

Sanjay Kumar Yadav vs State Of U.P. on 25 July, 2018

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HIGH COURT OF JUDICATURE AT ALLAHABAD

A.F.R.

Judgment Reserved on : 09.07.2018

Judgment Delivered on : 25.07.2018

Court No. - 47

Case :- CRIMINAL APPEAL No. - 5507 of 2010

Appellant :- Sanjay Kumar Yadav

Respondent :- State Of U.P.

Counsel for Appellant :- K.N. Yadav, Amar Nath Pandey, Shailendra Yadav, V.B. Yadav, Yadvend

Counsel for Respondent :- Govt. Advocate

Hon'ble Ram Surat Ram (Maurya), J.

Hon'ble Umesh Chandra Tripathi, J.

(Delivered by Umesh Chandra Tripathi, J.) [1]. By way of instant criminal appeal, the appellant has challenged the legality and sustainability of the judgment and order dated 08.07.2010 passed by Additional Sessions Judge/F.T.C. Vth, Jaunpur, in Sessions Trial No. 479 of 2008 (State v. Sanjay Kumar Yadav), Police Station - Baxa, District - Jaunpur, whereby appellant Sanjay Kumar Yadav was convicted and sentenced as follows :

(i) Imprisonment for life and fine of Rs. 10,000/- and in case of default in payment of fine, to undergo additional simple imprisonment for one year, under Section 302 of

the Indian Penal Code (in short 'IPC'); and

(ii) Six months' simple imprisonment and fine of Rs. 1,000/- and in case of default in payment of fine, to undergo additional simple imprisonment for two months, under Section 309 of IPC;

[2]. Both the sentences were directed to run concurrently.

[3]. Succinctly, facts of the case are that marriage of Phool Kumari, sister of informant Subedar Yadav s/o Ram Khelawan Yadav r/o Belhata, Police Station - Baksa, District - Jaunpur, was solemnized with Sanjay Kumar Yadav s/o Parmanand Yadav r/o Umarpur, Police Station - Baksa, District - Jaunpur. This was the second marriage of Sanjay Kumar Yadav. His first marriage was solemnized with one Madhuri, but being issueless from Madhuri, he solemnized his second marriage with Phool Kumari. Due to wedlock of Sanjay Kumar Yadav and Phool Kumari, a child Vaibhav was born. About 2-3 days before the occurrence, a verbal spat took place between Sanjay Kumar Yadav and Phool Kumari. On the date of the occurrence, that is to say, on 24.07.2008, an altercation again took place between the couple. On the same day, at about 11.00 A.M., the informant Subedar Yadav, along with his mother Somari Devi w/o Ram Khelawan, was going to District Court, Jaunpur for getting bail of his brother Jiledar Yadav. He asked Sanjay Kumar Yadav as to whether he would accompany them, but he replied in negative. At about 05.00 P.M., the informant and his mother reached Dhanyiamau from the court. From there, the mother of informant went home, while the informant went to the market. After sometime, while he was returning from the market, his brother Basdev informed him that an altercation had taken place between Sanjay Kumar Yadav and Phool Kumari, whereafter they attempted to commit suicide. His sister died, while his brother-in-law Sanjay Kumar Yadav was breathing. It was requested that report be lodged and action be taken. The written report is on record and the same is marked as Ex.Ka.1.

[4]. Contents of written report were taken down by moharir Constable Zamanat Abbas (scribe) in the chik first information report (FIR No. 94 of 2008) at Case Crime No. 405 of 2008 under Section 309 of IPC at Police Station - Baksa, District - Jaunpur on 24.07.2008 at 21.30 hours (09.30 P.M.). The FIR is on record and the same is marked as Ex.Ka.6. On the basis of entry so made in the FIR, relevant entry was made in the general diary ('G.D. kayami mukadma') by moharir Constable Ranjeet Singh (scribe) and a case was registered against the accused at the aforesaid case crime number under the aforesaid section. The carbon copy of the G.D. is on record and the same is marked as Ex.Ka.7.

