

Court No. - 47

Case :- CRIMINAL APPEAL No. - 1180 of 2014

Appellant :- Shahnawaj

Respondent :- State of U.P.

Counsel for Appellant :- Atul Kumar, Kripa Shanker Singh, Maohammd Nadeem, Mohammad Wadood

Counsel for Respondent :- Govt. Advocate

Hon'ble Siddharth, J.

Hon'ble Avnish Saxena, J.

(Per Justice Avnish Saxena)

1. Heard S/Sri Mohd. Samiuzzaman Khan, Chandra Bhushan and Mohammad Wadood, learned counsel for the appellant, learned A.G.A. for the State and perused the record.

2. Present criminal appeal has been preferred by accused-appellant, Shahnawaj, who has been held guilty for the offence under Sections 148 and 364-A I.P.C. by the judgement and order dated 07.02.2024 passed by the court of Additional District and Sessions Judge, Court No.15, Muzaffar Nagar in Sessions Trial No.846 of 2011 (State Versus Shahnawaj son of Akhtar), arising out of Case Crime No.200 of 2002 under Sections 147, 148, 149, 364-A and 302 I.P.C., Police Station Chhapar, District Muzaffar Nagar.

3. The learned trial court has recalled the charge of Section 302 I.P.C. as the same was not considered to be required in the light of accusation made under Sections 148 and 364-A I.P.C. The order in exact words is reiterated as, “.....जहां तक धारा-302 भा०दं०सं० के आरोप का सम्बन्ध है तो यह आरोप धारा 364 ए भा०दं०सं० में समाहित है। अतः धारा 302 भा०दं०सं० के आरोप के लिये दोषसिद्ध करने की आवश्यकता नहीं है। अतः धारा 302 भा०दं०सं० का आरोप वापस लिया जाता है।”

4. For the offence under Section 364-A I.P.C. the accused is imprisoned for life and directed to pay a fine of Rs. 10,000/-, in default whereof an additional incarceration of ten months and for offence under Section 148 I.P.C. the rigorous imprisonment to two years and Rs.1000/- fine, in default

whereof one month additional incarceration. The sentences were directed to run concurrently and set off period already undergone in the case.

5. The chick F.I.R. dated 10.10.2002 (Ext. Ka-2) got registered by Satish Kumar (PW-1) against six named and two anonymous persons, namely, Shaukeen son of Akhtar, Shahnawaj son of Akhtar (appellant), Nisar son of Akhtar, Jullu son of Hanif alias Chauda, Rizwan son of Kallu, Hasan son of Hanis lodged at Police Station Chhapar, District Muzaffar Nagar at 11.30 a.m. with the allegation that on 10.10.2002 at about 8 a.m. the informant was ploughing his field by tractor and his father Vishnudutt Tyagi was sitting on the boundary of the field. At 8 a.m. eight miscreants came out from the sugarcane field carrying firearm. He has recognized all of them, who were of his village. Two unknown persons were also with them, who could be identified, when came in front of informant. The accused came near the informant on which he sprinted away alighting from the tractor, making hue and cry. The miscreants then had caught hold of his father. On hearing the hue and cry of informant, Ramesh Chandra son of Kashi Ram, Bindu Kumar son of Jitendra Kumar and Rakesh son of Bijendra of the village along with other villagers came. They had challenged the accused and chased them, calling for more help. The miscreants being surrounded by the villagers, at 9.30 a.m. in the field of Dharmvir son of Kadam, resident of Falaund, killed the father and sprinted away towards the forest as the sugarcane crop was standing, the miscreants could not be apprehended. The dead body of father of the informant was lying on the place of incident.

6. After registration of F.I.R., the inquest (Ext. Ka-11) has been carried out on 10.10.2002 from 12.30 p.m. to 2 p.m. in the presence of inquest witnesses, Prem Prakash Tyagi, Sudhir Kumar, Dharmvir Tyagi and Chintamani, wherein it is mentioned that the deceased Vishnudutt Tyagi died due to gunshot injury, but to ascertain the cause of death, the dead body of the deceased was sent for postmortem examination.

