
(2010) 09 UK CK 0214

In the Uttarakhand High Court

Case No : Criminal Appeal No. 643 of 2001 (Old No. 523 of 1997)

Dharmendra and Shamshad

APPELLANT

Vs

State of U.P. (now State of Uttarakhand)

RESPONDENT

Date of Decision : 28-09-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 207, 313, 374

Penal Code, 1860 (IPC) — Section 302, 34, 394, 411

Uttar Pradesh Reorganisation Act, 2000 — Section 35

Citation : (2010) 09 UK CK 0214

Hon'ble Judges : Prafulla C. Pant, J; Nirmal Yadav, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Prafulla C. Pant, J.—This appeal, preferred u/s 374 of the Code of Criminal Procedure, 1973 (for short Code of Criminal Procedure), is directed against the judgment and order dated 14.03.1997, passed by II Addl. Sessions Judge, Haridwar, in Sessions Trial No. 118 of 1992, whereby said court has convicted accused/Appellants Dharmendra and Shamshad u/s 302 read with Section 34 of the Indian Penal Code, 1860 (for short I.P.C.), and sentenced each one of them to imprisonment for life. Each of the convicts is further convicted u/s 394 of I.P.C., and sentenced to rigorous imprisonment for ten years.

2. Heard learned Counsel for the parties and perused the lower court record.

3. Prosecution story, in brief, is that Swami Raghavacharya (deceased) and Swami Rangacharya used to live in Ramayan Satsang Bhawan, Bhupatwala, Haridwar. They were in litigation. In a meeting of Committee of the Ashram dated 20th of October 1991, a resolution was passed against Swami Rangacharya. This further aggravated the enmity between the two. Accused/Appellants Dharmendra and Shamshad, and one Shiv Dayal (absconded accused) were close to Swami Raghavacharya. On 25.10.1991, at about 08:30 A.M., P.W. 1 Mukthnath Pandey (complainant) was going with Swami Raghavacharya in a

scooter towards the place of Swami Venketacharya. Swami Raghavacharya (deceased) was driving the scooter. As soon as their scooter reached near Motichur crossing, accused/Appellants Dharmendra, armed with knife, Shamshad, armed with country made pistol, along with Yogesh and Shiv Dayal, stopped the scooter. Accused Shamshad and Yogesh fired shots from the country made pistols at Raghvacharya, on which he fell down. Thereafter, accused Dharmendra and Shiv Dayal, who were armed with knives, inflicted blows on the person of Raghavacharya with their weapons. Raghavacharya died on the spot. Accused/Appellants along with their two associates fled from the place of incident and took away the scooter of the deceased bearing registration No. DNF/7469. The incident was not only witnessed by P.W. 1 Mukthnath Pandey, but also by P.W. 2 Vishnu Prasad Tripathi. P.W. 1 Mukthnath Pandey lodged the first information report (Ext. A "1) at police station Kotwali Haridwar. Sub Inspector Uggrasen Yadav (P.W. 4) accompanied with a constable of police outpost Khadkhadi, reached the place of incident. When they saw crowd at the spot, the police personnel in their motorcycle chased the accused, who had fled in two scooters. When they were chased, one of their scooters got disbalanced, and one of the accused (Shamshad) fell down. He was immediately apprehended. The scooter registration No. was DNF/7469 (belonging to Raghavacharya). While falling down from scooter, due to accidental shot from the country made pistol, which was kept in the pocket of his pantaloons, Shamshad suffered injuries on his thigh. The police prepared necessary recovery memo (Ext. A "3) at the spot. On the basis of first information report (Ext. A "1), Crime No. 1042 of 1991 was registered at police station Kotwali Haridwar on 09:10 A.M., against accused Dharmendra, Shamshad, Yogesh and Shiv Dayal, in respect of offences punishable u/s 302 and 394 of I.P.C. P.W. 6 Inspector Satish Chandra Mehta investigated the crime. Soon after lodging of the first information report the policemen reached at the spot and prepared inquest report (Ext. A "4), sketch of the dead body (Ext. A "5), police form No. 13 (Ext. A " 6) and letter to the Chief Medical Officer (Ext. A "7). The dead body of Raghavacharya was sent in a sealed condition for postmortem examination. P.W. 5 Dr. V.K. Gairola conducted postmortem examination on 25.10.1991, at about 04:45 P.M. He recorded as many as 11 ante mortem injuries on the body of the deceased which included two firearm wounds of entry and two firearm wounds of exit. Apart from this, there were six incised wounds found on the body. The Medical Officer opined in the autopsy report (Ext. A "10) that deceased had died due to shock and haemorrhage, as a result of ante mortem injuries. After interrogating the witnesses, on completion of investigation, charge sheet (Ext. A "12) was filed by the Investigating Officer, against the four accused, namely Yogesh, Shiv Dayal, Dharmendra and Shamshad, for their trial in respect of offences punishable u/s 302, 394 and 411 of I.P.C.

