

Court No. - 44

Case :- CRIMINAL APPEAL No. - 2878 of 2013

Appellant :- Babu

Respondent :- State of U.P.

Counsel for Appellant :- A.P. Tewari, R.S. Tripathi

Counsel for Respondent :- Govt. Advocate

Hon'ble Dr. Kaushal Jayendra Thaker, J.

Hon'ble Ajai Tyagi, J.

(Oral Judgment by Hon'ble Ajai Tyagi, J.)

1. By way of this appeal, the appellant-Babu has challenged the Judgment and order dated 02.05.2013 passed by Court of Additional Session Judge, Court No.5 Badaun in Session Trial No.147 of 2011 arising out of Case Crime No.1002 of 2010 under Section 304 Part I read with Section 34 IPC along with joint trial of Session Trial No.148 of 2011 arising out of Case Crime No.1012 of 2012 (State Vs. Babu) under Section 4/25 of Arms Act, Police Station- Kotwali Badaun, whereby the accused-appellant was convicted under Section 304(i) read with Section 34 IPC and under Section 4/25 Arms. The accused was sentenced for life imprisonment and fine of Rs.20,000/- for offence under Section 304 Part I IPC and three months imprisonment in default of payment of fine under Section 304 Part I IPC. The accused was sentenced for three years with fine of Rs.2,000/- and one month imprisonment for default of payment of fine under Section 4/25 Arms Act.

2. The brief facts of the case as culled out from the record and proceedings and the FIR are that a first information report

was lodged by complainant Kamlesh averring that on 20.04.2010 she was returning home with her mother Rani after purchasing the vegetables and when they reached near Balmiki Pulia at about 6:00 pm, Babu son of Amar Singh and Munna Son of Kanhai came from behind. Babu put his hand on the shoulder of her mother, her mother gave a jerk and moved ahead, which annoyed Babu and he drove out a knife from his clothes and stabbed her mother in the abdomen. Both the accused ran away. There were other persons who are named in the FIR who are present. Along with other persons she took her mother to the hospital but she breathed her last.

3. S.I. Ram Kishore Singh tookup the investigation into motion, visited the spot, prepared site plan, recorded statements of the prosecutrix and witnesses and after completing investigation submitted charge sheet against the accused.

4. The matter being triable by court of sessions the learned Magistrate committed the case to court of sessions.

5. The learned trial court summoned the accused and framed charge under Section 304(i) read with Section 34 IPC, which was read over to the accused. The accused denied the charge and claimed to be tried. The prosecution so as to bring home the charge, examined five witnesses, who are as under:-

1	Vikas	P.W.1
2.	Kamlesh	P.W.2
3.	Dr. Ajay Kumar Verma	P.W.3
4.	Constable Rajendra Kumar	P.W. 4
5.	S.I. Ram Kishore Singh	P.W. 5

6. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1.	F.I.R.	Ext. Ka-4
2.	Written report	Ext. Ka-1
3.	Post mortem report	Ext. Ka-3
4.	Copy of G.D.	Ext. Ka-5
5.	Site-plan	Ext. Ka-6
6.	Inquest report	Ext. Ka-7
7.	Charge Sheet	Ext. Ka-13

7. After completion of prosecution evidence, the accused was examined under Section 313 Cr.P.C. The accused did not examine any witness in defence.

8. Heard Shri A.P. Tewari, learned counsel for the appellant, learned AGA for the State and also perused the record.

9. Perusal of record shows that occurrence of this case took place at 6:00 pm when the deceased was returning with her daughter complainant- Kamlesh after purchasing vegetables. The deceased was stabbed by the accused-appellant Babu in her abdomen. The occurrence took place in the public place. The post mortem of the deceased was conducted in which following ante mortem injuries were found:-

(i) Swelling on the right forehead and eye size 5cmx 3cm

(ii) Incised wound size 1.5cmx1.5cm muscle deep on the right side of the chest, 11cm below the right nipple. Margins inverted at the position of 5 o'clock lever was cut.

(iii) incised wound size 2cmx1cm skin deep on the back side of

the chest, 20 cm below the left shoulder at 4 o'clock position.

10. Learned counsel for the appellant has submitted that PW1-Vikas is said to be the eye-witness of the occurrence but he has not supported the prosecution case and has turned hostile. He was cross-examined by prosecution but nothing has come out from his statement which can prove the charge levelled against the appellant. It is further submitted by learned counsel for the appellant that PW2-Kamlesh is daughter of the deceased, therefore, she is interested witness and conviction cannot be based on the sole testimony of interested witness. Rest of the witnesses are formal in nature.

