This injury is attributed to Magansing, Accused 2 by all the prosecution witnesses. They are consistent on

8 (2001) 6 SCC 145

this point and not shaken in cross-examination. The dying declaration, Ext. 28 made by the deceased Sabuji and recorded by the Magistrate also attributes authorship of this injury to Magansing, Accused 2. However, what has to be really determined is the nature of this injury. In his statement Dr Varvadia has not stated the nature of the injury caused. Sabuji Viraji died on 30-3-1980. Post-mortem on his dead body was conducted on 31-3-1980 by Dr Solanki, PW 4. Dr Solanki, PW 4, conducted post-mortem on the dead body of Sabuji on 31-3-1980 at 10.20 a.m. He found the wound stitched. On opening it he found internally – "large intestine sutured, wound 2.5 cm on splenic flexure gaping containing faecal matter; surrounding area of wound was red in colour; opening was found absent". The cause of death in the opinion of Dr Solanki was shock due to acute peritonitis. None of the two doctors has deposed if the injury was grievous or sufficient in the ordinary course of nature to cause death or that the injury was so imminently dangerous that it must have in all probability resulted in death or was likely to cause death. The exact cause of peritonitis is not known. That negligence to treat the wound could be a contributing factor cannot be ruled out. In such state of medical evidence it will not be proper to draw an inference against Magansing, Accused 2 of his having committed murder of Sabuji Viraji punishable under Section 302 IPC. The injury dealt by him by a sharp weapon had cut into the intestine. Though an intention to cause death or such bodily injury as is likely to cause death cannot be attributed to him,

knowledge is attributable to Accused 2 that an injury by a knife into the abdomen was likely to cause death. As it was a case of sudden fight, the act of this accused would amount to culpable homicide not amounting to murder punishable under Part II Section 304 IPC. The other injuries on the person of Sabuji are not attributed to Accused 2 Magansing."

45. The Hon'ble Supreme Court in **Ramkishan and others vs. State of Rajasthan**⁹ in para-7 has held as under:-

"7. On the basis of the findings of the learned trial court, as noticed above, it is quite obvious that the intention of the appellants could only have been to cause injuries to the deceased by obstructing his bullock cart and they did not share any common intention or object to cause the death of the deceased. Indeed by causing injuries with an axe it could be said that the appellants should have realised that the injuries were likely to cause his death but that would only bring the case of the appellants under Section 304 Part II IPC and not one under Section 302 IPC."

(Emphasis supplied by us)

46. From a perusal of record, it is not borne out that the act of appellant, Kicchi @ Ram Surat was, in

⁹ (1997) 7 SCC 518

any manner, premeditated and in absence of any premeditation the incident of killing of Auhardeen appears to have occurred in a spur of moment wherein only one blow from ballam was given by the appellant, Kicchi @ Ram Surat to the deceased. It is proved fact that the appellant, Kicchi @ Ram Surat was armed with a ballam. He gave only one blow from it on the chest of the deceased, Auhardeen who ultimately succumbed to this injury. There was no premeditation, therefore, no intention to kill can be imputed to the appellant because he inflicted only one blow from ballam. However, the fact that he had knowledge that such blow from a sharp edged weapon could cause death of the deceased, cannot be ruled out in the facts of this case. Thus, in our considered view, the appellant, Kicchi @ Ram Surat is liable to be convicted under Section 304 Part-II I.P.C. The conviction and sentence awarded to the appellant, Kicchi @ Ram Surat under Section 302 I.P.C. is, thus, liable to be set aside.

47. So far as the case of the appellants, Gaya Chamar, Ram Sajeevan Yadav and Kundan Badhai are concerned, as we have held in preceding paragraphs

that these appellants were not sharing common intention with the appellant, Kicchi @ Ram Surat to kill the deceased, Auhardeen and only one appellant, Kundan Badhai who was armed with lathi, caused injuries to injured, namely, Adalatdeen and Ramu which are abrasion and contusion only, therefore, their conviction under Section 302 I.P.C. with the aid of Section 34 in want of any evidence of sharing common intention with the appellant, Kichhi to kill the deceased, Auhardeen can also not be upheld. Resultantly, the conviction and sentence awarded to the appellants, namely, Ram Sajeevan Yadav, Gaya Chamar and Kundan Badhai under Section 302 read with Section 34 I.P.C. deserves to be set aside. Their case, at most, falls under Sections 323/34 I.P.C. for which they deserve to be convicted and sentenced.

48. Insofar as the conviction of the appellants, namely, Ram Sajeevan Yadav, Kundan Badhai and Kicchi @ Ram Surat and sentences awarded to them for the offences under Sections 3(i)(x) and 3(2)(v) S.C./S.T. Act are concerned, it is apposite to refer to paragraphs-11, 12, 17 and 18 of a judgment rendered by the Hon'ble

Supreme Court in **Hitesh Verma vs. State of Uttarakhand and another**¹⁰ in paragraphs-11, 12, 17 and 18 has held as under:-

"11. It may be stated that the charge-sheet filed is for an offence under Section 3(1)(x) of the Act. The said section stands substituted by Act 1 of 2016 w.e.f. 26-1-2016. The substituted corresponding provision is Section 3(1)(r) which reads as under:

"3. (1)(r) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;"

12. The basic ingredients of the offence under Section 3(1)(r) of the Act can be classified as "(1) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe and (2) in any place within public view".

