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**(2008) 12 AHC CK 0253**  
**In the Allahabad High Court**  
**Case No : Criminal Appeal No. 2383 of 1981**

Rama Shanker Pandey & Anr.

APPELLANT

Vs

State of U.P.

RESPONDENT

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**Date of Decision :** 17-12-2008

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 105, 302, 4, 99

**Citation :** (2008) 12 AHC CK 0253

**Hon'ble Judges :** Amar Saran, J and R.N.Misra, J

**Final Decision :** Dismissed

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## Judgement

R.N. Misra, J.—This appeal has been preferred by the accused appellants Rama Shanker Pandey and Ghanshyam Sharma against the judgment and order dated 15101981 passed by Shri P.M. Roy, the then Sessions Judge, Moradabad in ST. No. 325 of 1981, by which they have been convicted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentenced to undergo imprisonment for life.

2. The facts giving rise to this case are as under:

That the complainantinformant Amar Singh and deceased Sheonath Singh were residents of village Jatpura, police station Dilari, district Moradabad. The appellants were the employees of Khadi Bhandar, Jatpura. It appears that some incidents of theft were being committed in the godown of Khadi Bhandar and the appellants had suspicion against the deceased. In the intervening night of 12/1331981 at about 10 p.m., the deceased was sleeping at his house after taking food. The appellants alongwith Raja Ram Yadavand Ram Kumar Azad came to the house of the deceased and took him with them for some talks regarding theft in the Khadi Bhandar. The deceased did not turn up in that very night. In the next morning Smt Chandra Wati, the wife of the deceased Sheo Nath Singh went to the house of Amar Singh.who was the collateral of the deceased and told him about the said facts. She also requested him to search out her husband. Amar Singh went out in the village in search of the deceased.

When he reached near the bus station Jatpura one Jagdish Singh, the owner of Truck No. USF 7323 and its driver Jai Singh met him and told him that in the last night at about 12:00, they were going towards Rampur on their truck and saw that seven persons were coming out of the Khadi Bhandar Godown situate in the house of Basant Singh and they were Bam Kumar, Rama Shanker Pandey, Raja Ram, Ghanshyam, Hanuman Singh, Brahma Pal Singh and Lal Behari Lal. Ram Kumar had an ironrod in his hand and the rest had lathis. Ram Kumar, Rama Shanker, Raja Ram and Ghanshyam told them that they had caught the thief in the Gandhi Ashram godown. On this information Amar Singh went to the Gandhi Ashram godown and saw that the door of the godown was opened and the deadbody of Sheo Nath Singh was lying on the earth. He started weeping and the village people assembled there. He sent information to the family members of the deceased and reported the matter to Dilari police vide FIR Ext Ka3. The police registered a case on crime No. 42 of 1981 under Section 302, I.P.C. against the named persons including the appellants as is evident from the Check Report Ext.Ka2. This report was lodged at Dilari police station on 1331981 at 9:15 a.m. In the meantime, appellant Rama Shanker Pandey also lodged a report on the same police station at 9:30 a.m., which is Ext Ka16 and police registered a case on crime No. 42A of 1981 under Section 457 and 380, I.P.C. against the deceased Sheo Nath Singh as is evident from Check report Ext.Ka15. Dilari police started investigation. The I.O. visited the spot, inspected the place of occurrence, prepared siteplan Ext. Ka10, inquest report alongwith the other connected papers Ext.Ka5 to Ext. Ka9 and sent the deadbody for autopsy. Dr. Akhilesh Gomat conducted autopsy on the deadbody of the deceased. The postmortem report is Ext.Ka1. The I.O. recorded the statement of the witnesses and after completing the investigation submitted chargesheet Ext.Ka.13 against the accused persons.

3. The accused persons denied the allegations levelled against them and alleged their false implications due to enmity. They adduced no oral evidence in their defence.

