

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No. 1623 of 2001
(Old No. 937 of 1995)

Kishan Singh.
S/o Shri Sunder Singh
R/o Village Naik Goth,
P.S. Tanakpur, District Nainital.

..... Appellant

Versus

The State

..... Respondent

Mr. B.S. Adhikari along with Mr. Pramod Tiwari, Advocates for the
appellant.

Mr. H.C. Pujari, Addl. Govt. Advocate for the respondent-State.

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

Hon. Prafulla C. Pant, J. (Oral)

This appeal, preferred under Section 374 of the Code of Criminal Procedure, 1973, is directed against the judgment and order dated 18.05.1995 / 19.05.1995, passed by learned Sessions Judge, Nainital, in Sessions trial No. 167 of 1994, whereby the accused / appellant Kishan Singh has been convicted under Section 302 of the Indian Penal Code, 1860 (hereinafter referred as I.P.C.), and sentenced to imprisonment for life.

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

3) Prosecution story, in brief, is that on 04.12.1993, during day time, a quarrel occurred between the children of

Kunwar Singh (deceased) and Kishan Singh (accused / appellant), in Village Nayak Goth (now part of District Champawat). At about 07:00 P.M., Kunwar Singh (deceased) along with Ajit Singh (P.W. 2) and Brij Mohan (P.W. 3) of his village, on that very day went to the house of accused / appellant Kishan Singh to lodge the protest. This annoyed accused / appellant Kishan Singh, who went inside his house and came out with a BADIYAT (a heavy sharp edged weapon) and gave a blow on the head of Kunwar Singh. Injured Kunwar Singh fell down. Accused / appellant Kishan Singh ran back inside the house. There was lantern light at the door of the house of Kishan Singh (accused / appellant). Nath Singh (P.W. 1), uncle of the deceased, along with Ajit Singh (P.W. 2) and Brij Mohan (P.W. 3) and others took injured Kunwar Singh to nearest Government hospital in Tanakpur, where he succumbed to injuries within ten minutes of reaching there. Thereafter, Nath Singh (P.W. 1), uncle of the deceased, got scribed the first information report (Ext. A -1) and gave it at the police station Tanakpur, at about 07:55 P.M., on the very day (04.12.1993). The report of the incident, as such, was lodged within one hour of the incident, as the distance between the place of incident and the police station is only 3/4 (.75) Kilometer. On the basis of said report, Crime No. 359 of 1993 was registered against the accused Kishan Singh, relating to offence punishable under section 302 of I.P.C., and investigation was taken up by P.W. 6 Station House Officer Raghubir Singh Aswal. Next day morning, the police went to the hospital and took dead body of the deceased in their possession, and prepared inquest report

(Ext. A -7). The Investigating Officer further prepared sketch of the dead body (Ext. A -8); Sample seal (Ext. A -9); police form No. 13 (Ext. A -10) and letter (Ext. A -11) to the Chief Medical Officer, requesting for postmortem examination. On 05.12.1993, postmortem examination was conducted by Dr. R.H. Gokhale (P.W. 4) of District Hospital Pilibhit (nearest District headquarter). He recorded one incised wound on middle of the head of the deceased, size 18 cm X 2 cm X brain deep. He found frontal and parietal bone fractured. The Medical Officer prepared autopsy report (Ext. A -2) and opined that the deceased had died of coma due to ante mortem head injury. Meanwhile, the Investigating Officer interrogated the witnesses, prepared site plan (Ext. A -12). He also took simple soil and blood stained soil from the place of incident on 05.12.1993, and prepared memorandum (Ext. A -13). After completing the investigation, the Investigating Officer submitted charge sheet (Ext. A -15) against accused / appellant Kishan Singh. After the accused / appellant was taken into custody, on his pointing out the Investigating Officer recovered on 08.02.1994 'BADIYAT' (heavy sharp edged weapon) used in the crime, and prepared memorandum (Ext. A -16) in the presence of the witnesses. Blood stained soil taken from the spot, blood stained clothes of the deceased, and the sharp edged weapon were also sent for examination in the Forensic Science Laboratory, Agra from where report received that the items contained human blood.

