

(2005) 09 AHC CK 0120

In the Allahabad High Court

Case No : Criminal Appeal No. 828 of 2005 and Reference No. 3 of 2005

Dhanna @ Dharmendra and Bittu @ Sudhir (In Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 30-09-2005

Acts Referred:

Arms Act, 1959 — Section 25

Criminal Procedure Code, 1973 (CrPC) — Section 129, 161, 313, 37, 43

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 120B, 302, 307, 34

Citation : (2006) 1 ACR 92

Hon'ble Judges : Imtiyaz Murtaza, J;G.P. Srivastava, J

Bench : Division Bench

Advocate : G.S. Chaturvedi and N.S. Chahar, for the Appellant; A.A. Ansari and R.K. Singh and A.G.A., for the Respondent

Judgement

G.P. Srivastava, J.—This appeal by appellants Dhanna @, Dharmendra and Bittu @ Sudhir is directed against the judgment and sentence dated 9.2.05 passed by Addl. Sessions Judge (Fast Track Court No. 2), Muzaffar Nagar in S.T. No. 1403 of 1999 State v. Dhanna @ Dharmendra and Ors. S.T. No. 27 of 2000 State v. Naresh Kumar, S.T. No. 922 of 2000 State v. Dhanna @ Dharmendra and S.T. No. 921 of 2000 State v. Bittu @ Sudhir whereby the learned Add. Sessions Judge has acquitted the appellants from offence u/s 307 read with 34 I.P.C. and Section 25 Arms Act and convicted them for the offence u/s 302 read with 34 I.P.C. and sentenced them to death. A reference for confirmation of the sentence was also received which has been connected with this appeal.

2. The prosecution case in brief is that the complainant Ramesh Chandra is resident of village Dera Jainpur police station Jhinhana district Muzaffar Nagar. The accused Dhanna @ Dharmendra has a field adjoining to the field of one Ram Kishan uncle of the complainant. On 18.7.1999 at about 5.45 P.M. the complainant, his uncle Ram Kishan, Ratan Singh, Karam Singh @ Karma, Subhash and Arjun were planting paddy in the said field of Ram Kishan. In the

mean time" accused appellant Dhanna, Bittu, Sikandar a servant of Bittu and one unknown person all armed with country made pistols reached there. The name of unknown person was revealed later on as Naresh Kumar. The aforesaid accused persons abused the complainant and others and told that they had demolished their mend. The complainant denied and told that if they wish they can get the land measured by calling Patwari. There upon the accused Dhanna, Bittu, Sikandar and Naresh Kumar fired upon the complainant and others with intention to kill them which caused fatal injuries to Ram Kishan and Ratan Singh who died on the spot. Deceased Karam Singh received grievous injuries who died subsequently at Shamli hospital due to the injuries. On hearing the sound of fire one Sahendra, Tejpal and a number of village people reached there. All the aforesaid accused persons were able to escape. The complainant carried the injured Karam Singh @ Karma to Shamli hospital where he was declared dead, It is pertinent to note that it was introduced subsequently that Smt. Krishna mother of appellants Dhanna and Bittu told them to kill the deceased Ram Kishan and others. The occurrence has taken place due to the said criminal conspiracy.

3. The complainant Ramesh Chandra submitted written report Ext. Ka-1 at police station Jhinhana on 3.8.1999 at 18.40 P.M. A chick F.I.R. Ext. Ka-31 was prepared on the basis of the written report. During investigation the Investigating Officer prepared site plan Ext. Ka-6 and Ka-26. Inquest report of the dead body of Ram Kishan, Ratan Singh and Karam Singh are Exts. Ka-7, Ka-8 and Ka-20 respectively. The Investigating Officer picked up, empty cartridges, blood stained and plain earth from the place of occurrence and prepared their memo.

4. On 3.8.1999 the appellants Dhanna and Bittu were taken on police remand. They got country made pistol recovered from the Sugar cane field of Katara which were sealed on the spot and memExt. Ka-25 was prepared. Case u/s 25 Arms Act were registered against them. The Investigating Officer obtained sanction for prosecution of the appellants u/s 25 Arms Act.

