

AFR
RESERVED

Case :- CRIMINAL APPEAL No. - 549 of 1983

Appellant :- Kanta

Respondent :- State of U.P.

Counsel for Appellant :- H.R. Misra, Amicus Curiae, Pankaj Kumar Asthana, Vrindavan Mishra

Counsel for Respondent :- A.G.A.

Hon'ble Vikram D. Chauhan, J.

1. Heard Sri Pankaj Kumar Asthana, learned Amicus Curiae for the appellant, learned A.G.A. for the State and perused the record.

2. The present appeal is filed challenging the judgement dated 18th February, 1983 passed by the Special and Additional Sessions Judge, Ghazipur in Sessions Trial No. 143 of 1982 (State Vs. Kanta and others), whereby the Appellant – Kanta has been convicted under Section 304 of the IPC and has been sentenced for three years rigorous imprisonment under Section 304 (II) of the IPC.

3. As per the prosecution case, on 27th October, 1981, at about 11:00 a.m., complainant – Chandrajeet lodged a First Information Report at Police Station Qasimabad, District Ghazipur being Case Crime No. 161 under Section 304 of the IPC against Kanta Yadav (Appellant), Rama Shankar Yadav and Sudarshan. The prosecution case as per the First Information Report is to the effect that the complainant was resident of

Village Bhatpura under Police Station Qasimabad. On 26th October, 1981, at about 12 noon, there was heated argument between the complainant and his nephew Sudarshan with regard to selling of agricultural land jointly belonging to the complainant and his nephew Sudarshan. The nephew of the complainant was selling the agricultural land and the complainant was asking him not to sell the land and there was heated argument between them and even abusive language was used. In the meantime, the Appellant – Kanta Yadav and Rama Shankar Yadav who are sympathisers of Sudarshan came and started abusing the complainant in favour of Sudarshan and when the complainant asked them not to use abusive language then the mother of Laxmi Shankar came to defuse the situation. Sudarshan caught the mother of Laxmi Shankar and Rama Shankar caught the complainant. Thereafter, Appellant – Kanta Yadav took 'Faruhi' in his hand to assault the complainant, however, Laxmi Shankar came in between to save the complainant and as such 'Faruhi' hit Lakshmi Shankar on his head. Laxmi Shankar on being hit on the head fell down and was taken to Dr. Shreekant who gave him first aid and thereafter Laxmi Shankar was talking normally and as such the complainant thought that he was out of danger and did not take him to hospital. At about 11:00 p.m. Laxmi Shankar died on account of injury. As the death occurred in the late night as such the police could not be informed and the First Information Report was lodged on 27th October, 1981.

4. The First Information Report was scribed by Ram Chandra, son of Sri Kishun and the same was lodged as Case Crime No. 161 under section 304 IPC. The Panchayatnama of

the deceased (Laxmi Shankar) was held on 27th October, 1981 and according to the Panchayatnama the death of the deceased has occurred on account of head injuries.

5. The post-mortem examination of the deceased was held on 28th October, 1981 at 1:45 p.m. The post-mortem examination was conducted by Dr. K.K. Srivastava. As per the post-mortem report, the deceased died due to head injury caused by anti-mortem injury no 1. The deceased sustained the following external injuries as per the post-mortem report :-

“1. Horizontal incised wound 5cm x 1cm x brain deep on the left side of skull, 8 cm above the root of left ear. Blood clot and a little brain substance present. The wounds painted yellow and is unstitched.”

6. After investigation, the Investigating Officer has submitted a chargesheet against the accused person under Section 304 IPC. The trial court on 3rd December, 1982 framed charge against the appellant under Section 304 IPC. It is to be noted that the charge against co-accused Ramashankar and Sudarshan was also framed under Section 304 read with section 34 IPC. However in the impugned judgment, the aforesaid two accused person namely Ramashankar and Sudarshan have been acquitted of the charge under Section 304 read with Section 34 IPC. The Appellant denied the charges and claimed to be tried.