4) After the charge sheet was received, processes under Section 82 / 83 of Cr.P.C. were issued against accused as he was absconding, and thereafter, the accused / appellant surrendered in the court. After his surrender, as mentioned above, the Investigating Officer appears to have taken the remand of the accused, and got recovered a heavy sharp edged weapon (Ext. 1) used in the crime, on 08.02.1994. Copies were given to the accused by the Magistrate, as required under Section 207 of Cr.P.C., and the case was committed to the court of Sessions, for trial. On 30th of May 1994, after hearing the parties, Sessions Judge, Nainital, framed charge of offence punishable under Section 302 of I.P.C. against the accused (present appellant) Kishan Singh, who pleaded not guilty and claimed to be tried. On this, prosecution got examined P.W. 1 Nath Singh (informant); P.W. 2 Ajit Singh (an eyewitness); P.W. 3 Brij Mohan (another eyewitness), P.W. 4 Dr. R.H. Gokhale (who conducted the postmortem examination); P.W. 5 Constable Ram Kishore (who took the dead body for postmortem examination); P.W. 6 Station House Officer Raghubir Singh Aswal (who investigated the crime) and P.W. 7 Govind Singh (hostile witness). The oral & documentary evidence and material exhibit were put to the accused / appellant under Section 313 of Cr.P.C., in reply to which the accused pleaded that the same are false and he has been falsely implicated in the case. However, no evidence in defence was adduced. After hearing the parties, the trial court found accused Kishan Singh guilty of the charge of offence punishable under Section 302 of I.P.C. Thereafter, on the next day, the accused was heard

on sentence, and sentenced to imprisonment for life. Aggrieved by said judgment and order dated 18.05.1995 / 19.05.1995, passed by the Sessions Judge, Nainital, in Sessions Trial No. 167 of 1994, this appeal was filed before the Allahabad High Court by the convict on 19.06.1995, where it was admitted on 03.07.1995. The appeal is received by transfer to this Court under Section 35 of the U.P. Re-organization Act, 2000 (Central Act No. 29 of 2000), for its disposal.

5) Before further discussion, we think it just and proper to mention here the ante mortem injury recorded by P.W. 4 Dr. R.H. Gokhale, at the time of postmortem examination on dead body (of Kunwar Singh), who prepared autopsy report (Ext. A -2). The ante mortem injury recorded in the autopsy report is being reproduced below:

“Incised wound on the middle of head, extending longitudinally backwards starting from 3 cm above the right eyebrow extending towards back of head in the middle of head going upto a point lying 14 cm above the hair line on the back of neck. Size of wound 18 cm X 2 cm X brain deep. Underlying frontal and parietal bone fractured. Brain matter exposed from wound. Ends of wound are tapering.”

The Medical Officer on internal examination found the brain and membranes lacerated. After the autopsy, Dr. R.H. Gokhale (P.W. 4) opined that the deceased had died of coma due to ante mortem head injury. This statement of the Medical Officer read with the autopsy report (Ext.

A -2) establishes on the record that Kunwar Singh died homicidal death. Now, this Court has to see whether, accused / appellant Kishan Singh committed culpable homicide of Kunwar Singh or not, and whether, it constitutes murder, or not?

6) P.W. 1 Nath Singh, informant, has stated that on 04.12.1993, there had been a quarrel between Mahesh Singh son of Kunwar Singh (deceased), and Santokh Singh son of accused Kishan Singh (accused). On the very day at 07:00 P.M., Kunwar Singh (deceased) along with Ajit Singh (P.W. 2), Brij Mohan (P.W. 3) went to the house of accused / appellant Kishan Singh to lodge the protest. According to this witness (P.W. 1), Kishan Singh (accused) went inside his house and came out with a 'BADIYAT' (a heavy sharp edged weapon) (Ext. 1), and gave a blow on the person of Kunwar Singh. The injured was taken by this witness (Nath Singh P.W. 1) along with Ajit Singh (P.W. 2), Brij Mohan (P.W. 3) and one Girish Chand to Government hospital, Tanakpur, where soon after reaching there the injured succumbed to the injuries. The witness has further stated that he got scribed first information report (Ext. A -1) through Girish Chand and gave it at police station Tanakpur. In the cross-examination, this witness has stated that he did not see incident of quarrel taking place between the children. He has further told that the place of incident in Village Nayak Goth was at the distance of half kilometer from Tanakpur.

7) P.W. 2 Ajit Singh, is an eyewitness of the incident, who has stated that on 04.12.1993, at about 06:45 / 07:00

P.M., he accompanied Kunwar Singh (deceased) along with Brij Mohan (P.W. 3) to the house of Kishan Singh, where Kunwar Singh lodged his protest to accused / appellant Kishan Singh. Accused / appellant Kishan Singh refused to hear Kunwar Singh and went inside his house and came out with 'BADIYAT' (Ext. 1) and gave a blow on the head on Kunwar Singh. The witness further narrated that injured Kunwar Singh fell down. P.W. 2 Ajit Singh has further disclosed that there was light of lantern at the door of the house of Kishan Singh (accused). He further told that he along with others took injured Kunwar Singh in a cot to hospital at Tanakpur, where the injured succumbed to injuries, within ten minutes. As such, this witness has fully corroborated the prosecution story, narrated by P.W. 1 Nath Singh. In the cross-examination, this witness states that only one blow was given by Kishan Singh, where after he ran away.

