
(2007) 03 AHC CK 0076
In the Allahabad High Court

Rinku alias Udai Shanker Mishra (In Jail)	APPELLANT
Vs	
State of U.P.	RESPONDENT

Date of Decision : 28-03-2007

Acts Referred:

Arms Act, 1959 — Section 25
Penal Code, 1860 (IPC) — Section 302, 307, 34, 504, 506

Citation : (2007) 03 AHC CK 0076

Hon'ble Judges : Saroj Bala, J;Imtiyaz Murtaza, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Saroj Bala, J.—The criminal appeals No. 767 of 2005 and 383 of 2005 have been preferred against the judgment and order dated 24.1.2005 passed by the Additional Sessions Judge/Special Judge (N.D.P.S. Act) court No. 3, Ballia in sessions trial No. 202 of 2003 under Sections 302/34, 504, 506 I.P.C. and sessions trial No. 203 of 2003 State v. Rinku alias Uday Shanker under Sections 25 Arms Act P.S. Kotwali District Ballia whereby convicting the appellant Rinku alias Udai Shanker for the offences punishable under Sections 302 and 506 I.P.C. and sentencing him to rigorous imprisonment for life for the offence u/s 302 I.P.C. and fine of Rs. 5000/- and in default to serve rigorous imprisonment for a period of one year, rigorous imprisonment for one year for the offence u/s 506 I.P.C. and rigorous imprisonment for a period of two years for the offence u/s 25 Arms Act and convicting the appellant Chhotu alias Mustak for the offence u/s 302/34 I.P.C. and Section 506 I.P.C. and sentencing him to rigorous imprisonment for life and fine of Rs. 5,000/- for the offence u/s 302/34 I.P.C. and in default to serve rigorous imprisonment for the period of one year and rigorous imprisonment for a period of one year for the offence u/s 506 I.P.C.

2. The relevant facts are these:

On March 29, 2003 at about 7 P.M. the informant Satish Chandra Pandey (P.W.I), his uncle Indrajeet Pandey and neighbour Devta Nand Pandey Advocate had been

returning to their residence on foot from Chatti Pouhari Pur, after purchasing vegetables and when they were at a distance of about fifty feet from their house, both the appellants along with co-accused Chandan Mishra (Juvenile offender and tried separately) who were lying in wait, came there. Co-accused Chandan Mishra using abusive language exhorted to kill. At this, appellant Rinku alias Udai Shanker opened fire which hit the back of informant's uncle. Both the appellants and co-accused Chandan Mishra opening fire in the air and threatening to kill them managed their escape. The motive behind the commission of offence was engagement of informant as counsel by Kaliash Dubey, and Ramesh Dubey who were accused in a case u/s 307 I.P.C, the First Information Report of which was lodged by co-accused Chandan Mishra and appellant Rinku alias Uday Shanker Mishra was injured. The informant got the accused Kailash Dubey and Ramesh Dubey released on bail. The victim Indrjeet Pandey, then alive was taken to the district hospital Ballia and was medically examined by Dr. R.K. Kejariwal on 29.3.2003 at 7.55 P.M. and following injury was found on his person as per injury report Ext. Ka 20:

Firearm wound of entry 1.5 Cm. X 0.5 Cm on left side of back, 7 Cm. below lower angle of scapula with collar of abrasion. Multiple pellet abrasion of 0.2 cm. diameter in an area of 7 Cm. X 7 Cm. around the wound were present. Fresh bleeding present. Advised X-ray Chest AP lateral. The injury was caused by firearm and kept under observation. Patient was admitted and referred to surgeon. Duration was fresh.

3. The injured succumbed to the firearm injury in the district hospital at 10.15 P.M. on 29.3.2003. The written report of the incident Ext. Ka-1 was lodged by Satish Chandra Pandey (P.W. 1) nephew of deceased on 29.3.2003 at 23.20 hrs. On the basis of written report, the chick F.I.R. Ext. Ka-13 was prepared by constable Hem Narayan Singh, (P.W.4) and entry in the G.D. about registration of crime was made by him which is Ext. Ka-14.

4. The inquest on the dead body was conducted by the Investigating officer Hari Prakash Vishwakarma (P.W.3). The Investigating Officer prepared the inquest memo Ext. Ka-4, specimen seal Ext. Ka-6 and wrote letters to C.M.O. and R.I. Ext. Ka-5 and Ka 7 for making arrangement of autopsy on the dead body.