[5]. Thereafter, investigation of the case ensued and it was entrusted to the then S.I. D.P. Tiwari (Investigating Officer). He first of all recorded the statement of moharir Constable Zamanat Abbas and thereafter, went to the place of occurrence on the same day, i.e. 24.07.2008 and came to know that injured accused Sanjay Kumar Yadav and deceased Phool Kumari were send to District Hospital, Jaunpur. The informant and other relatives were also there in the hospital. On the next day, i.e. 25.07.2008 he went to the hospital and from there, he went to the residence of the informant Subedar Yadav, where he recorded the statement of the informant and Somari Devi and

on the pointing out of the informant, inspected the place of occurrence and prepared site plan. The site plan is on record and the same is marked as Ex.Ka.17. Thereafter, in the presence of the witnesses, he took sample of blood-stained and simple earth and prepared memo of the same, which is on record and marked as Ex.Ka.4. He thereafter recovered blood-stained axe ('kulhadi') from the spot and prepared recovery memo of the same, which is on record and marked as Ex.Ka.5. On 03.08.2008, he recovered a blood-stained knife and a broken mobile from the spot. The recovery memo of blood-stained knife and mobile is on record and the same is marked as Ex.Ka.3. He also prepared a site plan of the place of recovery of knife and mobile, which is on record and marked as Ex.Ka.19. On 04.08.2008, he went to District Hospital, Jaunpur and took into possession parts of blood-stained jeans and vest of injured accused Sanjay Kumar Yadav. He prepared recovery memo of the same, which is on record and marked as Ex.Ka.18. Thereafter, he took statement of inquest witnesses and held inquest of the deceased. The inquest report ('panchayatnama') is on record and the same is marked as Ex.Ka.2. In the process, necessary formalities were undergone and the relevant papers in that context, were prepared, viz. photo nash (Ex.Ka.14), specimen seal (Ex.Ka.12), police form 13 (Ex.Ka.13), letter to R.I. (Ex.Ka.10), letter to CMS (Ex.Ka.11), police information letter ('police soochna paptra') of S.H.O., Kotwali Jaunpur (Ex.Ka.15), carbon copy of general diary (G.D. No. 15) ('rawangi G.D.') (Ex.Ka.16). On 31.03.2018, on the instruction of CJM, Jaunpur, he prepared a docket of blood-stained and simple earth, knife, mobile, blood-stained axe, clothes of deceased Phool Kumari and accused Sanjay Kumar Yadav and send to Vidhi Vigyan Prayogshala (Forensic Science Laboratory), Lucknow. The docket is on record and the same is marked as Ex.Ka.22. On 09.02.2009, the report of vidhi vigyan prayogshala was received, which is on record and marked as Ex.Ka.21.

[6]. Injured accused Sanjay Kumar Yadav was brought in District Hospital, Jaunpur on 25.07.2008 at 0.15 hours (12.15 A.M.) by C.P. 156 Arvind Yadav (constable), Police Station - Baksa, District - Jaunpur, where he was medically examined by Dr. Shyam Narayan Prasad, who noted the following injuries on his person :

1. Incised wound in front of neck size 1.5 cm. x 0.3 cm. x dept not probed, 6 cm. above the sternal notch, bleeding present.
2. Incised wound in front of neck, size 4 cm. x 0.5 cm. x depth not probed, bleeding present, 1 cm. above injury no. 1.
3. Incised wound in front of neck, size 2 cm. x 0.3 cm. x depth not probed, bleeding present, 2 cm. above injury no. 1.
4. Lacerated wound size 4 cm. x 0.5 cm. x bone deep, bleeding present on the head, 15 cm. above Rt. ear on middle of head.
5. Lacerated wound size 3 cm. x 0.3 cm. x muscle deep, bleeding present, 2 cm. above injury no. 4.

6. Lacerated wound on top of head size 4 cm. x 1cm. x bone deep, bleeding present, 3 cm. above & behind injury no. 5, bleeding present.