7. The prosecution produced five witnesses in support of the prosecution case :-

a) Chandrajeet (P.W.-1) : Chandrajeet is the informant and the eyewitness of the alleged incident. He has stated before the trial court that he is a resident of Village

Bharpura. The door of his house is towards east. Adjacent to his house is Neem tree and Mariaya. In the north of his house, the house of Shambhoo and Sudama exists. He has stated that they are brothers and their names are Kishun, Doodhnath, Chandrajeet and Shiv. The son of Shri Kishun is Ram Chander (Scribe of FIR). Laxmi Shankar – deceased is son of his brother Shiv. Rama Shankar is nephew of accused-appellant Kanta. He has also stated that Kanta and Rama Shankar are friend of Sudarshan. He has further deposed that in the village consolidation operation has been concluded. Joint Chak was carved out in the name of complainant and his brothers. Sudarshan wanted to sell the agricultural land and the complainant did not want Sudarshan to sell the joint ownership land. About 14 to 15 months prior to the deposition there was heated arguments and abusive language used between the complainant and Sudarshan with regard to the selling of the agricultural field, in front of the house of the complainant and in the meantime the co-accused Rama Shankar and Kanta came to the aforesaid place and started using abusive language and the witness asked them not to use abusive language and thereafter Laxmi Shankar and his mother came to the place and Kanta hit Laxmi Shankar with 'Faruhi' on his head. It is further stated that the 'Faruhi' was used by Kanta to attack the complainant, however, the same hit Laxmi Shankar as he tried to save the complainant. The 'Faruhi' hit the head of Laxmi Shankar. On receiving injuries on the head, Laxmi Shankar fell down and deceased was provided medical aid by Dr. Shreekant and

Laxmi Shankar was speaking but later on his condition became serious and he died at 11:00 p.m. in the night. He further stated that the First Information Report was scribed by his nephew Ramchandra on the dictation of the complainant. The written report is Exhibit Ka-1.

- b) Dr. K.K. Srivastava (P.W.-2) : The said witness has stated that on 28th October, 1981 he was posted at Sadar Hospital Ghazipur. At about 1:45 p.m. the body of the deceased Laxmi Shankar was brought by Sepoy Hardev Singh. He has conducted the post-mortem of the deceased on the said day and the following injuries were found on the body of the deceased :-

“1. Horizontal incised wound 5cm x 1cm x brain deep on the left side of skull, 8 cm above the root of left ear. Blood clot and a little brain substance present. The wounds painted yellow and is unstitched.”

He has further deposed that the deceased would have died on 26th October, 1981 at 11:00 p.m. and has proved the post-mortem report being Exhibit Ka-2. He has further stated that the injuries could have been sustained by ‘Faruhi’.

- c) Banarsi (P.W.-3) : the said witness was declared hostile by the trial court as initially the said witness corroborated the prosecution case however later on he has stated that he reached after the occurrence.

d) H.C. Shri Niwas Mishra (P.W.-4) : The said witness has stated that he was posted at the concerned police station as Head Constable. He has further submitted that he had received the First Information Report being Exhibit Ka-1. On the basis of the aforesaid First Information Report, he had prepared Chik FIR and same was marked as Exhibit Ka-3. The said witness has proved the First Information Report.

e) Suryabali Singh (P.W.-5) : The said witness has stated that in October 1981 he was posted as Station House Officer, Police Station – Qasimabad. On 26th October, 1981 at 11.00 a.m. he was present at the police station when the FIR was lodged. The statement of the informant was recorded on the same day. He reached the place of occurrence at 1:20 p.m. The Panchayatnama of the deceased was done on the same day. The said witness has proved the contents of the Panchayatnama as Exhibit Ka-5. The body of the deceased was sent for post-mortem. The site plan of the incident was prepared on 27th October, 1981. The chargesheet was filed against the said accused.

8. It is submitted on behalf of the learned Amicus Curiae that the Prosecution Witness No. 1 has stated that the deceased sustained injury by 'Faruhi' which was made of wood but he could not know about 'Faruhi' after the incident and as such the presence of Prosecution Witness No. 1 on the spot is doubtful. It is to be noted that the place of occurrence was a public place and as per the statement of the Prosecution Witness No. 1 the 'Faruhi' was lying at the place of occurrence and the aforesaid

was not brought by the accused person. After the alleged incident, the deceased was taken for medical aid by the Prosecution Witness No. 1 and as such the fact that the aforesaid witness has no knowledge with regard to whereabouts of the 'Faruhi' after the occurrence will not demolish the prosecution case where the testimony of the Prosecution Witness No. 1 is trustworthy and reliable. It is further submitted by learned Amicus Curiae that during investigation 'Faruhi' (weapon used for assault) was not recovered from the place of occurrence by the Investigating Officer. It is to be noted that 'Faruhi' was taken by the accused person from the place of occurrence and was not brought by the accused person with premeditated mind. The alleged occurrence took place on 26th October, 1981 at 12:00 noon and the death of the deceased occurred on the same day at 11:00 p.m. and the First Information Report was lodged on 27th October, 1981 and thereafter the Investigating Officer visited the site on 27th October, 1981 at 12:00 noon and prepared the site plan. The place of occurrence was a public place and as such the scene of occurrence would have changed and on the aforesaid grounds, the prosecution case cannot be rejected. It is also to be noted that where the prosecution evidence is otherwise reliable mere non-recovery of the weapon of assault would be of no consequence.

