

ABDUL WAHEED

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v.

STATE OF UTTAR PRADESH

(Criminal Appeal No.1166 of 2005)

SEPTEMBER 01, 2015

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[DIPAK MISRA AND R. BANUMATHI, JJ.]

Penal Code, 1860: s. 302 – Murder – Previous enmity – Appellant armed with gun and other accused armed with lathis and dandas – Gun shot by appellant resulting in death of two persons – Other accused inflicting injuries on complainant party with lathis and dandas – Conviction by courts below – Held: In case of gun shot, person who fires the gun is presumed to have knowledge and intention that he is inflicting an injury which in the ordinary course of nature is sufficient to cause death and the offence is clearly murder – Courts below recorded concurrent findings of fact that the evidence of PWs 1, 3 and 4 remained unshaken and inspite of lengthy cross-examination of these witnesses, the accused were not able to bring any point shaking their credibility – No interference with the order of conviction called for.

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Sentence/Sentencing: Magnitude of crime – Proportionality of punishment – Held: It is the duty of every court to award proper sentence having regard to the manner in which the offence was committed.

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Dismissing the appeal, the Court

HELD: 1. The appellant and the accused party were having enmity against the deceased on account of civil suit and filing of contempt petition. The appellant and the accused party went to *chabutra* of the deceased

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A armed with pistol, guns and *lathis* which shows the
intention of the appellant to commit the murder. An
ordinary person is not presumed to know the precise
location of the arteries in the human limbs. Therefore, if
B a stab with a knife or dagger, aimed at an arm or a leg,
severs an artery and the injured man dies as a result, it
may be reasonable to argue that the offence is not one
of culpable homicide and that the assailant can only be
presumed to have intended to cause hurt or grievous
C hurt with a dangerous weapon. The case in hand is quite
different. When gun is used and the person who fires
the gun must be presumed to have knowledge and
intention that he is inflicting an injury which in the
ordinary course of nature is sufficient to cause death
D and the offence is clearly murder. Having regard to the
enmity and the weapon used, the courts below rightly
held that the appellant-accused was guilty of committing
the murder of the deceased. [Para 14] [750-F-H; 751-A-
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E 2. In the occurrence when two persons died and
number of others were injured, age of the accused is of
no relevance. Undue sympathy would do more harm to
the Criminal Justice System undermining the public
confidence in the efficacy of the system. It is therefore
F the duty of every court to award proper sentence having
regard to the manner in which the offence was
committed. The trial court and the High Court have
recorded concurrent findings and the findings are based
G upon evidence warranting no interference in exercise
of jurisdiction under Article 136 of the Constitution of
India. [Para 15] [751-D-F]

CRIMINAL APPELLATE JURISDICTION: Criminal
Appeal No. 1166 of 2005.

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From the Judgment and Order dated 17.12.2004 of the

High Court of Judicature at Allahabad in Criminal Appeal No. 796 of 1981. A

Salman Khurshid, Imtiaz Ahmed, Naghma Imtiaz (for Equity Lex Associates) for the Appellant.

