

MADHUBAN

v.

STATE OF U.P.

(Criminal Appeal No.799 of 2008)

MAY 5, 2008

(C.K. THAKKER AND D.K. JAIN, JJ.)

Penal Code, 1860; Ss.302, 323, 394 r/w s.34 IPC:

Murder – Trial Court found accused guilty of committing murder of father and son and convicted him u/ss 302, 323, 394 r/w s.34 IPC and sentenced them accordingly – Affirmed by High Court allegedly without hearing counsel of appellant – Correctness of – Held: Counsel for appellant sought for extension of time before the High Court for the facts, reasons and circumstances stated in the affidavit – Advocate for the appellant could not make oral submission before the High Court because of infection in vocal cord – Under the circumstances, it would be appropriate if the High Court hears the counsel for the appellant and passes an order in accordance with law – Practice & Procedure.

According to the prosecution, in the night of November 15, 1976, the brother and nephew of the informant were attacked by four persons. When he came to their rescue, he was also assaulted. On his raising alarm, the accused fled away. The brother of the informant died on the spot. The informant has taken his nephew, in critical condition to a hospital and later, First Information Report was lodged in the police station. Nephew of the informant succumbed to injuries in the Hospital. After investigation, the police submitted charge sheet against accused for committing the offences punishable u/ss.302, 323 and 394 r/w s.34 IPC. Trial Court found accused guilty of committing the offences punishable u/ss 302, 323, 394 and sentenced them accordingly. The appeal preferred

A thereagainst by the appellant was dismissed by the High Court. Hence the present appeal.

B Appellant contended that on November 21, 2006, when the appeal was heard by the Division Bench of the High Court, the counsel for the appellant was unable to argue the case due to swelling in his vocal cord and the said fact had been brought to the notice of the Court while filing an application for extension of time for filing written statement; and that an affidavit in support of such assertion was also filed in the High Court.

C Allowing the appeal, the Court

D HELD: 1.1 This Court went through the records and proceedings before the High Court and satisfied that the statement made by the counsel for the appellant is found to be correct. In the application for extension of time dated 24th/25th November, 2006, it was stated that for the facts, reasons and circumstances stated in the accompanying affidavit, time for filing written statements might be extended. [Para 11] [732-B, C]

E 1.2 It appears that the advocate appearing on behalf of the appellant before the High Court could not make oral submissions because of infection in vocal cord. [Para 12] [732-E-F]

F 2.1 In view of the above facts and circumstances, ends of justice would be met by setting aside the impugned order and remitting the matter to the High Court for fresh disposal in accordance with law. [Para 13] [732-F, G]

G 2.2 It would be appropriate if the High Court hears the counsel for the appellant-accused and passes an appropriate order in accordance with law. Only on that ground, the appeal is allowed. [Para 14] [733-A, B]

H 2.3 It is clarified that this Court has not entered into the merits of the matter and as and when the matter is

placed for hearing before the High Court, the Court will
decide the same on its own merits. [Para 15] [733-B, C] A

CRIMINAL APPELLATE JURISDICTION : Criminal
Appeal No. 799 of 2008.

From the final Judgment and Order dated 30.4.2007 of
the High Court of Judicature at Allahabad, Lucknow Bench,
Lucknow in Criminal Appeal No. 13 of 1982. B

Z.K. Faizan, Ruby Khan and Goodwill Indeevar for the
Appellant.

Pramod Swarup, Savitri Pandey and Anil Kumar Jha, for
the Respondent. C

The Judgment of the Court was delivered by

C.K. THAKKER, J. 1. Leave granted. D

2. The present appeal is filed against judgment and order
passed by the High Court of Judicature at Allahabad on April
30, 2007 in Criminal Appeal NO. 13 of 1982 by which it
confirmed the order of conviction and sentence recorded on
December 22, 1981 by the 1st Additional District & Sessions
Judge, Faizabad in Sessions Trial No. 156 of 1979. E

3. It was the case of the prosecution that in the night of
November 15, 1976, Jai Ram Singh (Deceased – 1) returned
home from out of station. After taking meal, he went to sleep
in the room with his wife and his son Akhilesh Singh @ Sanjay
Singh (Deceased – 2). His younger brother Sri Nath Singh
(informant) was sleeping in the adjoining room. At about 12.30
a.m., i.e. early morning of November 16, 1976, Sri Nath Singh
heard cries of his nephew and *Bhabhi*, wife of Jai Ram Singh.
On opening the door between the two rooms, he saw that his
brother Jai Ram Singh and nephew Akhilesh Singh were being
attacked by four persons. When Sri Nath Singh tried to intervene,
he was also assaulted and received injuries. Shout was raised
for calling neighbours and the assailants fled away. Jai Ram
Singh died on the spot. Sri Nath Singh informed the Police F
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A Station, Ayodhya and First Information Report was registered on the same day, i.e. November 16, 1976. Akhilesh Singh @ Sanjay Singh was critical. He was sent to District Hospital, Faizabad, but his condition deteriorated. He was, therefore, shifted to Medical College, Lucknow. He, however, died there on November 22, 1976. When the matter came up before the Chief Judicial Magistrate, Faizabad, he passed an order on May 19, 1979 of committal to the Court of Session. The learned Sessions Judge, Faizabad framed charges against the accused for offences punishable under Sections 302, 323 and 394 read with Section 34 of the Indian Penal Code (IPC). The statement of the accused under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code'), was recorded. The learned 1st Additional Sessions Judge held that the case of the prosecution was proved against the appellant and accordingly he convicted the appellant for an offence punishable under Section 302, IPC and ordered him to undergo rigorous imprisonment for life. He also convicted the appellant for an offence punishable under Section 394, IPC and ordered to undergo rigorous imprisonment for four years and for an offence punishable under Section 323, IPC, to undergo imprisonment for nine months.