7. Constables Jagdish and Mayaram took the dead body of Vishnudutt Tyagi to District Hospital, Muzaffar Nagar, where Dr R. Kumar had

conducted the postmortem examination on 10.10.2002 at 4.30 p.m. It is found that the death of the deceased was nearly one-fourth day prior to the postmortem examination. Rigor mortis was present all over the body. Bleeding from nostrils and left eye and cause of death was due to shock and haemorrhage as a result of ante mortem injuries. Following ante mortem injuries were found:

- 1.) Gunshot wound of entry of 2 cm x .5 cm x cavity deep on front of top of bridge of nose, an area of 17 cm x 15 cm including both eyes and nose surrounding the wound shown presence of blackening and tattooing. On exploring it, one large yellow metallic bullet recovered from the lower part of larynx in the throat;
 - 2.) Gunshot wound of entry of 3 cm x .5 cm x cavity deep on back of right upper arm, 15 cm below shoulder joint;
 - 3) Gunshot wound of exit of 4 cm x 2 cm x connected with injury no.2 at top of left shoulder, causing fracture of head of left humerus and its scapular joint;
 - 4.) Gunshot wound of entry of 2.5 cm x .5 cm x cavity deep on front of right chest, 14 cm above right nipple at 12 O' clock;
 - 5.) Gunshot wound of exit of 4 cm x 2 cm x connected with injury no.4 on left side of chest, 6 cm from left nipple at 2 O'clock position. On exploring, there is fracture of ribs in front, 3, 4, 5 of right side and 4, 5, 6 of left side.
8. Inspector, Dinesh Singh Bhandari has investigated the case, leading to submission of charge-sheet against, (1) Shaukin, (2) Shah Nawaj, (3) Nisar, (4) Jullu, (5) Hasan, (6) Ehsan, (7) Suleman and (8) Rizwan.
9. It is revealed from paragraph no.36 of the judgement, under challenge, that four of the accused, namely, **Suleman, Rizwan, Nisar and Hasan** had faced trial in Sessions Trial No. 208 of 2004 (State Versus Suleman and others) which ended in acquittal of these accused, as the witnesses of fact including informant turned hostile and stated that these four accused were not involved in the incident as the accused had covered their faces.
10. This acquittal on the basis of hostile witness is dealt here because the accused in the case became less than five, which is a minimum number required for invoking the provision of unlawful assembly. In the case of **Dahari and others Vs. State of Uttar Pradesh {(2012) 10 SCC 256}**, the Supreme Court has dealt with the similar issue and made it amply clear in paragraph nos. 20 and 21 of the judgement that where the number of

accused is less than five then the Court should resort to common intention, but on fulfilment of requirement that there is adequate evidence on record to show that the accused shared a common intention to commit the crime in question. The relevant paragraphs are reiterated underneath:

“20. Undoubtedly, this Court has categorically held that in such a situation, a conviction cannot be made with the aid of Section 149 IPC, particularly when, upon the acquittal of some of the accused, the total number of accused stands reduced to less than 5, and it is not the case of the prosecution that there are in fact, some other accused who have not yet been put to trial. However, it is also a settled legal proposition that in such a fact situation, the High Court could most certainly have convicted the appellants, under Section 302 read with Section 34 IPC.

21. In *Nethala Pothuraju v. State of A.P.* [(1992) 1 SCC 49 : 1992 SCC (Cri) 20 : AIR 1991 SC 2214] this Court while considering a similar case, held that the non-applicability of Section 149 IPC is no bar for the purpose of convicting the accused under Section 302 read with Section 34 IPC, if the evidence discloses the commission of an offence, in furtherance of the common intention of such accused. This is because both Sections 149 and 34 IPC deal with a group of persons who become liable to be punished as sharers in the commission of an offence. Thus, in a case where the prosecution fails to prove that the number of members of an unlawful assembly are 5 or more, the court can simply convict the guilty persons with the aid of Section 34 IPC, provided that there is adequate evidence on record to show that such accused shared a common intention to commit the crime in question.”

Therefore, the Court has to see through evidence whether the appellant has a role and whether there exists any meeting of mind with any other accused to commit crime.

11. In this case, statements of Satish Kumar was recorded as PW-1 and of Ramesh Chand was recorded as PW-2, as witnesses of fact, whereas constable Ravindra Kumar has been examined as PW-3, the scribe of chick F.I.R and G.D. No. 21 dated 10.10.2002 (11.30 a.m.), Dinesh Singh Bhandari, the Investigating Officer of the case was examined as PW-4. Abdul Aziz Khan, Chief Pharmacist deposed as PW-5, who has proved the postmortem examination report as secondary evidence. Record further reveals that constable Rizwan Ahmed has proved Ext. 11-15 by way of secondary evidence of Inspector Dinesh Singh Bhandari, which are the inquest report and other documents prepared by Dinesh Singh Bhandari pertaining to sealing of dead body and preparation of documents which were sent for postmortem examination along with the dead body.