Ratnakar Dash, Harsh Vardhan Jha, Adarsh Upadhyay for the Respondent. B

The Judgment of the Court was delivered by

R. BANUMATHI, J. 1. This appeal is preferred against the judgment dated 17.12.2004 passed by the Allahabad High Court in Criminal Appeal No.796 of 1981 whereby the High Court affirmed the conviction of the appellant Abdul Waheed under Sections 302, 148 and 323 IPC read with Section 149 IPC and sentence of life imprisonment and one year rigorous imprisonment respectively awarded to him. The High Court partly allowed the appeal qua accused Babu Khan, Mukhtiyar, Javed Khan and Mohd. Hafeez Khan. The appeal before the High Court abated qua accused Vakil Khan, Abdul Hai and Shafiq Khan. C
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2. Case of the prosecution is that complainant-Razzaq Khan's brother Abbas and Shabbir instituted a suit in the court of Munsif, Farrukhabad and an injunction order was issued by the court. Despite the court order, appellant Abdul Waheed did not stop construction and continued the construction on the Panchayat Ghar. Due to the continuing unlawful act of the appellant, contempt proceedings were initiated against him and the case was listed for hearing on 06.11.1974. One day before the hearing date i.e. 05.11.1974, at about 8.00 p.m., the complainant was sitting near the *chabutra* of the well along with Abbas, Shubrati and Israr discussing about the court hearing. At that time, Abdul Hai, appellant Abdul Waheed, Vakil Khan, Babu, Shafiq, Mukhtiar, Javed and Hafeez came there and abused them giving a warning that they would be killed if F
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A they proceeded to the court next day. Abbas replied back saying that he has instituted the suit and he will pursue the matter. Appellant-Abdul Waheed, Abdul Hai and Shafiq were armed with licensed guns, while the rest had *lathis* and *dandas*.
B On hearing the altercations, Ashfaq, Ishtiyaq, Yasim Khan, Ali Daraj and Mchd. Yaseen came to the spot and intervened saying that the court would decide the issue. Abdul Waheed and Shafiq exhorted others to break the bones, whereupon Babu, Wakil, Mukhtiyar, Javed and Hafeez started inflicting injuries by giving *lathi* blows. Ishtiyaq and Ashfaq used *lathis*
C in defence. The accused Abdul Hai, Abdul Waheed and Shafiq opened fire on the complainant party. Abdul Waheed's gunshot directly hit Abbas in his arm and Abbas sustained fracture injuries and he died little thereafter. Israr was also hit by pellets and sustained gunshot injuries.
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3. On the complaint lodged by Razzaq Khan (PW-1), a case was registered in Crime Case No. 313/1974 at Police Station Kamalganj under Sections 147, 148, 302, 302/149 & 302/149 IPC and Bisheshwar Singh, Sub Inspector of Police
E (PW-7) had taken up the investigation. Injured Ashfaq Khan, Ishtiyaq Khan, Razzaq Khan and Shubrati were admitted in Primary Health Centre Kamalganj and after first aid they were referred to District Hospital Fatehgarh where they were treated.
F Dr. H.D. Gupta conducted post-mortem on the body of Abbas on 06.11.1974 and issued post-mortem certificate (Ext.Ka-25) opining that Abbas died of shock and haemorrhage due to injuries sustained by him. Injured Israr Khan was admitted as indoor patient in District Hospital Fatehgarh and he was discharged from the hospital on 18.11.1974. Thereafter Israr
G was again admitted in the hospital on 14.12.1974 complaining of intestinal obstruction. On 16.12.1974, dying declaration of Israr Khan (Ext Ka-28) was recorded in the District Hospital by Sri Vinai Kumar (PW-13) the then S.D.M. Sadar. Dr. Sabir
H Hussain has given a certificate (Ext.Ka-17) that Israr Khan was

in a fit state of mind to give dying declaration. Despite A
treatment Israr Khan died on 18.12.1974. Dr. S. Tandon (PW-
10) conducted the autopsy on the body of deceased-Israr Khan
and issued post-mortem certificate (Ext.Ka-24) opining that
the death was due to shock as septic peritonitis which B
according to the doctor, Israr could have developed for want
of proper treatment of injuries. After due investigation charge
sheet was filed against the accused on 07.01.1975 under
Sections 147, 148, 302 IPC read with Section 149 IPC (two
counts).

4. To bring home the guilt of the accused, prosecution has C
examined thirteen witnesses. On behalf of the accused,
defence has examined two witnesses. Upon consideration of
the evidence, the II Additional District & Sessions Judge
Farrukhabad vide judgment dated 31.03.1981 convicted the D
appellant Abdul Waheed under Section 302 IPC for murder of
Abbas Khan and sentenced him to undergo life imprisonment.
Other seven accused persons were convicted for murder of
Abbas Khan under Section 302 IPC read with Section 149 E
IPC and each of them were sentenced to undergo life
imprisonment. All the eight persons were convicted under
Sections 302/149 IPC for the murder of Israr Khan and each
of them were sentenced to undergo life imprisonment. F
Accused Abdul Hai, Abdul Waheed and Shafiq were also
convicted under Section 148 IPC. All the eight accused
persons were also convicted under Sections 323/149 IPC.
Aggrieved by the verdict of conviction, the accused persons
preferred appeal before the Allahabad High Court which vide G
impugned judgment confirmed the conviction of the appellant-
Abdul Waheed as awarded by the trial court and partly allowed
the appeal qua other accused as aforesaid. This appeal
assails the correctness of the impugned judgment.

5. Taking us through the evidence and the material on H
record, Mr. Salman Khurshid, learned Senior Counsel for the

A appellant assailed the conviction *inter alia* on the grounds:- (i) the discrepancy as to the place of occurrence; (ii) complainant party were the aggressors and (iii) conviction of the appellant could only be under Section 304 Part II IPC and not under Section 302 IPC. Learned Senior Counsel submitted that the
B incident took place near the *chabutra* of Shafiq where Shafiq and co-accused Vakil and Hafeez were sitting and not in the place and manner as putforth by the prosecution. It was further submitted that the investigating officer did not find any blood
C spot at the alleged place of occurrence i.e. in front of door of Abbas. It was further submitted that the accused party were not the aggressors and only deceased Abbas Khan and Israr were armed with gun and pistol respectively and the investigating officer recovered a gun belonging to the
D deceased Abbas Khan from the place of occurrence but the prosecution has failed to explain as to how the gun was found there and the material lapses in the prosecution case were not properly appreciated by the High Court.