7. Abraded contusion size 4 cm. x 3 cm. on left arm, 6 cm. below the left shoulder.

8. Multiple linear abrasion in front of neck in an area of 12 cm. x 6 cm. just above sternal notch.

[7]. From the above injuries, following inference was drawn :-

All above injuries are kept under observation. Advised x-ray of A.P. & lateral part of head and neck. Injury nos. 1-3 are caused by sharp object, injury nos. 4-7 are caused by hard and blunt object. Injury no. 8 is caused by friction. Duration fresh.

[8]. The injury report of injured Sanjay Kumar Yadav is on record and the same is marked as Ex.Ka.8.

[9]. Autopsy on the mortal remains of deceased Phool Kumari was conducted on 25.07.2008 at 05.30 P.M. by Dr. O.P. Singh at District Hospital, Jaunpur, whereby he noted the following ante-mortem injuries on her person:-

1. Incised wound on Rt. side cheek 4 cm. x 1 cm. x bone deep Rt. maxilla fractured.

2. Incised wound 9 cm. x 5 cm. muscle deep just below chin. Mandible fractured.

3. Incised wound 12 cm. x 4 cm. x cervical vertebra deep on the Lt. Side neck Larynx, Trachea, oesophagus & carotid artery Lt. cut.

4. Incised wound 10 cm. x 3 cm. cervical vertebra deep on Rt. Side neck. Rt. side carotid artery cut.

[10]. In the opinion of the doctor, cause of death of deceased Phool Kumari was shock and haemorrhage as a result of ante-mortem injuries.

[11]. The post-mortem report of deceased Phool Kumari is on record and the same is marked as Ex.Ka.9.

[12]. After completion of investigation, the Investigating Officer submitted charge sheet against the accused-appellant under Sections 309 and 304 of IPC. The charge sheet is on record and the same is marked as Ex.Ka.20.

[13]. Consequent thereupon, the learned Magistrate took cognizance against the accused. After complying with the provisions contained in Section 207 of the Code of Criminal Procedure (in short 'Cr.P.C.'), he found case against the accused to be prima facie apposite for committing it to the

Sessions Court.

[14]. Thereafter, committal proceedings took place and the case was committed to the Court of Sessions, where it was registered as Sessions Trial No. - 479 of 2008. As a sequel to that, it was made over for trial and disposal to the court of Additional Sessions Judge/F.T.C. Vth, Jaunpur. Accused Sanjay Kumar Yadav was heard on point of charge and the trial court was prima facie satisfied with the case against him, therefore, it framed charges against him under Sections 302 and 309 of IPC. Charges were read over and explained to the accused, who pleaded not guilty and claimed to be tried.

[15]. The prosecution, in order to prove the guilt of the accused and substantiate charge against him, examined informant Subedar Yadav (P.W.1), his mother Somari Devi (P.W.2), neighbour of informant Subedar Yadav - D.K. Yadav (P.W.3), constable moharir Zamanat Abbas (P.W.4), Dr. S.N. Prasad, Emergency Medical Officer, Sadar Hospital, Jaunpur (P.W.5), Dr. O.P. Singh of District Hospital, Jaunpur (P.W.6), neighbour of informant Subedar Yadav - Gopi Nath (P.W.7), S.I. Suresh Ram, Police Station Officer, Shankarmandi, Police Station - Kotwali, District - Jaunpur (P.W.8), S.I. Durga Prasad Tiwari (I.O.) (P.W.9) and constable moharir Ranjeet Singh (P.W.10) as prosecution witnesses.

[16]. Except as above, no other testimony was adduced, therefore, evidence for the prosecution was closed and the statement of the accused Sanjay Kumar Yadav was recorded under Section 313 of the Cr.P.C., wherein he claimed to have been falsely implicated in the present case. The accused further stated that on the date of the occurrence, at about 02.00 P.M., 3-4 miscreants, having axe ('kulhadi') and iron rod, entered into his residence and attacked on him and his wife, due to which they sustained injuries. Due to the injuries sustained, he became unconscious, while his wife died. Thereafter, he was admitted to the hospital. He stated that his brother-in-law Subedar Yadav has lodged F.I.R. with false allegation.