9. It is further submitted by learned Amicus Curiae on behalf of the appellant that no blood was found on the spot where the incident is alleged to have occurred and as such the manner in which occurrence has taken place is highly doubtful. He submits that as per the prosecution case the 'Faruhi' was

wielded on the deceased and as a result of the same, the deceased suffered injuries including injuries in the head. He submits that from perusal of the injuries sustained by the deceased would indicate that the blood would have oozed out from the injury sustained by the deceased. However, the Investigating Officer has neither declared the spot where the blood stains were found in the site plan nor any blood stain soil was recovered from the place of occurrence and the same is indicative of the fact that the manner in which the occurrence has been stated by the prosecution to have taken place is highly doubtful. It is to be noted that the place of occurrence is a public place and the incident is alleged to have taken place on 26th October, 1981 at 12:00 noon and the First Information Report was lodged on 27th October, 1981 and thereafter the Investigating Officer has visited the place of occurrence on 27th October, 1981 i.e. after 24 hours of the alleged occurrence. The aforesaid time gap is of material significance as the place of occurrence was a public place and the scene of occurrence would have changed with the lapse of time. It is further to be noted that the Prosecution Witness No. 1 in his testimony has stated that the blood stains were there on the soil of place of occurrence. However, he has stated that the blood was licked by the local dogs and as such the same was not found when the Investigating Officer visited the place of occurrence. It is to be noted that the absence of blood on the spot is of no consequence in the facts and circumstances of the case where there is no doubt with regard to actual occurrence having taken place and about the place where it took place. It is emerging from the record that the place was an open public place accessible to the public at large and plausible explanation has

been given by Prosecution Witness No. 1 with regard to non-availability of blood stains when the Investigating Officer visited the place of occurrence and as such the prosecution story cannot be discarded on the aforesaid ground. In **Narendra Nath Khaware Vs. Parasnath Khaware and others**, (2003) 5 SCC 488, the Apex Court has taken note that where the place of occurrence was a courtyard open to sky and it was a rainy day, the blood stains could have washed away and as such non-recovery of blood stains from the place of occurrence will be of no consequence. In **Hari Har Singh and others Vs. The State of U.P.**, (1975) 4 SCC 148, the Apex Court has observed that where the place of incident was a public place, by trampling of the feet of the passers-by, stains of blood must have vanished and as such the Apex Court has held that the non-recovery of the blood stains from the place of occurrence is of no consequence. The Apex Court in **Gaya Yadav and others Vs. State of Bihar and others**, (2003) 9 SCC 122 has taken note that the incident had taken place in a public place and as such the trail of blood would get disintegrated when the incident had occurred at about 7:45 p.m. and the Investigating Officer arrived at the place of incident only at 11:30 p.m. and as such, the Supreme Court has held that there would be no trail of blood left on the arrival of the Investigating Officer.

10. In **State of Rajasthan Vs. Satyanarayan**, (1998) 8 SCC 404 has held as under :-

“7. Merely because no blood was found near the house of the respondent, it cannot be said that no incident took place there. The fact that Kesar Lal had received a knife blow near his house was admitted by the accused though according to him the knife was with PW 2- Satyanarayan

and not with him. As the trial court has pointed out, the place was a public road and there was a lot of traffic on that road. That could have been the reason why no blood was found when the spot panchnama was made after a few hours. Moreover, the evidence discloses that intestines of Kesar Lal had come out and that could have blocked the flow of much blood. Some blood was absorbed by the clothes. Therefore, the circumstances that not sufficient blood was noticed when the spot panchnama was made should not have been utilised by the High Court for holding that the prosecution version was not correct and that the defence version was more probable.”

