IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No. 1389 of 2001
(Old No. 88 of 1994)

1. Bhagat Singh
2. Darwan Singh
3. Birendra Singh
   sons of Gabar Singh
4. Narain Singh
   S/o Shyam Singh
   All R/o Village Barmwadi
   Patwari Circle, Bhiri
   Tehsil Ukhimath, District Chamoli.

…....Appellant.

Versus

State of U.P. …….Respondent.

Shri U.P.S. Negi, Advocate for the appellants.
Shri Amit Bhatt, learned A.G.A. for the respondent.

Coram: Hon'ble Prafulla C. Pant, J.
Hon'ble B.S. Verma, J.

Oral:-Hon'ble Prafulla C. Pant, J.

This appeal, preferred under Section 374 of Code of Criminal Procedure, 1973 (herein after referred as Cr.P.C.), is directed against the judgment and order dated 05/06-01-1994, passed by learned Sessions Judge, Chamoli, at Gopeshwar, in Sessions Trial No. 22 of 1992, whereby accused/appellants namely Bhagat Singh and Darwan Singh, are convicted under Sections 147 and 302 read with Section 149 of Indian Penal

Code, 1860 (herein after referred as I.P.C.) and accused/appellants Birendra Singh and Narain Singh, are convicted under Section 148 I.P.C. and 302 read with Section 149 of I.P.C. Each of the convicts namely Bhagat Singh and Darwan Singh has been sentenced to rigorous imprisonment for a period of one year under section 147 I.P.C. and to imprisonment for life under Section 302 read with Section 149 I.P.C. And each of the accused/appellants Birendra Singh and Narain Singh has been sentenced to undergo rigorous imprisonment for a period of two years under Section 148 I.P.C. and imprisonment for life under Section 302 read with Section 149 I.P.C.

2. Heard learned counsel for the parties and perused the lower court record.

3. Prosecution story in brief is that on 31.03.1992, at about 8:00 p.m., complainant Jasdei Devi (P.W. 1) resident of Village Baramwadi, had gone to her cow-shed. Her husband Kunwar Singh (deceased) was serving food to his children inside the house. At that point of time accused/appellants Bhagat Singh, Birendra Singh, Darwan Singh and Narain Singh along with one Umed Singh, came to the courtyard of the complainant and started removing and throwing away the slates of the roof of the house of the complainant. Accused Bhagat

Singh was in possession of a torch, accused Birendra Singh was armed with *Khukari*, accused Darwan Singh was armed with *Lathi* and accused Narain Singh and Umed Singh were armed with *Thamalis* (sharp edged weapon like sickle). Accused after damaging the house caught hold of Kunwar Singh and started inflicting injuries on his person with the weapons, they possessed. They left Kunwar Singh in a badly injured condition. On 01.04.1992, complainant Jasdei Devi went to the Naib Tehsildar, Ukhimath and lodged the First Information Report (Ext. A-1). (In the interior hills revenue officials are given police powers vide U.P. Government Notification No. 494/VIII-418-16, dated 07.03.1916). Patwari of the area (Bhiri) after registering the case and preparing the check report (Ext. A-7), and making necessary entry in the general diary (copy Ext. A-8), started the investigation. Initially the crime was registered relating to offences punishable under Sections 307, 326, 325, 452, 147, 427, 504 and 506 I.P.C. He interrogated Smt. Jasdei Devi (complainant) and her son Dinesh Singh. Thereafter, he proceeded to the spot and prepared site plan (Ext. A-9). He also recovered the blood stained clothes of Kunwar Singh and prepared memorandum (Ext. A-11). Meanwhile, Kunwar Singh in an injured condition had already been taken to primary health centre, Ukhimath, where he was medically examined on

01.04.1992 at 2:10 p.m. by Dr. K.C. Rai and Dr. S.P. Sharma (none of the two examined by the prosecution). He appears to have prepared injury report, showing as many as 14 injuries (this document is neither proved by anyone nor the genuineness of the document is admitted by the defence counsel). It appears that a dying declaration (Ext. A-4) was recorded on 01.04.1992, at 4:15 p.m. by Tehsildar, Ukhimath (Incharge Sub-Divisional Magistrate) without any mention of the fact that the injured was conscious or not. According to the prosecution story, the injured Kunwar Singh was referred by Medical Officer of Ukhimath to the District Hospital Gopeshwar (Chamoli) where he was declared brought dead. The Investigating Officer appears to have taken the dead body of the deceased in his possession and prepared inquest report (Ext. A-19) and other necessary papers. Dr. G.S. Gupta (not examined by the prosecution), conducted post mortem examination on the dead body of Kunwar Singh on 02.04.1992 at 4:05 p.m. and prepared autopsy report (Ext. A-20). The Medical Officer after recording the ante mortem injuries opined that the deceased had died due to shock and haemorrhage as a result of ante mortem injuries. The Investigating Officer after completing the investigation, submitted charge sheet (Ext. A-18) against the four accused/appellants namely Bhagat

Singh, Darwan Singh, Birendra Singh and Narain Singh, relating to offences punishable under Sections 302, 323, 147, 148, 149, 452, 427 and 506 I.P.C. showing name of accused Umed Singh in the column of absconders.