[17]. The defence did not lead any evidence, either oral or documentary.

[18]. The learned trial Judge after considering the case on its merit, passed the impugned judgment and order of conviction.

[19]. Feeling aggrieved by the order of the learned trial Judge, the appellant has preferred the instant criminal appeal.

[20]. Heard Sri P.C. Mishra, learned counsel for the appellant and Sri Anil Kushwaha, learned Additional Government Advocate for the State of U.P. [21]. Learned counsel for the appellant contended that some unknown miscreants had caused injury to accused-appellant Sanjay Kumar Yadav and death of his wife Phool Kumari. First information report has been lodged with an inordinate delay, for which no presumptive explanation was put forth by the prosecution. The prosecution has failed to prove the guilt of the accused-appellant Sanjay Kumar Yadav beyond all reasonable doubt. Even so, learned trial court has convicted the accused-appellant without properly appreciating the facts and evidence brought on record, which is not sustainable in the eyes of law.

Hence, the impugned order of conviction is liable to be set aside and the appeal deserves to be allowed.

[22]. Retorting to the submissions made by learned counsel for the appellant, learned A.G.A. for the State contended that death of deceased Phool Kumari was caused at her residence. Accused-appellant Sanjay Kumar Yadav was also present at the residence at the time of the occurrence. As per provision contained in Section 106 of the Indian Evidence Act, 1872 (in short 'Act, 1872'), it is the duty of accused-appellant Sanjay Kumar Yadav to prove how his wife Phool Kumari died. The accused-appellant has not adduced any evidence to show that unknown miscreants had caused death of Phool Kumari. Accordingly, inference should be drawn against him. The learned trial court has not committed any error in framing charge against the accused-appellant and passing the impugned order of conviction and the same is liable to be upheld.

[23]. From the statement of P.W.1 informant Subedar Yadav and P.W.2 Somari Devi, it is evident that on the date of the occurrence, that is to say, on 24.07.2008 at about 06.00 P.M., accused-appellant Sanjay Kumar Yadav and his wife Phool Kumari were found by Somari Devi lying injured at her residence. Phool Kumari was found to be dead, while her husband Sanjay Kumar Yadav was found unconscious.

[24]. From the perusal of injury report (Ex.Ka.8) of injured Sanjay Kumar Yadav, post-mortem report (Ex.Ka.9) of deceased Phool Kumari and statement of accused-appellant Sanjay Kumar Yadav under Section 313 of Cr.P.C., it is evident that both Sanjay Kumar Yadav and Phool Kumari had sustained injuries at the same time. All the injuries of Phool Kumari were caused by sharp-edged weapon. Her maxilla and mandible were fractured. Her larynx, trachea, oesophagus & carotid artery was left cut.

[25]. From the nature of injuries, it is evident that all these injuries have been caused by a single weapon. Nature of injuries also shows that these injuries have been inflicted by some other person and not by the deceased herself. In other words, from the nature of injuries, it cannot be said that they were self-inflicted. Of the eight injuries caused to accused-appellant Sanjay Kumar Yadav, three injuries have been caused on his neck by a sharp-edged weapon, while three other injuries were caused on his head by a hard and blunt object. There was multiple abrasion in an area of 12 cm. x 6 cm. on his neck and an abraded contusion in an area of 4 cm. x 3 cm. on his left arm.

[26]. There is no eye-witness of the occurrence. At the time of the occurrence, only Phool Kumari and her husband accused-appellant Sanjay Kumar Yadav were present in the house. Phool Kumari was found dead, while Sanjay Kumar Yadav was found breathing in a state of unconsciousness.

