

In Chamber

Case :- CRIMINAL APPEAL No. - 583 of 2000

Appellant :- Subhash Yadav and others

Respondent :- State of U.P.

Counsel for Appellant :- G.R. Chhabra, Vijay Kumar Verma, Vinod Kumar Tiwari

Counsel for Respondent :- Govt Advocate

Hon'ble Umesh Chandra Sharma,J.

1. Heard Mr. Vinod Kumar Tiwari, learned counsel for the appellants, Ms. Anupriya Jaiswal, learned AGA, Sri Devanshu Pratap Singh Brief Holder for the State and perused the record.

2. This appeal has been preferred against the judgment and order of conviction and sentencing dated 19.05.2000 passed by the Special Judge (PC Act)/Additional Sessions Judge, Lucknow in ST No.655 of 1997 alongwith ST No.655A of 1997 (State Vs. Dharmesh and others), arising out of Case Crime No.80 of 1997, Police Station Banthra, District Lucknow by which the learned trial Judge convicted all the three accused persons under Section 323 read with Section 34 IPC and sentenced them for rigorous imprisonment of one year, under Section 308 read with section 34 IPC for rigorous imprisonment of five years, under Section 504 IPC for rigorous imprisonment of six months, under Section 506 IPC for rigorous imprisonment of one year and awarded ten years rigorous imprisonment under Section 304 read with section 34 IPC. It was also directed to run all the sentences concurrently.

3. During the pendency of appeal convicts Jang Bahadur and Subhash Yadav have died and the appeal survives only in respect of appellant no.2, Darmesh Yadav.

(I) Grounds of appeal-

4. The appellants have taken grounds in the appeal that; (i) that PW-3, Sushil Kumar had simply written the FIR on the dictation of the IO even then the trial Judge has concluded that the FIR was proved according to the Indian Evidence Act; that such approach of the trial court is perverse; that the learned Sessions Judge has also erred in holding that from the evidence of PW-1, PW-3 and CW-1 the alleged occurrence has been proved because these witnesses have not supported the prosecution version; that PW-4 and PW-5 have not supported the statements of each other and there are material contradictions in their evidence which create serious doubts of their presence and the learned Sessions Judge has ignored such contradictions which rendered the conviction of the appellants; that the learned Judge has wrongly relied on the statement of PW-4 who was not interrogated by the IO as he has accepted in his statement that he was not interrogated by the IO during the investigation since there is no evidence on record to prove that any lacerated wound had occurred to the deceased even then the trial Judge recorded that the blood was oozing and had fallen on the earth from the person of the deceased and the same was collected by the IO; that in absence of that, the place of occurrence cannot

be said to have been proved; that the finding of the Sessions Judge that not taking the towel in the custody would not disprove the prosecution case is incorrect and it has resulted into great miscarriage of justice; that the Sessions Judge has also erred in misreading the death memo (Ex.Ka-5); the name of the deceased Om Prakash @ Ram Prakash while the death memo is of Ram Prakash only which has resulted into great miscarriage of justice; that the learned Sessions Judge has also erred in law and fact in holding that the deceased died at 11:12 a.m. contrary to the doctor PW-6 noting to the time of death at 03:00 a.m. thus, the trial Judge has misread the evidence on record; that the learned Sessions Judge has also erred in law and fact that the statement of the IO recorded in the court was correctly recorded; that the learned Sessions Judge has erred in holding that CW-1 has proved the occurrence and the participation of the appellants; that the evidence of PW-3 and CW-1 has not been considered in right perspective regarding place of occurrence; that the learned Sessions Judge has also erred in holding that that the part of the statement which supports the defence was given under the confusion. He has also erred in holding that CW-1 is an interested witness being a person of same caste as that of the appellants; that due to non-production of the pathani suit of the deceased, his identification could not be established; that the learned Judge has also erred in convicting the accused persons under Section 323 IPC in absence of any simple injury; that when the deceased was alive, the FIR was registered and even after his death the

learned Sessions Judge has convicted the accused persons under Section 308 IPC and also under Section 304 IPC, both the said sections cannot sail together when the victim died; that since no evidence of Sections 504 and 506 IPC is on record, hence the conviction under those sections is without any basis, therefore, the impugned judgment and order of the Special Judge (PC Act), Lucknow be quashed and the appellants be acquitted.

(II) Brief facts of the case-

5. The informant Sushil Kumar Yadav son of Sri Putti Lal Yadav, resident of Noor Nagar Madarsa, Police Station Banthra, District Lucknow, lodged an FIR that a fight had taken place between the deceased Om Prakash Yadav of his village and accused Subhash Yadav at village Devi Kheda in the *tilak* ceremony of Mishrilal Yadav. Accused Shubhash Yadav had threatened to kill the deceased Om Prakash Yadav.

