

Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

THE ACTING CHIEF JUSTICE SHRI SANJAYA KUMAR MISHRA

AND

JUSTICE SHRI RAMESH CHANDRA KHULBE

CRIMINAL APPEAL NO.204 OF 2012

Reserved on: 26.04.2022

Delivered on: 18.05.2022

Between:

Safdar and Another Appellants

Vs.

State of Uttarakhand Respondent

With

CRIMINAL APPEAL NO.27 OF 2013

Between:

Mehar Alam @ Mehar Appellant

Vs.

State of Uttarakhand Respondent

Counsel for the appellants : Mr. Sajjad Ahmad and Mr. Mohd. Umar learned counsels.

Counsel for the State : Mr. J. S. Virk, learned Deputy Advocate General for the State.

Counsel for the private respondent : Mr. Ramji Srivastava, learned counsel.

Upon hearing the learned Counsel, the Court made the following

JUDGMENT: (per Shri Justice Ramesh Chandra Khulbe)

Since the appellants in these appeals were tried together and convicted by the court below vide a

common judgment, hence both these appeals are taken up together and decided by this common judgment.

2. Appellants in these criminal appeals have challenged the judgment and order dated 16.05.2012 passed by the Sessions Judge, Haridwar in S.T. No.294 of 2007, *State vs. Shahnajar and others*, whereby they have been convicted under Section 302 read with Section 34 IPC and each of them was sentenced to undergo imprisonment for life along with a fine of Rs.5,000/-; in default of payment of fine, the defaulter was directed to undergo three months' additional imprisonment.

3. Briefly stated, facts of the case are that on 25.01.2007, Rao Budhan Khan (P.W.1) submitted a written report at P.S. Kotwali Ranipur, Haridwar to the effect that on 24.01.2007 at about 1:30 PM, while he along with his sons Abrar, Karaar and servant Shamim were peeling the sugarcane, two persons came there to extract honey from a honeycomb. When the complainant and his associates stopped those persons not to break the honeycomb to avoid being hurt by the bites of honey bees, those persons began to abuse the complainant and his family members and threatened them of their lives. After that incident, on 25.01.2007 at about 12:00 noon, when the complainant's sons Abrar, Karar and servant Shamim were peeling the sugarcane and the complainant was watering the fields, four persons, including those two who had quarreled on 24.01.2007, at once assaulted complainant's elder son Abrar with a dagger and Gandasa (a sharp edged weapon). On raising an alarm by him, the assailants ran away from there extending a threat to kill them also in future. With these averments, the FIR was lodged. Accordingly, the Chick FIR being Crime

No.22 of 2007 under Section 302 IPC was registered against four persons.

4. The matter was investigated and the I.O., after completing the investigation, submitted the charge sheet against the appellants.

5. After complying with the provisions of Section 207 Cr.P.C, the concerned court committed the case to the Court of Sessions for trial. Accordingly, the concerned Court took the cognizance. Thereafter, the concerned Court framed the charges against the appellants on 30.08.2007 for the offence punishable under Section 302/34 34 IPC, to which they pleaded not guilty and claimed to be tried.

6. To prove its case, the prosecution examined PW1 Rao Budhan Khan (informant), PW2 Rao Shahid Khan, PW3 Khalid, PW4 Karaar Ahmed (eyewitness), PW5 Shamim, PW6 Ali Nawaz, PW7 Dr. J.S. Chufal, PW8 Nafasat Khan, PW9 Inspector Ashok Kumar Arora (I.O.), PW10 Dr. R.S. Chauhan (who conducted autopsy) and PW11 S.I. Ram Babu Arya (I.O. of the case).

7. After completion of the prosecution evidence, statements of appellants were recorded under Section 313 of the Cr.P.C., in which they denied the evidence produced by the prosecution.

8. In defence, no evidence was produced.

9. After hearing learned counsel for both the parties, the trial Court convicted and sentenced the appellants as mentioned in paragraph no.2 of this judgment.

10. Being aggrieved by the judgment and order dated 16.05.2012, these criminal appeals have been preferred by the appellants.