12. The judgement, under challenge, is silent about trial of remaining three accused, who were also charge-sheeted.

13. It is revealed from the deposition of formal witnesses and PW-1 that it is the photocopy of the documents which have been exhibited, though its original is in the record of Sessions Trial No. 208 of 2004 (State Versus Suleman and others). Photocopy cannot be exhibited and the procedure for proving original documents is provided under Rule 33 of General Rules (Criminal), 1977. The Rule 33 is quoted underneath:

“33. Use of document exhibited in another record.

- When a document in any record, civil or criminal, is made an exhibit in another record, civil or criminal, and is removed to that record, a certified copy of the document shall be retained in the record from which the document is removed, and a note of the removal made on the general index and the order-sheet. The certified copy shall be prepared by the Court reader or ahlmad, and shall be signed by the Presiding Officer of the Court. After the decision of the appeal or after the expiry of the period of appeal, if no appeal has been brought, the document shall be returned to the record of which it originally formed part, its place being taken by the certified copy.”

14. Learned counsel for the appellant has submitted that the trial court has convicted the appellant for the offence under Section 364-A I.P.C. in the light of common object provided under Section 148 I.P.C., which is not established by the prosecution. Moreover, four accused, out of eight charge-sheeted have been acquitted by the trial court on the basis of hostility of witnesses of fact, due to which the case of the appellant did not qualify as being a member of unlawful assembly provided under Section 141 I.P.C., as it requires the assembly of five or more persons. It is further contended that the trial court has taken into consideration the acquittal recorded in Sessions Trial No. 208 of 2004, but despite that convicted the appellant. It is further contended that learned trial court has relied upon the statement of witnesses of the fact, who are neither reliable nor trustworthy and are related witnesses. The conviction of the appellant has been recorded on the basis of statement of witnesses of fact recorded in the examination-in-chief without considering the material discrepancies in the cross examination and the corroborative evidence on record. The informant, son of the deceased, has made improvement in his deposition

before the court, and therefore, cannot be relied. Even the ingredient of ask for ransom required by section 364-A I.P.C. has not been proved by the prosecution witnesses. Proper appreciation of evidence has not been made by learned trial court. The conviction of the appellant is bad in eye of law and is liable to be set aside. Learned counsel for the appellant has relied upon following cases:

- i) **Ram Singh Versus The State of U.P., (2024) 4 SCC 208**
- ii) **Ashish Kumar Versus State of U.P. (2021) 1 ADJ 522**
- iii) **Pitchu Mani @ Pitchai Mani Versus State Represented by the Inspector of Police, 2025 SCC OnLine SC 1496**

15. Per contra, learned A.G.A. submits that the father of the informant has been abducted by the appellant along with other miscreant, who have been identified by the informant, as he was present at the place of incident. The evidence is clear that combing operation has been carried out by the police to apprehend the miscreants to save the abductee, but the appellant and other miscreants had committed murder of the abductee, whose dead body was recovered from the field and they sprinted away. The F.I.R. was lodged promptly against the named accused, who had a role in the incident, having criminal history to committing such type of crime and the appellant was indulged in crime of abduction for ransom. He further contended that the trial court has considered the acquittal of co-accused and found that the role of the appellant is clear and explicit in view of the statement of eye-witnesses. It is further contended that the accused-appellant was absconding, which led to separation of his trial in year 2011 and the conviction is recorded after trial.

16 This Court has taken into consideration the rival submissions made by the parties and perused the record.

17. The F.I.R. Ext. Ka-2 reveals that the incident occurred on 10.10.2002 at 8 a.m. when the informant Satish Kumar was ploughing his field by tractor and his father was sitting on the boundary of the field. Satish Kumar, PW-1 deposed before the trial court that 8 accused came out from sugarcane field at 8 a.m. They initially came towards PW-1, but he alighted

from the tractor and ran away, making hue and cry. He then stated that the miscreants had taken his father. The accused were having countrymade pistols in their hand. In his examination-in-chief he has stated that Shahnawaj and Shaukin were bare faced and remaining accused had covered their faces. It is further stated that it is Shahnawaj and his brother Shaukin who had held hands of his father and dragged him. This fact regarding covering of face by miscreants, other than Shahnawaj and Shaukin is mentioned. On the contrary, the names of all the six accused have clearly been mentioned in the F.I.R. Even unnamed two accused were also shown bare faced, who were made identifiable and the charge-sheet was submitted against eight named accused.