4. The Magistrate on receipt of the charge sheet, after giving necessary copies to the accused, as required under Section 207 Cr.P.C. appears to have committed the case to the court of Sessions for trial. Learned Sessions Judge on 30.03.1993, after hearing the parties, framed charge of offences punishable under Sections 147, 452, 302 read with Section 149 against accused Bhagat Singh and Darwan Singh. A separate charge was framed against the accused Birendra Singh and Narain Singh relating to the offences punishable under Sections 148, 452 and 302 read with Section 149 I.P.C. All the four accused pleaded not guilty and claimed to be tried. On this, prosecution got examined P.W. 1 Jasdei Devi, complainant (declared hostile), P.W. 2 Km. Mangleshwari Devi (a child eye witness), P.W. 3 Sultan Singh Rawat (Tehsildar), who recorded the dying declaration and P.W. 4 Pushkar Singh Chauhan, Patwari (Investigating Officer). The oral and documentary evidence adduced on behalf of the prosecution was put to the accused under Section 313 Cr.P.C. in reply to which they alleged the same to be false.

However, no evidence in defence was adduced. The trial court after hearing the parties on 05.01.1994, found accused/appellants Bhagat Singh and Darwan Singh Singh guilty of charge of offences punishable under Sections 147 and 302 read with Section 149 I.P.C., and accused/appellants Birendra Singh and Narain Singh guilty of charge offences punishable under Sections 148 and 302 read with Section 149 I.P.C. None of the accused were found guilty of charge of offence punishable under Section 452 I.P.C. and accordingly, acquitted of said charge. After hearing the parties on sentence, on 06.01.1994, the trial court sentenced each of the convicts Bhagat Singh and Darwan Singh to rigorous imprisonment for a period of one year under Section 147 I.P.C., and to imprisonment for life under Section 302 read with Section 149 I.P.C. Each of the convicts Birendra Singh and Narain Singh sentenced to rigorous imprisonment of two years under section 148 I.P.C. and imprisonment for life under Section 302 read with Section 149 I.P.C. Aggrieved by said judgment and order dated 05.01.1994/06.01.1994, the four convicts filed this appeal before Allahabad High Court on 19.01.1994, where it was admitted on 20.01.1994. The appeal is received by this Court by transfer under Section 35 of U.P. Reorganisation Act, 2000 (Central Act 29 of 2000), for its disposal.

5. The most glaring feature in the impugned judgment and order, passed by the trial court is that the injury report dated 01.04.1992, said to have been prepared by Dr. K.C. Rai and Dr. S.P. Sharma, after examining Kunwar Singh (deceased), who was brought in an injured condition to Primary Health Centre, Ukhimath, is read in evidence without getting examined either of the two witnesses. From the perusal of the lower court record, it is clear that the defence counsel has not admitted the genuineness of the document nor the formal proof was dispensed with. We are at loss to understand how the trial court has read that document and mentioned 14 injuries, recorded by the two medical officers relating to the deceased. It appears that the Public Prosecutor has dealt the case with gross negligence. As far as the post mortem examination report (Ext. A-20) is concerned, it is true that formal proof of said document is dispensed with by the defence counsel. As such though Dr. G.S. Gupta, who conducted the autopsy was also not examined by the prosecution but said document could have been read in evidence. This document shows 16 ante mortem injuries, which read as under:-

1. Stitched wound left side scalp, 4cm above the left ear. 3cm X muscle deep.

2. Stitched wound on the scalp, 5cm above injury No. 1. 4cm X muscle deep.
3. Stitched wound on the posterior part of skull, 4cm behind injury No. 2. 5cm X muscle deep.
4. Stitched wound 8cm X skull deep on cutting the stiches margins getting everted and gap between the two cut edges 1cm X 5cm behind injury No. 3. On dissection bone fractured (skull) below it.
5. Lacerated wound 6cm X 4cm X muscle deep on the right side of the angle of mouth.
6. Stitched wound 5cm X scalp deep, margins getting everted after cutting stitches gap of 1.5cm occurs. On cutting stitch 8cm above and front side of right ear.
7. Stitched wound 5cm X skull deep, 1cm wide. On cutting stitches 3cm above right eyebrow.
8. Stitched wound 3cm X 2cm, muscle deep. Margins clear cut

and getting everted on cutting stitches. 1cm above medial end of right clavicle.