6. On 25.03.1997 Om Prakash Yadav had to take a bus for Kaithi, when he reached near the hut of Gaya Prasad in Anoop Kheda at about 09:30 a.m, the accused persons Subhash Yadav, Darmesh and Jang Bahadur came out of bus with sticks. Shubhash Yadav tried his best to kill him. Seeing this, Om Prakash Yadav started screaming and running from there but Shubhash Yadav and Darmesh Yadav caught Om Prakash Yadav near the wheat field of Gangadeen, thereafter Jang Bahadur caught him and also took him to the *babool* tree (*vachellia nilotica*) near the

parti-land. Accused Jang Bahadur threatened to kill him and abusively forced him to sit there. While accused Shubhash Yadav tied the legs of Om Prakash Yadav and pushed him down, Shubhash Yadav and Darmesh Yadav started beating Om Prakash Yadav brutally. On hearing his cries and screams, Ram Narayan, Milap Yadav and other farmers reached on the spot but accused Subhash Yadav in order to stop them threatened of dire consequences. Therefore, they did not proceed ahead, and all the accused persons continued to beat Om Prakash Yadav mercilessly for 15-20 minutes. When Shubhash Yadav and Dharmesh Yadav got exhausted, the accused Jang Bahadur started beating him with stick. When Suresh Yadav came from the tractor, the accused persons ran away towards Madarsa.

7. Informant, PW-3, Sushil Kumar Yadav produced a written complaint dated 25.03.1997 at about 10:45 a.m. at Police Station Banthra on which basis, the case under Sections 323, 504, 506, 308 IPC was registered at Case Crime No.80 of 1997. During the course of the journey to Balrampur Hospital, injured, Om Prakash Yadav died, therefore, the case was converted into Section 304 IPC.

8. After the death of Om Prakash Yadav, the inquest report was prepared and autopsy of the dead body of the deceased was also conducted. After investigation, investigating officer (IO) submitted the charge-sheet. The case was committed to the Court of Sessions which was transferred to the trial court. The Additional Sessions

Judge-III, Lucknow framed the charge on 29.09.1997, that the accused denied and sought trial.

9. The prosecution examined the following witnesses:

1	PW-1	Raghu Nandan
2	PW-2	Gaya Prasad
3	PW-3	Sushil Kumar Yadav
4	PW-4	Milap Singh
5	PW-5	Ram Narayan
6	PW-6	Dr. Anil Kumar
7	PW-7	SI Rajendra Prasad Kannaujia
8	PW-8	SI SP Singh
9	PW-9	Head Constable Jageshwar Dayal
10	CW-1	Suresh Prasad

10. Prosecution relied on following documentary evidences:

1	Ex.Ka-1	Written complaint
2	Ex.Ka-2	Postmortem report
3	Ex.Ka-3	Photonash
4	Ex.Ka-4	Police report
5	Ex.Ka-5	Roopkar/death memo
6	Ex.Ka-6	Specimen seal
7	Ex.Ka-7	Police Station report
8	Ex.Ka-8	Inquest report
9	Ex.Ka-9	Site map/Site plan

10	Ex.Ka-10	Recovery memo
11	Ex.Ka-11	Charge-sheet
12	Ex.Ka-12	Chik FIR
13	Ex.Ka-13	Carbon copy/kaymi case GD
14	M.Ex.1	Plain soil
15	M.Ex.2	Blood stained soil
16	M.Ex.3&4	Boxes of plain and blood stained soil

(III) Brief discussion on the statement of the prosecution witnesses-

11. PW-1, Raghu Nandan has not supported the prosecution version and has deposed that before him neither accused Shubhash Yadav tied the feet of the deceased Om Prakash Yadav nor the deceased was beaten by the accused persons by sticks. He himself stated that he was at his house. When his son Sandeep Kumar informed him regarding the scuffle, he reached on the spot and saw that a severely injured person was lying there, and another person was also standing there. Seeing this, he and the villagers kept the injured on a tractor. The person standing there also accompanied the injured on the tractor. The witness deposed that he does not know the names of those two persons. During the course of deposition, the accused persons were present in the court. Seeing them, the witness deposed that since the scuffle had not taken place before him, he did not see

these persons on the spot and, therefore, can not say whether the accused persons had beaten the deceased or not. The witness denied his statement recorded under Section 161 CrPC.

12. PW-2, Gaya Prasad has also given a hostile statement and against the prosecution. This witness also denied that the accused persons had tied the feet of the deceased and had beaten him with stick before him. The witness was declared hostile and was cross-examined by ADGC. The witness disowned his statement recorded by the IO during the investigation.

13. PW-3, informant Sushil Kumar Yadav has also not supported the prosecution version in his evidence. This witness has not admitted that he was with the deceased, Om Prakash Yadav at the time of occurrence. The witness also denied the statement recorded by the IO and deposed that he had written the complaint on the dictation of a Sub Inspector.

14. PW-4, Milap Singh has said that the accused persons and Sushil Kumar Yadav are from his village and the deceased Om Prakash Yadav was his elder brother. The witness deposed that there was a farm house of Chotu Sardar at a distance of 01km from his village and his brother Om Prakash used to ply his truck. On 25.03.1997, at about 09:00 to 09:30 a.m. his brother was going to the aforesaid farm house on foot along with Sushil Kumar Yadav. That time he and his father were digging potatoes

in the field. After 10 minutes, they heard a noise "save-save". He recognised the voice and reached there and saw that all the accused Subhash Yadav, Jang Bahadur and Darmesh Yadav were beating his brother Om Prakash Yadav by stick in *banjar* land. They threatened that if they proceed ahead, they shall also be beaten. The accused persons kept beating his brother and after seeing the persons present there coming nearby, they ran away. Looking to the condition of his brother, his father became unconscious. People managed a tractor and carried the injured to hospital. He himself did not took his brother to the hospital. The villagers said that they took him to the police station. He had neither accompanied the deceased to the police station nor to the hospital. Doctor declared him to be dead.