4. In all, seven accused were charged for the offence punishable under Section 147,148,302 read with Section 149, I.P.C. But after trial only the appellants were convicted and rest were acquitted, so this appeal by the convicted appellants.

5. In support of its case, besides the documentary evidence, the prosecution has examined Dr. Akhilesh Gomat P.W. 1, who had conducted the autopsy on the deadbody of the deceased. He has proved the postmortem report Ext.Ka1. P.W. 2 Amar Singh, P.W. 3 Smt. Chandra Vati, P.W. 4 Basanta, P.W. 5 Jagdish and P.W. 6 Kallu Singh are the witnesses of fact. P.W. 7 Constable Mahesh Pal Singh had recorded the FIR Ext.Ka16 of Amar Singh and prepared Check report Ext.Ka15. In his cross examination he has also proved the G.D. entry Ext.Kha1 lodged by Rama Shanker Pandey, the present appellant He was recalled by the prosecution and proved checkreport Ext. Ka. 15 prepared on the basis of written report Ex. Kha1. P.W. 8 is S.I. Balbir Singh, who had prepared the inquest report and other

papers Ext.Ka5 to Ex.Ka9 and had sent the deadbody for autopsy. He had also prepared the site plan of the place of occurrence Ext.Ka10. Some incriminating articles were also taken by him from the spot by preparing the memo Ext. Ka11 and Ext. Ka12. The later part of the investigation was done by S.I. K. Sharma, who has been examined as P.W. 9 and submitted chargesheet Ex. Ka13 against the accused. Besides these witnesses, constable Sardar Wali Khan had filed his affidavit in evidence which is Ext.Ka14.

6. We have heard Shri Gulab Chandra, learned Counsel for the appellant Rama Shanker Pandey and learned AGA for the State. None appeared for the appellant Ghanshyam Sharma. The ordersheet shows that Shri A. Singhal and Shri Jitan Tiwari, learned Counsels for the appellant Ghanshyam Sharma were informed and in spite of more than sufficient opportunity given they did not appear to argue the appeal. Hence, in view of the law laid down by the three Judges Bench of the Apex Court in the case of Bani Singh v State of U.R, 1996 (4) SCC 720, the appeal was heard on merits and the evidence on record was perused.

7. The incident took place in the intervening night of 12/13th March, 1981 and the FIR Ext Ka3 was lodged at police station Dilarion 1331981 at about 9:1a a.m. giving the details of the occurrence. The distance of the police station from the place of occurrence was about 6 miles (about 10 Kms). Since the incident took place in the night and it was detected in the early morning of 1331981, therefore, there was no delay in lodging the FIR. All the accused persons were named in the FIR.

8. The police recovered the deadbody of Sheo Nath Singh from the godown of, Khadi Bhandar. Dr. Akhilesh Gomat had conducted the autopsy, whose report isj Ext.Ka1. The following antemortem injuries were found on the body of the deceased:

- (1) "Swelling 6 an x 6 cm x over top of middle of head extravacession of blood present in scalp.
- (2) Lacerated wound 1 c.m. x 1/2 cm x I bone deep over left forehead, 1 c.m. above and outer top, outer angle of left thigh.
- (3) Lacerated wound 3 cm x 1/2 cm x bone deep left head 6 cm above left ear.
- (4) Lacerated wound 5 cm x 1/2 cm x bone deep 2 cm above Injury No. 3.
- (5) Lacerated wound 4 cm x 1/2 cm x bone deep, 1 cm above the injury No. 4.
- (6) Multiple contusions in an area of 28 cm x 12 cm over front and sides of left upper arm, extending from top of left shoulder to left elbow joint.
- (7) Lacerated wound "1 c.m. x 1 cm x muscle deep over middle of left forearm back
- (8) Abraded contusion 2 cm x 3 1/2 cm over middle of right forearm back.
- (9) Contusion 8 cm x 6 cm over back of left side.

(10) Contusion 7 cm x 5 cm over left palm."