9. Lacerated wound 2cm X 1cm X muscle deep, 1cm below injury No. 8.
10. Incised wound 8cm X 4cm X 6cm deep reaching to lung tissue on the left side of back of chest wall.
11. Incised wound 4cm X 2cm X bone deep (rib) on the sub costal margin of left side back of the chest.
12. Incised wound 5cm X 2cm X muscle deep on the middle part outer aspect of the left arm.
13. Multiple incised wound in area of 5cm on the back of left wrist joint.
14. Incised wound 3cm X 2cm X muscle deep on the top of right shoulder.
15. Lacerated wound 8cm X 5cm X bone deep along with deformity on junction of lower 1/3 of left lower limb. On dissection both bones fractured.

16. Incised wound 5cm X 2cm X muscle deep. Margins clean cut and everted. 8 cm below right knee joint.

In the opinion of the Medical Officer, deceased had died due to shock and haemorrhage as a result of ante mortem injuries. From the perusal of the post mortem report (Ext. A-20) of which the formal proof is dispensed with by the defence counsel, it is established on record that Kunwar Singh has died homicidal death on 02.04.1992. Now the question is whether the accused/appellants have with common intention committed murder of Kunwar Singh (deceased) after making unlawful assembly with one Umed Singh.

6. P.W. 1 complainant Jasdei Devi, who is widow of the deceased has stated that on the day of the incident, at about 8:00 p.m. she was milching she buffalo when she heard sounds of throwing slates of her roof on the floor. The witness further states that she came out of the cow shed and her husband (Kunwar Singh) also came out along with the children. P.W. 1 Jasdei Devi, complainant further states that she immediately took the children from there. She has further stated that there was darkness and she could not see, who has injured her husband. However, she states that her husband after the incident was lying in an injured condition

and died the next day. The witness has proved the First Information Report (Ext. A-1), lodged by her. This witness has further stated that her family had good relations with the accused. Prosecution got this witness declared hostile. (Which means prosecution does not rely this witness as she might have been won over by the accused). We examined the statement of this witness in the light of the contents of the First Information Report, lodged by her with the revenue officials having police powers. In said report, she has named the accused Bhagat Singh, as having in possession of a torch, accused Birendra Singh armed with *Khukari* (sharp edged weapon), Darwan Singh, armed with *Lathi*, Umed Singh and Narain Singh, armed with *Thamali* (sharp edged weapon like sickle). She has further mentioned in the First Information Report that she is not sure that her husband was alive. As far as the role of accused/appellants namely Bhagat Singh, Birendra Singh, Narain Singh and Darwan Singh, is concerned, P.W. 1 Jasdei Devi, as discussed above, has not supported the prosecution. Her statement does not throw any light against accused appellants as to constituting of unlawful assembly and committing murder of Kunwar Singh.

7. The only other eye witness examined on behalf of the prosecution is P.W. 2 Km.

Mangleshwari, who is a 13 year old young daughter of deceased Kunwar Singh. Learned Sessions Judge as to the statement of this eye witness has observed that it was recorded without administering her oath. Learned counsel for the appellants argued that the statement of this witness cannot be read in evidence as under proviso to Section 4 of Oaths Act, 1969, it is only a child below age of 12 years who need not to be administered oath by the court. However, we are of the opinion that in view of the provision of Section 7 of Oaths Act, 1969, merely for the reason that the oath is not administered to a witness, his or her statement does not become inadmissible. The Apex Court has also given same view in ***State of Bihar Vs. Kameshwar Singh AIR 1952 Supreme Court 252***. Having gone through the relevant provision of law, we are of the opinion that omission of administering the oath to a witness of aged more than 12 years only makes his or her testimony a bit less credible as against one which is recorded on oath. In the circumstances, we have to see whether the testimony of the young girl P.W. 2 Mangleshwari, aged 13 years gets corroboration from the other evidence on record, as against the accused/appellants or not. This witness has stated that her father was feeding her and her mother had gone to cow shed when she heard sound of throwing slates of the roof of her house on the floor. The witness further states that she along with

her father came out. She further states that accused Bhagat Singh was possessing a torch, accused Narain Singh was armed with *Thamali*, accused Birendra Singh was armed with *Khukari* and accused Darwan Singh was armed with *lathi*. The witness further states that accused/appellants inflicted injuries on the person of her father Kunwar Singh with *Thamali* and *Khukari*. She further told that her uncle took her father to hospital. Apparently, the statement of this witness is looking natural. However, she has in examination in chief itself stated that it was a dark night when the incident took place. It creates doubt as to how could she identify accused/appellant Bhagat Singh, as even if it is assumed that he possessed the torch, it cannot be said that he flashed it on his own face and at the faces of each of the accused. In the cross examination, P.W. 2 Mangleshwari has stated that when his father heard some noise on the roof, he closed the door to save his children. She has further clarified that she and her six brothers and sisters were saved by her father by closing the door. In the circumstances, we are of the view that the evidence given by P.W. 2 Mangleshwari cannot be said to be reliable beyond reasonable doubt, as it is not clear how could she see the incident after her father (deceased Kunwar Singh) closed the door of the house to save his children.

