

STATE OF U.P. A

v.

SAHRUNISSA & ANR.

(Criminal Appeal No. 431 of 2003)

JULY 7, 2009 B

[V.S. SIRPURKAR AND R.M. LODHA, JJ.]

*Penal Code, 1860 – ss. 302/34, 307/34 and s. 307 – Conviction under – Murder of two boys of tender age on account of superstitious belief – Commission of the said act by father and his daughter – Third son barely escaping death – Wife and daughter's husband also present – Conviction of all of them u/ss.302/34, 307/34 and s.307 – High Court upholding conviction of father and his daughter – However, acquittal of wife and daughter's husband – Challenge to – Held: Wife and daughter's husband could not be attributed with the common intention by their mere presence – Witnesses did not attribute any overt act to them, except for one – High Court rightly gave them benefit of doubt, thus, order of High Court upheld.* C D E

**Prosecution case was that A1-father and A2-daughter were overpowered by superstitious beliefs. They killed two boys of tender age. The said boys are sons' of A1. They were in process of strangulating the third son but he escaped death. A3-wife of A1 and A4-husband of A2 were present during the said act. Trial court convicted all the accused u/ss 302 r/w s. 34 IPC as also s. 307 r/w s. 34 and sentenced them to rigorous imprisonment for life. They were also convicted u/s. 307 with rigorous imprisonment of three years. High Court upheld conviction of A1 and A2, however, acquitted A3 and A4. Hence the present appeal, challenging the acquittal of A3 and A4.** F G

**A Dismissing the appeal, the Court**

**B HELD: 1.1. PW-1-eye witness and PW-3 in examination-in-chief specifically stated about the claim of A 1 that the two boys were killed by way of sacrifice and that they would regain their lives when the third son is sacrificed. All that the witnesses said about the present respondent was that they were present at the scene. As regard PW-4, there is hardly anything in his cross-examination which raises any doubt about the role played by A-1 and A-2 and all that can be said that he merely referred to the presence of the respondents. The other witness PW 7-Investigating Officer claimed that when he reached he saw the dead bodies of two boys lying on the cot and A 1 and A 2 were in the process of strangulating the third boy. He however, claimed that the two respondents were holding the legs of the third boy SA. He arrested the accused. Thus, only PW 7 attributed a specific role to the respondents. There was no reason not to accept this version against the present respondents. However, the High Court noted that he had not mentioned in the Panchnama that the two respondents had also held the legs of SA. In the absence of any role attributed to these respondents by PW-3 and PW-4, the High Court did not feel safe in accepting the version of this witness, particularly, against the respondents and, therefore, the High Court awarded the benefit of doubt to the two respondents. [Paras 7 and 8] [244-D-E; 244-B-F]**

**G 1.2. There can be no dispute that these two respondents were present and indeed their mere presence by itself cannot be of criminal nature in the sense that by their mere presence a common intention cannot be attributed to them. Indeed, they have not done anything. No overt act is attributed to them though it was tried to be claimed by one of the witnesses that when the**

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police party reached that they were standing on one leg. This also appears to be a claim without any basis and the High Court rightly did not believe the story which was tried to be introduced. [Para 9] [245-G-H; 246-A]

1.3. The spectre of superstition had affected the psyche of all these accused persons. The force of the superstition was so overpowering that A-1 and A-2 probably were convinced of the non-existent supernatural powers of A-2. A3-poor Mohammedan lady coming from the humble background, whose husband and daughter claimed these powers could not have ordinarily opposed which was being done and, therefore, had to see with open eyes the death of her two sons. It cannot be said that her not opposing the gruesome acts speaks in favour of her nurturing the common intention. High Court was right that she could be afraid of A-1 and A-2 as she herself might be under the superstitious psyche. [Para 10] [246-C-E]

1.4. Respondent no. 4 was a police Constable, but the fact is that he has not committed any overt acts. His own wife claimed all the supernatural powers and went on to commit the horrible acts of un-paralleled cruelty against the two innocent boys. It was his duty to stop the crime from being committed but inaction on his part would not by itself make him join the company of the guilty accused. This is apart from the fact that he has not been asked about his duty in his examination. The whole prosecution is strangely silent about the aspect of s.21 IPC nor was such charge ever levelled against him. [Para 11] [246-H; 247-A, B]

1.5. It is bane of the Indian society that in search of some worldly gains, the society becomes superstitious and blindly follows the path which leads only to desolation. Number of lives are lost and number of families are destroyed because of this false belief in the