9. From the internal examination, the Doctor found both the parietal bones fractured and the brain and its membranes were lacerated. In the opinion of Doctor the death was caused due to Coma as a result of head injury (injury No. 1). This injury was sufficient in the ordinary course of nature for causing death. The rigor mortis had passed away from the neck and was passing away from the upper portion of the body and present over the lower extremity. The decomposition had started. It was the month of March and the autopsy was conducted on 14/3/1981 at about 4:00 p.m.. These symptoms of the deadbody were indicative of the death of the deceased in the midnight of 12/13/1981. However, the date, time and place of the death of deceased has not been disputed by the appellants by any evidence.

10. The learned, Counsel for the appellant has argued that there was no motive for the crime, therefore, the prosecution story could not be believed. No doubt the motive has not been specifically alleged, but law is very clear on this point that when there is an eyeaccount of the offence, the motive loses its importance. It has been alleged by P.W. 3 Smt. Chandrawati that in the intervening night of 12/13/1981 at about 10:00 p.m. the appellants alongwith two others came to her house and took her husband for having some talks. She has not specified what talks had to take place. But from the F.I.R. Ext Ka1 5 lodged by the appellant Rama Shanker Pandey it appears that the incidents of theft in Khadi Bhandar were taking place and in that connection the appellants and others, were keeping watch over the godown where this incident took place. A suggestion was made from the side of defence to P.W. 2 Amar Singh. In para 21 of his statement, this suggestion was given to him, the relevant portion of which is quoted below:

11. From these facts it appears that the accused persons had suspicion against the deceased for theft in the Khadi Bhandar godown. This could be the alleged motive for the crime. Moreover, there is nothing on the record to show that the deceased and the complainant/informant (P.W. 2) had any animus against the appellants or other accused persons who stood trial. The learned Sessions Judge has rightly observed that Smt. Chandra Wati, the wife of the deceased was not expected to falsely implicate the innocent persons leaving the real culprits.

12. The most important and the only witness of prime fact is P.W. 3 Smt. Chandra wati, the wife of deceased Sheo Nath. She has dearily stated that in the night of 12/13/1981 the deceased and other members of the family were sleeping after taking the meals. It was about 10:00 p.m. when the present appellants alongwith their associates Ram Kumar Azad and Raza Ram Yadav came to her house and called the deceased and asked him to accompany them for some talks. They took the deceased with them. Since all were residents of the same village, therefore, family members of the deceased did not raise any objection, when the deceased did not turn up in the night, naturally the family members became perturbed and in the morning P.W. 3 went to house of Amar Singh, who

was the collateral of deceased and told him about the night incident and requested him to search out the deceased. Amar Singh P.W. 2 went in the village in search of the deceased . P.W. 3 has further stated that when Amar Singh went in the search of deceased, some children of the village came to her and told her that her husband was murdered and deadbody was lying in the Khadi Bhandar godown. She became unconscious hearing this news. In her crossexamination, she has clearly admitted this fact that sometimes her husband used to come back in the late night but she denied the fact that her husband was a thief and so many cases of theft were already there against him.

13. P.W. 2 Amar Singh admittedly belonged to the family of deceased. He has stated that on 1331981 at about 6:00 a.m. P.W. 3 Smt. Chandra wati came to him and told him that in the night at about 10:00 p.m. the appellants alongwith two others took her husband Sheo Nath Singh for having some talks and he did not turn up in the night She also requested him to search out her husband. He went out in the village for searching the deceased and when he reached near the bus station Jatapura, two persons namely Jai Singh and Jagdish met him and told him that about 12 in the night they had seen the appellants with four others while coming out of Khadi Bhandar godown. The appellants and two others had lathi and one had ironrod in his hand. Rama Shanker Pandey and Ram Kumar told him that they had caught a thief in the Khadi Bhandar Godown and they went away. On their information he went to the Khadi Bhandar and found its door broken. When he peeped inside the godown he found the deadbody of Sheo Nath Singh in a pool of blood lying on the earth. He identified the deceased. He started weeping and the village people assembled there. The police was informed and the necessary formality were completed and the dead body was sent for autopsy. In his crossexamination P.W. 2 had denied this suggestion of the defence that the deceased was a thief and he used to commit theft and dacoity by forming a gang with the aforesaid Jagdish and Jai Singh. There is nothing on the record to show that the deceased was a thief and used to commit theft and dacoity. Merely on the basis of this statement of P.W. 2 and P.W. 3 that off and on the deceased used to to come late in the night to his house is not sufficient to hold that the deceased was a thief.