15. Prior to this incident, in *tilak* ceremony at the house of Sri Ram Yadav resident of Devi Kheda, an altercation had taken place between his brother and accused Shubhash Yadav. After the incident, his father was called by Shubhash Yadav who had threatened his father of dire consequences. The feet and hands of the deceased were tied separately by separate towels at the time of incident.

16. During the course of cross-examination, the witness deposed that his potato field is about 100-150 steps south of his house. He reached on the spot after crossing the drainage from his field. Hearing the noise, he crossed 2-3 fields which lies in between the place of occurrence and his potato field. He had reached on the spot before

reaching the villagers. He had come to his house with his father. Due to this incident for next 12 days his father used to faint frequently. The witness could not remember the person who had taken his brother from the tractor. He expressed ignorance about the timing of his return. The witness further deposed that he does not know the whereabouts of the people who carried his brother from the tractor. The witness denied that IO had recorded his statement. This witness further deposed that he had not talked about the incident prior to the deposition.

17. PW-5, Ram Narayan has deposed that the deceased, Om Prakash Yadav was his nephew (*bhanja*). He further stated that Om Prakash Yadav became orphan in his childhood and he was being nurtured by him. He further deposed that the deceased was about 23 years old. At the time of the incident, he was in his field with his son Milap Singh where they were digging potatoes. Hearing the noise "save-save", both of them ran there and saw that accused Shubhash Yadav, Darmesh Yadav and Jang Bahadur were beating Om Prakash Yadav with sticks. When they went ahead, the accused persons threatened them that if they came to rescue, they would also be killed, so they stopped there. Sushil Kumar Yadav was also present there. Both of them had come to the place of occurrence together and both were going to Kaithi **Farm**. When they reached at the hut of Gaya Prasad, this incident had taken place. After hearing the commotion, Suresh Yadav reached there with a tractor. Seeing this, the accused persons ran away towards village Noor

Nagar, thereafter Suresh Yadav untied his brother's feet. They kept the deceased at his tractor and thereafter took him to Police Station Banthra by tempo and from there he was taken to Balrampur Hospital, Lucknow. He had not come to Balrampur Hospital from Police Station Banthra with the deceased, Om Prakash Yadav. Bhagwan Dev, Ram Dev, Sardar, Inder Pal and two constables had gone to Balrampur Hospital with the deceased, Om Prakash Yadav.

18. The report was lodged by Sushil Kumar Yadav and at the time of lodging the report, he was sitting near Om Prakash Yadav outside the building of the police station and from the police station he had returned to his home. Before reaching home, the younger brother of Ram Dev had informed that Om Prakash Yadav had died.

19. Fifteen days prior to this incident, a scuffle had taken place in the village between Harish Chandra and his elder brother Beerpal. Deceased, Om Prakash Yadav also reached there. The wife of Harish Chandra requested Om Prakash for help upon which Om Prakash Yadav intervened and said, "why did you beat a lady in a fight between two brothers". On being annoyed, Subhash Yadav present on the spot had threatened the deceased. After 10-12 days of the aforesaid incident, another altercation took place between Subhash Yadav and Om Prakash Yadav (the deceased) in a *tilak* ceremony held at the house of Mishiri Lal resident of Devi Kheda. On the next day, he was summoned by Subhash Yadav through his

younger brother. To take his revenge, he threatened him of dire consequences. Thereafter, he had directed Om Prakash Yadav not to intervene in any matter in which the accused persons were involved. This witness further deposed that Shubhash Yadav, Darmesh Yadav and Jang Bahadur Yadav are not the accused persons.

20. At this juncture, the trial court intervened and asked about the eye vision of the witness, who informed that he may recognize any person at a distance of one hand. The witness went near the accused persons and recognized them, and after touching them, he deposed that these three accused persons had beaten the deceased Om Prakash Yadav by sticks. After this deposition, the witness felt ill and the cross-examination was adjourned for the next day where the witness deposed that after the murder of Om Prakash Yadav, he fell ill and his eye sight had also become weak. He further deposed that his eye vision was quite good even after 2-3 months of the incident. On the date of occurrence, he had left home at about 08:00 a.m. to reach at his field and had reached there within five minutes. After 10-15 minutes, Sushil Kumar Yadav and Om Prakash Yadav had reached together, and after staying for 15 minutes, they had gone towards the south, where the bungalow of Gaya Prasad is situated at a distance of 5-6 plots.

21. From the place of occurrence, Om Prakash Yadav was taken to Police Station Banthra by his brother-in-law, Ram Dev, his brother, father, and Indra Pal Master from

where he was taken to the medical college Lucknow. Seeing the injuries of the deceased, he fell unconscious for 4-5 minutes. Thereafter he saw that Om Prakash Yadav was lying there in an injured state and the villagers and nearby plot holders had also reached there. At the time of the incident, Suresh resident of Anupkheda was ploughing his field there with a tractor. He reached there with the tractor by which Om Prakash Yadav was taken to Kamlapur and from there he was carried to Police Station Banthra by tempo. Hearing the noise, they had reached on the spot. Suresh had also reached on the spot by tractor after the accused had left the place of occurrence. The witness further deposed that injured Om Prakash Yadav was conscious till Kamlapur.

22. PW-6, Dr. Anil Kumar had conducted autopsy of the dead body of the deceased and had found following injuries:

External examination-

- (a) Abrasion 2.5cm x 2.5cm on the dorsum of the left wrist.
- (b) Abrasion 3cm x 2cm on the back part of left elbow.
- (c) Multiple contusions on the left arm and front of forearm in an area of 8cm below the left shoulder.
- (d) Multiple contusions on the back of right arm in an area of 30cm x 8cm, 3cm below the right shoulder.
- (e) Multiple abrasions and contusions in an area of 15cm x 10cm on the right forearm, 8cm above the right hand wrist bones were broken.