8. As far as the dying declaration (Ext. A-4) is concerned, P.W. 3 Sultan Singh, the then Tehsildar, has stated that he recorded the dying declaration of the deceased on 01.04.1992. Perusal of Ext. A-4 shows that there is no endorsement of any Medical Officer, as to whether the deceased was in a fit condition to make the statement or not. The contents of dying declaration read as under:-

"श्री कुँवर सिंह पुत्र श्री शेर सिंह उम्र 42 वर्ष ग्राम बरमाड़ी पटवारी क्षेत्र भीरी ने बयान किया किय दिनांक 31.03.1992 को रात्रि 8 बजे मेरे घर में आकर श्री दरवान सिंह पुत्र गर्बरसिंह, नारायण सिंह का बाप बताने में असमर्थ, बीरेन्द्र पुत्र गर्बरसिंह जो तीन भाई है उम्मेदसिंह पुत्र नामालूम ग्राम बरमाड़ी वालो थापली, खुकरी, लट्ठी से बहार, भीतर मारा। तथा मकान को उल्टा है, तथा बच्चों को मारा है। यही बयान है पढ़कर सुनाये गये कबूल किये।

नि0ऊं कुँवरसिंह
ग्राम बरमाड़ी
01.04.1992
4:15 p.m."

The aforesaid dying declaration does not show as to whether the injured was in a condition to make the statement or not. In view of the principle of law laid down in ***Laxman Singh Vs. State of Maharashtra 2002 (45) Allahabad Criminal Cases 1062***, Hon'ble the Supreme Court has held that

where the witnesses have stated before the court that the deceased was in a fit state of mind to make a statement, dying declaration can be read in evidence even if there is no certificate of any Medical Officer to that effect. In the circumstances, now it is relevant to see whether P.W. 3 Sultan Singh Rawat has stated that whether the deceased was in a fit condition to make a statement. There is not a single word either in the examination in chief or in the cross examination of P.W. 3 Sultan Singh Rawat, which suggests that the deceased was in a fit state of mind to make the statement. It is again a gross negligence on the part of the Public Prosecutor, who got this witness examined before the trial court. Neither the Medical Officers Dr. S.P. Sharma, Dr. K.C. Rai Dr. G.S. Gupta, were got examined by the prosecution nor it is asked to P.W. 3 Sultan Singh Rawat (Tehsildar), who recorded dying declaration that whether the deceased was conscious or not at the time when he made the statement. Said Tehsildar (P.W. 3) has not recorded satisfaction either in the dying declaration (Ext. A-4) as to whether deceased was conscious and able to answer the questions. In the circumstances, the dying declaration is of little help to the prosecution. Even the Investigating Officer Pushkar Singh Chauhan (P.W. 4) has not mentioned even a single word if the deceased was conscious to make the statement.

9. In the above circumstances, we are unable to agree with the finding of the trial court that the prosecution has been successful in proving the charge of offences punishable under Sections 147, 148 and 302 read with Section 149 I.P.C. against the accused/appellants. The trial court has relied on the injury report of Mangleshwari, daughter of the deceased, recorded by Dr. S.P. Sharma and the injury report of Jasdei Devi (widow of the deceased). We have seen these two injury reports in the lower court record but the same are not proved. Neither Dr. S.P. Sharma was got examined to prove the document nor anyone else was produced to prove his writing nor the formal proof was dispensed with nor the concerned witnesses anywhere stated they received injuries. As such, the trial court has erred in law in reading the document which cannot be said to be proved on record, and could not have been read in evidence.

10. For the reasons, as discussed above, we have no option but to hold that prosecution has failed to prove the charge of offences punishable under Sections 147, 148 and the one punishable under Section 302 read with Section 149 I.P.C. against accused/appellants, beyond reasonable doubt. As such, the four accused/appellants are entitled to benefit of reasonable doubt. Accordingly, the

appeal deserves to be allowed. The appeal is allowed. The impugned judgment and order dated 05.01.1994/06.01.1994, passed by Sessions Judge, Chamoli, in Sessions Trial No. 22 of 1992, is set aside so far it relates to conviction and sentence recorded against accused/appellants. Accused/appellants namely Bhagat Singh, Darwan Singh, Birendra Singh and Narain Singh, are acquitted of charge of offences punishable under Sections 147, 148, and 302 read with Section 149 I.P.C. They are on bail. They need not surrender. Their bail bonds are cancelled. Lower court record be sent back to the trial court.

(B.S. Verma, J.) **(Prafulla C. Pant, J.)**

Dt: 30.09.2008

Sweta