8) P.W. 3 Brij Mohan, another eyewitness, has narrated the prosecution story as stated by P.W. 2 Ajit Singh. P.W. 3 Brij Mohan has stated that when he came back from duty on the day of incident, he saw Kunwar Singh (deceased) scolding his son. When he asked as to what had happened, the deceased told him that his son had a quarrel with son of Kishan Singh. Thereafter, Kunwar Singh (deceased) asked this witness (P.W. 3) to accompany him to the house of Kishan Singh. The witness further told that Ajit Singh (P.W. 2) also accompanied them. The witness (P.W. 3) states that after reaching house of Kishan Singh, there had been exchange of words between the deceased and the accused. Thereafter, accused Kishan Singh went inside his

house and came back with a 'BADIYAT' (a heavy sharp edged weapon) and gave a blow on the head of Kunwar Singh. This witness has further corroborated the prosecution story that after taking a cot from the house of Girish Chand, injured Kunwar Singh was taken on it to hospital at Tanakpur, where he succumbed to the injuries, within ten minutes of reaching there. P.W. 3 Brij Mohan has further stated that there was a lantern light at the place of incident. In the cross-examination, this witness has stated that when Kishan Singh (accused / appellant) came out of his house, he could not see 'BADIYAT' (Ext. 1) in his hand as he had hidden said weapon behind his back, but he could see the accused giving blow to the deceased.

9) The oral testimony of the above three witnesses, which includes the eyewitness account, read with the postmortem examination report (Ext. A -2) and recovery of weapon (Ext. 1), on pointing of accused / appellant, establishes on the record, that it was accused / appellant Kishan Singh who committed culpable homicide and killed Kunwar Singh. The recovery of the weapon (Ext. 1) has been proved by P.W. 6 Station House Officer Raghubir Singh Aswal. Apart from this, the report of the Forensic Science Laboratory also supports the prosecution story in which it is mentioned that the blood stained soil taken from the spot (blood stained weapon and the blood stained clothes of the deceased) contained human blood.

10) Learned counsel for the appellant pointed out that no lantern was recovered by the Investigating Officer, as such, it cannot be said that there was a light in which the

witnesses could see the incident narrated by them. No doubt, there appears to be lapse on the part of the Investigating Officer, but that by itself is not sufficient to disbelieve the prosecution story, narrated by the eyewitnesses. It is pertinent to mention here that the accused / appellant was known to P.W. 1 Nath Singh, P.W. 2 Ajit Singh and P.W. 3 Brij Mohan, as all belong to one Village i.e. Nayak Goth. In such circumstances, even in dim light at 07:00 P.M., there could have been no difficulty in recognizing the accused. Apart from this, it is further relevant to mention here that the first information report is a prompt one and there is evidence that soon after the incident the above three witnesses took injured to the hospital immediately. As such, their presence at the spot appears to be natural and their testimony is trustworthy.

11) It is further argued on behalf of the appellant that assuming for a moment what the eyewitnesses are stating is true, even then, the act on the part of the accused / appellant does not constitute the offence punishable under Section 302 of I.P.C., and at the most it can be said to be an offence punishable under Section 304 of I.P.C. We have carefully gone through the evidence on record to examine whether the blow given by the accused / appellant on the person of Kunwar Singh (deceased), which resulted in his death, constitutes culpable homicide amounting to murder, or culpable homicide not amounting to murder? On examination of the evidence on record, we find that it was Kunwar Singh (deceased) who had gone to the house of the accused / appellant Kishan Singh with P.W. 2 Ajit Singh

and P.W. 3 Brij Mohan. It has also come on the record that the deceased lodged protest to Kishan Singh on which he got enraged. We also find that there is only single ante mortem injury found on the dead body of the deceased, and witnesses also state that only one blow was given by the accused / appellant. Considering all these facts and circumstances together we find that the act on the part of the accused / appellant constitutes offence punishable under Section 304 Part I of I.P.C. and not the one punishable under Section 302 of I.P.C.

12) Accordingly, we are of the view that this appeal deserves to be allowed, partly. The appeal is partly allowed. The conviction and sentence recorded by the trial court under Section 302 of I.P.C., is set aside. Instead, accused / appellant Kishan Singh is convicted under Section 304 Part I of I.P.C., and sentenced to rigorous imprisonment for a period of ten years. Out of the sentence of ten years awarded by this Court, the period already spent in jail by the accused / appellant Kishan Singh shall be set off. The accused / appellant is on bail. His bail is cancelled. The lower court record be sent back so that the trial court may make the accused / appellant Kishan Singh serve out the remaining part of the sentence, as modified by this Court.

(B.S. Verma, J.)

(Prafulla C. Pant, J.)