(f) Multiple contusions in an area of 30cm x 25cm, 4cm below the neck, on the upper portion of the back. In this injury there was the biggest contusion in an area of 12cm x 2.5cm and the lowest contusion was in an area of 8cm x 2.5cm.

Internal Examinations-

23. On the left side, third and fourth back ribs of the dead body were found to be broken. There was half a litre of blood in the left pleural cavity. Left pleural had also been torn. Right pleural and lung were intact and left lung towards the upper and back sides had also been broken. According to this witness, the deceased would have died due to the above injuries and also due to bleeding, shock and haemorrhage. This witness has proved the postmortem report Ex.Ka-2, and the related papers have also been proved by this witness as Ex.Ka-3 to Ex.Ka-10. The witness opined that these injuries may occur from stick blows 12 hours prior to the postmortem. It could have occurred at about 03:00 p.m. on 25.03.1997.

24. During the cross-examination, this witness admitted that *rigor mortis* is completed within 4-12 hours. He admitted that it is also a method to ascertain the time of death of a deceased.

25. PW-7, SI Rajendra Prasad Kanaujia has deposed that he had completed the inquest, reaching Balrampur Hospital Mortuary, Lucknow, he appointed five witnesses for inquest. This witness has proved the inquest report Ex.Ka-8 and has also deposed that after completion of the

inquest, he sealed the dead body, prepared a memo for postmortem and prepared a specimen seal. The witness proved Ex.Ka-3, Ex.Ka-4, Ex.Ka-6 and Ex.Ka-7 to be in his hand writing and signature. The witness admitted that in Ex.Ka-5, the crime number has not been written, and after verifying the crime number and sections through a wireless set from Police Station Banthra, the same was incorporated.

26. PW-8, SI SP Singh has deposed that after lodging the FIR, the case was entrusted to him for investigation. On the same day he received the chick FIR and kaymi GD, recorded the statements of the informant, Sushil Kumar Yadav and Head Constable (Head Moharrir), Jageshwar Dayal. Thereafter he went to the place of occurrence, and on the pointing of the informant, he inspected the place of occurrence and prepared site plan Ex.Ka-9, took the blood stained and plain soil from the place of occurrence and sealed them in two separate boxes and prepared a specimen seal and recorded the statements of the witnesses of fard, Suresh, Gaya Prasad, Raghunandan and raided the houses of the accused persons but in vain. The witness has proved the concerned recovery memo Ex.Ka-10. This witness proved both the boxes of plain soil and blood stained soil as M.Ex.1 and M.Ex.2 and clothes thereon as M.Ex-3 and M.Ex-4. Next day on 26.03.1997, he again searched the accused persons; recorded the statements of witnesses Ram Narayan Yadav and Milap Singh Yadav; same day he received a parcha regarding surrender of the accused in the court. On 04.04.1997, he

recorded the statement of SI Rajendra Prasad Kanaujia, Constable Mohd. Raza and witnesses to the inquest, Abdul Razzaq and Abdul Sattar, Ram Dev Singh, Indra Pal, Santram and Home Guard, Birendra Tiwari.

27. After getting permission from the court, he recorded the statements of the accused persons on 13.06.1997 in District Jail, Lucknow and after finding sufficient evidence against the accused persons, he submitted the charge-sheet Ex.Ka-11. During the cross-examination, the witness accepted that another name of the deceased was Ram Prakash Yadav about which he was not informed. He was known as Om Prakash Yadav or Ram Prakash Yadav. This witness admitted that he had not seen the potato field of the witness Ram Narayan. Ram Narayan did not state that at the time of the incident he was digging potato but had said that he was working on his plot. The witnesses Ram Narayan and Ram Milap stated that they heard commotion in their farm. The witness further deposed that when Om Prakash Yadav reached the police station in the injured state, he was present there. As he was unconscious, was sent to the hospital for treatment. He had not inspected the alleged tempo. He had recorded the statement of Suresh Yadav, the tractor owner, but had not inspected the tractor. The witness further deposed that it is true that on the injury letter, name of the injured was written as Om Prakash Yadav while concerned doctor has named the deceased as Ram Prakash Yadav. The witness admitted that he had not asked Ram Narayan or Ram

Milap regarding two names of the deceased and had also not contacted the hospital or the doctor in this regard.

28. The witness admits that he has not shown the distance between the places 'A' and 'B' shown in the site plan and has also not searched the towel used in tying the feet of the deceased. Ram Narayan and Ram Milap informed him that they had untied the feet of the deceased. According to him, the towel used in tying the feet was not material, hence he did not search the same. The witness further deposed that since the accused persons could not be arrested, sticks were not recovered on their pointing. The accused persons had also not stated about the sticks during their statements. The witness further deposed that when the deceased was carried to the police station, the names of the persons who accompanied the injured were not written in the GD that they were Sushil Kumar Yadav, Bhagwan Dev and Ram Dev. The witness accepted that he had recorded the statement of informant Sushil Kumar Yadav at the police station. The witnesses, Ram Narayan and Milap Singh had not accompanied the injured to the police station. The witness admits that he had not recorded the statements of Bhagwan Dev and Ram Dev when they came to the police station with the injured and Dr. Anil Kumar who had conducted the postmortem of the deceased.