4. The Magistrate, on receipt of the charge sheet after giving necessary copies to the accused, as required u/s 207 of Code of Criminal Procedure, committed the case to the court of sessions for trial. The trial court on 20.11.1992, after hearing

the parties, framed charge of offences punishable u/s 302/34 and 394/34 of I.P.C., against all the four accused, namely Yogesh, Shiv Dayal, Dharmendra and Shamshad, who pleaded not guilty and claimed to be tried. Against accused Shamshad a separate charge of offence punishable u/s 411 of I.P.C. was framed, to which also he pleaded not guilty and claimed to be tried. Out of the four, accused Yogesh died during trial, and his case stood abated. Accused Shiv Dayal absconded during the trial and his case was separated. On behalf of the prosecution P.W. 1 Mukthnath Pandey (complainant and eyewitness); P.W. 2 Vishnu Prasad Tripathi (another eyewitness); P.W. 3 Sub Inspector R.S. Tiwari (who prepared inquest report of the dead body); P.W. 4 Sub Inspector Uggrasen Yadav (who apprehended Shamshad, after chasing the accused); P.W. 5 Dr. V.K. Gairola (who conducted the postmortem examination), and P.W. 6 Sub Inspector Satish Chandra Mehta (Investigating Officer. Who investigated the crime), were got examined. Apart from this C.W. 1 Sub Inspector R.K. Chaudhary was also examined. The oral and documentary evidence was put to the accused u/s 313 of Code of Criminal Procedure, in reply to which they pleaded ignorance as to the evidence adduced by the prosecution witnesses. They further pleaded that the evidence adduced against them is false. However, no evidence in defence was adduced. The trial court, after hearing the parties, found accused Shamshad and accused Dharmendra guilty of charge of offences punishable u/s 302/34 and 394 of I.P.C. However, the accused were acquitted of the charge of offence punishable u/s 411 of I.P.C. on the technical ground that the recovery was made in the transaction of the robbery itself. After hearing on sentence, the trial court sentenced each of the convicts to imprisonment for life u/s 302/34 of I.P.C., and rigorous imprisonment for a period of ten years u/s 394 of I.P.C. Aggrieved by said judgment and order dated 14.03.1997, passed by II Addl. Sessions Judge, Haridwar, in Sessions Trial No. 118 of 1992, this appeal was preferred by the convicts before the Allahabad High Court on 27.03.1997, where it was admitted on 28th of March 1997. This appeal is received by this Court u/s 35 of the U.P. Reorganization Act 2000 (Central Act No. 29 of 2000), for its disposal.

