

## SUPREME COURT OF INDIA

Sunil Kumar

Vs.

State of U.P.

(V. S. Sirpurkar and Mukundakam Sharma JJ.)

06.01.2010

### JUDGMENT

#### **V.S. Sirpurkar, J.**

1. This judgment will dispose of two appeals being Criminal Appeal No. 1241 of 2003 and Criminal Appeal No. 1242 of 2003. The High Court's judgment dismissing the appeal and confirming the conviction and sentence is in challenge in these appeals at the instance of the three accused persons, namely, accused Sunil Kumar, accused Tilak Singh and accused Ram Singh. Originally, five accused persons came to be tried for committing offences under Section 304 Part II read with Sections 147, 504 and 302 read with Sections 149, 147 and 504, IPC. They were accused Sunil Kumar, accused Jageshwar, accused Tilak Singh, accused Ram Singh and accused Munna. All the accused persons were charged and convicted for the offence under Section 304 Part II read with Section 149 and Section 147, IPC and were sentenced to suffer rigorous imprisonment for four years. All of them filed appeal before the High Court. However, the High Court convicted all the accused persons.

2. Before us only three accused persons have come up in appeal, they being accused Sunil Kumar and accused Tilak Singh (in Criminal Appeal No. 1241 of 2003) and accused Ram Singh (in Criminal Appeal No. 1242 of 2003). It is reported that accused Jageshwar and accused Munna are no more. That is how we have to consider the case only of three appellants. They shall be referred to as appellant Nos. 1, 2 and 3 respectively.

3. The prosecution case was that all the accused persons had on 23.02.1982 at about 5 p.m. in Mohalla Shivapuri within the limits of Police Station Orai, District Jalaun formed an unlawful assembly with the common object to commit the murder of Salim and inflict injuries on the person of Salim causing his death. The matter was reported by Hamid Khan, father of the deceased immediately at 5.30 p.m. It was contended therein that when Salim was working in his shop at about 5 p.m., the accused persons came to his shop and started asking Salim whether he considered himself to be a great gunda since he was showing off in the exhibition ground and thereafter started abusing him in filthy language. On being objected by Salim, all the accused started beating him with lathis/dandas whereupon Salim fell down. The complainant raised an alarm hearing which witnesses Naeem, Mohd. Ilyas @

Naushe and several other persons reached the spot. Seeing them, accused persons fled away from the scene.

4. Usual investigations followed and the accused came to be arrested barely within 2 or 3 days. The injured Salim was sent for Medical examination of the injuries where as many as six contused wounds were found on his body. Salim had become unconscious and, therefore, all the injuries could not be noted. Salim was thereafter transferred to the Medical College, Kanpur for treatment where next day i.e. on 24.02.1982 at 7.55 a.m. he breathed his last. The information of death was sent to the Police Station, Swarup Nagar, Kanpur and an inquest was prepared of his body. Photographs were taken and the body was sent for post mortem examination. Salim was hardly 22 years old. In the post mortem examination, three injuries were found on his head and it was found that he had suffered a linear fracture of parietal bone on both sides extending from left ear to right ear. Haemetoma was found in the brain and according to the doctors, death was due to coma as a result of the head injuries caused by blunt weapons. The accused were charged for the offences under Sections 147, 304, 323 and 504 IPC. They abjured the guilt. Hamid Khan (PW-1), Mohd. Ilyas @ Naushe (PW-2) and Naeem (PW-3) were examined by the prosecution as eye-witnesses along with others. Their evidence was accepted and the accused persons came to be convicted as stated above. Their appeal also failed and that is how the accused persons are before us.

5. Mr. Amarendra Sharan, learned Senior Counsel who appeared in both the appeals attacked the judgment of the High Court and the Trial Court firstly, contending that there was absolutely no reason for the accused persons to assault the deceased and no motive has been attributed to all these accused persons. Learned Counsel suggested that basically the story of the prosecution in the absence of any apparent motive became extremely doubtful.

6. We are not impressed by this submission since motive in a criminal case is irrelevant where evidence of the eye-witnesses is available. In this case, there were as many as three eye-witnesses one of whom was the father of the deceased. Therefore, the question of absence of motive would have no importance whatsoever.

7. Learned Senior Counsel then took us extensively through the evidence of three eye-witnesses and pointed out that the evidence of the father would be that of an interested witness and there was no possibility of the two other witnesses, namely, Mohd. Ilyas @ Naushe (PW-2) and Naeem (PW-3) being the eye-witnesses as according to the Counsel, they were busy in their own shops. But it has clearly come in the evidence that the father was very much present at the shop while the shop of Mohd. Ilyas @ Naushe (PW-2) is just by the side of the shop of the deceased. It has also come in the evidence that the shop of Naeem (PW-3) is about 20 yards from the shop of the deceased which is a tractor repairing workshop. Considering this position and also considering that it was 5 O'clock in the evening, there is no possibility of the shop remaining closed and under these circumstances, the presence of the eye-witnesses would be most natural. Therefore, on that count, the evidence cannot be discarded. It was also suggested that the day on which the occurrence took place was Tuesday and as such the market remained closed. The shops of the deceased

as also the eye-witnesses were not big shops and they were in the nature of small workshops where welding and electric work etc. was going on. Under such circumstances, it is not possible to hold that such small shops also remained closed on Tuesday. Again, in the wake of the direct evidence of the witnesses, we cannot accept the contention that the shops were not there. All the three witnesses have very specifically deposed about the presence of the accused persons. They have also deposed about the individual acts in assaulting the deceased Salim on his head. There is very little cross-examination on the actual occurrence. We have seen the evidence and found that the evidence given by these witnesses could not be shaken even in the cross-examination.

8. It was suggested further that PW-1, Hamid Khan had in his evidence admitted that he did not pay any tax to the municipality and there was no permit which would mean that there was no shop as such. Now, merely because the permit was not there, it does not mean that the deceased was not doing the gas welding work in his shop. In fact, all the witnesses have unanimously stated about the shop being there and the deceased being assaulted. Much of the cross-examination was redundant of this witness as also the other witnesses. Same is the story of evidence regarding Mohd. Ilyas @ Naushe (PW-2). There appears to be some cross-examination as regards the identification particularly of Mohd. Ilyas @ Naushe. However, this witness had actually identified all these accused persons since they all knew the deceased as also the accused persons.

9. The Trial Court as well as the High Court have considered the evidence closely and we do not think that there is any error in the appreciation.

10. Lastly, it was stated by the learned senior Counsel that the offence would not be under Section 304 Part II, IPC. At the most it could be under Section 325 or 326, IPC. We do not think that we can accept this argument. In fact, seeing the seriousness of the wounds, injuries on the head including the fracture on the head, we wonder as to how the accused were charged of the offence under Section 304, IPC. It was absolutely incorrect. They should have been charged under Section 302, IPC. However, in the absence of the appeal by the State, we would not be in a position to do anything in that behalf. Learned Counsel also suggested that considering that this incident had taken place in the year 1982 and sentence of four years would be harsh punishment. We do not think so. In fact, the punishment is on the lenient side. After all, one young life was lost at the young age of 22 years. While considering the sentence, merely because the appeal pended and merely because the incident had taken place long back would not by itself justify any interference with the punishment, particularly, when the punishment itself is a lenient one.

11. In that view, both the appeals are dismissed as being without any merit. The accused persons, who are on bail, shall immediately surrender within 15 days failing which immediate steps including issuance of non-bailable warrant shall be taken.