A so-called black magic and so-called supernatural powers. All this is a result of the total lack of education and human avarice. It is for this reason that the findings of the High Court are concurred with. [Para 11] [246-F, G]

B 1.6. While dealing with an appeal against acquittal where the law so far crystallized desists this Court from fact finding exercise. Though, the whole evidence is open for this Court to appreciate the finding of acquittal that too by the High Court has to be given its own weight. C Therefore, on going through the evidence it is found that the evidence against the two respondents is not clinching enough and it cannot be said that the finding of the High Court is perverse or such as cannot be reached after reasonable and careful survey of the evidence. A suspicion by itself cannot take place of the proof D muchless in an appeal against acquittal. The law requires hard facts duly proved by admissible and truthful evidence. In a case where the High Court has recorded the finding of acquittal giving benefit of doubt, unless such a finding was an impossible one, the interference E at this stage is not feasible. Therefore, the finding by High Court is concurred with though with a heavy heart. [Para 12] [247-C-E]

F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 431 of 2003.

From the Judgment & Order dated 27.02.2002 of the High Court of Judicature at Allahabad in Criminal Appeal No. 842 of 1981.

G Sahdev Singh, S.K. Dwivedi, Mukesh Verma and Chandra Prakash Pandey for the Appellants.

Dinesh Kumar Garg, S.K. Billoria, Vijay Pratap Singh and Dr. Bheem Pratap Singh for the Respondents.

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The Judgment of the Court was delivered by

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**V.S. SIRPURKAR, J.** 1. Superstition plays a very important role in the Indian society. It is not restricted to any particular religion or a particular section of society including the haves and the have-nots. The present case is one such dreadful and hair-raising example wherein two innocent boys lost their lives while the third barely escaped death. Very unfortunately, in all this, the father and the sister of the unfortunate boys were involved while their own mother had to remain as a powerless and mute spectator to this gruesome act of cruelty.

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2. The sordid saga of un-paralleled cruelty as a result of superstitions took place in the area called Canal Colony situated at Kasba Koraon, P.S. Koraon, District Allahabad where accused No.1 was working as an Amin in Irrigation Department, accused No. 2, Shakila Bano, wife of Siraj Khan, is his daughter, accused No.3 Shahrunnisa is the wife of accused No.1, while accused No.4, Siraj Khan is the husband of accused No.2. The unfortunate deceased who lost their lives were Shamshad Ali, Naushad Ali while Shaukat Ali barely escaped. All the three boys were born to Saharunnisa and Abdul Hafeez Khan and belonged to the tender age of 7 years, 4 years and 3 years, respectively.

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3. The gruesome incident took place on 27.10.1978 at about 12:00 noon when the sound of Azaan (call for Namaz) was heard from the quarter of Abdul Hafiz Khan, accused No. 1. It was not a usual time. PW-4, Habib Ullah had gone to the house of Budda Ram in the Koraon colony. Hearing this unusual Azaan, he reached the house of accused No. 1 (hereinafter called "A-1") and peeped through the window and saw that the accused No.2, Shakila Bano (hereinafter called "A-2") was beating the elder son Shamshad Ali with a pipe whereas Abdul Hafiz Khan (A-1), Saharunnisa (A-3) and, Siraj Khan (hereinafter called "A-4") were also present there. He saw Abdul Hafiz Khan catching hold of the boy. He again saw that Abdul Hafiz Khan throttled the neck of the boy as a result of which he

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A died. He further saw that A-2 committed the same act with the other boy who also died. Seeing this horrible site, PW-4 got frightened and started running away. However, the accused shouted that the boys would become alive. At about the same time Ram Hujur Yadav, PW-3 Head Clerk in the office of Belan Canal Divison observed crowd in front of the quarter of Abdul Hafiz Khan, A-1. He saw that the boys had died and were lying near A-2 and she was uttering something in some unknown language and A-1 was repeatedly saying that the two boys who had died would become alive on the sacrifice of the third boy. Whole day was spent in all this when one Shyam Mohan Airan (PW-1) returned at about 7:00 p.m. He also observed crowd in front of the quarter of A-1. He, therefore, called Head Clerk Ram Hujur Yadav and enquired about the crowd and was told that A-2, daughter of A-1 was smitten with some evil spirit. He called others including B.P.Singh, R.R.Singh, Junior Engineers to the house of appellatant and found two dead bodies and the injured youngest son. Even then A-2 had caught the hair of the boy and was reciting something and A-1 was repeatedly saying that the boys would become alive after sometime. Shahrunnisa, the helpless mother of the boys and fourth accused, husband of A-2, both were present there. A report was immediately got prepared by Shyam Mohan Airan (PW-1) by dictating the same to Ram Hujur Yadav (PW-3) which was again fairly drafted by B.R.Singh and Shyam Mohan Airan put his signatures and sent the report to PS koroan by official jeep which was lodged at the police station at 7:30 p.m. The police immediately registered the case under Sections 302 and 307 of the Indian Penal Code and started investigations. When the police reached the spot they found A-2 catching hold of the hair of the boy and A-3 and A-4 were standing on their one leg. Even seeing the police, A-1 was undeterred and claimed that "Paigamber" had possessed the body of his daughter and the two persons were sacrificed and the third person would also be sacrificed. The investigating team also saw some articles of worship. The police rescued the third boy, Shaukat Ali and arrested all the accused persons. The usual investigation was