5. Before further discussion, we think it just and proper to mention here the ante mortem injuries recorded by P.W. 5 Dr. V.K. Gairola, on 25.10.1991, at 04:45 P.M, in the autopsy report (Ext. A "10) at the time of postmortem examination on the dead body of the deceased. The same are being reproduced below:

- i) Firearm wound of entry 2 cm X 1? cm through and through communicating with wound of exit on the outer surface of right arm 17 cm below left shoulder margins of which inverted and the wound is surrounded by gun powder abrasion in an area of 10 cm X 8 cm
- ii) Firearm wound of exit 3 cm X 3 cm on the inner side of left arm 14 cm above left elbow joint. Margins everted, left humerus bone fractured.
- iii) Firearm wound of entry 1 cm X 1? cm at the top of right shoulder downward backward and towards left. No blackening and tattooing present

iv) Firearm wound of exit 3 cm X 2? cm on the back at the level of T-11 vertebra 6 cm away from midline of left side.

v) Incised wound 3 cm X 1 cm X muscle deep on the front of left side of chest 5 cm medially away from the left nipple at 9 O" clock position.

vi) Incised wounds numbering 3, each measuring 3 cm X 1 cm X muscle deep in the right hypocondrium each 3 cm apart in about the same vertical plane.

vii) Incised wound 7 cm X 3 cm X abdominal cavity deep (bowels protruding out of it). Injury is vertically placed on outermost part of abdomen 14 cm above the right iliac crest.

viii) Incised wound 10 cm X 5 cm X abdominal cavity deep (bowel protruding out). Injury vertically placed on the outer most part of left side of abdomen 10 cm above the left iliac crest.

ix) Incised wound 3 cm X 1? cm X muscle deep on the back of left side, 5 cm below the injury No. (iv).

x) Incised wound 3 cm X 1 cm X muscle deep at the back of left elbow.

xi) Abrasion 5 cm X 6 cm on the right forearm 10 cm away from left wrist on outer side.

The Medical Officer opined in the autopsy report (Ext A "10) that deceased (Raghavacharya) had died due to shock and haemorrhage, as a result of ante mortem injuries.

6. The medical evidence on record establishes that deceased had died homicidal death. Now, this Court has to see whether accused/Appellants Dharmendra and Shamshad, with common intention, committed murder of Raghavacharya with their associates, and whether they had looted the scooter of the deceased.

7. P.W. 1 Mukthnath Pandey (complainant) has stated that Swami Raghavacharya (deceased) and Swami Rangacharya were litigating with each other in the courts. On 20th of October 1991, in a meeting held at Ramayan Satsang Bhawan, a resolution was passed against Raghavacharya, which further aggravated their enmity. According to this witness on 25.10.1991, at about 08:30 A.M., Raghavacharya was going on a scooter towards the place of Swami Venkatacharya. P.W. 1 Mukthnath Pandey states that he was accompanying him in the scooter as pillion rider. The witness further narrates that when the scooter of the deceased reached near Motichur crossing, accused/Appellants Dharmendra, Shamshad and two others, namely Yogesh and Shiv Dayal, suddenly came there and stopped the deceased. The witness further states that Dharmendra and Shiv Dayal were armed with knives, while Shamshad and Yogesh were armed with country made pistols. The witness further states that fires were shot from their country made pistols by Yogesh and Shamshad, where after Raghavacharya fell down from the scooter, and accused Dharmendra and Shiv Dayal inflicted knife blows on the person of Raghavacharya. According to

the witness, Raghavacharya died on the spot. The witness further states that accused ran away on the scooter of Raghavacharya. P.W. 1 Mukthnath Pandey states that soon after the incident he lodged first information report (Ext. A "1) at police station.

8. P.W. 2 Vishnu Prasad Tripathy, another eyewitness of the incident, corroborates the testimony of P.W. 1 Mukthnath Pandey and states that he saw accused/Appellants and two of their associates, armed with country made pistols and knives, who stopped Raghavacharya and fires were shot at him, where after knife blows were given on his person. P.W. 2 Vishnu Prasad Tripathy further states that Raghavacharya was being accompanied by Mukthnath Pandey (P.W. 1) on the scooter. This witness has also states that accused after committing murder of Raghavacharya took his scooter and ran away towards Motichur. P.W. 2 Vishnu Prasad Tripathy further states that soon after the incident, in a motorcycle a Sub Inspector and a constable, reached there.

