A.F.R.

Judgment Reserved on 17.08.2022

Judgment Delivered on 08.09.2022

Court No. - 48

Case :- JAIL APPEAL No. - 2994 of 2010

Appellant :- Shamshad

Respondent :- State of U.P.

Counsel for Appellant :- From Jail,Mithilesh Tiwari,Satyaveer Singh (A.C.)

Counsel for Respondent :- A.G.A.

Hon'ble Suneet Kumar,J.

Hon'ble Mrs. Jyotsna Sharma,J.

(Per Mrs. Jyotsna Sharma,J.)

1. Heard Sri Satyaveer Singh, learned Amicus Curiae appearing for the appellant and Sri Vikas Goswami, learned A.G.A. for the State.

2. This is an appeal against the judgment and order dated 13.04.2010 passed by learned Additional District and Session Judge/F.T.C.-3, Bijnor in Session Trial No. 638 of 2009 (State vs. Shamshad) in Case Crime No. 920 of 2009 under Section 302 IPC, Police Station-Afzalgarh, District-Bijnor and sentenced to imprisonment for life and imposed fine of Rs. 1,00,000/- and further imprisonment of three years in default thereof.

3. As per the prosecution case, the lone named accused Shamshad, murdered his pregnant step-mother alongwith her three kids i.e., his step siblings by assaulting them and inflicting injuries on vital parts with an axe on the night of 26.08.2009 at around 10 pm. The FIR was lodged by his own father Abdul Rashid, the same day at 22.45 hours.

4. The prosecution examined two eye-witnesses namely, Chhote and Sirajuddin as PW1 and PW2 respectively, the informant Abdul Rashid as PW4. The prosecution also examined PW9-Ishrar in whose presence the weapon of offence ‘kulhari’ was

retrieved by the accused himself after giving a disclosure statement. The prosecution in all examined ten witnesses and furnished the documentary evidence Exhibit Ka-1 to Exhibit Ka-41.

5. Before proceeding further, it shall be useful to briefly state the FIR version which said that the informant-Abdul Rashid, on returning to his house, found a crowd of people at his doorstep and was told by them that his own son Shamshad, who was in inebriated state assaulted and inflicted wounds by a 'kulhari' on the neck of the informant's wife Chhoti, who had died by then and also inflicted fatal injuries to his children. His daughters Ruksana and Farzana, aged about 12 years and 6 years respectively and 5 years old son Faizan, were found by him lying in an injured condition on the cots. All of them, died before they could avail any medical help in the hospital. It is also mentioned in the FIR that the people of the locality saw the accused Shamshad escaping with 'kulhari' held in his hands.

6. As per the prosecution version, the inquest was carried out on 26.08.2009, the same night from 22:45 onwards and continued till 6:00 am on 27.08.2009 in the precincts of the Hospital. The dead bodies had fatal injuries on their neck, faces and areas around it. As per the opinion of Dr. S.R. Soni PW3, the victims died because of shock and hemorrhage following ante-mortem injuries. The postmortem on all four dead bodies was conducted on 27.08.2009 between 1.30 pm to 3.45 pm and all of them found to have incised wounds on face, neck, skull and other body parts.

7. PW1-Chhotte and PW2-Sirajuddin, the residents of same Village deposed that Chhotte's sister namely, Chhoti, the victim was often harassed by his step-son. They went to her house between 09.40 to 10.00 pm and saw with their own eyes that Shamshad was assaulting the deceased persons with an axe inflicting injuries. When they tried to intervene, he ran towards

them in attacking mode. The witnesses tried to catch hold of him, but he escaped towards the jungle and could not be apprehended.

8. We have gone through the testimony of PW1 and PW2, in the light of the submission of the defence that the above two witnesses are in fact not the eye-witnesses but have been planted by the prosecution to give credence to its version. In our view, in the brief cross-examination done by the defence, nothing has come to lead us to disbelieve their testimony. We cannot scrutinise the testimony of witnesses with an air distrust unless there are some strong indicators compelling the Court to draw a different conclusion. If no material is coming forth to indicate that witnesses may be lying or may be giving a wrong evidence for certain ulterior motives or extraneous reasons, the Court is not supposed to discard such testimony for non-existent or imaginary reasons. In our view, the conclusion drawn by the trial court is based upon the evidence available before it which may be direct or circumstantial and not on conjunctures.

9. PW4-Abdul Rashid, the husband of deceased Chhoti and father of three innocent kids, has deposed that when he returned to his house, he found a crowd of people there and they told him that his son Shamshad escaped holding an axe, soaked in blood. In his cross-examination, he fairly admitted that he did not witness the incident. He did not himself see anybody fleeing from the scene of crime and that he lodged the FIR on the basis of things narrated by the people of the locality present at the spot at that time. This has come in a very brief cross-examination done by the defence.

10. This fact cannot escape attention of the Court that though his whole family got killed but he refrained from giving any exaggerated version. His testimony evokes confidence of the Court and is, in our view, one of the most important pieces of evidence in this case. With regard to his testimony, the

Illustration (a) to Section 6 of the Indian Evidence Act, 1872 is worth notice, which reads as under:-

"*(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.*"

11. Section 6 of the Indian Evidence Act, 1872 makes those facts relevant which though not in issue, are so connected with a fact in issue so as to form part of same transaction, whether they occurred at the same time and place or at different times and place.