then completed. Inquest and spot Panchnama were conducted and material objects were seized. The dead body was sent for post-mortem and on the basis of this charge-sheet came to be filed. A number of witnesses came to be examined including Shyam Mohan Airan (PW-1), R.B. Singh (PW-2), Ram Hujur Yadav (PW-3), Habib Ullah (PW-4), Constable Chandra Bhushan (PW-5), Head Constable Ram Singh (PW-6), Investigating Officer Kamal Singh (PW-) and Constable Kalim Ullah (PW-8). The Sessions Judge came to the conclusion that the crimes were committed in the name of "Peer Paigamber". He found all the accused guilty for offences under Section 302 read with Section 44, IPC and also Section 307 read with Section 34, IPC and sentenced them to suffer rigorous imprisonment for life. The accused were also separately convicted and sentenced to rigorous imprisonment of three years for the offences under Section 307, IPC.

4. On appeal, the High Court confirmed the conviction and sentence of the two accused namely A1 & A2. However, the High Court acquitted A-3, Shahrunnisa and A-4, Siraj Khan. The High Court took the view that there was no evidence on record to show that A-3 and A-4 had done any over act or had shared common intention of Abdul Hafiz Khan (A-1) and Shakila Bano (A-2) and the allegation against them was that they were not raising objection to the illegal criminal acts of A-1 and A-2. The High Court, however, took the view that under the circumstances it could not be said that they had shared common intention as perhaps they were afraid of the accused or the so-called powers. The High Court, therefore, gave benefit of doubt to the said accused and acquitted them. The State of Uttar Pradesh has now come up in this appeal challenging the acquittal of the two respondents herein who were originally accused Nos. 3 and 4.

5. We have heard learned counsel appearing on behalf of the State as also Shri D.K. Garg appearing for the respondents. We are told at the Bar that no appeal, at the

A instance of the first two accused, is pending before this Court  
and, therefore, we would not be concerned with accused No.  
1 and accused No.2 in this appeal.

B 6. The learned counsel for the appellant very strongly  
pointed out that it was most un-likely that the two respondents  
would not know about the intentions on the part of A-1 and A-  
2. He pointed out that when the investigating party reached to  
the spot they were standing on their one leg indicating thereby  
that they were also the part of the so-called worship which was  
C going on in the house. Our attention was drawn to the evidence  
of eye-witnesses as also the evidence of PW-1, Shyam Mohan  
who filed the report.

D 7. This witness on the fateful day had gone to the house  
of A-1 along with one B.P.Singh and B.R.Singh and Ram Hujur  
Yadav and he was told by Ram Hujur Yadav, that there was  
crowd at the house of Abdul Hajur Khan. In examination-in-chief  
he has specifically stated about the claim of A-1 that the two  
boys were killed by way of sacrifice and that they would regain  
their lives. This witness spoke only about A-1, though he had  
E identified all the accused including the present respondent. All  
that the witness said about the present respondent was that they  
were present at the scene. Other witness was PW-3, Ram Hujur  
Yadav who had gone to the house of A-1 and had seen the two  
boys who were already dead. He also heard the claim of A-1  
F that the two boys would regain their lives. He also deposed that  
A-1 claimed that when the third son is sacrificed all the two sons  
would regain their lives. This witness did not specifically say  
anything about the present respondents. He did not even  
mention them in examination-in-chief. He merely referred to  
G them that they were present. The most important is PW-4,  
Habibullha who claimed that he heard the noise of Azaan at  
about 12:00 to 12:30 and wondering as to why the Azaan was  
being made he and one Shafi reached the house of A-1. He  
actually claimed that the daughter of A-1, Shakila (A-2) was  
beating one boy with a pipe and at that time Siraj Khan and  
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wife of Abdul Hafiz Khan were also present. He has attributed a specific role to Abdul Hafiz Khan by claiming that he strangled the boy and the boy died and he got frightened and, therefore, ran away. The witness, therefore, has not assigned any role to the respondents herein, excepting that they were present. There is hardly anything in his cross-examination which raises any doubt about the role played by A-1 and A-2 and all that can be said that he merely referred to the presence of the respondents herein. The other witness was Kamal Singh, Investigating Officer (PW-7) who had visited the house after registering the offence. His claim is that when he reached he saw the dead bodies of two boys lying on the cot and A-1 and A-2 were in the process of strangulating the third boy. He however, claimed that the two respondents were holding the legs of the third boy Shaukat Ali. He arrested the accused. Thus, only this witness had attributed a specific role to the respondents.