11. After some arguments, learned counsel for the appellant submitted that he is not pressing this appeal on its merit, but he prays only for reduction of the sentence as the sentence of life imprisonment awarded to the appellant by the trial court is very harsh. Learned counsel also submitted that appellant is in jail for the past more than 9 years.

12. Although the PW1 has not supported the prosecution case but the testimony of PW2- Kamlesh cannot be brushed aside only on the basis of that she was daughter of the deceased. The testimony of interested witness cannot be ignored on this ground alone but the testimony of interested witness should be scrutinized cautiously and carefully. As per the prosecution version PW2 was with the deceased at the time of occurrence and it is very natural that the daughter goes with her mother to purchase the vegetables. There is nothing unusual in it. PW2 is complainant of this case also. She has lodged first information report just after one and half hours of the occurrence, which is

not delayed. Hence, there was no opportunity to falsely implicate the accused. Moreover, the testimony of PW2, who is eye-witness, supports the prosecution case completely in her cross-examination. Nothing has come out, which could give any benefit to the appellant. The knife, used in the commission of crime, recovered by the investigating officer on the pointing out of the accused-appellant Babu. This fact of recovery is proved by investigating officer as PW5.

13. Medical evidence also goes to show that injury No.2 in ante mortem injuries, mentioned in post mortem report, is the injury which could be inflicted by the weapon like knife. Hence, the ocular version of eye-witness PW2 is corroborated by medical evidence also.

14. While coming to the conclusion that the accused is the perpetrator of the offence, whether sentence of life imprisonment and fine is adequate or the sentence requires to be modified in the facts and circumstances of this case and in the light of certain judicial pronouncements and precedents applicable in such matters. This Court would refer to the following precedents, namely, ***Mohd. Giasuddin Vs. State of AP***, [AIR 1977 SC 1926], explaining rehabilitary & reformatory aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology is in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a

process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

15. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP*** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

16. In ***Ravada Sasikala vs. State of A.P.*** AIR 2017 SC 1166, the Supreme Court referred the judgments in ***Jameel vs State of UP*** [(2010) 12 SCC 532], ***Guru Basavraj vs State of Karnatak,*** [(2012) 8 SCC 734], ***Sumer Singh vs Surajbhan Singh,*** [(2014) 7 SCC 323], ***State of Punjab vs Bawa Singh,*** [(2015) 3 SCC 441], and ***Raj Bala vs State of Haryana,*** [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue

sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformatory and corrective. At the same time, undue harshness should also be avoided keeping in view the reformatory approach underlying in our criminal justice system.

17. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformatory and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

18. While going through the record and the testimony of the witnesses specially the FIR and the medical version, the guilt of the accused is proved to the hilt and we are unable to disagree that the learned court below in recording the finding of guilt of the accused-Babu as the knife was found from the possession of the accused. The evidence of PW1 though has turned hostile. The evidence of Kamlesh who has categorically mentioned that Babu is the person who has inflicted the knife blow to the deceased on the abdomen. It was a single blow. They had even intimidated her.

19. The evidence of Dr. Dinesh Kumar who had performed the post mortem as narrated herein-above also testified this effect that the injuries were possible by the knife. Hence, we hold that it was the accused and the accused alone who was perpetrator of the offence.

20. As discussed above, 'reformatory theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformatory approach underlying in criminal justice system.

21. Learned AGA also admitted the fact that appellant is languishing in jail for the last more than 9 years. The accused-appellant convicted under Section 304 Part I read with Section 34 IPC, which is a major offence and is sentenced for life

imprisonment along with fine. In our opinion, ends of justice would be met if sentence is reduced to the period of 10 years imprisonment for the aforesaid offence.

22. Hence, the sentence awarded to the appellant-Babu by the learned trial-court is modified as sentence of 10 years rigorous imprisonment under Section 304 Part I read with Section 34 IPC and fine of Rs.10,000/-. Default sentence is maintained. Period of sentence for three years rigorous imprisonment under Section 4/25 of Arms Act and default sentence for the said punishment has already been undergone by the appellant. Fine and imprisonment for default under Section 4/25 Arms Act is maintained.

23. Accordingly, the appeal is **partly allowed** with the modification of the sentence, as above.

24. The Jailer to release the accused on completing tenure of his rigorous imprisonment as per jail record with remission.

25. Record be sent back to the court below.

(Ajai Tyagi, J.) *(Dr.Kaushal Jayendra Thaker, J.)*

Order Date: 15.07.2022
Ashutosh Pandey