E 6. Per contra, Mr. Ratnakar Dash, learned Senior Counsel appearing for the respondent submitted that the prosecution has established the guilt of the accused beyond reasonable doubt and the trial court rightly convicted the appellant for committing the murder of Abbas Khan and the High Court rightly
F dismissed the appeal.

7. We have carefully considered the rival contentions and perused the impugned judgment and material on record.

G 8. Shabbir Khan and Abbas filed the civil suit No.110/74 (Ex.Ka-40) alleging that the appellant Abdul Waheed has started construction of his house over the site of Panchayat Ghar. On the application of Abbas Khan, the Munsif Court vide order dated 17.04.1974 passed the order of status quo. Ex.Ka-41 is the copy of the Commissioner's report and map
H in the aforesaid suit. Ex. Ka-42 is the application moved by

Shabir Khan in the aforesaid suit No. 110/74 for taking action against the appellant Abdul Waheed under Order XXXIX Rule 2 CPC which was registered as Miscellaneous Case No.65/74 of 1974 and the same was scheduled to be heard on the next date of the incident i.e. 06.11.1974. By the evidence of PW-1 and by the aforesaid documents prosecution has established the motive of the accused. Admittedly, the accused persons were close relations of the accused-appellant hence they also rendered a helping hand in the commission of the crime and all of them formed an unlawful assembly with common intention of inflicting injuries to the complainant party. There is plausible and cogent evidence establishing motive of the accused person for committing the alleged crime. Proof of motive of the accused towards the deceased heightens the possibility of the crime. Proof of motive adds weight and value to the evidence of the eye-witnesses.

9. Prosecution has mainly relied on the testimony of three eye-witnesses Razzaq Khan (PW-1), Yasin Khan (PW-3) and Ali Daraj (PW-4). PWs 1, 3 and 4 have spoken in one voice about the overt acts of the accused. PW1-Razzaq Khan being injured witness, his evidence stands on a higher footing. Unless there are cogent and convincing grounds, evidence of PW1-injured witness cannot be doubted. PW-3's house is at a distance of 30 to 35 paces towards the west of the house of Abbas Khan and his presence on the spot is quite natural. At the time of occurrence PWs 3 and 4 were present in the house of PW3 and on hearing the hues and cries of the occurrence, both of them rushed to the spot and their evidence is fully corroborated by the evidence of PW-1. Courts below recorded concurrent findings of fact that the evidence of PWs 1, 3 and 4 remains unshaken and in spite of lengthy cross-examination of these witnesses, the accused were not able to bring any point shaking credibility of PWs 1, 3 and 4.

10. Learned Senior Counsel for the appellant contended

A that the appellant Abdul Waheed and the accused party were
not the aggressors and that the fateful incident took place near
the *chabutra* of Shafiq where co-accused Vakil Khan, Hafeez
were sitting and discussing the strategy of the contempt case
listed on 06.11.1974 and at that moment deceased Abbas
B and Israr armed with gun and pistol respectively along with
other accused armed with *lathis* came there hurling abuses
and an altercation took place between both parties and Razzaq
Khan had given *lathi* blows to Vakil Khan and Hafeez and
Abbas fired from his gun and only to show that the accused
C party were the aggressors, the scene of occurrence was shifted
as *chabutra* of Abbas. As per prosecution version, in the
evening of 5.11.1974, PW-1 was sitting on the *chabutra* of the
well situated in front of the house of Abbas Khan and the
D accused party came and fired gunshot injuries and attacked
them with *lathis*. The controversy between the parties is about
the exact location of the place of occurrence. Admittedly, both
parties have stated that after the wordy altercation on account
of civil dispute, the fight ensued between them. PW-1 and other
E witnesses have spoken consistently about the place of
occurrence being *chabutra* of Abbas. If the occurrence had
taken place at the *chabutra* of Shafiq Khan as alleged by the
defence, then it was expected that some blood would have
been found near the *chabutra* of the house of Shafiq; the fact
F that no blood was found at the *chabutra* of Shafiq Khan
improbabilises the defence version.