[27]. Accused-appellant Sanjay Kumar Yadav, for the first time, on 09.08.2008, submitted before Remand Magistrate, Jaunpur, an application stating that some unknown miscreants had assaulted him and his wife Phool Kumari, due to which she sustained grievous injuries, resulting into her death. He remained unconscious in District Hospital, Jaunpur for 15 days. In his written statement under Section 313 of Cr.P.C., he stated that on the day of the occurrence, at about 02.00 P.M., unknown miscreants, 3-4 in number, having axe and iron rod, entered into the residence and

assaulted him and his wife Phool Kumari, due to which she died. The accused-appellant had not narrated this fact either before the Magistrate on 09.08.2008 or in his statement under Section 313 of Cr.P.C. recorded on 22.04.2010 verbally.

[28.] From the perusal of application dated 09.08.2008 submitted by the accused-appellant Sanjay Kumar Yadav before the Remand Magistrate, it is evident that the application had not been written by him, but by someone else. In that application, he has not even narrated the time of the occurrence, number of miscreants who committed the crime and the weapons used in the commission of offence. If the occurrence had taken place, as alleged by accused-appellant Sanjay Kumar Yadav, then he may have stated the full particulars viz. time of occurrence, number of miscreants and weapons used, both before the Remand Magistrate and in his statement under Section 313 of Cr.P.C. He made written statement which shows that his submission is an afterthought, with the advice of someone else.

[29]. Although accused-appellant Sanjay Kumar Yadav submitted before the Magistrate that he was unconscious in District Hospital, Azamgarh for 15 days, but his version is not supported by medical evidence. In his injury report (Ex.Ka.8), it is not mentioned that he was unconscious. None of the injuries caused to him was grievous in nature and dangerous to life as no x-ray plate or x-ray report has been submitted either by the prosecution or by the appellant. Due to such type of injuries, no person may remain unconscious for 15 days. In written statement submitted before court under Section 313 of Cr.P.C., accused-appellant Sanjay Kumar Yadav tried to convince the court that the family members of his first wife Madhuri may have committed the crime, but this fact was not narrated by him before the Magistrate on 09.08.2008. Although there is no evidence on record to show that accused-appellant Sanjay Kumar Yadav was admitted to District Hospital, Jaunpur for 15 days, even if it is presumed that he was admitted in hospital for 15 days, he may state before the hospital authorities or inform the police that some outsider miscreants have committed the crime. It is not possible that outsider miscreants enter into the house of a person in broad daylight and commit murder of a lady and cause grievous injuries to her husband and no person could see them while they were entering into the house of the informant and going out after committing the crime. From these circumstances and facts of the case, it is evident that accused-appellant Sanjay Kumar Yadav has falsely deposed before the Magistrate and in his statement under Section 313 of Cr.P.C. that some outsider miscreants have caused the death of his wife Phool Kumari.

[30]. Hon'ble Apex Court in *Sidhartha Vashisht @ Manu Sharma vs State* (NCT Of Delhi) reported in (2010) 6 SCC 1 held that if any fact is in special knowledge of a person and he fails to produce the fact, adverse inference may be drawn against him, as per provision of Section 106 of Act, 1872. Hon'ble Apex Court further held that if the accused makes a wrong statement under Section 313 of Cr.P.C., adverse inference may be drawn against him and it shall become an additional circumstance to prove the guilt of the accused.

[31]. In the present case, it was in the special knowledge of accused-appellant Sanjay Kumar Yadav, the person who have committed the murder of his wife Phool Kumari and he had made a false statement that some outsider miscreants committed the murder of his wife. In such a situation, adverse inference may be drawn against him. Certainly, it is an additional circumstance against

accused-appellant Sanjay Kumar Yadav. But if the accused-appellant had not sustained any injury, then it may have been inferred that he had committed murder of his wife.

