A

**RAM ASREY**

*v.*

**STATE OF UTTAR PRADESH**

**MAY 5, 1993**

B

**[DR. A.S. ANAND AND N.P. SINGH, JJ.]**

*Indian Penal Code : SS. 34, 302 304 Part-I—Injuries afflicted with Bankas—Accused persons having different intentions—Appellant attributed with the role of pressing down the victim/deceased before the other two accused persons—Resulting in death—Convicted under Section 304 Part-I read with Section 34 I.P.C.*

C

**The appellant alongwith Radhey Shyam and Munni Lal were charged with the murder of Gokaran Prasad on 24.11.1975 at about 5 PM. The Trial Court on consideration of the evidence concluded that the prosecution has failed to prove the case beyond reasonable doubts and acquitted the accused persons.**

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**On appeal, the High Court appreciating the facts and circumstances of the case convicted Munni Lal along with the appellant for an offence under Section 302 read with 34 I.P.C. and sentenced each of them to undergo rigorous imprisonment for life. During the pendency of the appeal the main accused Radhey Shyam died.**

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**This appeal is against the High Court's Judgment under Section 379 of the code of Criminal Procedure. Allowing the Appeal in part,**

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**HELD : 1. The High Court has rightly pointed out that PW-6 was not connected with the prosecution party in any manner and there was no reason for him to depose falsely, claiming to be an eye-witness of the occurrence. As such, his evidence can be taken tnto consideration. to corroborate the evidence of the informant PW-1. (587-C)**

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**2. The occurrence took place at about 5 P.M. and the first information report was lodged at 6.45 P.M. within two hours, the Police Station being at the distance of four miles from the place of occurrence. In the first information report the same version of the occurrence was disclosed, which has been stated in Court. Apart from naming himself, PW-1 also named PW-5 and PW-**

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**6 as eye-witness of the occurrence. The Investigating Officer reached the place of the occurrence at 9. P.M. the same evening. In such a situation there does not appear to be any scope for concoction of a false case to implicate the accused persons leaving out the real culprits. PW-1 being the brother of the deceased, his going to the Court of Tehsildar at Sitapur and returning to village with the deceased is most natural. His evidence cannot be rejected merely on the ground that he happened to be the brother of the victim. It has been repeatedly pointed out by this Court that near relations will be the last persons to leave out the real culprits and to implicate those who have not participated in the crime. Taking all facts and circumstances into consideration, the prosecution has been able to prove the case as disclosed in FIR against the accused persons. (587-E-G)**

**3. The appellant was a school student and there was no reason on his part to share the common intention of committing the murder of the victim. By merely pressing down the victim before the other two accused persons, assaulted him, it cannot be held that appellant had shared the common intention of causing the death of the victim. In the facts and circumstances of the case it has to be held that he shared only the common intention of culpable homicide not amounting to murder. He can be attributed with the intention that the injuries, which were being caused by the other two accused persons, were likely to cause the death of the victim. (588-E-F)**

**4. The conviction of the appellant under Section 302 read with 34 I.P.C. as well as his sentence to imprisonment for life is set aside. He is convicted under Section 304, Part-I, read with Section 34 of the Penal Code sentenced to undergo rigorous imprisonment for ten years. (588-G)**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 618 of 1985.

From the Judgment and Order dated 17.5.1984 of the Allahabad High Court in Criminal Appeal No. 564 of 1977.

R.L. Kohli, and C.P. Lal for the Appellant.

S.P. Pandey and A.S. Pundir for the Respondent.

The Judgment of the Court was delivered by

A **N.P. SINGH, J.** The appellant along with Radhey Shayam and Munni Lal, was put on trial for an offence under Section 302 read with Section 34 of the Penal Code, for having committed the murder of Gokaran Prasad on 24.11.1975 at about 5.00 P.M.

B It is the case of the prosecution that the deceased along with his brother, Parbhu Dayal PW-1, on 24.11.1975, had gone to the Court of Tehsildar at Sitapur to attend their case, which had been fixed for hearing. The case was, however, postponed. In the evening they were returning to village. On Sitapur Lucknow Road. at about 5.00 P.M. the three accused persons, all armed with *Bankas*, emerged from the field of Rani Saheba and ran towards to deceased. PW-1 started C shouting for help. The deceased fell down on the brick stack. It is said that the appellant Ram Asrey pressed down the deceased, while Radhey Shyam and Munni Lal gave the blows with *Bankas*. The occurrence was witnessed by Parbhu Dayal, PW-1, Jagannath, PW-5, and Narain, PW-6. In respect of the motive for the commission of the offence, it is said that two years prior to the occurrence aforesaid, accused Radhey Shyam had erected a wall in front of the house of the D deceased, who resisted and did not allow the wall to be constructed. For that Radhey Shyam was prosecuted and because of that he bore a grudge against the deceased.