18. It is also noteworthy that PW-1 in his statement has stated that the police nearly 100 in number came to the place of incident and they have also chased the accused. Dinesh Singh Bhandari, PW-4 has also stated that the police had chased the accused from 8.30 a.m. to 10.30 a.m. but the accused had sprinted away in the forest. It is further stated by this witness that there were 30-35 police personnel. Chasing of the accused by the police is not mentioned in the F.I.R. There are two site-plans, Ext. Ka-7 and Ext. Ka-8 proved by Dinesh Singh Bhandari, PW-4. One is the place from where 8 accused had abducted the abductee and another place is where the dead body was recovered. Both these site-plans are silent on the point of distance covered by the accused along with abductee. Ext. Ka-7 reveals that point "A" is the place, where the father of the informant was abducted and the point "B" is the place where the informant ran away. The distance between two points is five paces. Ramesh Chand, PW-2 who is stated to be eye-witness of the incident, deposed that he came to the place of incident from where Vinshnudutt Tyagi was abducted after hearing the shrieks of informant, but the place of PW-2 is not shown in the site-plan.

19. Both the witnesses of fact have stated that the abduction was for the purpose of ransom. The entire prosecution is silent about the amount of ransom and when the ransom was asked for and from whom?

20. Learned trial court has not appreciated the evidence on record, which is apparent from the fact that the trial court has considered the shoe recovered from the place of incident to be the shoe of abductee, though the shoe which was recovered from the place of incident is stated to be of one of the miscreants and proved by the prosecution.

21. There is not even an iota of doubt that Vishnudutt Tyagi, the father of the informant died due to gunshot injuries and the dead body was recovered from the chakroad in the field of Dharmvir, but the point of concern is whether the accused has committed the crime of the abduction for ransom and subsequent death of the abductee by the appellant either being a part of unlawful assembly, the common object of which is of taking ransom and committing murder or it is a common intention of accused..

22. In the trial only accused-appellant has been convicted. The judgement is silent in respect to three other co-accused and about the status of their trial, but four of the named accused had been acquitted on the basis of statement of informant, Satish Kumar PW-1, when he has stated that except two persons all the remaining six had covered their face, and therefore, they cannot be identified. This statement has cast doubt on the veracity of F.I.R. as well as trustworthiness of witnesses of fact. Moreover, the accused are of same village. There is statement of the accused recorded under Section 313 Cr.P.C. that the accused were falsely implicated due to party politics.

23. The Investigating Officer has collected bullets, pellets from the place of the incident and one of bullet is recovered from the body of the deceased, but no F.S.L. report is called for. There is no recovery of firearms from the accused.

24. It is a settled principle of law that the scrutiny of interested witnesses should be carried out with circumspection. A Three-Judge Bench of Supreme Court in **Jaikam Khan v. State of U.P., (2021) 13 SCC 716** notes:

“28.....No doubt that, merely because the witnesses are interested and related witnesses, it cannot be a ground to disbelieve their

testimony. However, the testimony of such witnesses has to be scrutinised with due care and caution. Upon scrutiny of the evidence of such witnesses, if the court is satisfied that the evidence is creditworthy, then there is no bar on the court in relying on such evidence.”

25. The role of the present accused-appellant as stated by Satish Kumar, PW-1 in his deposition does not find place in the F.I.R., because in the F.I.R. role of all eight accused was identical.

26. Therefore, considering totality of facts, evidence and circumstances of the case, this Court is of the view that the accused is liable to be acquitted in Sessions Trial No.846 of 2011 (State Versus Shahnawaj son of Akhtar), arising out of Case Crime No.200 of 2002 under Sections 147, 148, 149, 364-A and 302 I.P.C., Police Station Chhapar, District Muzaffar Nagar.

26. The appeal is accordingly, **allowed**. The conviction and sentence of the accused appellant, Shahnawaj recorded by the trial court is hereby set aside. The accused appellant is in jail. He shall be set at liberty subject to compliance of Section 437-A, Cr.P.C., if he is not wanted in any other case.

27. The office is directed to send a copy of this judgment to the court concerned forthwith for ensuring necessary compliance. Records of the court below be transmitted back forthwith.

Order Date :- 30.7.2025

MN/-

(Avnish Saxena,J.) (Siddharth,J.)