29. PW-9, Head Constable Jageshwar Dayal has deposed that on 25.03.1997, informant Sushil Kumar Yadav came to him and produced a written complaint on which basis

he lodged the FIR at Crime No.80 of 1997, under Sections 323, 504, 506, 308 IPC and had also prepared chik FIR Ex.Ka-12 and proved it. He entered the case in kaymi GD at Serial No.20 at about 10:45 a.m. The witness proved kaymi case GD/carbon copy Ex.Ka-13.

30. In the cross-examination, this witness deposed that at about 04:45 p.m. Home Guard Birendra Kumar reported the death of the injured on which basis the case was converted into Section 304 IPC. Its information was also given to the superior officers. This witness admits that no special report was forwarded to the District Magistrate. There is no averment in GD regarding the sending of the special report for converting the case into Section 304 IPC though it must be sent immediately. The witness further deposed that he had seen the injuries sustained by Om Prakash Yadav when he was brought to the police station. This witness described the injuries of Om Prakash Yadav.

31. The court summoned Suresh son of Sheetla Prasad as CW-1 who has said to have carried the injured from the place of occurrence keeping him on his tractor. This witness deposed that he had brought the injured upto Anoop Kheda from where he was carried by tempo. The witness denied that the accused had beaten the injured with sticks before him. The witness also denied to be acquainted with the accused persons. He also denied that his statement was recorded by the IO under Section 161 CrPC.

32. In cross-examination, this witness admitted that the injured, aged about 30 years was wearing a pathani suit and Gaya Prasad and others were telling that the injured was Om Prakash Yadav.

33. Mohan Lal son of late Gajraj Singh resident of Noor Nagar Madarsa, Police Station Banthra, Lucknow has been examined as DW-1. This witness deposed that he was the Pradhan of village Noor Nagar. Om Prakash Yadav, the nephew of Ram Narayan, is also called Mannu. Kaithi Farm is about 1½km away from the house of Ram Narayan. At the time of the incident, he was detained in Lucknow Jail. He had heard about the incident from his sons, Ajeet and Sher Bahadur. The bungalow of Gaya Prasad is about 02kms away from the plot of Ram Narayan. It will take about half an hour to reach there. The eye sight of Ram Narain is very weak; he could hardly see one furlong away. The witness admitted that he was brought by Thakur Prasad, father of Shubhash Yadav. The witness admitted that he is in jail for 17 years in connection with murder of Pintu. According to this witness, he had seen Ram Narayan going to the fields with the help of a stick. At the time of the incident, Ram Narayan was about 40-45 years old. The witness admitted that during his imprisonment, the accused persons were also with him in Lucknow Jail, and sometimes they used to meet him.

(IV) This case is being decided as under discussing following issues-

(i) FIR-

34. In this case the occurrence has taken place on 25.03.1997 at 09:30 a.m. and the FIR was lodged at 10:45 a.m. same day at Police Station Banthra which was 11kms away from the place of occurrence. Thus, it cannot be said that there was any delay in lodging the FIR though later on informant PW-3, Shushil Kumar has become hostile and has not supported the prosecution version in his statement on oath but from the evidence of PW-9, HCP Jageshwar Dayal it is fully proved that on the date and time of lodging the FIR, the informant PW-3, Sushil Kumar was present at the concerned police station and had lodged the FIR voluntarily. It has been deposed by the informant that though he had not accompanied the deceased for going to Kaithi Farm but were going by bus to Lucknow. He has also deposed that when the bus stopped, it was about 09:30 a.m, thereafter this witness has not supported the prosecution version. Thus it cannot be said that there is any anti-dating or anti-timing in lodging the FIR.

(ii) Motive-

35. So far the motive behind the commission of crime is concerned, it has been mentioned in the FIR and the same has also been proved from the evidence of PW-4 and PW-5. These witnesses have proved that prior to this incident, an altercation between the deceased and accused, Subhash Yadav had taken place in *tilak* ceremony held at

the house of Sriram Madhav resident of Devi Khera. After this incident his father was called by Subhash Yadav who had threatened his father of dire consequences and that he will cut the hands and legs of the deceased and in the consequent during commission of the crime deceased's both feet and hands were separately tied with towel.

36. PW-5, Ram Narayan has also proved the motive behind the crime that 15 days prior to this incident a scuffle had taken place in the village between Harish Chandra and his brother Veer Pal. Deceased Om Prakash had also reached there and on the request of Harish Chandra's wife he had intervened in the matter and had said that why a lady was being beaten in a fight between two brothers upon which accused, Subhash Yadav had threatened the deceased. Another motive has been proved by this witness that after the aforesaid incident another altercation had taken place between Subhash Yadav and deceased Om Prakash in the *tilak* ceremony held at the house of Sriram Madhav resident of Devi Khera thereafter he was summoned by the accused Subhash and he had threatened him that he would ampute the legs of the deceased. Thus, the motive behind the crime has been proved beyond any doubt.

(iii) Place of occurrence-

37. So far as the place of occurrence is concerned, it has been fully proved from all the witnesses including the hostile witness, PWs-1, 2 and 3 and CW-1. They have not

denied the place of occurrence. It has also been proved from the evidence of the PW-4, PW-5 and IO, PW-8 who has prepared and proved the site plan Ex.Ka-9.