5. The autopsy of the dead body of deceased Ram Kishan was conducted by Sri S.K. Agni.hotri, Medical Officer, district hospital, Muzaffar Nagar on 19.7.1999 at 3.45 P.M. According to the opinion of the doctor the death was caused due to haemorrhage and shock ays a result of ante mortem injuries. The death was caused one day before the post mortem examination. The doctor found the following ante mortem injuries on his person:-

1 Abrasion 3 cm x 1.5 cm on the inners aspect of (Lt) elbow.

2. Multiple gun shot wounds of entry on the left lateral aspect of chest in an area of 19 cm x 14 cm starting 4 cm belo posterior axillary fold. All wounds are 2 cm in diameters with bleeding around them except one which is 2 cm in diameter and is at the level of vth rib. On dissections subcutaneous haematoma with Vth rib fractured. A wadding piece & 8 pellets recovered from the muscle and skin. On opening chest cavity, large wound found communicating to the chest cavity,

large wound found communicating to the chest cavity with multiple perforated in pleura & lung 1 liter blood found in the cavity mediastinum too found perforated at places so is heart with 250 ml blood in pericardium. Six pellets from pleura! cavity & four pellets from heart muscles....

6. The autopsy of the dead body of deceased Ratan Singh was conducted by Sri S.K. Agnihotri, Medical Officer, district hospital, Muzaffar Nagar on 19.7.1999 at about 3.15 P.M. According to the opinion of the doctor the death was caused due to haemorrhage and shock as a result of ante mortem injuries. The death was caused one day before the post mortem examination. The doctor found following ante mortem injuries on his person:-

1. Abraded contusions 7 cm x 3 cm on the (Lt) side of head 5 cm above & behind (Lt) ear. On dissection scab scale haematoma found on opening cavity 200 ml. blood with lacerated of (Lt) side of brain matter found.

2. Multiple gunshot wound of entries on the left side of face & neck in an area of 15 cm x 14 cm wounds measuring 2 mm diameter with a caller blackening around them. On dissection 2 metallic pellets recovered from the side of injury. All were muscle deep wounds.

3. Multiple gun shot wounds of entry on the front of (Rt) adjoining neck & front of chest in an area of 16 cm x 13 cm. Each wound measuring 2 mm in diameter with blackening around them. On dissection of neck cerium connected vessels found punctured & 200 ml haematoma in the vicinity. On opening chest cavity (Rt) side of pleura apex of lung found punctured with 100 ml blood in the cavity 3 pellets recovered from the tissue of (Rt) lung.

4. Multiple gun shot wounds of entry on antero lateral aspect of (Lt) arm in an area of 18 cm x 9 cm Each wound measuring 2 mm in dissection with blackening around them. All were muscle deep. Two metallic pellets recovered from the site.

7. The autopsy of the dead body of Karam Singh was conducted by Sri S.K. Agnihotri, Medical Officer, district hospital, Muzaffar Nagar on 19.7.1999 at about 4.30 P.M. According to the opinion of the doctor the death was caused due to haemorrhage and shock as a result of ante mortem injuries. The death had taken place one day before the post mortem examination. The doctor found following ante mortem injuries on his person:-

1. Multiple gun shot wounds of entry over the right side of chest, abdomen, arm to their front in an area of 43 cm x 34 cm wounds measuring from 1.2 mm to 3 mm in dissection are surrounded by blackening. On dissection subcutaneous tissue & muscles found suffered with blood on opening chest cavity (Rt) pleura & lung found perforated at multiple places. Cavity contains blood 1.5 liters pericardium found perforated. Heart at Rt. atrium found penetrated by two pellets, which found in it. Abdominal cavity contains 300 ml blood with multiple perforating wounds on linear three pellets recovered from the chest cavity.

8. After conclusion of investigation the Investigating Officer submitted charge

sheet against the accused persons Dhanna, Bittu, appellants Smt. Krishna and Naresh Kumar in an offence Under Sections 302/307/120B I.P.C. and further against the appellants u/s 25 Arms Act. The case of the accused persons were committed to the court of Session.

9. The prosecution examined P.W. 1 complainant Ramesh Chandra, P.W. 2 Arjun, P.W. 3 Sahendra, P.W. 4 Mange, P.W.5 Dr. S.K.Agnihotri, P.W.6 "Dr. Net Ram, P.W.7 SO. Adesh Kumar Sharma, P.W, 8 Constable Raj Kumar, P.W.9 S.I. K.P. Singh and P.W. 10 Constable Narendra Singh.