5. The autopsy on the dead body was conducted by Dr. R.N. Upadhyay (P.W.2) on 30.3.2003 at 4.30 P.M. According to the postmortem report Ext. Ka-3 the following antemortem injuries were found on the person of deceased:

(1) fire arm wound of entry 2.5 cm. X 2 cm over lower angle of right scapula, 4 cm. lateral to vertebral column with tattooing and singing of hair around the wound of entry. On probing it communicated with thorasic cavity, underneath ribs fractured on dissection, during the course of injury which is oblique in direction. There is laceration of base of left lung including all vessels of left lung. Bullet lodged in left autrium of heart recovered after dissection of left autrium. Throasic cavity is full of blood about three liters.

(2) Lacerated wound 2 cm X 2 cm over dorsal aspect of right great toe and finger.

(3) Lacerated wound 2 cm. over four fingers of left leg.

The death was caused due to antemortem firearm injury as a result of shock and haemorrhage.

6. S.S.I. Hari Prakash Vishwakarma (P.W.3) visited the place of offence, prepared the site plan Ext. Ka-8 and took in police custody the empty cartridge 315 bore from the spot under the memo Ext. Ka 9. He collected blood smeared and plain earth from the spot under the memo Ext. Ka 10. He arrested the appellant Rinku alias Uday Shanker Mishra on 1.4.2003. On the basis of memo of arrest and recovery memo Ext. Ka 11 chick F.I.R. number 56 of 2003 of case crime number 184 of 2003 u/s 25 Arms Act was prepared by constable Pramod Mishra and entry was made in the G.D maintained at Police Station KotwaJi. The chick F.I.R. and copy of G.D. of registration of crime under section" 25 Arms Act are Ext. 18 and 19 respectively. After recording the statements of informant and other witnesses and completing the necessary formalities he submitted the charge sheet No. 112 of 2003 Ext. Ka 12 for the offences under Sections 302, 504, 506 I.P.C. against the appellants and co-accused Chandan Mishra. He has proved the material Exhibts. 1 to 6. The responsibility to investigate the case crime No. 184 of 2003 u/s 25 of Arms Act was entrusted to S.I A.H. Zaidi P.W. 5. The Investigating Officer visited the place of offence prepared site plan Ext. Ka-15 and after thorough investigation he submitted the charge sheet No. 63 of 2003 u/ s 25 of Arms Act against the appellant Rinku alias Udai Shaker which is Ext.Ka-16. Prior to the submission of charge sheet sanction Ext. Ka-17 to prosecute the appellant for the offence under Sections 25 Arms Act was taken from Shri S.P. Dixit, the then District Magistrate Ballia.

7. Both the appellants were committed to the court of sessions by the order dated 12.9.2003 passed by the C.J.M. Ballia for facing trial for the offences punishable under Sections 302, 504, 506 I.P.C. and Section 25 Arms Act. The appellant Rinku alias Udai Shanker was charged for the offences punishable u/s 302, 504, 506 I.P.C. He was separately charged for the offence u/s 25 of Arms Act. The appellant Chhotu alias Mustaq was charged for the offence u/s 302 read with Section 34, 504, 506 I.P.C. The appellants pleaded not guilty to the charges and claimed to be tried.

8. The prosecution in order to substantiate the charges examined Satish Chandra Pandey P.W.I maker of First Information Report and eye witness Dr. R.N. Upadhyay P.W.2 autopsy surgeon, Hari Prakash Vishwakarma, P.W.3, Investigating Officer, C.P. Hem Narain Singh, P.W.4, S.I. A.H. Zaidi, P.W.5 another Investigating Officer and Chief Pharmacist Bengali Ram, P.W.6 who has proved the injury report of the victim.

9. The plea of appellants was of total denial. According to the appellant Rinku alias Udai Shanker he was lifted from his house in the night of the incident and fictitious recovery of country made pistol was shown on 1.4.2003. According to

him he has been falsely implicated and the documents relied on by the prosecution are false and fabricated documents. The appellant Chhotu alias Mustaq stated that fictitious recovery of empty cartridge from the spot was shown. The appellants examined Dinesh Pandey alias Loha Pandey (D.W.I) in their defence.

10. After taking into consideration the prosecution evidence, the trial judge recorded the impugned judgment of conviction and sentence which has been assailed by the appellants through these appeals.