11. The prosecution has proved Rao Budhan Khan (P.W.1) as an eyewitness of the case. By supporting the contents of the FIR lodged by him, he has deposed that on 24.01.2007, two accused persons reached at the spot to break the honeycomb. On being stopped by the complainant's party, they threatened that they would do so even at the cost of someone's life, and they also hurled derogatory abuses. On this, his son scolded those persons due to which they left giving a threat that they are the sons of 'Rohit Pahalwan'. On 25.01.2007, when his sons Abraar, Karaar and servant Shamim were doing work in the field, and he (informant) was also working in the adjacent field, at about 12:30 PM, those two accused persons, who came on 24.01.2007, as well as one more person, reached there. The witness identifying all those three persons in the court, stated that on 25.01.2007 at about 12:30 PM all those three persons came on the spot being armed with weapons; Mehar Alam was armed with a 'Patal', Shahnazar was having a 'Gandasa' and Safdar was having a 'dagger'. Those accused persons with their respective weapons attacked Abrar upon his head. On raising an alarm by the servant Shamim, when he reached on the spot, he saw that the accused persons had cut the head and neck of his son and he had fallen down. The accused persons, while leaving, had also extended a threat to kill in case anyone comes forward. After the incident, he dictated the report of this incident to Rao Sahab and lodged the same at the police station which was registered as Ex.Ka-1. This witness was subjected to a lengthy cross-examination at the hands of defence counsel but nothing substantial could be derived to raise any doubt on the testimony of this witness.

12. Rao Shahid Khan (PW2) is the scribe of the FIR. In his statement, he has deposed that he wrote the report at the instance of Rao Budhan Khan. After writing the same, he read over the report to the informant who had put his thumb impression on the same. He has proved his signatures as also the thumb impression of the informant on the report. He is also a witness of the inquest as he was appointed a 'Panch'.

13. Khalid (PW3) is a witness of recovery of dagger at the instance of appellant Safdar. He has proved his signature on the recovery memo Ex.Ka-10.

14. Karaar Ahmed (PW4) is said to be another son of the informant as also the eyewitness of the occurrence. He has deposed that on 24.01.2007, he along with his brother Abrar, father and servant Shamim were peeling the sugarcane. On that day, at about 1:00 PM, two persons came and started to break the honeycomb. When they stopped them not to do so as the honeybees may bite them, those persons, stating them to be the sons of 'Wahid Pahalwan', began to hurl abuses. His brother Abrar scolded and ran them away, then one out of them stated that they would certainly break the hive and extract the honey. On the next day i.e. on 25.01.2007, he along with his brother Abrar (deceased) and servant Shamim was working in sugarcane field, and his father was doing work in the adjacent field, then the same two persons, who came last day, along with one other person came there and at once, they began to assault his brother by their respective weapons viz. 'Patal, Gandasa and a dagger'. When his brother screamed, they saw that those persons were heavily assaulting his brother. Those persons had cut the neck and head of his brother by their weapons

'Patal, Gandasa and a dagger'. On raising the alarm, his father came running on the spot and when they proceeded to save his brother, the accused persons, brandishing the weapons, challenged that if someone moves forward, he will also suffer the same consequences. In the Court, he identified Safdar and Mehar Alam. This witness was also subjected to a lengthy cross-examination at the hands of defence counsel but nothing substantial could be derived to raise any doubt on the testimony of this witness.

15. Shamim (PW5) is also a person who has given the eyewitness account in the case. This witness has categorically corroborated the evidence of PW1 Rao Budhan Khan as well as PW4 Karaar Ahmed. Narrating the same tale of plucking the honeycomb by the accused persons on 24.01.2007 and being scolded by the Abraar (deceased), he has clearly stated that on 25.01.2007 at about 12:00 noon, the accused persons (appellants) being armed with deadly weapons i.e. 'Patal, Gandasa and a dagger', came on the spot; they surrounded Abrar and assaulted him causing severe injuries on his head and neck. In the court he identified Safdar and Shahnazar. This witness was also subjected to a lengthy cross-examination at the hands of defence counsel but nothing substantial could be derived to raise any doubt on the testimony of this witness.

16. Ali Nawaz (PW6) is also a witness of recovery of murder weapons. He has proved recovery of 'Gandasa' at the instance of appellant-Shahnazar, recovery of 'Patal' by appellant Mehar Alam. He has proved his signature on the joint recovery memo (Ex.Ka-8).

17. Dr. J.S. Chufal (PW7) is the medical officer who medically examined the appellants, namely, Shahnazar

and Mehar Alam on 30.01.2007 and proved their medical reports as Ex.Ka-3 and Ex.Ka-4 respectively.

18. Nafasat Khan (PW8) is a witness of inquest report.

19. PW11 S.I. Ram Babu Arya is the person who conducted the investigation of the case, prepared the spot map and arrested the accused. Subsequently, the investigation was entrusted to the Inspector Ashok Kumar Arora (PW9) who ultimately submitted the charge sheet against the accused which is Ex.Ka-25.