4. Being aggrieved by the order of conviction, the appellant herein preferred an appeal before the High Court. The High Court again considered the evidence in detail and confirmed the order of conviction and sentence recorded by the trial court. It is this order which is challenged in the present appeal.

5. This matter was placed for admission hearing on September 17, 2007. Attention of the Court was invited to Ground 'D' of the Special Leave Petition wherein it was stated that the High Court had decided the appeal without hearing the counsel for the accused. In the light of the above contention, the Court passed the following order;

"It was stated in ground No. 'D', page 57 of the special leave petition that the High Court was not justified in deciding the appeal without hearing the counsel for the

petitioner and merely permitted him to file "written arguments". So far as the copy of the High Court judgment which has been annexed to the special leave petition is concerned, it does not state anything with regard to appearance of advocates. A

In the light of the above statement and ground, issue notice returnable in six weeks. B

Record and proceedings of the courts below be called for within four weeks."

6. Record and proceedings of the courts below had been received and the matter has been placed before us for final hearing. C

7. We have heard the learned counsel for the parties.

8. In view of the fact that the notice was only with regard to ground 'D', we heard the learned counsel for the parties only on that limited issue. So far as the judgment is concerned, it no doubt records submissions of the learned counsel for the appellant-accused in various paragraphs. In the beginning of the judgment, however, there is no reference as regards appearance of advocates. D E

9. From the record and proceedings, it clearly appears that the Criminal Appeal was heard on November 21, 2006 and the following order was passed;

"Hon'ble O.P. Srivastava, J.

Hon'ble M.K. Mittal, J.

Heard Sri M.P. Verma counsel for appellant Sri H.A. Alvi appearing for the State. F

Judgment is reserved. G

In the meantime on prayer of appellant's counsel 5 days' time is granted to file arguments in writing."

10. It was contended on behalf of the appellant that on H

A November 21, 2006, when the appeal was heard by the Division
Bench, the learned counsel for the appellant was unable to argue
the case due to swelling on vocal cord infected with influenza.
The learned counsel also stated that the said fact had been
brought to the notice of the Court even in an application for
extension of time for filing written statement. An affidavit in
support of such assertion was also filed in the High Court and it
is very much there in the record and proceedings.

11. We went through the records and proceedings before
the High Court and we are satisfied that the statement made by
the learned counsel for the appellant is found to be correct. In
the application for extension of time dated 24th/25th November,
2006, it was stated that 'for the facts, reasons and circumstances
stated in the accompanying affidavit', time for filing written
statements might be extended. In the accompanying affidavit,
in paragraph 2, it was stated as under;

"2. That the above noted Crl. Appeal was listed for hearing
on 21.11.2006, before the Division Bench, comprising of
Hon. Mr. O.P. Srivastava and Hon. Mr. M.K. Mittal 'JJ', but
unfortunately the counsel for the deponent was unable to
argue the case, due to swelling on vocal cord infected
with influenza."

12. It appears that the learned advocate appearing on
behalf of the appellant before the High Court could not make
oral submissions because of infection in vocal cord.

13. In view of the above facts and circumstances, in our
opinion, ends of justice would be met if we allow this appeal,
set aside the order passed by the High Court and remit the
matter to the High Court for fresh disposal in accordance with
law.

14. Though the learned advocate appearing for the State
submitted that the case is of double murder and injured witness
who was very much at the scene of offence, who was assaulted
and sustained injuries has been believed by the courts below

and even on that ground, no interference is called for. In our opinion, however, in the light of what is observed by us hereinabove, it would be appropriate if the High Court hears the learned counsel for the appellant-accused and passes an appropriate order in accordance with law. Only on that ground, the appeal is allowed, the order passed by the High Court is set aside and the matter is remanded for fresh disposal in accordance with law.

15. We may observe that we have not entered into the merits of the matter and as and when the matter is placed for hearing before the High Court, the Court will decide the same on its own merits.

16. Ordered accordingly.

S.K.S.

Appeal allowed

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