11. We have heard Shri V.P. Srivastava, learned Senior Advocate appearing on behalf of the appellants and Shri A.K. Dwivedi, learned A.G.A. appearing for the State. Lower court record has been summoned before us which we have thoroughly scrutinized.

12. The learned Counsel for the appellants submitted that the admission of the victim in the hospital by Dinesh Pandey alias Loha Pandey (D.W.I), material discrepancy with regard to the place from where shot fired and absence of attempt on his life though he was the main target make the very presence of witness Satish Chandra Pandey (P.W.I) at the place of offence, doubtful. The argument of the learned Counsel was that the victim Indrajeet Pandey, then alive was taken and admitted in the hospital by Dinesh Pandey (D.W.I) and he is also a witness to the inquest on the dead body. The learned Counsel urged that there are two versions of the incident namely one narrated by prosecution witness Satish Chandra Pandey (P.W.I) and another given by Dinesh Pandey alias Loha Pandey (D.W. 1) and it is to be assessed which version is true.

13. The prosecution case squarely rests on the testimony of Satish Chandra Pandey (P.W.I), solitary eye witness to the occurrence. He has testified that on 29.3.2003 at about 7 P.M. he along with his uncle Indrajeet Pandey (victim) and Devta Nand Pandey was returning home after purchasing vegetables from Chatti Pohari Pur. According to him his uncle was going ahead and they were at a distance of about fifty feet from their house towards the eastern direction when the accused came out from the wheat field. He further stated that Rinku alias Udai Shanker opened fire from country made pistol with intent to kill him, on the exhortation of co-accused Chandan Mishra but the shot hit the back of his uncle who had turned towards him. According to him his uncle was rushed to Sadar Hospital Ballia with the help of people of the locality and was admitted there and his condition being serious he was referred to Varanasi. According to him his uncle died in Sadar Hospital Ballia at 10-10.15 P.M. The witness proved the written report Ext. Ka -1, lodged at P.S. Kotwali Ballia. He deposed that he was engaged as counsel by Kailash Dubey and Ramesh Dubey in a case u/s 307 I.P.C. the First Information Report of which was lodged by co-accused Chandan Mishra and accused Rinku alias Udai Shanker was injured in that case and he having got the accused of that case namely Kailash Dubey and Ramesh Dubey bailed out Rinku alias Udai Shanker and Chandan Mishra bore enmity with him. In the cross-examination he gave out that after the incident he went to fetch vehicle for

taking his uncle to the hospital and when he came back he saw some persons taking him to the hospital on a motor cycle.

14. Dinesh Pandey alias Loha Pandey (D.W.I) testified that Satish Pandey advocate was previously known to him as his house is situated at a distance of about 15.200 Mt. from his residence towards the southern direction and they were on visiting terms. According to him Indrajeet Pandey came to the house of Satish Chandra Pandey one and half month before and resided with him. He further stated that Indrajeet Pandey died on 29.3.2003 in the hospital on account of firearm injury sustained at about 7-7.35 P.M. the same day. According to him he reached the place of incident on his motor cycle after being informed about the occurrence by the elder daughter of Satish Chandra Pandey and found the injured Indrajeet Pandey lying on the ground and took him to the hospital on his motor cycle. According to him Indrajeet Pandey was admitted in Sadar Hospital Ballia and he died at about 9.30 P.M. He gave out that Satish Chandra Pandey came to the hospital 10-15 minutes after the death of Indrajeet Pandey. He further stated that names of assailants were not disclosed to him by Satish Chandra Pandey. In his cross examination he admitted that he was present at the time of inquest on the dead body and is a witness to the inquest. He denied his presence at the place of offence at the time of incident.