20. Dr. R.S. Chauhan (PW10) is the person who conducted autopsy on the dead body of deceased Abrar on 25.01.2007. The following ante-mortem injuries were found on the body: -

- *“Transverse incised wound on back of head 8cm x 3cm, brain deep grey matter exposed, it is 6 cm above C1.*
- *Incised wound 1cm X 1.8 cm in size, it is over right shoulder.*
- *Incised wound 3cm X 0.7cm in size, 3cm below injury no.2.*
- *Incised wound 3 x 1cm on back of right shoulder.*
- *Incised wound 4 x 1 cm over medial side of left forearm.*

Deep incised wound on back of head (occipital region).

Blood and blood stains trt over scalp head, face and chest.

In the opinion of Doctor, the death was caused by massive haemorrhage and shock due to ante-mortem injuries.”

21. Thereafter, the statements of accused appellants were recorded under Section 313 Cr.P.C. in

which they denied all the allegations levelled against them. However, no evidence, either oral or documentary, was led into defence.

22. We have heard learned counsel for the parties at great length and carefully examined the entire documentary evidence available in the records of the Court.

23. Learned counsel appearing on behalf of the appellants has argued that the prosecution has utterly failed to prove its case against the appellants beyond any reasonable doubt and the appellants are liable to be acquitted.

24. On the other hand, learned Deputy Advocate General appearing for the State as well as learned counsel appearing for the informant has emphatically argued that it is a broad daylight murder brutally committed by the accused persons, even there is direct evidence available on record against the accused persons, and thus, the Trial Court has rightly convicted and sentenced the accused for imprisonment for life.

25. As per the FIR, firstly on 24.01.2007, the appellants – Mehar Alam and Shah Nazar came at the agricultural field of the informant and they were going to break honeycomb for extracting honey. The deceased Abrar stopped them from doing so. On this, the accused said that one of them is son of 'Habib Pehalwan' and who will extract the honey even after killing Abrar. Again on 25.01.2007, at about 12:00 hours, both the appellants along with the appellant-Safdar reached at the same field when deceased Abrar along with his younger brother-Karaar and servant– Shamim were peeling sugarcane where they started to grievously assault Abrar with a

dagger and a Gandasa; due to this incident, Abrar succumbed to his injuries.

26. As per the evidence of PW1 Rao Buddan Khan (father of deceased Abrar), PW4 Karaar Ahmad (brother of deceased) and PW5 Shamim (servant of PW1), on 24.01.2007, Abraar (deceased), PW4 Karaar and PW5 Shahim were peeling sugarcane in the field of PW1 Rao Buddan Khan. At about 1:00–1:30 p.m. appellants-Mehar Alam and Shah Nazar reached at the field and started going to pluck the hive stuck on a tree standing in the field of Wahid adjacent to our field. When the complaint and his associates stopped them, they started to abuse and said that you do not know us, and we will destroy this hive even if we have to commit murder of Abrar.

27. On 25.01.2007, when Abrar (deceased), PW4 Karar and PW5 Shamim were present in the field and PW1 Rao Buddan Khan was also working in the field adjacent to the spot, at about 12:00 to 12:30 p.m. the appellants reached at the spot with weapons. Mehar Alam was having Patal, Shah Nazar was having Gandasa while Safdar was having a knife and they started to badly assault the deceased (Abrar). After PW5 Shamim, PW1 Rao Buddan Khan reached at the spot. The appellants also extended life threats to PW1 Rao Buddan Khan and ran away towards the forest. Due to the assault by the appellants, Abraar died at the spot.

28. PW1 Rao Buddan Khan submitted the information (Ex.Ka-1) with Kotwali Ranipur on the very same day. On the basis of the said information, the police lodged the chick FIR (Ex.Ka-22). The Inquest Report (Ex.Ka-13) was prepared by PW11 Ram Babu Arya, which is also proved by PW2 Shahid Khan and PW8 Nafasat

Khan. Post-mortem report (Ex.Ka-6) was prepared by PW10 Dr. R.S. Chauhan.

29. On 29.01.2007, appellant-Mehar Alam and Shah Nazar were arrested. Their disclosure statements were recorded, which is Ex.Ka-11. At the pointing out of appellant-Mehar Alam, Patal was recovered and at the pointing out of appellant-Shah Nazar, Gandasa was recovered. Accordingly, the recovery memo (Ex.Ka-8) was prepared which was proved by PW11 Ram Babu Arya.

30. On 02.02.2007, the disclosure statement of appellant-Safdar was recorded, which is Ex.Ka-12. At the pointing out of him, a knife (Ex.Ka-10) was recovered, which is proved by PW11.