The First Information Report was lodged by PW-1 at about 6.45 P.M., in which he gave the details of the occurrence and named PW-5 and PW-6 as the eye- E witnesses of the occurrence. The Investigating Officer visited the spot, made the inquest and sent the body for post mortem, which was held the next day. During post mortem examination, the following injuries were found :-

"1. Incised wound 7 cms. x. 1 cm. x bone deep on the right side of F head 6 cms. above the right eye-brow.

2. Lacerated wound 4 cms. x. 1.5 cms. x scalp deep in the mid-line of head 6 cms. above the root of nose.

3. Lacerated wound 4 cms. x 1.5 cms. x bone deep on the left side G of head 3 cms. above left eye-brow.

4. Lacerated wound 4.5 cms. x 1 cm. x bone deep on the outer part of left eye-brow extending down on the outer side of the outer angle of left eye and below its level.

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5. Incised wound 8 cms. x 3 cms. x scalp deep on the back of head on the left side of middle line 5 cms. behind the left ear. A

6. Incised wound 11 cms. x 3 cms. x vertebrae bone deep 4 cms. below the right ear and 2.5 cms. below left angle of left lower jaw at the level of the body of third cervical vertebrae, underneath of injury oecsophagus. Thyroid cartilage and neck vessels of both the sides out. B

7. Incised wound 2.5 cms. x .5 cm. x muscle deep over the front of Ist Pharyanx region of right thumb.

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8. Incised wound 9 cms. x 2 cms. x muscle deep over the palmar aspect of left hand starting from the web of left thumb and index finger going inner and upper side towards the wrist."

According to the doctor, who held the post mortem examination, the incised wound might have been caused by weapon like *Banka*. He, however, pointed out D that *Banka* had a sharp edge on one side and blunt on the other. He stated :-

"Injury No. 2, 3, 4 might be caused by some blunt weapon. Injury No. 4 might be caused by some blunt side of the banka. As in my opinion blunt part of the banka is about 1 cm. in width, injury No. E 2 and 3 might be caused by sharp fall on the heap of Bajri.

Injury No. 2 and 3 might be caused by blunt part of banka if its width was 1.4 cms."

In cross-examination he states :- F

"Injuries No. 2, 3 and 4 are likely to be caused by lathi. There was a fraction of fractured bone below injury No. 2. The injury No. 2 is likely to occur if heavy weight weapon is struck with considerable force. The injury No. 3 might occur by fall on the Bajri. If anyone fall with face side in addition to injury Nos. 2 and 3 other abrasions G are likely to occur on the face."

Again, in cross-examination about injuries Nos. 2, 3 and 4, he has stated that they are likely to be caused with *lathi* portion.

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A The Trial Court on consideration of the evidence came to the conclusion that prosecution had failed to prove the case beyond reasonable doubt. On that finding the accused persons were acquitted.

The State Government filed an appeal against the judgment of acquittal. During the pendency of the appeal, the main accused Radhey Shyam died. The B High Court, however, after referring to the different facts and circumstances of the case, recorded a finding that the charge levelled against the two accused persons, namely, the appellant and Munni Lal, had been proved beyond reasonable doubt. On that finding the High Court convicted the appellant along with Munni Lal, for an offence under Section 302 read with Section 34 of the Penal Code and sentenced each of them to undergo rigorous imprisonment for life.

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This appeal, under Section 379 of the Criminal Procedure Code, has been filed on behalf of Ram Asrey, the appellant. We are informed that Munni Lal has not preferred any appeal to this Court.

D On behalf of the appellant it was urged that the Trial Court had rightly disbelieved the evidence of the three eye-witnesses PW-1, PW-5 and PW-6 because of the inherent improbabilities in their deposition and lack of consistency and there was no occasion for the High Court while hearing the appeal against acquittal to reverse the finding recorded about their credibility. It was also pointed out that so far Jagannath, PW-5, is concerned, he has been disbelieved not only by E the Trial Court but even by the High Court saying that he has changed his statement from stage to stage, to make it consistent with the statement of PW-1. The High Court has observed in respect of PW-5 :-

> "We may, therefore, exclude his testimony from consideration, not F so much because he might not have been present at the spot but because there are elements in his testimony which make it unsafe to place reliance on it having been once disbelieved by the Trial Court. That is the true angle in which the evidence must be considered by this Court when dealing with an appeal against acquittal."