[32]. At the time of the occurrence, only accused-appellant Sanjay Kumar Yadav and his wife Phool Kumari were present in a room of the residence of informant Subedar Yadav. Phool Kumari sustained grievous injuries, due to which she died. From the nature of these injuries, it cannot be inferred that these were self-inflicted. From these circumstances, it is evident that accused-appellant Sanjay Kumar Yadav had caused injury to his wife Phool Kumari, due to which she died.

[33]. On 25.07.2008, a blood-stained axe was recovered from the spot. From the perusal of nature of injuries of deceased Phool Kumari, it appears that these injuries might have been caused to her by the same axe. First information report of the case has been lodged on the same day at 09.30 P.M. The police reached on the spot the same day, therefore, it cannot be said that first information report was ante-timed. The delay in lodging the F.I.R. in this case does not effect the merit of the case in any way. The fact of case is narrated in the F.I.R. in a very natural way. In the F.I.R., it is not narrated that accused-appellant Sanjay Kumar Yadav has committed murder of his wife Phool Kumari, but it is narrated that both have attempted to commit suicide.

[34]. From the perusal of F.I.R. and statement of P.W.1 informant Subedar Yadav and P.W.2 Somari Devi, it is evident that the first marriage of accused-appellant Sanjay Kumar Yadav was solemnized with Madhuri d/o Kailash r/o Barpur, Letuka, Police Station - Baksa, District - Jaunpur. Madhuri is alive and has filed a case of harassment for dowry and second marriage against accused-appellant Sanjay Kumar Yadav. From the perusal statement of P.W.1 Subedar Yadav and P.W.2 Somari Devi, it is also evident that first marriage of Phool Kumari was also solemnized with Ram Kripal r/o Ugrasen Patti, Police Station - Badlapur, District - Jaunpur. Her marriage with Ram Kripal was solemnized somewhere between 1998 and 2000. After her separation with Ram Kripal, her second marriage was solemnized in court with accused-appellant Sanjay Kumar Yadav in the year 2005-2006. A son named Vaibhav, aged about 1½ years at the time of the occurrence, was born from the wedlock of accused-appellant Sanjay Kumar Yadav and his wife Phool Kumari. On the date of occurrence, when P.W.2 Somari Devi returned to the house from court at about 06.00 P.M., Vaibhav was found at the residence of neighbourer Lakhon Yadav. P.W.1 informant Subedar Yadav and P.W.2 Somari Devi stated before court that accused-appellant Sanjay Kumar Yadav wanted to take his son Vaibhav with him. His wife Phool Kumari denied to give son Vaibhav to him, due to which, an altercation took place between them. P.W.1 informant Subedar Yadav admitted this fact that his brother-in-law appellant Sanjay Kumar Yadav loved his child Vaibhav more than his wife Phool Kumari.

[35]. P.W.1 informant Subedar Yadav and P.W.2 Somari Devi have made improvement from the F.I.R. and their statement under Section 161 of Cr.P.C. recorded for the first time. They stated before the court that while they were in District Court, Jaunpur, Phool Kumari had made a phone call at about 01.00 P.M. on mobile of Santosh Kumar Upadhyay, Advocate of Jiledar Yadav and told her brother Subedar Yadav to come home immediately because her husband Sanjay Kumar Yadav was threatening to kill her. This version of prosecution witnesses Subedar Yadav and Somari Devi is not reliable. Advocate Santosh Kumar Upadhyay, to whom Phool Kumari had made phone call, has not

been examined. Moreover, how Phool Kumari got to know the mobile number of Santosh Kumar Upadhyay is not explained. If any such phone call had been made by Phool Kumari to her brother Subedar Yadav on the mobile phone of Santosh Kumar Upadhyay, then it must have been narrated in the F.I.R. and statement of P.W.1 Subedar Yadav and P.W.2 Somari Devi under Section 161 of Cr.P.C. recorded for the first time.

