

**Kushal and ors. Vs. State**

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**Court :** Allahabad

**Decided On :** Nov-29-2002

**Reported in :** 2003CriLJ3458

**Judge :** Vishnu Sahai and ;Kamal Kishore, JJ.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 300 and 394

**Appeal No. :** Crl. A. No. 89 of 1981

**Appellant :** Kushal and ors.

**Respondent :** State

**Advocate for Def. :** G.A.

**Advocate for Pet/Ap. :** J.N. Choudhry, Adv.

**Judgement :**

**Vishnu Sahai, J.**

1. This appeal has been preferred by Kushal, Kashi Ram and Sanwal against the judgment and order dated 31-1-1981 passed by the II Additional Sessions Judge, Unnao in Sessions Trial No. 371 of 1980, whereby they have been convicted and sentenced in the manner stated hereinafter :--

Sanwal :-- (i) Under Section 302 IPC to undergo imprisonment for life; and

(ii) under Section 394 read with 397 IPC to undergo 7 years R.I.

Kushal and Kashi Ram :-- (i) Under Section 302/34 IPC to undergo imprisonment for life; and

(ii) Under Section 394 IPC to undergo 5 years R.I.

The sentences of all the appellants were directed to run concurrently,

2. Shortly stated the prosecution case, runs as under :--

Deceased Sabira was the daughter of the Informant Rajja PW-1, She was married to Barkat of village Hardaspur within the limits of Police Station Sandila, district Hardoi, 10 days prior to the Incident, the informant had brought her to his house in village Rajepur Grunt (Pulenda) within the limits of Police Station Ashiwan, district Unnao.

On 6-4-1980 at about 8.30 p.m. Sabira went to answer the call of nature at the back of the informant's house. 2-3 minutes later, the informant heard cries of Sabira to the effect 'DAUDO MARE DALTE HAIN'. Hearing them the informant, who was joined on the way by his neighbours Ishrar (PW-2) Sahjade and Subedar who were having lathies and torches rushed. When they reached near the southern Mend of field of Bachcha, and flashed torches they saw, from a distance of 40 steps, that in the drain situated between the fields of Madari and Hamid, appellant Sanwal was assaulting Sabira with tabbal and appellants Kushal and Kashi Ram were forcibly taking off ornaments from her person. On seeing them the appellants ran away. Thereafter, the informant, reached at the place where Sabira was assaulted and found her dead.

On account of the fact that there was no Chaukldar in the village and near, the informant did not proceed to lodge the FIR at night. In the morning, he along with Husaini proceeded to Police Station Ashiwan on foot. In Ashiwan, he met Surya Prakash and dictated the FIR to him and thereafter, lodged it at 8.15 a.m. at Police Station Ashiwan.

3. The evidence of S.I. Ram Krishna Nigam, PW-3 shows that on 7-4-1980 at 8.15 a.m. the informant Rajja lodged the FIR at Police Station Ashiwan and on its basis, in his presence a case was registered by Head Constable Jang Bahadur, whose signature and writing he recognizes.

4. The investigation was conducted in the usual manner by S.I. Ram Krishna Nigam, PW-3 who after completing it submitted the chargesheet against the appellants on 27-4-1980.

5. Going backwards the autopsy on the corpse of the deceased Sabira was conducted on 8-4-1980 at 2.45 p.m. by Dr. R.R. Acharya, PW-4 who found on it 9 incised wounds, 2 multiple abrasions and 2 abrasions. In the opinion of Dr. Acharya, the deceased died on account of shock and hemorrhage as a result of multiple Injuries,

In his statement during trial Dr. Acharya stated that incised Injuries suffered by the deceased were attributable to a heavy sharp edged weapon and abrasions could have been caused by friction.

6. The case was committed to the Court of Session where after being charged, the appellants were put to trial. Their defence was of denial. During trial the prosecution examined 4 witnesses. Two of them namely Rajja PW-1, and Ishrar PW-2 were examined as eye witnesses. The learned trial Judge believed their evidence and convicted and sentenced the appellants in the manner stated in para-1.

Hence, this appeal.

7. We have heard learned counsel for the parties and perused the entire evidence on record. In our view, this appeal deserves to be partly allowed.

8. So far as the involvement of the appellants in the incident is concerned, the same in our view has been established beyond doubt by the credible evidence furnished by informant Rajja and Ishrar. We now proceed to give reasons as to why we find their evidence to be credible.

9. We would first examine the evidence of Rajja (PW-1). His evidence shows :-- The deceased Sabira was his married daughter and on the date and time of incident (referred to in para 2) she had gone to answer the call of nature behind the back of his house and 2-3 minutes later he heard cries of 'DAUDO MARE DALTE HAIN' and upon hearing them rushed to the place of the incident, having being joined on the way by Ishrar, Subedar and Sahjade who had lathies and torches with them and in torch light they saw that appellant Sanwal was assaulting Sabira with a tabbal and appellants Kushal and Kashi Ram were relieving her of her ornaments and jewellery from her person. When he and the aforesaid persons reprimanded them, they ran away.