10. The accused persons in their statements u/s 313 Cr.P.C. have denied the prosecution case. The accused appellant Dhanna has stated that the witnesses are deposing false. They have settled at village Kertu. The complainant, deceased and witness Sahendra are Khandani and relations. One Sarjit was-grand father of the witness Sahendra. He had no son but a married daughter Chahto. One Devi Singh is the son of aforesaid Chahto. Witness Sahendra and the family members of complainant were cultivating the land of Sarjit during his"life time and even after his death. The father of the accused got a sale deed of the said land executed from the grand son of Sarjit and obtained forceful possession of the said land from Sahendra. As a result of which they became inimical, He has stated that he will lead evidence in defence. The accused appellant Bittu has owned the statement of his brother accused Dhanna. He too has stated that he will lead the evidence in defence.

11. The learned Addl. Sessions Judge after considering the evidence on record acquitted the accused Naresh Kumar and Smt. Krishna from the offence u/s 307 read with 34 I.P.C.; u/s 302 read with 34 I.P.C. and Section 120B I.P.C. respectively. He acquitted the accused-appellants Dhanna @ Dharmendra and Bittu alias Sudhir from the offence u/s 307 read with 34 I.P.C. and u/s 25 Arms Act. He convicted the aforesaid appellants for the offence u/s 302 read with 34 I.P.C. and sentenced them.to death.

12. Feeling aggrieved by the judgment and sentence passed by the court belo the accused appellants Dhanna @ Dharmendra and Bittu alias Sudhir have preferred this appeal. The learned Addl. Sessions Judge has also submitted reference for continuation of death sentence.

13. We have heard Sri GopalSwaroop Chaturvedi, learned Senior counsel for the appellants, learned A.G.A. and perused the entire evidence on record.

14. The factum of death of deceased Ram Kishan, Ratan Singh and Karam Singh has not been disputed. It is also not disputed that the death of the aforesaid deceased persons which has been caused by fire arm injuries. The post mortem examination of the body of the deceased Ram Kishan, Ratan Singh and Karam Singh has taken place on 19.7.1999 at 3.45 P.M., 3.15 P.M. and 4.30 P.M. respectively. The probable time of death from the post mortem examination in respect of the deceased persons have been given about one day which corresponds with the prosecution case that the occurrence has taken place on

18.7.1999 at about 17.45 hours.

15. In order to prove the prosecution case three eye witnesses were examined These are P.W.I Ramesh Chandra (informant), P.W.2 Arjun son of deceased Ram Kishnn and P.W.3 Sahendra who is an independent witness.

16. The learned counsel for the appellants has argued that the presence of complainant P.W.I Ramesh Chandra is highly doubtful at the time of occurrence and at the place of occurrence. He has further argued that in fact he was in service at Panipat and he came when he received information of the occurrence. It has further been argued that in the F.I.R. it has been mentioned that the witnesses and the deceased persons were planting paddy in the field of deceased Ram Kishan when the occurrence has taken place. During investigation the Investigating Officer did not find any evidence of plantation of paddy to justify the presence of witnesses and to fix up the place of occurrence. It has been introduced that the deceased persons and witnesses were making preparation of plant paddy when the occurrence took place. It has further been argued that in order to justify the presence of the complainant the place of occurrence has been shifted from the field of Ram Kishan to the tri-crossing of the Kharanja (brick road)..

17. P.W.I Ramesh Chandra (complainant) has stated that deceased Ram Kishan and Ratan Singh were his (TAU) uncles and deceased Karam Singh was son of his Till. He has claimed that he was working in the field of his TALI Ram Kishan at the time of the occurrence along with deceased Ram Kishan, Ratan Singh and Karam Singh and witnesses Arjun and Subhash. They were making preparation to plant paddy. He was confronted with the recital of the written report where it was mentioned that they were planting paddy in the field. The witness has explained that plantation of paddy, means preparation for plantation of paddy. The learned Addl. Sessions Judge in the judgment has rightly interpreted the two, things when he observed that plantation of paddy includes preparation of planting paddy, The plantation of paddy does not mean actual plantation of paddy only but naturally it includes preparation for planting paddy in the field.

18. P.W.I Ramesh Chandra in his cross-examination has admitted that he is no in service at Panipat but has denied that he was in service at Panipat at the time of occurrence. He has specifically stated that he started service at Panipat w.e.f. 3.1.2000. There is no evidence from the side of the defence to falsify the statement of this witness and it can not be held that the witness was away at Panipat on the date and time of occurrence.