14. P.W. 5 Jagdish has not been believed by the learned trial Court.

15. P.W. 6 is Kallu Singh, who has halfheartedly supported the prosecution. The learned trial Court has rightly believed the portion of his statement that in the relevant night he heard a hue and cry from Khadi Bhandar godown and when he reached there he found the godown locked. Rama Shanker Pandey asked him to call Raja Ram to open the lock because he had caught the thief in the godown. In the morning the deadbody of Sheo Nath Singh was found in the godown. In his crossexamination re has stated that there were bundles of cotton in the godown and each bundle was weighing about two quintals, which could not be removed by a single person, but could be removed by five or six persons. There is nothing on the record to show that except the deceased, there was any other thief also,

therefore, it could not be believed that the deceased had entered the godown for committing theft of cotton bundles, which were too heavy and could not have been removed by a single person.

16. The police also found the deadbody in the godown as is evident from inquest report Ext.Ka5. There were injuries on the body. There is nothing on the record to show that murder was committed anywhere else and the deadbody was thrown in the godown. Ext.Ka15 is the FIR lodged by accusedappellant Rama Shanker Pandey at the police station Dilari on the same date i.e. 1331981 at 9:30 a.m. as is evident from check report Ext.Ka16 and G.D. Entry Ext.Kha1. It may be recalled here that Amar Singh P.W. 2 already lodged the FIR of the occurrence on the same day at 9:15 a.m.

17. P.W. 7 constable Mahesh Pal Singh was examined by the prosecution to prove these facts. The accused persons themselves questioned this witness in the crossexamination and proved G.D. entry Ext.Kha1 regarding the FIR lodged by Rama Shanker Pandey. This shows that accusedappellant Rama Shanker Pandey had lodged the report Ext.Ka15. But in his statement under Section 313, Cr.P.C. he resiled from it In his statement he has stated that the SubInspector got the signature on Ex. Ka15 though he had not lodged this report at the police station and the facts which he wanted to report to the police were not written in the FIR. Nowhere he has specified the facts, which he wanted to report to the police. P.W. 7 has categorically denied this fact that the SubInspector had got the signature of this accusedappellant on the report Ext.Ka15 against his will. There is nothing on the record that Rama Shanker Pandey ever made a complaint to any superior authorities "that the police got his signature on any report against his will. Nothing is there on the record to show that Ext.Ka15 was not lodged by Rama Shanker Pandey at the police station or it was brought on record against his will. The learned Counsel for the appellant has vehemently argued that Ext. Ka15 was in the form of confession and could not . be relied upon to support the prosecution. The learned Sessions Judge has discussed this legal position in his judgment in very detail. In our opinion, this FIR was neither a confession nor statement made to the police officer during the course of the investigation. Its admissibility was not barred by Section 25 of the Evidence Act or Section 162 of the Code of Criminal Procedure. There is dear difference between the confession and the statement. The FIR was merely information to the police given by the appellant Rama Shanker Pandey regarding an incident which according to him occurred in the night. There is nothing on the record to show that when Ext. Ka15 was lodged at the police station by Rama Shanker Pandey, he was not aware of the fact that the FIR had already been lodged against him for murder of Sheo Nath Singh. The learned Counsel for the appellant has further contended that this so called FIR could only be used under Section 157, Cr.P.C. to corroborate or under Section 145 of the Evidence Act to contradict any fact The learned Sessions Judge has rightly rejected this contention because Rama Shanker Pandey was accused in the case and not a witness. He did not appear before the Court as a witness in his defence also. The police officer was bound to