8. Ordinarily, there was no reason not to accept this version against the present respondents. However, the High Court has noted that he had not mentioned in the Panchnama that the two respondents had also held the legs of Shaukat Ali. In the absence of any role attributed to these respondents by Ram Hujur Yadav (PW-3), Habib Ullah (PW-4) the High Court did not feel safe in accepting the version of this witness, particularly, against the respondents and, therefore, the High Court has awarded the benefit of doubt to these two respondents. The High Court also reasoned further that it may be that these two respondents were afraid of the first accused and, therefore, they were mere mute spectators to the sordid drama that was being performed there.

9. There can be no dispute that these two respondents were present and indeed their mere presence by itself cannot be of criminal nature in the sense that by their mere presence a common intention can not be attributed to them. Indeed, they have not done anything. No overt act is attributed to them though

A it was tried to be claimed by one of the witnesses that when the police party reached that they were standing on one leg. This also appears to be a tall claim without any basis and the High Court has rightly not believed this story which was tried to be introduced.

B 10. The question, therefore, is as to whether by their mere presence these two respondents could be attributed with the common intention. The answer is clearly in the negative. There can be no dispute that the spectre of superstition had affected the psyche of all these accused persons. The case of the C Shahrunnisa (A-3) is one of a Mohammedan lady whose husband and daughter were overpowered by the superstitious belief. The force of the superstition was so overpowering that A-1 and A-2 probably were convinced of the non-existent supernatural powers of A-2. A poor Mohammedan lady coming D from the humble background, whose husband and whose daughter claimed these powers could not have ordinarily opposed which was being done and, therefore, had to see with open eyes the death of her two sons. We do not think that her not opposing the gruesome acts speaks in favour of her E nurturing the common intention. The High Court was undoubtedly right that she could be afraid of A-1 and A-2 as she herself might be under the superstitious psyche.

F 11. It is bane of the Indian society that in search of some worldly gains, the society becomes superstitious and blindly follows the path which leads only to desolation. Number of lives are lost and number of families are destroyed because of this false belief in the so-called black magic and so-called supernatural powers. All this is a result of the total lack of G education and human avarice. It is for this reason that we agree with the findings of the High Court. Even the case of the 4th respondent is no different. True it is that he was a police H Constable, but the fact is that he has not committed any overt acts. Again it is his own wife who claimed all the supernatural powers and went on to commit the horrible acts of un-paralleled

cruelty against the two innocent boys. True it is that it was his duty to stop the crime from being committed but inaction on his part would not by itself make him join the company of the guilty accused. This is apart from the fact that he has not been asked about his duty in his examination. In fact, the whole prosecution is strangely silent about the aspect of Section 221 IPC nor was such charge ever levelled against him.

12. We are dealing with an appeal against acquittal where the law so far crystallized desists us from fact finding exercise. Though, the whole evidence is open for us to appreciate the finding of acquittal that too by the High Court has to be given its own weight. We have, therefore, gone through the evidence ourselves only to find that the evidence against the two respondents is not clinching enough and it cannot be said that the finding of the High Court is perverse or such as cannot be reached after reasonable and careful survey of the evidence. A suspicion by itself cannot take place of the proof muchless in an appeal against acquittal. The law requires hard facts duly proved by admissible and truthful evidence. In a case where the High Court has recorded the finding of acquittal giving benefit of doubt, unless such a finding was an impossible one, the interference at this stage is not feasible. We, therefore, would agree with the High Court, though with a heavy heart. In the whole process the two innocent boys even before they could bloom and become good citizens of this country had to lose their lives. Thanks to the lack of education coupled with superstition probably actuated with the human avarice and greed. The appeal has no merits and it is dismissed.

N.J.

Appeal dismissed.