12. The Hon'ble Supreme Court in **Sukhar vs. State of U.P. (1999) 9 SCC 507**, discussed several landmark judgments and gave an opinion in-line with settled legal proposition that the statement must be contemporaneous with the act or must have been made immediately thereafter. It is the spontaneity and immediate nature of such statement which makes them admissible and reliable. In **Arjun vs. State of U.P.; 2003 (1) A.Cr.R. 329**, PW2 rushed to the spot on hearing distress cries and gained knowledge through others present there (PW3) that it was the accused appellant who stabbed the victim. His evidence was found admissible under Section 6 of the Indian Evidence Act.

13. The evidence given by PW4 comes within the scope of Section 6 of the Indian Evidence Act. It is such a piece of circumstantial evidence which cannot be ignored. It passes the test of proximity in time and of spontaneity as held in umpteen cases by the Hon'ble Courts. The evidence of PW4 gets intrinsic support from documentary evidence Exhibit Ka-41 which is a Memo prepared by the Police at the time of the arrest of the accused. This paper mentions that at the time of his arrest, there were blood spots on the clothes worn by the appellant. It should be noted that the accused was arrested shortly after the occurrence on 27.08.2009 at 12.30.

14. PW9-Ishrar has given an evidence that alongwith the Police personnels, he went to the place Ghasi Wala Park, Jungle where the vehicle was stopped and the accused retrieved a blood stained axe, hidden inside the bushes at about 1 pm in the afternoon of 27.08.2009, before him.

15. PW10- S.I. Sri Ram has given a similar statement and has also proved Exhibit Ka-40, Memo of recovery and has stated that the blood stained axe was recovered from the spot different from the place of occurrence of crime. The accused himself retrieved the weapon hidden in bushes.

16. Recovery of an article from a place hitherto unknown to anybody else including the investigating officer, is a fact which underlines the confirmation theory which is at the heart of provisions of Section 27 of the Indian Evidence Act. The discovery of facts includes not only the object found but more importantly the place from which it was produced and the knowledge of the accused as to its existence. The importance of disclosure statement and the discovery of fact has been very well examined in **Charan Das Swami vs. State of Gujrat; (2017) 7 SCC 177**. In this case before us, the evidence of PW9 and PW10 further strengthens the prosecution case in the light of the above provisions of law. In our view, the evidence led by the prosecution on this count, is not only admissible and relevant under Section 27 of the Indian Evidence Act but also tantamounts to the evidence of conduct of an accused which too is relevant.

17. The accused was given an opportunity as provided under Section 313 Cr.P.C. to enable him to explain his side and to give explanation, if any, for testimony which came against him implicating him in the crime. However, to all the questions put by the Court, he simply gave a bald reply that the evidence is wrong. He refrained from saying anything else.

18. The Hon’ble Apex Court in **Rafique Ahammad @ Rafi vs. State of U.P.; AIR 2011 Supreme Court 3114**, observed that the

statement under Section 313 Cr.P.C. cannot form sole basis for conviction but certainly it can be a relevant consideration for the courts to examine, particularly when the prosecution has otherwise been able to establish the chain of events.

19. In view of the above, the only conclusion which can be drawn is that perhaps he had no plausible explanation to offer before the Court. Though the fact of non-explanation cannot replace the burden of prosecution to prove its case beyond reasonable doubt, however, where such burden stands discharged fully the defence is expected to offer whatever reasonable explanation it might have. Here there is none, which further strengthens the prosecution case.

20. To sum up the PW1 and PW2 have given the eye-witness account of the incident. The informant, who happens to be the father of the accused (and husband of the deceased-Chhoti and father of rest of the deceased persons, Ruksana, Farzana and Faizan) has given an unimpeachable evidence found relevant under Section 6 of the Indian Evidence Act. An incriminating article i.e., weapon of offence was recovered on the basis of the disclosure statement given by the accused during investigation. The FIR has been lodged with requisite promptness ruling out any probability of embellishment therein. There is no material before the Court to indicate even remote probability of false implication. In our view, there is no infirmity in the conclusion drawn by the trial Court as to the culpability of the appellant.

21. There has been a very faint submission on behalf of the appellant that PW1 and PW9 are not reliable because they happen to be closely related to the informant. In our view, a relationship howsoever close it may be, cannot by itself be a ground to discard the testimony unless there is some material which may have tendency to corrode the credibility of a witness. The court has to examine the evidence in toto to determine whether it has, on the whole a ring of truth. While evaluating the

evidence, it cannot be held to be unworthy of credit just because the witnesses were closely related.

22. This appeal lacks merits and is liable to be dismissed and is hereby **dismissed**. The judgment of the trial court is hereby affirmed. The appellant is in jail. He shall serve out the sentence as awarded by the trial court.

23. Office is directed to certify this order to the court concerned forthwith to ensure compliance and also to send back the lower court record.

Order Date :- 8.9.2022.
Vik/-

Digitally signed by VIKRAM GUPTA
Date: 2022.09.08 16:48:03 IST
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at Allahabad