19. Regarding shifting of place of occurrence it is true that in the F.I.R, it is mentioned that at the time of occurrence the deceased and witnesses were working in the field when the accused persons came and complained that they had damaged the Mend of their field and on refusal of the deceased persons all the accused persons fired upon the deceased persons. The P.W. 1 Ramesh Chandra in his statement has specifically stated that the accused persons began,

to complain about dismantling Mend from the western Mend of the field of Charan Singh and they began walking on the Kharanja towards the field of the deceased Ram Kishan. Deceased persons also proceeded towards them. The witness specified that at the time of firing the accused persons were 4 or 5 paces away from tri-crossing towards Khanpura road at Kharanja. He has specified that the occurrence did not take place in the field but at the tri crossing. He was confronted with the F.I.R. and he has confirmed that this fact has not been mentioned in the F.I.R. The other two eye witnesses P.W.2 Arjun and P.W.3 Sahendra have also corroborated the factum of place of occurrence. The Investigating Officer P.W.7 S.O. Adesh Kumar Sharma has stated that the Kharanja is 15 to 20 yards away from the field of Ram Kishan. He has further stated that according to F.I.R. the place of occurrence is the field of deceased Ram Kishan but he neither found any blood nor any empty cartridges nor any other proof to prove that the occurrence had taken place in the field of Ram Kishan. He has further stated that he found the dead body at place A and B on Kharanja. He found blood and empty cartridges of 12 bore at the same place. So it is established that the place of occurrence is Kharanja which is 15 to 20 yards away from the field of Ram Kishan. It is true that in the F.I.R. it has not been mentioned that the occurrence has taken place at Kharanja but at the same time there is no specific recital in the F.I.R. that the occurrence has taken place in the field of Ram Kishan. It appears that the Investigating Officer stated that, the place of the occurrence according to the F.I.R. is field of Ram Kishan only because recital of the FIR. shows that at the time of occurrence the deceased and witnesses were planting paddy in the field of Ram Kishan. It is true that it has not been mentioned in the F.I.R. that the occurrence has taken place at Kharanja but there is consistent statements of the eye witnesses coupled with the physical proof to prove that the occurrence has taken place at Kharanja which is about 15 to 20 yards away from the field of Ram Kishan. It has been specified by the complainant eye witness Ramesh Chandra as to ho the occurrence has taken place at Kharanja.

20. As regards the credibility of the eye witnesses P.W.2 Arjun and P.W.3 Sahendra it has been argued by the learned counsel for the appellants that the statement of Arjun was recorded by the Investigating Officer u/s 161 Cr.P.C. on 24.7.1999 and the statement of P.W.3 Sahendra was recorded on 2.8.1999 i.e. after a lapse of six days and 14 days respectively. This fact was put to the Investigating Officer P.W.7 Adesh Kumar Shanna, S.O. who could not give any satisfactory explanation for the said omission. It is settled la that the latches in prosecution will not discredit the prosecution case and the eye witnesses cannot be disbelieved on the sole ground that their statements were recorded by the Investigating Officer after a lapse of one or two weeks. It has been held in Ramesh v. State of M.P. SCC (Cri) 206 "....The argument of Mr. Naik, appearing for the appellant against acceptability of witnesses 2 and 4 is that they were examined by the police u/s 161 Cr.P.C. on 6.10.1985 and 4.10.1985 respectively. This delay in examining the two witnesses ipso facto cannot be a ground to

discard their testimony, more so, when in the cross-examination of the witnesses, nothing tangible had been brought out to impeach their testimony. On the other hand, the evidence of P.Ws. 2 and 4 fully corroborates the reliable evidence of P.W.I and, therefore, the courts below were justified in maintaining the conviction of appellant Ramesh of the charge u/s 302 I.P.C." Thus the evidence of P.W.2 Arjun and P.W.3 Sahendra is credible and cogent and cannot be discarded on the above ground alone.

21. In view of the above discussions we are of the view that the eye witnesses P.W.I Ramesh Chandra, P.W.2 Arjun and P.W.3 Sahendra are trustworthy and there is no reason to discard their statements.

22. The learned Addl. Sessions Judge has disbelieved the recovery of fire arms on the pointing of appellants Dhanna and Bittu on 3.8.1999 and has rightly acquitted them from offence u/s 25 Arms Act. The prosecution case does not show that these recoveries were u/s 27 Evidence Act nor the said recoveries were so proved nor any statement concerning the recoveries were recorded by the Investigating Officer. Therefore, there is no ground to re-agitate the matter of recovery.