(iv) Inquest and postmortem report-

38. The inquest and the postmortem report has been proved by the formal witnesses which have been discussed earlier. Chik FIR and carbon GD has also been proved by PW-9, HCP, Jageshwar Dayal. Thus, on the basis of above discussion, it can be concluded that where the facts of the case have been proved beyond reasonable doubt from the evidence of PW-4 and PW-5, the documentary evidences have also been proved by the formal witnesses.

(v) Evidentiary value of the evidence of hostile witnesses-

39. PW-1, Raghu Nandan has become hostile and has not supported the prosecution version but he has accepted in his deposition that when his son Sandeep Kumar informed regarding the scuffle, he reached on the spot and saw that a severely injured person was lying there and another person was also standing there. Seeing this he and the villagers kept the injured on a tractor. The person standing there also accompanied the injured on the tractor. Thus, from the evidence of this witness it has been proved that on the date and time of the place of occurrence deceased, Om Prakash Yadav was severely beaten on the spot and another person was also with him

who according to the prosecution was the informant PW-3, Sushil Kumar.

40. PW-2, Gaya Prasad has also given hostile statement and he had totally denied that any occurrence had taken place before him or the accused persons had tied the feet of the deceased and had beaten him by lathi. In the cross-examination by ADGC this witness has accepted that IO had interrogated him about the incident but he denied the statement recorded under Section 161 CrPC though he has accepted that he is 'Yadav' by caste and the injured was also 'Yadav' by caste and this fact was stated by the persons gathered on the spot. From the evidence of this hostile witness place of occurrence, injury to the deceased and the fact that occurrence was seen by several persons have been proved.

41. PW-3, informant, Sushil Kumar has not supported the prosecution version and has also been declared hostile but he has accepted that the accused persons are the residents of his village. Deceased was also the resident of his village. This witness has denied any scuffle between the accused Subhash Yadav and deceased Om Prakash Yadav in tilak ceremony held at the house of Mishri Lal Yadav and has expressed ignorance that accused Subhash Yadav had threatened the deceased to kill him. He accepted that on the date and time of occurrence, he was with the deceased and they were going to Lucknow but not to Kaithi Farm. He has also accepted that the bus had stopped at 09:30 a.m. but the witness denied that accused

persons had taken off from the bus. He also denied that the deceased was beaten by the accused or he was caught hold by the accused Jang Bahadur but this witness has accepted that he had seen the deceased Om Prakash Yadav in injured state and at that time he was unconscious. Three-four persons had taken the deceased to police station wherefrom he was sent to hospital but in the way he died. This witness has accepted that he wrote the complaint at the police station but stated that whatever was spoken by the Sub-Inspector, was written by him. This witness could not remember the name of the Sub-Inspector who is said to have dictated the FIR. Generally, the Sub-Inspector bear their names on their uniforms. If the FIR had been dictated by any Sub-Inspector, his name would have been in the knowledge of this witness. Therefore, it is concluded that virtually the FIR was written by this witness voluntarily as he was the eye-witness and companion of the deceased but due to terror or winning over by the accused persons, this witness has not deposed in favour of the prosecution.

42. According to this Court, there was natural narration of the incident in the written complaint Ex.Ka-1 which cannot be reduced in writing by any unknown person like Sub-Inspector of the concerned police station, therefore, this Court is of the opinion that after being terrorised or won over by the accused persons this witness was denying the writing of the written complaint voluntarily.

43. In **Khujji @ Surendra Tiwari Vs. State of MP, (1991) 3 SCC 627** the witnesses including the informant had been hostile. In such situation the Apex Court held that merely because a witness has been declared hostile, his entire evidence cannot be treated as effaced from the record. His testimony to the extent found reliable can be acted upon.

44. During the cross-examination this witness has accepted that he had heard the cries of the incident. This witness has also accepted that on reaching the spot, Suresh Yadav had carried the deceased upto Kamlapur and after that he was carried by tempo.

45. As per FIR, CW-1, Suresh was not the eye-witness but he had reached on the spot after the incident and had carried the deceased from his tractor to Kamlapur wherefrom he was carried to the police station and hospital by tempo. It has also been proved from the evidence of PW-4 and PW-5 that when the CW-1, Suresh reached on the spot by tractor, accused persons ran away from the spot, therefore, the past activities after the incident has been proved from the evidence of this witness and the place of occurrence has also been proved and it has also been proved that on the place of occurrence, the deceased was beaten by the assailants. The evidentiary value of a hostile witness has been discussed in **Khujji @ Surendra Tiwari** (supra) and has been held by the Apex Court in paragraph-6 of the judgment that the evidence of a prosecution witness

cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether, but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof.

46. In **Raja Vs. State of Karnataka, (2016) 10 SCC 506; Pooja Pal Vs. Union of India, (2016) 3 SCC 135; Vinod Kumar Vs. State of Punjab, (2015) 3 SCC 200; Sucha Singh Vs. State of Punjab, 2003 (47) ACC 555 (SC); Malkhan Singh Vs. State of UP, 2001 JIC 290 (All)**, it has been held that it is settled law that the evidence of a hostile witness cannot be rejected out right. Both parties are entitled to rely on such part of the evidence which assists their case.