11. In **Ram Swaroop and others Vs. State of U.P., (2000) 2 SCC 461** has held as under :-

“12. According to the learned counsel for the appellants, as no blood had collected or found on the platform, it is a serious infirmity in the case for the prosecution. This point was also urged before the High Court and the High Court rightly rejected this point on the ground that the victims were immediately taken to the police station and people were also moving here and there at the place of the occurrence. Therefore, by the time investigating officer went to the place, even if blood had fallen on the ground, the officer could not have collected the blood.”

12. It is further argued by the learned Amicus Curiae on the behalf of the appellant that the injury could have been sustained from ‘Gandasa’ and the prosecution case that the injury was sustained from ‘Faruhi’ is highly doubtful. It is undisputed that Laxmi Shankar died due to head injury and the Prosecution Witness No. 2-Dr. K.K. Srivastava has deposed that Laxmi Shankar died due to head injury sustained and his death was possible on 26th October, 1981, at about 11:00 p.m. The post-

mortem report (Exhibit Ka-2) shows that Laxmi Shankar had a horizontal incised wound which was 5 cm x 1 cm x brain deep and the Prosecution Witness No. 2 has further deposed that he has not seen the 'Faruhi' but if it is a sharp instrument, the injury can be caused by it. The Prosecution Witness No. 1 and informant has stated that 'Faruhi' was wielded by the appellant and the deceased Laxmi Shankar had sustained the injuries by 'Faruhi'. It is to be noted that in 'Faruhi' the blade is attached horizontally to the main handle which is generally a small 'lathi' and in 'Gandasa' the blade is vertical and parallel to the 'lathi' in which it is attached. The incised wound could not have been caused by 'Gandasa' when the assault is made from the front. It is further to be noted that the Prosecution Witness No. 2 has deposed that the bone was not found cut but it was fractured and the aforesaid facts and circumstances exclude the possibility of use of 'Gandasa' as has been argued by the learned Amicus Curiae for the appellant. The fact that the Prosecution Witness No. 2 has stated that the injury in question was more probable by 'Gandasa' does not appear to be correct as the skull of the deceased was found fractured and the Prosecution Witness No. 2 has himself stated that he has not seen the 'Faruhi'. The trial court has recorded the finding that the injury in question was caused by 'Faruhi' and the same is supported by deposition of Prosecution Witness No. 1- Chandrajeet and PW-2 – Dr K.K. Srivastava and as such there is no perversity in the finding of the trial court. The aforesaid submission of learned Amicus Curiae for the Appellant is not tenable in law.

13. It is submitted on behalf of the learned Amicus Curiae for the appellant that there is delay in lodging the First Information Report and the prosecution case should be rejected on this ground alone. It is to be seen that the occurrence took place on 26th October, 1981 at about 12:00 noon and the First Information report was lodged on 27th October, 1981 at 11.00 a.m. As per the First Information Report the distance of the police station and the place of occurrence is about eight miles. It is further to be noted that as per the prosecution case after the alleged incident the deceased was taken for medical aid to a local doctor and the informant thought that since the deceased was talking normally, he was out of danger. However, the deceased died in the night of 26th October, 1981 at 11:00 p.m. and thereafter the First Information Report has been lodged on next day morning at 11.00 am. It is further to be noted that the complainant had to implicate his nephew and person with whom he had no direct enmity and the manner in which the occurrence have taken place and even subsequent thereof that the injured was taken for medical aid and was normal for sometime after providing medical aid and thereafter has died at 11.00 p.m. in the night. There is no inordinate delay and the delay has been duly explained by the prosecution and as such the argument of the learned Amicus Curiae for the appellant is not tenable under law.

14. It is further submitted by learned counsel for the Appellant that the First Information Report was prepared in consultation with the police and as such the same should be ignored. The Prosecution Witness No. 1-Chandrajeet has testified that he had dictated the First Information Report at his

house after arrival of the police but not at the dictation of the police. The Prosecution Witness No. 4-H.C. Sri Niwash Misra had deposed that the First Information Report was made over at the police station and it was not prepared at the dictation of the police. The scribe of the First Information Report was Ramchander. Even if the First Information Report was scribed after arrival of the police that by itself would not make the First Information Report as has been prepared at the dictate of the police and the trial court has recorded a specific finding that the First Information Report was not lodged at the dictation or instigation of the police and no fault is found with the aforesaid finding of the trial court.

15. It is further submitted that there is no independent witness of the alleged occurrence. It is submitted that Prosecution Witness No. 1-Chandrajeet was relative of the deceased and as such there being no independent witness of the alleged occurrence, the prosecution story is not reliable and the evidence related witness is not trustworthy and is liable to be rejected.

16. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. It is worthy

to note that there is a distinction between a witness who is related and an interested witness. A relative is a natural witness. The Apex Court in **Kartik Malhar Vs. State of Bihar, (1996) 1 SCC 614** has opined that a close relative who is a natural witness cannot be regarded as an interested witness, for the term “interested” postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason.

17. Merely because the witnesses are family members their evidence cannot *per se* be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. There is no bar in law on examining family members as witness. Evidence of a related witness can be relied upon provided it is trustworthy.

18. The Supreme Court in **State of Uttar Pradesh Vs. Samman Dass, (1972) 3 SCC 201** observed as under :-

“23...It is well known that the close relatives of a murdered person are most reluctant to spare the real assailant and falsely involve another person in place of the assailant...”

19. In **Khurshid Ahmed Vs. State of Jammu and Kashmir (2018) 7 SCC 429**, the Supreme Court on the issue of evidence of a related witness observed as under :-

“31. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused.”

20. The Apex Court in **Mohd. Rojali Ali and others Vs. State of Assam, (2019) 19 SCC 567** in respect of related witness has observed as under :-

“13. As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now well-settled that a related witness cannot be said to be an “interested” witness merely by virtue of being a relative of the victim. This Court has elucidated the difference between “interested” and “related” witnesses in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see *State of Rajasthan v. Kalki [(1981) 2 SCC 752 : 1981 SCC (Cri) 593]* ; *Amit v. State of U.P. [(2012) 4 SCC 107 : (2012) 2 SCC (Cri) 590]* ; and *Gangabhavani v. Rayapati Venkat Reddy [(2013) 15 SCC 298 : (2014) 6 SCC (Cri) 182]*. Recently, this difference was reiterated in *Ganapathi v. State of T.N. [(2018) 5 SCC 549 : (2018) 2 SCC (Cri) 793]*, in the following terms, by referring to the three-Judge Bench decision in *State of Rajasthan v. Kalki [(1981) 2 SCC 752 : 1981 SCC (Cri) 593]* : *(Ganapathi case [(2018) 5 SCC 549 : [(2018) 2 SCC (Cri) 793]*, (SCC p. 555, para 14).

“14. “Related” is not equivalent to “interested”. A witness may be called “interested” only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be “interested”.”

14. In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal cases was made by this Court in *Dalip Singh v. State of Punjab* [1954 SCR 145 : AIR 1953 SC 364 : 1953 Cri LJ 1465], wherein this Court observed: (AIR p. 366, para 26)

“26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relative would be the last to screen the real culprit and falsely implicate an innocent person.”

15. In case of a related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and consistent. We may refer to the observations of this Court in *Jayabalan v. State (UT of Pondicherry)* [(2010) 1 SCC 199 : (2010) 2 SCC (Cri) 966] : (SCC p. 213, para 23)

“23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of

the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.” ”

21. The Apex Court in **Kulwinder Singh and another Vs. State of Punjab, (2015) 6 SCC 674** held that the case of the prosecution cannot be rejected solely on the ground that independent witnesses have not been examined when, on the perusal of the evidence on record the Court finds that the case put forth by the prosecution is trustworthy. When the evidence of the official witnesses is trustworthy and credible, there is no reason not to rest the conviction on the basis of their evidence.

22. It is held in recent judgement rendered in **Surinder Kumar Vs. State of Punjab, AIR 2020 Supreme Court 303** that merely because prosecution has not examined any independent witness, same would not necessarily lead to the conclusion that the appellant has been falsely implicated.

23. In view of the law laid down by the Apex court, the plea of the Appellant that there is no independent witness to support the prosecution case is not tenable in law and is liable to be rejected.

24. This court does not find any illegality, infirmity and perversity in the impugned judgement passed by the trial court convicting and sentencing the Appellant for the offence. The

conviction and sentence awarded by the trial court is in accordance with law and needs no interference.

25. As a result, the present appeal lacks merit and is dismissed.

26. Registrar General of this Court is directed to pay an honorarium of **Rs. 20,000/-** to Sri Pankaj Kumar Asthana, learned Amicus Curiae for rendering effective assistance in the appeal.

27. The bail bond of the Appellant stands cancelled and the Appellant is directed to surrender before the court below for serving the sentence as per trial court judgment.

28. Let the lower court record be transmitted back to court below along with a copy of this order.

Order Date :- 26.08.2022

VMA

(Vikram D. Chauhan, J.)