23. In view of foregoing discussions we are of the confirmed view that the learned Addl. Sessions Judge has rightly convicted the appellants in offence u/s 302 read with 34 I.P.C. The appellants could not be able to make out any case to interfere in the findings of guilt recorded by the learned Addl. Sessions Judge.

24. The learned Addl. Sessions Judge (F.T.C. No. 2) has sentenced the appellants to death. The reason given by him in awarding the extreme penalty of death to the appellants is that the offence has been committed by, the appellants in preplanned manner as they were armed with fire arms and there was no prior dispute in between the parties regarding dismantling the Mand. The second ground given by the learned Addl. Sessions Judge is that the offence committed shows the criminal mentality of the appellants. According to him it all shows that the appellants have no love to humanity.

25. In *Bachan Singh Vs. State of Punjab*, the Apex Court laid down the following broad guidelines to be borne in mind to the courts while considering the question of awarding a sentence in cases involving murder:

196. We will first notice some of the aggravating circumstances which, in the absence of any mitigating circumstances, have been regarded as an indication for imposition of the extreme penalty.

197. Pre-planned, calculated, cold-blooded murder has always been regarded as one of an aggravated kind. In *Jagmohan Singh v. State of U.P.*, it was reiterated by this Court that if a murder is "diabolically conceived and cruelly executed", it would justify the imposition of the death penalty on the murderer. The same principle was substantially reiterated by V.R. Krishna Iyer, J., speaking for the Bench in *Ediga Anamma v. State of A.P.* in these terms:

"The weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, land the like steel the heart of the la for a sterner sentence...."

199...it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the Court must pay regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors,, depends on the facts and circumstances of the particular fee. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because "style is the man". In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments...."

26. Further, this Court also laid down circumstances, which could considered as aggravating circumstances. These circumstances are ollows:

200...(a) If the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed -

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful. discharge of his duty u/s 43 of the Code of Criminal Procedure, 1973," or who had rendered assistance to a Magistrate or a police officer demanding his aid or assistance u/s 37 and Section 129 of the said Code."

27. Similarly, it also considered the following circumstances as mitigating circumstances:

204. (1)That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the conditions of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

28. In the instant case the learned Addl. Sessions Judge while awarding death sentence to the appellants laid emphasis on the sole ground that murders in the case were preplanned murders. The prosecution in order to prove the preplanning introduced a witness P. 4 Mange who has stated that on the date of occurrence at about 10.00 A.M. he saw that accused Smt. Krishna, mother of the appellants present in the gallery of her house where the appellants came and informed that deceased Ram Kishan, Karam Singh and others despite being threatened are refusing to leave the land. Smt. Krishna asked the appellants to kill Ram Kishan and others. This witness was disbelieved by the learned Addl. Sessions Judge and consequently accused Smt. Krishna was acquitted from the offence u/s 120B I.P.C. Therefore the theory of preplanning had gone. After that, there is no evidence to prove that there was any preplanning to commit the murder of deceased persons. It cannot be said that the murderers in question were preplanned, calculated and cold blooded. The case does not come in the category of one of aggravated kind.

29. In this connection the Apex Court in *Ashok Kumar Pandey v. State of Delhi* XLVI 2002 ACC 946 Supreme Court has held that reference in this connection may be made to the Constitution Bench decision of this Court in the case of *Bachan Singh v. State of Punjab*, as well as, following the same, the three-Judge Bench decision of this Court in *Machhi Singh v. State of Punjab*, wherein various circumstances have been enumerated and it was laid down that if the case squarely falls within its ambit, only in that eventuality, death penalty can be awarded. It was observed that in rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise retaining death penalty, such a penalty can be inflicted. In the facts and circumstances of the present case, it is not possible to come to the conclusion that the present case would fall within the category of rarest and rare one. Therefore, we are clearly of the opinion that in the fitness of the things, extreme penalty of death was not called for and the same is fit to be commuted to life imprisonment. Keeping in view the guidelines laid down by the Apex Court in the case of *Bachan Singh* and the case of *Ashok Kumar Pandey* (supra) we are of the view that this case does not come within the category of

rarest and rare cases in which the death penalty is warranted. In our view this is a fit case where the death sentence to be converted into life imprisonment.

30. In the result the appeal is allowed in part and while upholding the conviction of the appellants the sentence of death awarded against them u/s 302 read with 34 I.P.C. is commuted to rigorous imprisonment for life. The appellants are in jail. They shall be kept there to serve out the sentence as modified by this Court.

31. The reference made by learned Addl. Sessions Judge for confirmation of death sentence is rejected.