31. At the time of incident, PW1 Rao Buddan Khan (informant) was also working in the field nearby the spot. On hearing noise of PW5 Shamim, he reached at the spot. He also saw the incident of committing murder of his son Abrar (deceased) by the appellants.

32. On the fateful day, PW4 Karar Ahmed, who is younger brother of the deceased, was also peeling the sugarcane. He supported the entire story, as alleged in the FIR.

33. As per the FIR, PW5 Shamim, who is the servant of PW1 Rao Buddan Khan, was also present at the spot. He also narrated the same story as stated by PW1 Rao Buddan Khan and PW4 Karar Ahmed.

34. All the above three witnesses are the eye-witness of the scene. PW2 Rao Shahid Khan is the scribe of the report (Ex.Ka-1), who is also one of the witnesses of the inquest report and in whose presence the inquest report was prepared.

35. PW3 Khalid is also the witness of the recovery of the knife in whose presence the knife was recovered at the pointing out of the appellant-Safdar on 02.02.2007.

36. From the evidence of PW3 Khalid, it is clear that a knife was got recovered by the appellant-Safdar, which was used in the crime.

37. PW6 Ali Nawaz is also a witness of the recovery, in whose presence, appellant-Shah Nazar got recovered the Gandasa and appellant-Mehar Alam got recovered a Patal.

38. It is argued by learned counsel for the appellant that no Test Identification Parade (TIP) was conducted by the investigating agency during the investigation. The FIR was lodged only against a son of Wahid Pehalwan and the appellants were not named in the FIR. Since, no TIP was conducted, accordingly, the case of the prosecution has become doubtful.

39. It is true that in this matter, no test identification was conducted by the investigating agency as per Section 9 of the Evidence Act, but as per the FIR, PW1 Rao Buddan Khan, PW4 Karar Ahmed and PW5 Shamim were present at the spot. They knew the appellants by face. On 29.01.2007, in the presence of police, appellants – Shah Nazar and Mehar Alam were identified by PW1 Rao Buddan Khan (informant and father of the deceased) and PW4 Karar Ahmed (brother of the deceased). On 02.02.2007, when the appellant-Safdar was arrested, at that time, both the witnesses were also present and the appellant-Safdar was properly identified by them. At the time of recording the statement, PW1 Rao Buddan Khan (informant) also identified the appellant before the Court. At the time of recording the statement, PW4 Karar Ahmed also

identified appellants-Safdar and Mehar Alam. As far as appellant-Shah Nazar is concerned, he was not present at the time of recording the statement in the Court because his exemption application was also moved by the defence counsel. PW5 Shamim also identified the appellants-Safdar and Shah Nazar at the time of recording the statement before the Court.

40. The Hon'ble Apex Court in Dana Yadav Vs. State of Bihar, (2002) 7 SCC 295 has held that: -

"11. It is well settled that no test identification parade is called for and it would be waste of time to put him up for identification if the victim mentions name of the accused in the first information report or he is known to the prosecution witnesses from before.

41. In a recent judgment, the Hon'ble Apex Court in **Rajesh Vs. State of Haryana, (2021) 1 SCC 118** summarized the principles regarding test identification. For the sake of convenience, relevant principles are quoted hereinbelow: -

- "43.1
- 43.2
- 43.3
- 43.4
- 43.5 The identification of the accused in court constitutes substantive evidence;
- 43.6
- 43.7
- 43.8
- 43.9 Since a TIP does not constitute substantive evidence, the failure to hold it does not *ipso facto* make the evidence of identification inadmissible;
- 43.10
- 43.11 Identification of the accused in a TIP or in court is not essential in every case where guilt is

established on the basis of circumstances which lend assurance to the nature and the quality of the evidence; and

43.12"

42. Similarly, the Hon'ble Apex Court of-late in *Jayan Vs. State of Kerala, (2021) SCC OnLine SC 961* has held that: -

"15.However, the absence of T.I Parade may not be ipso facto sufficient to discard the testimony of a witness who has identified the accused in the Court. In a given case, there may be otherwise sufficient corroboration to the testimony of the witness. In some cases, the Court may be impressed with testimony of the prosecution witnesses which is of a sterling quality. In such cases, the testimony of such a witness can be believed.

43. In the present matter, PW1 Rao Buddan Khan, PW4 Karar Ahmed and PW5 Shamim were well acquainted with the facial identity of the appellants although they were unaware of their names. However, at the time of arrest as also before the trial Court, the above witnesses properly identified the appellants. In these circumstances, it is immaterial that no test identification was conducted during investigation by the investigating agency.