9. P.W. 4 Sub Inspector Uggrasen Yadav states that at about 08.35 A.M., on 25.10.1991, he was going on a motorcycle with constable Jai Prakash. He saw crowd near the place of incident where he found Raghavacharya lying dead. According to this witness, when he came to know that the accused after killing Raghavacharya had ran away towards Brahamchari Ashram on the scooter of the deceased, he chased them. Near Sapt Vihar Colony the four accused were seen going in two scooters. Out of the two scooters, one got disbalanced, and one of the accused fell down. After he fell down from the scooter, due to accidental fire from the pistol kept in his pocket, he suffered injury on his leg. P.W. 4 Sub Inspector Uggrasen Yadav further states that the number of scooter was DNF/7469 (the one which was looted from Raghavacharya). According to this witness he apprehended the accused, and prepared the necessary recovery memo of the scooter and the blood stained clothes. Evidence adduced by this witness further corroborates the prosecution story narrated by P.W. 1 Mukthnath Pandey and P.W. 2 Vishnu Prasad Tripathy. Statement of P.W. 3 Sub Inspector R.S. Tiwari is of formal nature, as he prepared the inquest report and other necessary reports before the dead body was sent for postmortem examination. From the testimony of the two eyewitnesses of commission of murder, and evidence of P.W. 4 Sub Inspector Uggrasen Yadav read with medical evidence establishes on the record beyond reasonable doubt that accused/Appellant Dharmendra, armed with knife, and accused/Appellant Shamshad, armed with country made pistol, committed murder of Raghavacharya with the assistance of their two associates, and looted his scooter.

10. On behalf of the Appellants it is submitted that the complainant did not know the accused/Appellants Dharmendra and Shamshad. It is further contended that inclusion of their names in the first information report indicates that it is an ante timed report. However, on going through the record we find that soon after the first information report is lodged, inquest report is prepared, where after the dead body was sent for postmortem examination, and the autopsy was

conducted at 04:45 P.M., on the same day (i.e. 25.10.1991). This clearly indicates that report is not ante timed, nor on this ground the testimony of the two eyewitnesses can be disbelieved.

11. As far as accused/Appellant Shamshad is concerned, he has been arrested immediately after the incident, after being chased by the two policemen, as such, there is nothing doubtful in the prosecution story, as against him.

12. Mr. Vivek Shukla, learned Counsel for Appellant Dharmendra submitted that Dharmendra was aged less than 16 years on the date of incident, and he was a juvenile. In this connection, attention of this Court has been drawn to the case of Dharambir v. State (NCT Delhi), (2010) 5 Supreme Court Cases 344, and it is pleaded that at any stage the plea of juvenility can be taken. Having considered submissions of learned Counsel for the Appellant, and after going through the case law referred, we found that though the plea of juvenility can be taken at the appellate stage, but it can't be taken without any basis. No doubt, in his statement u/s 313 of Code of Criminal Procedure, accused/Appellant Dharmendra has disclosed his age 20 years in the year 1996, but the trial court judge has clearly mentioned that apparently he looked 25 years old. No date of birth has been disclosed by the Appellant Dharmendra in respect of the plea that he was a juvenile on the date of incident. In the circumstances, we do not see sufficient reason to give benefit to the accused/Appellant Dharmendra of the Juvenile Justice (Care and Protection of Children) Act, 2000, in the present case.

13. For the reasons as discussed above, there is no force in this appeal, which is liable to be dismissed. Accordingly, the appeal is dismissed. The impugned judgment and order dated 14.03.1997, passed by II Addl. Sessions Judge, Haridwar, in Sessions Trial No. 118 of 1992, is affirmed. Conviction and sentence recorded against accused/Appellants Dharmendra and Shamshad u/s 302/34 and 394 of I.P.C., are affirmed. Accused/Appellant Dharmendra is on bail. His bail is cancelled. He shall be taken into custody to serve out the sentence awarded against him by the trial court. Accused/Appellant Shamshad is in jail. Let a copy of this judgment be sent to the Superintendent of jail concerned, where he is serving his sentence. Lower court record be sent back to the trial court for compliance of this order.