47. In **Bable Vs. State of Chhattisgarh, AIR 2012 SC 2621**, principle regarding the informant/complainant turning hostile and not proving the FIR has been discussed and it has been held that once registration of the FIR is proved by the police and the same is accepted on record by the Court and the prosecution establishes its case beyond reasonable doubt by other admissible, cogent and relevant evidence, it will be impermissible for the Court to ignore the evidentiary value of the FIR. It is settled law that FIR is not substantive piece of evidence. But certainly it is a relevant circumstance of the evidence produced by the investigating agency. Merely because the informant turns hostile it cannot be said that the FIR

would lose all of its relevancy and cannot be looked into for any purpose.

48. In **Sidharth Vashisth alias Manu Sharma Vs. State of NCT of Delhi, 2010 (69) ACC 833 (SC)**, it has been held that if the prosecution witness has turned hostile, the court may rely upon so much of his testimony which supports the case of the prosecution and is corroborated by other evidence.

49. On the basis of above discussion, it is concluded that from the evidence of the aforesaid hostile witnesses, the date, time and place of occurrence has been proved and it has also been proved that the deceased was beaten by the assailants on the alleged date, time and place of occurrence.

(vi) Evidentiary value of witnesses of fact PW-4 and PW-5-

50. PW-4, Milap Singh was aged about 15 years at the time of the incident. He was a villager though he was a student of High School. A person of 15 years of age who is student of High School normally understands well everything which is happening before him. Since he was a boy of tender age and his father PW-5 Ram Narayan became unconscious seeing the incident, therefore, he could not accompany the deceased upto the police station and the hospital. But this witness has clearly deposed about the incident which happened before him and has also proved the motive. It has also been proved by this

witness that the place of occurrence was hardly 100-150 steps away from his house and the place of occurrence was hardly 2-3 fields away from his potato field. Therefore, he had reached on the spot before reaching the villagers. This witness has also narrated the rest part of the story of the incident though this witness has denied that any statement was recorded by the IO but according to this Court such statement has been given due to non-understanding of the nature of recording the statement under Section 161 CrPC. Generally, the IOs do not right the statement of the witnesses then and there but after interrogating the witnesses and after collecting the fact and evidence from the concerned witness, they later on incorporate it in the case diary. According to this Court from the evidence of PW-4, the prosecution case has been proved beyond any reasonable doubt against the accused persons.

51. PW-5, Ram Narayan is the maternal uncle of the deceased who was present at his potato field with his son PW-4, Milap Singh. PW-5 has also conquered the statement of PW-4. Both the witnesses have clearly named and mentioned the name of the accused persons. PW-5 had also recognised the accused persons in the Court. No any other incident came into picture that the deceased had enmity with any other person. In the aforesaid circumstances, it cannot be said that these two witnesses would name the accused persons falsely excluding the real culprit.

52. In **Sudeep Kumar Singh Vs. State of West Bengal, (2016) 3 SCC 26, Prithvipal Singh Vs. State of UP, 2012 (76) ACC 680, Janrail Singh Vs. State of Punjab, 2009 (1) Supreme 224** it has been held that conviction can be based on the evidence of sole witness. In a criminal trial quantity of evidence and not the quantity of matters. As per Section 134 of the Indian Evidence Act, no particular number of witness is required to prove any fact. Plurality of witnesses in a criminal trial is not legislative intent. If the testimony of sole witnesses found reliable on the touchstone of credibility the accused can be convicted on the basis of such sole testimony. Since the witnesses PW-4 and PW-5 were relative, therefore, only on account of relationship the testimony of the above two witnesses cannot be discarded but the same shall be considered. It has been held in **Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537; Shyamal Ghosh Vs. State of West Bengal, AIR 2012 SC 3539; Sone Lal Vs. State of MP, AIR 2009 SC 760; Sucha Singh Vs. State of UP, (2003) 7 SCC 643** that in case of evidence of relative and interested witnesses, the court has to adopt a careful approach in analysing such witnesses and if the testimony of the related witness is otherwise found credible, the accused can be convicted on the basis of testimony of such related witness.

53. From the analysis of evidence of PW-4 and PW-5 it cannot be said that they were inimical to the accused persons. Thus, from the evidence of PW-4 and PW-5, the

prosecution case has been proved against the accused persons beyond reasonable doubt.

(vii) Faulty investigation-

54. It has also been argued that SI PW-8, SP Singh has not properly investigated the case. It is true that he had not recorded the statement of Dr. AB Saxena who had prepared death memo Ex.Ka-5. According to this Court, non-recording of the statement of Dr. SB Saxena who had prepared the death memo is not material in presence of the postmortem report which had been proved by the concerned doctor. It is also argued that the IO had also not shown the potato field where PW-4 and PW-5 were digging the potatoes. In this regard the IO had explained that since the aforesaid potato field was outside the boundaries, therefore, it was not shown in the map. The IO has deposed that he had himself went to Om Prakash when he was brought to the police station and had found him unconscious and this fact had also been mentioned in GD. According to this Court, failure in recording the statement of the tempo driver and non-inspection of the tempo is immaterial for the purposes of this case. Similarly, not inspecting the tractor of Suresh and not mentioning its registration number is not fatal for the prosecution. This witness has accepted that upon the injury letter name of the injured was written as Om Prakash whereas the PM Doctor has named him Ram Prakash. From the evidence available on record it has been proved that deceased Om Prakash had a nick name

as Ram Prakash. Therefore, the identity of the deceased can not be disputed. It is also argued that the IO could not recover the towel from which feet of the deceased were tied. Similarly, the sticks used in commission of crime could not be recovered by the IO. The IO deposed that he did not think necessary to search and obtain the towel and since the accused persons had not stated about the sticks, therefore, the same could not be recovered. According to this Court, non-recovery of aforesaid towel and sticks used in commission of the crime is not fatal for the prosecution.