record the information relating to commission of cognizable offence given by anyone under Section 154, Cr.P.C. This Information could neither be termed as confession nor the statement by the maker. This could be termed only as information to the police regarding commission of crime. It was clear that the statement given by Smt. Chandra Wati was correct and reliable. The accused persons took the deceased from his house, probably they were under the impression that the theft was being committed in the Khadi Bhandar by the deceased also. The deceased was caused injuries by these persons and it is evident from the statement of Dr. Akhilesh Gomat that he died due to the ante mortem injuries.

18. In the alternative, the learned Counsel for the appellant has also argued that this was a case of selfdefence of property as given under Section 103 of the Indian Penal Code in which it has been given that the right of private defence of property extends to voluntarily causing the death of the wrongdoer. He has contended that since the appellants were incharge of Khadi Bhandar, therefore, it was their duty to protect the godown from the thieves and dacoits. They defended the property by killing the deceased, who had come there to commit theft. But we disagree with this contention. Section 99 of the Indian Penal Code is very clear on the point The relevant portion of Section 99, I.P.C. is quoted below:

"There is no right of private defence In cases in which there is time to have the recourse to the protection of public authorities."

19. In the FIR Ext. Ka15 It has been mentioned that the appellants had received information that the theft was to be committed in the night in the godown and to catch the thief they had assembled near the godown as is evident from the evidence on the record. As such they had ample opportunity for approaching the police to get the thief arrested. But without doing so they caught and killed the deceased. As such there was no right of private defence available to the appellants in killing the deceased. Section 103 of the Indian Penal deals with the right of private defence of property extending to cause death and Section 105, I.P.C. limits such right.

20. According to Section 105 of the Indian Penal Code, the right of private defence of property against housebreaking by night continues as long as the house-trespass which has been begun by such housebreaking, continues. In the present case before us it is evident that the deceased had no arms. Neither the appellants nor the police has stated that the deceased had any arm like lathi, country made pistol or some other weapon. There is nothing on the record that the deceased had broken open the door of the godown though according to RW. 2 Amar Singh, a portion of the wooden door of the godown was broken when he reached there. The deadbody in the pool of blood was lying on the earth in the godown itself. Even if for a moment it is taken to be true that the deceased had entered the godown by breaking open the door for committing theft having no arm in his hand, even then there was no right of private defence of property

available to the appellants to cause his death as there was ample opportunity for the appellants to catch him or to prevent him from breaking open the door and if he entered the godown, they could close the godown from the outside and could take the help of the villagers in detaining the deceased in the godown. There is nothing on the record to that show that the appellants had made any attempt to catch the deceased and the deceased over powered them. Thus, this is a case of dear exceeding the right of private defence of property, if any.

21. In view of our above discussions, it is dear that the deceased was taken by the appellants from his house in the intervening night of 12/1331981 and was killed in the Gandhi Ashram godown by causing injuries. The deceased succumbed to the head injury caused by them. No right of private defence was available to the appellants and even if it was available, they exceeded their right. The learned trial Court has rightly held them guilty and convicted them as discussed earlier. Tills appeal is devoid of merits and is liable to be dismissed.

22. The appeal is dismissed and the judgment and order passed by the learned trial Court are hereby confirmed. The appellants are on bail. Their bails are cancelled.

23. Let a copy of this judgment be sent to the Chief Judicial Magistrate Moradabad for Issuing nonbailable warrant of arrest against the appellants Rama Shanker Pandey and Ghanshyam Pandey and for sending them jail to serve out the sentence awarded by the learned trial Court and confirmed by this Court.

24. Office is directed to communicate this judgment within 10 days.

25. Compliance report by CJM Moradabad be sent to this Court within two months. Appeal dismissed.