44. It is next argued by the learned counsel appearing for the appellants that the weapons, which were recovered at the pointing out of the appellants, were not sent for FSL testing and, accordingly, the appellants are liable to be acquitted.

45. It is true that the investigating agency did not send the weapons recovered at the pointing out of the appellants to FSL, but, from the record, it is proved that when the appellants were arrested, they disclosed the crime before the Police and also disclosed about the weapons used in the crime. Accordingly, their disclosure statements were recorded. On the pointing out of the

appellant-Safdar, a knife was recovered on 02.02.2007 in presence of PW3 Khalid, who is an independent witness. At the pointing out of Shah Nazar, the weapon of assault 'Gandasa' was recovered and at the pointing out of Mehar Alam, 'Patal' was recovered. At the time of recovery of 'Gandasa' and 'Patal', Ali Nawaz (PW6) and Abdul Rehman were also present, who proved the recovery memo (Ex.Ka-8).

46. The Hon'ble Apex Court in **Amar Singh Vs. Balwinder Singh and Others, (2003) 2 SCC 518** has held that: -

"15.....It would have been certainly better if the investigating agency had sent the fire arms and the empties to the Forensic Science Laboratory for comparison. However, the report of the Ballistic Expert would in any case be in the nature of an expert opinion and the same is not conclusive. The failure of the investigating officer in sending the fire arms and the empties for comparison cannot completely throw out the prosecution case when the same is fully established from the testimony of eye-witnesses whose presence on the spot cannot be doubted as they all received gunshot injuries in the incident."

47. Thus from the above discussion, the following points are emerging: -

A. On 24.01.2007 when the son of the informant, namely, Abrar (deceased), Karar and servant Shamim were peeling sugarcane in their field at about 1:30 p.m. two boys came there and were going to extract honey. On stopping them, both of them started abusing and on making protest, one of them hurled derogatory words and threatened that one of them is the son of Habib Pehalwan and that they will extract the honey even after killing them.

B. On 25.01.2007, at about 12:00 hours when elder son of PW1 Rao Buddan Khan (informant), PW4 Karar Ahmed and PW5 Shamim were peeling

sugarcane on the same field while PW1 Rao Buddan Khan (informant) was working nearby, in the meantime, appellants came and started assaulting grievously to the elder son Abrar with the weapons due to which Abrar succumbed to the injuries at the spot.

C. PW1 Rao Buddan Khan, who is father of the deceased, promptly reported the matter with Police Station on 25.1.2007 itself at 12:45 hours while the incident is said to have taken place on that day at about 12 noon.

D. On the very same day, inquest report and post-mortem report were prepared.

E. On 29.01.2007, appellant-Mehar Alam and Shah Nazar were arrested and they were duly identified by PW1 Rao Buddan Khan and PW4 Karar Ahmed.

F. On 02.02.2007, the appellant- Safdar was arrested being identified by PW1 Rao Buddan Khan and PW4 Karar Ahmed and PW5 Shamim.

G. At the pointing out of appellant-Mehar Alam and Shah Nazar, Gandasa and Patal were recovered in presence of PW6 Ali Nawaj and Abdul Rehman, while at the pointing out of Safdar and in presence of PW3 Khalid, a knife (recovery memo Ex.Ka-10) was recovered, which is proved by PW11.

H. At the time of incident, PW1 Rao Buddan Khan, PW4 Karar Ahmed and PW5 Shamim were present at the spot and they duly corroborated the prosecution story.

I. The appellants were also identified by PW1 Rao Buddan Khan, PW4 Karar Ahmed and PW5 Shamim before the trial Court at the time of recording of

their statements.

48. For the aforesaid reasons, as discussed above, we do not find any sufficient ground to interfere with the impugned judgment and order passed by the trial Court convicting the appellants under Section 302 IPC. The trial Court has given detailed reasons after discussing the entire evidence on record before coming to the conclusion that the appellants were found guilty of the offence. We are in complete agreement with the findings recorded by the trial Court that the charge of offence u/s 302/34 IPC is fully proved against the appellants.

49. Accordingly, we do not find any infirmity or perversity in the impugned findings recorded by the Trial Court.

50. Both the appeals lack merit and the same are, accordingly, dismissed affirming the judgment and order under challenge. The appellants are on bail. Their bail bonds are cancelled. Let they be taken into custody forthwith to serve out the sentence imposed against them by the Trial Court. The sureties shall stand discharged only after the appellants are taken into custody.

51. Registry is directed to send a copy of this judgment and order along with the LCR to the Court concerned for forthwith compliance.

SANJAYA KUMAR MISHRA, A.C.J.

RAMESH CHANDRA KHULBE, J.