11. On behalf of the accused it was contended that the
complainant party were the aggressors and deceased Abbas
Khan and Israr armed with gun and pistol respectively along
G with other persons armed with *lathis* came to *chabutra* of Shafiq
Khan hurling abuses and the complainant gave *lathi* blows to
Vakil Khan and Hafeez and Abbas Khan opened fire from his
gun as a result of which accused viz. Vakil Khan and Hafeez
H sustained injuries and the prosecution has suppressed genesis

of the occurrence. Evidence of PW2-Dr. G.M. Solanki, of course A
shows that the accused persons namely Mohd. Hafeez and
Vakil Khan sustained simple injuries (Ext. Ka-6 and Ka-43).
Prosecution is obliged to explain injuries sustained by the
accused, if it is not trivial in nature. The injuries sustained by
Mohd. Hafeez and Vakil Khan were simple injuries. However, B
the prosecution has sufficiently explained the injuries sustained
by accused even at the time of registration of the FIR as in
defence Ishtiyaq and Ashfaq inflicted blows with *lathis* on the
accused party. As discussed earlier, the accused party were C
armed with guns, pistols and *lathis*, the injuries sustained by
the complainant party and that there were two deaths on the
side of the complainant party and the injuries sustained by them
would clearly prove that the accused party were the aggressors.
The truth of the matter is that the accused were the aggressors D
and the accused Vakil Khan and Hafeez Khan received minor
simple injuries of blunt weapons at the hands of Ishtiyaq and
Ashfaq Khan who wielded lathis in lawful exercise of their right
of private defence.

12. Prosecution version is assailed contending that the E
prosecution has not explained the recovery of third gun from
the scene of occurrence. Learned Senior Counsel for appellant
contended that three allegedly recovered empty cartridges
were sent to Ballistic Expert-PW8 who has given a certificate F
(Ex. Ka- 23) that two of the said cartridges were fired from gun
No.3696-69 i.e. the gun allegedly recovered from co-accused
Abdul Hai and the third cartridge was not fired from either of
the two guns and in the absence of the recovery of third gun, G
the version of the prosecution becomes highly doubtful. Be it
noted that although it is proved that two cartridges were fired
from the gun recovered from the accused, from the statement
adduced by the three eye witnesses it is evident that Abdul
Waheed had a gun and he fired one shot from his gun. The
said cartridges could have been possibly from the gun of H

A appellant-Abdul Waheed which was not recovered. Non-recovery of gun from the appellant nor opinion of ballistic expert regarding three cartridges does not in any way raise doubts about the prosecution case and the involvement of the appellant.

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13. Learned Senior Counsel Mr. Salman Khurshid further urged that gun shot fired by the appellant hit Abbas on his arm which is not a vital part of the body and appellant cannot be held guilty of the murder. By perusal of post-mortem certificate (Ext. Ka-25), it is seen that Abbas sustained following injuries:

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(i) Gunshot wound $1\frac{1}{2}'' \times \frac{1}{2}''$ bone deep on the front and inner side of right upper arm. $3\frac{1}{2}''$ above elbow with fracture of the shaft of humerus bone...

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(ii) Multiple gunshot wound of exit of varying dimensions from $1/8'' \times 1/8'' \times 1/10'' \times 1/10''$ in middle part of right upper arm with everted margins.

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(iii) Abrasion $1/2'' \times 1/2''$ on the right side of tip of nose.

The doctor recovered twelve shots from the wounds and Dr. H.D. Gupta opined that the death of the deceased Abbas was due to shock and haemorrhage as a result of injuries sustained by him.

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14. The appellant and the accused party were having enmity against the deceased-Abbas Khan on account of civil suit and filing of contempt petition. The appellant and the accused party went to *chabutra* of Abbas Khan armed with pistol, guns and *lathis* which shows the intention of the appellant to commit the murder. An ordinary person is not presumed to know the precise location of the arteries in the human limbs. Therefore, if a stab with a knife or dagger, aimed at an arm or a leg, severs an artery and the injured man dies as a result, it may be reasonable to argue that the offence is

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not one of culpable homicide and that the assailant can only be presumed to have intended to cause hurt or grievous hurt with a dangerous weapon. The case in hand is quite different. When gun is used and the person who fires the gun must be presumed to have knowledge and intention that he is inflicting an injury which in the ordinary course of nature is sufficient to cause death and the offence is clearly murder. Having regard to the enmity and the weapon used, the courts below rightly held that the appellant-accused was guilty of committing the murder of Abbas Khan.

15. On behalf of the appellant it was stated that the occurrence was of the year 1974 and the appellant is aged about ninety years and sending him to prison at this distant point of time would be harsh. We are not impressed with this submission. In the occurrence when two persons died and number of others were injured, in our view, age of the accused is of no relevance. Undue sympathy would do more harm to the Criminal Justice System undermining the public confidence in the efficacy of the system. It is therefore the duty of every court to award proper sentence having regard to the manner in which the offence was committed. The trial court and the High Court have recorded concurrent findings and the findings are based upon evidence warranting no interference in exercise of jurisdiction under Article 136 of the Constitution of India.

16. The appeal is dismissed. Appellant is on bail. His bail bonds are cancelled. He shall be taken into custody forthwith to serve the remaining sentence.