[36]. P.W.2 Somari Devi has made further improvement in her statement before court and stated that on the day of the occurrence, her daughter Phool Kumari asked her to take her to court with them, otherwise her husband Sanjay Kumar Yadav would kill her. But Somari Devi denied to take her with them. Then she requested Somari Devi to take Sanjay Kumar Yadav with them, but when asked about the same, Sanjay Kumar Yadav refused. This improvement has been made to show the circumstance that accused-appellant Sanjay Kumar Yadav was intended to commit murder of Phool Kumari. If these conversations had taken place, then it should have been mentioned in the F.I.R. because these are material facts. In the F.I.R., it should also have been mentioned that accused-appellant Sanjay Kumar Yadav had committed murder of Phool Kumari. In the F.I.R., it is mentioned that accused-appellant Sanjay Kumar Yadav and his wife Phool Kumari have attempted to commit suicide. This shows that all these facts have been narrated before court after deliberation, to prove guilt of the accused-appellant.

[37.] In the F.I.R., it is mentioned that appellant Sanjay Kumar Yadav and Phool Kumari had attempted to commit suicide, due to altercation between them. It is also mentioned that Phool Kumari was dead and Sanjay Kumar Yadav was breathing. P.W.2 Somari Devi stated before court that for the first time, when she saw Sanjay Kumar Yadav after the incident, it appeared that he was dead. On the day of the occurrence, at about 12 midnight, the police came on the spot. At that time, appellant Sanjay Kumar Yadav started coughing. Then the police officer told that Sanjay Kumar Yadav is alive. This shows that at that time, appellant Sanjay Kumar Yadav was unconscious.

[38]. P.W.1 informant Subedar Yadav had also stated that when he reached at his residence, his sister Phool Kumari was dead. His brother-in-law Sanjay Kumar Yadav was breathing. He took Sanjay to District Hospital, Jaunpur, where he was admitted. Sanjay Kumar Yadav also sustained eight injuries by sharp-edged weapon and blunt object. There was multiple abrasion on his neck. All the injuries of Sanjay Kumar Yadav cannot be self-inflicted.

[39]. Vaibhav, son of accused-appellant Sanjay Kumar Yadav and Phool Kumari was found at the residence of informant's neighbour Lakhan Yadav. A child mere about 1½ years old cannot go all alone at the residence of a neighbourer. Accused-appellant Sanjay Kumar Yadav was not a resident of village Belhata, as such, he would not have been aware of the neighbourers of the informant and his family members. His wife Phool Kumari, who was a resident of Belhata, might have taken her son Vaibhav at the residence of Lakhan Yadav. After that, she might have returned to her residence.

[40]. As there is no eye-witness of the occurrence, from the facts and circumstances of the case, only three possibilities arise :

(i) Accused-appellant Sanjay Kumar Yadav committed the murder of his wife Phool Kumari and after that, in deliberation, attempted to commit suicide;

(ii) An altercation between Phool Kumari and accused-appellant Sanjay Kumar Yadav might have taken place for the possession of their son Vaibhav, as a result whereof, they have assaulted each other, due to which they sustained grievous injuries; and

(iii) In altercation, Phool Kumari might have assaulted her husband accused-appellant Sanjay Kumar Yadav with handle of axe, due to which he sustained injuries and in defence, he caused injuries to Phool Kumari by snatching axe from her, which proved to be fatal.

[41]. If after killing his wife Phool Kumari, accused-appellant Sanjay Kumar Yadav attempted to commit suicide, then he might have used only axe available there to cut his neck. There are three lacerated wounds on his head caused by blunt object. It was not possible for him to cause injury to himself by sharp-edged weapon and then by blunt object or vice-versa.

[42]. Here it must be noted that there are multiple abrasion on the neck of accused-appellant Sanjay Kumar Yadav and an abraded contusion on his left arm below shoulder. This abraded contusion cannot be caused to accused-appellant Sanjay Kumar Yadav by himself. The abrasion on his neck shows that a scuffle might have taken place between him and his wife Phool Kumari, due to which he might have sustained abrasion on his neck.

[43]. From these facts, the first possibility is totally ruled out. Only the second and third possibility could have arisen.