17. In another judgment reported as *Khuman Singh v. State of M.P.* [*Khuman Singh v. State of M.P.*, (2020) 18 SCC 763 : 2019 SCC OnLine SC 1104] , this Court held that in a case for applicability of Section 3(2)(v) of the Act, the fact that the deceased belonged to Scheduled Caste would not be enough to inflict enhanced punishment. This Court held that there was nothing to suggest that the offence was

¹⁰ (2020) 10 SCC 710

committed by the appellant only because the deceased belonged to Scheduled Caste. The Court held as under:

"15. As held by the Supreme Court, the offence must be such so as to attract the offence under Section 3(2) (v) of the Act. The offence must have been committed against the person on the ground that such person is a member of Scheduled Caste and Scheduled Tribe. In the present case, the fact that the deceased was belonging to "Khangar" Scheduled Caste is not disputed. There is no evidence to show that the offence was committed only on the ground that the victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable."

18. Therefore, offence under the Act is not established merely on the fact that the informant is a member of Scheduled Caste unless there is an intention to humiliate a member of Scheduled Caste or Scheduled Tribe for the reason that the victim belongs to such caste. In the present case, the parties are litigating over possession of the land. The allegation of hurling of abuses is against a person who claims title over the property. If such person happens to be a

Scheduled Caste, the offence under Section 3(1)(r) of the Act is not made out.

(emphasis supplied by us)

49. Our anxious search to find out ingredients which constitute offence under Sections 3(i)(x) and 3(2)(v) S.C./S.T. Act in the written report, Ex. Ka-1 and also in the testimonies of PW-1, Mansharam, PW-2, Adalatdeen, PW-9, Ramu and PW-10, Ambar Prasad ended in vain. We have been unable to notice any caste based insult and intimidation by the appellants given with intent to humiliate the first informant, PW-1, Mansharam, deceased-Auhardeen and injured persons, namely, Ramu and Adalatdeen in any place within public view. Therefore, mere fact that the first informant, PW-1-Mansharam, deceased-Auhardeen and the injured persons, namely, Ramu and Adalatdeen belonged to the scheduled caste community, *per se*, does not constitute offence under Sections 3(i)(x) and 3(2)(v) S.C./S.T. Act in view of law laid down by the Hon'ble Supreme Court in **Hitesh Verma's case (supra)**.

50. It is also relevant to mention that in terms of Rule 7 of the Scheduled Castes and the Scheduled Tribes

(Prevention of Atrocities) Rules, 1995 (hereinafter referred to as "S.C./S.T. Rules), the offence committed under the S.C./S.T. Act shall be investigated by a police officer not below the rank of a Deputy Superintendent of Police. However, to our utter surprise, the instant case has been investigated by S.I. Sher Bahadur Singh who is not an officer of the rank of Deputy Superintendent of Police as required by Rule 7 of S.C./S.T. Rules. Due to this reason also, the investigation of this case, insofar as, the same relates to offences under Sections 3(i)(x) and 3(2)(v) S.C./S.T. Act is vitiated.

51. Accordingly, we find ourselves unable to uphold the conviction of appellants, namely, Ram Sajeevan Yadav, Kundan Badhai and Kicchi @ Ram Surat under Sections 3(i)(x) and 3(2)(v) S.C./S.T. Act which being palpably illegal, are also liable to be set aside.

52. On the basis of foregoing discussion, we hold the appellant, Kicchi @ Ram Surat guilty under Section 304 Part-II I.P.C. and sentence him to rigorous imprisonment for ten years with a fine of Rs.10,000/- and in default of payment of fine, the appellant, Kicchi

@ Ram Surat would undergo six months' additional simple imprisonment.

53. The appellants, namely, Ram Sajeevan Yadav, Gaya Chamar and Kundan Badhai are held guilty for the offence under Section 323 read with Section 34 I.P.C. Accordingly, they are sentenced to period already undergone by them in this case.

54. The conviction and sentences awarded to the appellant, Kicchi @ Ram Surat, under Section 302 I.P.C. and Sections 3(i)(x), 3(2)(v) S.C./S.T. Act, conviction and sentences awarded to the the appellants, namely, Ram Sajeevan Yadav and Kundan Badhai, under Sections 302/34 I.P.C., Sections 3(i)(x), 3(2)(v) S.C./S.T. Act and the conviction and sentences awarded to the appellant, Gaya Chamar, under Section 302/34 I.P.C. are hereby set aside and they are, accordingly, acquitted of charges as aforesaid.

55. These appeals, therefore, deserve to be partly allowed with aforesaid modification which are accordingly **partly allowed**.

56. In case, the appellant, Kicchi @ Ram Surat has already served out the sentence awarded to him by this Court for the offence under Section 304 Part-II I.P.C., he shall be released forthwith, if he is not wanted in any other case.

57. The appellants, Ram Sajeevan Yadav and Gaya Chamar shall also be released forthwith if they are not wanted in any other case.

58. The accused/appellant, Kundan Badhai is on bail. His bail bonds are hereby cancelled and sureties are discharged from their liabilities.

59. All appellants are directed to file a personal bond and two sureties each in the like amount to the satisfaction of the court concerned in compliance of Section 437-A Cr.P.C. within six weeks from today.

60. Before we part with the case, we express our appreciation for the distinguished assistance rendered by Shri Anurag Shukla, learned *amicus curiae* for the appellant (in Criminal Appeal No.1202 of 2008). He shall be paid fee for *amicus curiae* as per the Rules of the Court.

61. Let copies of this judgment be placed on the records of Criminal Appeal No.1078 of 2008 (Kundan Badhai vs. State of U.P.) and Criminal Appeal No.1202 of 2008 (Kicchi @ Ram Surat vs. State of U.P.)

62. Let a copy of this judgment be also sent to learned trial court concerned along with lower court record for its information and necessary compliance forthwith.

(Ajai Kumar Srivastava-I, J.) (Ramesh Sinha, J.)

Order Date :- 05.08.2022

cks/-