

CASE NO.:  
Appeal (crl.) 799 of 2008

PETITIONER:  
MADHUBAN

RESPONDENT:  
STATE OF U.P.

DATE OF JUDGMENT: 05/05/2008

BENCH:  
C.K. THAKKER & D.K. JAIN

JUDGMENT:  
J U D G M E N T  
ARISING OUT OF SPECIAL LEAVE PETITION (CRL.) NO. 5446 OF 2007

REPORTABLE

C.K. THAKKER, J.

1. Leave granted.
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.
3. It was the case of the prosecution that in the night of November 15, 1976, Jai Ram Singh (Deceased \026 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 \026 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 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.

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

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.

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.

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.

Judgment is reserved.

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 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 CrI. 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.