10. We have gone through the evidence of Rajja and find it to be credible. As would become manifest from the preceding paragraph, he has explained his presence on the place of the incident. Because the incident had taken place behind his house, it was natural for him to have rushed to the place of the incident and seen it and it was equally natural for his neighbours Sahjade, Subedar and Ishrar to have reached in time to see the incident. The manner of the incident as furnished by him is corroborated by the medical evidence. He stated that Sanwal assaulted the deceased with tabbal and Dr. Acharya found 9 incised wounds on her corpse. Further his evidence that appellants Kashi Ram and Kushal took off ornaments from the person of deceased Sabira is corroborated by the circumstance that he found ornaments missing from Sabira's person.

It is pertinent to mention that although he was subjected to extensive cross-examination, but his presence on the place of incident could not be discredited. It is significant to point out that he is an independent witness who had no rancour or ill-will against the appellants.

11. For the aforesaid reasons, we find the evidence of Rajja to be credible.

12. We now take up the evidence of Ishrar PW-2, His evidence shows :-- On the date and time of the incident he was at his Khalian which was situated in the proximity of the place of the incident and on hearing the cries of Sabira he rushed to the place of incident and Rajja, Subedar and Shahjade also reached there with lathies and torches and in torch-light they saw appellant Sanwal assaulting Sabira

with a tabbal and the other two appellants relieving her of her ornaments and thereafter the appellants running away.

13. We have gone through the evidence of Ishrar and find it to be credible. In the first place he has explained his presence on the place of incident. He has stated that on hearing the cries of Sabira he rushed to the place of incident and saw the incident. Since the place of incident was in the proximity of his Khalihan it was not surprising for him to have reached in time to see the incident. Secondly the manner of assault as furnished by him is in consonance with probabilities and medical evidence. He stated that appellant Sanwal assaulted Sabira with tabbal and autopsy surgeon found 9 incised wounds on the person of Sabira. He also stated that the appellants Kashi Ram and Kushal were relieving Sabira of ornaments and as mentioned earlier the evidence of the informant shows that some ornaments were missing from the person of Sabira.

It is pertinent to mention that although he was subjected to extensive cross examination but his presence on the place of incident could not be shaken and neither any reason could be extracted therein as to why he was falsely implicating the appellants. It is significant to note that he is an independent eye-witness.

14. For the said reasons we accept the evidence of Ishrar PW-2.

15. In our view the involvement of the appellants in the incident has been established beyond doubt. The only question which remains is whether the trial Court was justified in convicting appellants Kashi Ram and Kushal for the offence punishable under Section 302 IPC read with Section 34 IPC. Our answer to it is in the negative.

The Judicial Committee of the Privy Council in the oft quoted case of Mahbub Shah v. Emperor has laid down that 'the inference of common intention within the meaning of the term in Section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case'.

We feel that in factual matrix in which the incident took place it cannot be inferred with certainty that appellants Kushal and Kashi Ram shared with appellant,

Sanwal the common intention to commit murder of the deceased. It is pertinent to mention that there was no enmity either between them or between the appellant Sanwal on one side and the deceased or her family members on the other.

To us, it appears that the common intention of appellants Kushal, Kashi Ram and Sanwal was to relieve the deceased of her ornaments and when she offered resistance to this endeavour of the appellants, appellant Sanwal acted in excess of it and started assaulting her with a tabbal; killing her on the spot. In these circumstances in our view appellant Sanwal alone would be responsible for murder of the deceased.

16. So far as appellant Sanwal is concerned, there is no doubt in our minds that an offence punishable under Section 302 IPC would be made out against him because the autopsy report shows that he inflicted 9 incised wounds on the corpse of the deceased and 7 of them were situated in the region of head and face. It is pertinent to mention that beneath injury Nos. 2 and 5 the doctor found skull and jaw respectively cut and found trachea cut beneath injury No. 7.

It is true that the autopsy surgeon, Dr. Acharya did not state that the injuries of the deceased were sufficient in the ordinary course of nature to cause her death but in our view there is no impediment in finding Sanwal guilty for the offence punishable under Section 302 IPC because the Supreme Court in Para 6 of the oft-quoted case of Brij Bhukhan v. State of U.P., reported in : 1957 CriLJ591 has laid down that if a perusal of the ante-mortem injuries makes it manifest that they are sufficient to cause death in ordinary course then absence of medical evidence to the said effect will not come in the way of the Court for recording a conviction under Section 302 IPC.

17. For the aforesaid reasons, this appeal is partly allowed. Although we acquit the appellants Kushal and Kashi Ram for the offence punishable under Section 302/34 IPC and set aside their conviction and sentence thereunder but we uphold their conviction and sentence of 5 years R.I. for the offence punishable under Section 394 IPC.

We uphold the conviction and sentence of appellant Sanwal, both for offences punishable under Sections 302 IPC and 394 IPC read with Section 397 IPC.

Appellants Sanwal, Kushal and Kashi Ram are on bail. They shall be taken into custody forthwith to serve out the sentence.

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