55. In this regard **Nankaunoo Vs. State of UP, (2016) 3 SCC 317 (three-Judge Bench)** and **Mritunjoy Biswas Vs. Pranab alias Kuti Biswas and another, AIR 2013 SC 3334**, are relevant wherein it has been held that when there is ample unimpeachable ocular evidence corroborated by the medical evidence, mere non-recovery of weapon from the accused does not affect the prosecution case relating to murder.

56. This witness admits that he had not seen the dead body of the deceased but he had seen him in injured state. He had also not seen the dead body of the deceased even after the postmortem. The aforesaid latches are immaterial in the eyes of law.

57. In **Leela Ram Vs. State of Haryana, (1999) 9 SCC 525; Dashrath Singh Vs. State of UP, (2004) 7 SCC 208; State of Punjab Vs. Hakam Singh, (2005) 7**

SCC 408; State of Karnataka Vs. Suvarnamma, (2015) 1 SCC 329; and in Khem Ram Vs. State of Himachal Pradesh, (2018) 1 SCC 202, it has been held that any irregularity or deficiency in investigation by the IO need not necessarily lead to rejection of the case of prosecution when it is otherwise proved. The only requirement is the use of extra caution in evaluation of evidence. A defective investigation cannot be fatal to prosecution where the ocular testimony is found credible and cogent.

58. In **Rahul Mishra Vs. State of Uttarakhand, AIR 2015 SC 3043 (three-Judges Bench)**, it has been held that the IO is not obliged to anticipate all possible defences and investigate in that angle. In any event, any omission on the part of IO cannot go against the prosecution. Interest of justice demands that such acts or omission of IO should not be taken in favour of the accused or otherwise it would amount to placing a premium upon such omissions.

59. In **Maqbool Vs. State of Andhra Pradesh, AIR 2011 SC 184; Sheo Shankar Singh Vs. State of Jharkhand, 2011 CrLJ 2139 (SC); and in Dhanaj Singh Vs. State of Punjab, (2004) 3 SCC 654**, it has been held that non-sending of blood stained earth and clothes of the deceased or injured to chemical examiner for chemical examination is not fatal for the case of the prosecution if the ocular testimony is found credible and cogent. In **Maqbool** (supra) and **Dhanaj Singh** (supra) it

has also been laid down by the Apex Court that by non-sending of weapons of assault, cartridges and pellets to ballistic experts for examination would not be fatal to the case of prosecution if the ocular testimony is found credible and cogent.

60. From perusal of the evidence of the IO PW-8, SI SP Singh it cannot be ruled that the IO had committed major default in the investigation. The things which could not be taken by the IO or which could not be done by him are not very much material for the purposes of this case.

(viii) Whether the medical report is in consonance with and in support of the case of prosecution and ocular evidence if so, it's effect-

61. According to the prosecution, the deceased was beaten to death by the accused persons by giving lathi blow. Therefore, abrasion and contusion had occurred and were found by PW-6, Dr. Anil Kumar. He had also found that third-fourth ribs were broken and left plura had also been torn. This witness has opined that such injury may occur from the blows caused by the lathi. Thus, from the above, it has been fully established that the injuries found on the person of the deceased were caused by the lathi blow as alleged by the witnesses of fact PW-4 and PW-5. Thus, it can safely be concluded that in this case the ocular evidence and the medical evidence are not in conflict but they are in consonance with and supportive to each other and from this aspect as well, the case of

prosecution has been proved beyond reasonable doubt and against the accused persons.

62. On the basis of above discussion, this Court is of the considered view that the prosecution has successfully proved the case under Section 304 read with Section 34 IPC beyond reasonable doubt and since the sole victim has died, therefore, there was no need to convict and sentence the appellants under Sections 323 and 308 IPC, therefore, the conviction under Section 323 and 308 IPC is liable to be quashed. So far as the conviction under Sections 504 and 506 IPC is concerned, there is no evidence on record to establish that the accused persons had abused the deceased and had also threatened to kill him before or after or at the time of incident, therefore, in absence of related evidence, the convict-appellant could not have been convicted under Sections 504 and 506 IPC, therefore, the conviction and sentencing under Sections 504 and 506 IPC is also liable to be quashed.

63. Accordingly, the appeal is **allowed partly** so far as the the conviction and sentencing under Section 323 read with Section 34 IPC, Section 308 read with Section 34 IPC, Sections 504 and 506 IPC are concerned and the same is **quashed**.

64. The appeal, so far as the conviction and sentencing under Section 304 read with Section 34 IPC is concerned, is dismissed and the conviction and sentencing passed by the trial court is upheld. It is also directed that the period

of incarceration of the surviving accused appellant no.2, Darmesh Yadav would be adjusted in accordance with law and rules.

65. Let a copy of this order be sent forthwith alongwith the lower court record to the court concerned for consignment and compliance. It is also directed that appellant no.2, Darmesh Yadav would appear before the Special Judge (PC Act), Lucknow by 09.10.2023 otherwise Special Judge (PC Act), Lucknow would be under obligation to issue process to arrest the convict-appellant no.2, Darmesh Yadav and send him jail to serve rest of the sentence.

Order Date :- 27.09.2023
Shahroz/Anurag

(Umesh Chandra Sharma,J.)