[44]. Although in this case, appellant Sanjay Kumar Yadav has not claimed right of private defence, but in *Munshi Ram and others v. Delhi Administration* reported in AIR 1968 SC 702 Hon'ble Apex Court held as follows :

5. It is well-settled that even if an accused does not plead self defence, it is open to the court to consider such a plea if the same arises from the material on record-see *In re Jogali Bhaigo Naiks*¹. The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.

[45]. In *Periasami and Another v. State of Tamil Nadu* reported in (1996) 6 SCC 457 Hon'ble Apex Court held as under :

17. While dealing with the said alternative contention we have to bear in mind section 105 of the Evidence Act. A rule of burden of proof is prescribed therein that the burden is on the accused to prove the existence of circumstances bringing the case within any of the exceptions "and the Court shall presume the absence of such circumstances." The said rule does not whittle down the axiomatic rule of burden

(indicated in section 101) that the prosecution must prove that the accused has committed the offence charged against. The traditional rule that it is for prosecution to prove the offence beyond reasonable doubt applies in all criminal cases except where any particular statute prescribes otherwise. The legal presumption created in section 105 with the words "the Court shall presume the absence of such circumstances" is not intended to displace the aforesaid traditional burden of the prosecution. It is only where the prosecution has proved its case with reasonable certainty that the court can rest on the presumption regarding absence of circumstances bringing the case with any of the exceptions. This presumption helps the Court to determine on whom is the burden to prove facts necessary to attract the exception and an accused can discharge the burden by "preponderance of probabilities" unlike the prosecution. But there is no presumption that an accused is the aggressor in every case of homicide. If there is any reasonable doubt, even from prosecution evidence, that the aggressor in the occurrence was not the accused but would have been the deceased party, then benefit of that reasonable doubt has to be extended to the accused, no matter he did not adduce any evidence in that direction.

[46]. In Mohd. Ramzani v. State of Delhi reported in 1980 Supp SCC 215 Hon'ble Apex Court held as under :

19. It is trite that the onus which rests on an accused person under Section 105, Evidence Act, to establish his plea of private defence is not as onerous as the unshifting burden which lies on the prosecution to establish every ingredient of the offence with which the accused is charged, beyond reasonable doubt. It is further well-established that a person faced with imminent peril of life and limb of himself or another, is not expected to weigh in "golden scales" the precise force needed to repel the danger. Even if he at the heat of the moment carries his defence a little further than what would be necessary when calculated with precision and exactitude by a calm and unruffled mind the law makes due allowance for it.

[47]. In view of the principle laid down by Hon'ble Apex Court in the aforesaid cases, although accused-appellant Sanjay Kumar Yadav has not claimed right of private defence, but from the facts and circumstances of the case, probability of right of self-defence arises in his favour and benefit of reasonable doubt has to be extended to him.

[48]. In Raghunath v. State of Harayana and another reported in (2003) 1 SCC 398 Hon'ble Apex Court held as under :

33.if two views are possible, the one in favour of the accused and the other adversely against it, the view favouring the accused must be accepted.

[49]. Here it must be noted that the learned trial court has convicted the appellant only on the basis of probability, which is not tenable and is against the basic tenets of law. Accordingly, we are of the considered view that the accused-appellant Sanjay Kumar Yadav should be given benefit of doubt.

[50]. Resultantly, the appeal succeeds and the same is allowed. Conviction and sentence of appellant Sanjay Kumar Yadav passed by Additional Sessions Judge/F.T.C. Vth, Jaunpur, are hereby set aside and he is acquitted.

[51]. Appellant Sanjay Kumar Yadav is in jail. He shall be released forthwith, if not wanted in any other case.

[52]. Let a copy of this order be certified to the court below for the purposes of intimation and necessary compliance. Let lower court's record be remitted back to the court concerned.

Order Date :- 25.7.2018 I. Batabyal [U.C. Tripathi,J.] [R.S.R. (Maurya),J.] *****