G It was urged that the same approach should have been adopted in respect of Narain PW-6, who claimed to have accompanied PW-5, PW-6, has stated that he had gone that day to the market of Khairabad to get Salim Mistry for repairing his *Chakki*, but Salim Mistry was not available and when he was returning to village he met PW-5 in the market of Khairabad and both of them started for their village.

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He has further stated that at about 5 P.M. he saw the deceased and PW-1 on Sitapur-Lucknow Road. Then he claimed to have seen the accused persons coming out from the field of Rani Saheba. According to him, this appellant held down the deceased, while the other two accused persons Radhey Shyam and Munni Lal struck the deceased with *Bankas* and caused his death. The High Court has observed that if the testimony of PW-6 is examined in the light of surrounding circumstances, then it is consistent with the version of PW-1 and, as such, the evidence of PW-1 receives adequate corroboration. The High Court has rightly pointed out that PW-6 was not connected with the prosecution party in any manner and there was no reason for him to depose falsely, claiming to be an eye-witness of the occurrence. As such, his evidence can be taken into consideration to corroborate the evidence of the informant PW-1.

On behalf of the appellant, it was said about PW-1 that on his own statement, he lodged the First Information Report, on the basis of a report written by Lallu Ram PW-8 at the spot, which he took to Police Station Khairabad. This aspect of the matter has been dealt with in the judgment under appeal. We are in complete agreement. That merely because PW-1 lodged the First Information Report on basis of a report prepared by PW-8, by itself shall not affect the prosecution version. The matter would have been different. if the accused persons had shown some oblique motive on the part of PW-8, who is said to have prepared the report. The occurrence took place at about 5.00 P.M. and the First Information Report was lodged at 6.45 P.M. within two hours, the police station being at the distance of four miles from the place of occurrence. In the First Information Report the same version of the occurrence was disclosed, which has been stated in Court. Apart from naming himself, PW-1 also named PW-5 and PW-6 as eye-witnesses of the occurrence. The Investigating Officer reached the place of occurrence at 9.00 P.M. the same evening. In such a situation there does not appear to be any scope for concoction of a false case to implicate the accused persons leaving out the real culprits. PW-1 being the brother of the deceased, his going to the Court of Tehsildar at Sitapur and returning to village with the deceased is most natural. His evidence cannot be rejected merely on the ground that he happened to be the brother of the victim. It has been repeatedly pointed out by this Court that near relations will be the last persons to leave out the real culprits and to implicate those who have not participated in the crime. Taking all facts and circumstances into consideration. we are of the view that prosecution has been able to prove the case as disclosed in the First Information Report against the accused persons and there is no reason to reject the same.

The next question which has to be examined is as to whether so far the

A appellant is concerned who, according to the prosecution case itself, has not given any *Banka* blow to the victim, but is said to have pressed down the deceased, before the other two accused persons Radhey Shyam and Munni Lal had given the blows, should have been held guilty for an offence under Section 302 read with Section 34 of the Penal Code. It was pointed out that the appellant was a school student and there was no reason on his part to share the common intention of committing the B murder of the victim. In this connection, reference was made to the injuries found on the person of the victim during the post mortem examination. It was pointed out that the injuries were not consistent with the prosecution case that the other two accused persons caused those injuries with *Bankas*. About injuries Nos. 2, 3 and 4 the Doctor, who held the post mortem examination, has clearly stated that they must have been caused by some blunt weapon. In respect of injury No. 4, he has C said that it might have been caused by the blunt side of the *Banka*. This itself shows that amongst the two participants in the occurrence. They had different intentions. One out of the two assailants i.e. Radhey Shyam and Munni Lal had used the back side of the *Banka*. If one of the two assailants had used the back side of the *Banka*, then from this conduct it can be reasonably inferred that such assailant had not the D intention to cause the death of the victim, otherwise there was no reason to use the back side of the *Banka*, instead of sharp side which in normal course could have caused the death of the victim. However, so far the present appeal is concerned, we are not concerned with either of the two other accused persons. But this circumstance can be taken into consideration for judging the role played by the appellant. According to us, by merely pressing down the victim before the other E two accused persons assaulted him, it cannot be held that appellant had shared the common intention of causing the death of the victim. In the facts and circumstances of the case, of course, it has to be held that he shared only the common intention of culpable homicide not amounting to murder. He can be attributed with the intention that the injuries, which were being caused by the other two accused persons, were likely to cause the death of the victim.

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Accordingly, we set aside the conviction of the appellant under Section 302 read with Section 34, as well as his sentence to imprisonment for life. He is convicted under Section 304, Part I, read with Section 34 of the Penal Code and sentenced to undergo rigorous imprisonment for ten years. The appeal is accordG ingly allowed in part to the extent indicated above.

S.K. Appeal Partly allowed.