15. The witness Dinesh Pandey (D.W.I) having denied his presence at the spot at the time of incident his testimony does not belie the presence of the witness Satish Chandra Pandey (P.W.I) at the place of offence at the relevant time. The witness Dinesh Pandey reached at the spot after the incident on being informed about it by the elder daughter of the witness Satsih Chandra Pandey. He feigned ignorance about the fact as to who accompanied the victim at the time of occurrence. According to the witness Satish Chandra Pandey (P.W.I) he along with his uncle Indrajeet Pandey and neighbour Devta Nand Pandey had been returning home after purchasing vegetables and when they were at a distance of about fifty feet from their house, the appellant Rinku alias Udai Shanker Mishra opened fire from the country made pistol aiming at him on the exhortation of co-accused Chandan Mishra but his uncle who was going ahead turned towards him and the shot hit his back. He had testified that his uncle was rushed to Sadar Hospital Ballia with the help of local people. In the cross-examination he stated that after the incident he had gone in search of vehicle for carrying his injured uncle to the hospital and when he returned with vehicle he met some persons on the way who were taking his uncle to the hospital: According to him his uncle was admitted in the hospital before he reached there. The witness Satish Chandra Pandey (P.W.I) gave a plausible explanation about absence of his name in the medical examination report of victim. More-over no factual presumption can be drawn on this basis that the witness Satish Chandra Pandey (P.W.I) had not accompanied the injured. Reliance in this regard is placed on the decision in Sukhchain Singh Vs. State of Haryana and Others, wherein the Apex Court has held as hereunder:

As in the medico-legal report Ext. PE, name of P.W.I was found not mentioned, the High Court presumed that he had not accompanied the injured. Such an assumption is not referable to any legal or factual presumption. It was further observed that" it is neither the requirement of law nor usually expected that names of all the relatives of the injured should be mentioned in the medico-legal report prepared by the doctor in his discretion.

16. Coming to the question of material discrepancies in the testimony of witness Satish Chandra Pandey (P.W.I), in the site plan Ext. Ka-8, the place of the presence of appellants has been shown towards northern side. According to the witness Satish Chandra Pandey (P.W.I) the accused persons were seen standing in the wheat field situated near the place of offence towards western and southern direction and he was on the road at a distance of 4-5 paces from them on eastern and southern side and his uncle was at a distance of 4-5 paces from them towards western and southern direction. He had testified that accused persons came out from the wheat field situated towards the southern direction and using abusive language exhorted and fired a shot from country made pistol. He further deposed that his uncle proceeded towards his side after exhortation by the accused and when he (uncle) reached near him the shot was fired. He gave out that the accused were at a distance of 5-7 paces towards the western and southern direction of his uncle when shot was fired and he was at a distance of 2-3 paces towards eastern direction from his uncle. The assailants and witnesses do not remain stationary at the time of incident nor a witness is expected to possess a photographic memory and to recall the minute details of an incident and his testimony can not be discarded on the basis of discrepancies with regard to directions of place of offence as truth suffers from infirmity when projected through human agency. Moreover, the place of offence being passage the distance between its different directions was quite narrow. The evidence of the witness of fact is to be judged with the yard-stick of probabilities, its intrinsic worth and animus of the witness with accused. The eye witness Satish Chandra Pandey (P.W.I) is the real nephew of deceased and it is against human nature to spare the real assailants and implicate innocent persons. The witness having no previous animus with the appellants, there was no possibility of their false implication. The witness Dinesh Pandey (D.W.I) was a witness to inquest on the dead body but he did not tell the investigating officer that appellants were falsely implicated. The testimony of eye witness was in conformity with medical evidence. In our opinion, the witness Satish Chandra Pandey having narrated the incident in a truthful and honest manner, his testimony inspires confidence and cannot be brushed aside on the basis of so called contradictions highlighted by the learned Counsel.

17. It has next been argued that in the absence of source of light it was not possible for the witness to identify the assailants. The submission of the learned Counsel was that torch, in the light of which the incident is said to have been witnessed, was not taken in police custody. The incident took place on 29.3.2003 at 7 P.M. The time of occurrence has not been challenged. The victim Indrajeet

Pandey was critically injured and was medically examined in the district hospital Ballia at 7.55 P.M. The testimony of Dinesh Pandey (D.W.I) corroborates the prosecution case with regard to the date and time of the incident. The occurrence having taken place in the last week of month of March when there is sufficient natural light at 7 P.M. The appellants and co-accused being previously known to the eye witness, there is no question of mistaken identity. The witness Hari Prakash Vishwakarma (P.W.3) stated that the witness Satish Chandra Pandey had shown the torch to him but he had not taken it in police custody. The appellants cannot get advantage of any lapse on the part of investigating officer.

18. The next plank of argument of the learned Counsel for the appellants was that the motive as alleged by the prosecution is weak and feeble whereas the chances of false implication are stronger. According to the learned Counsel the witness Satish Chandra Pandey (P.W.I) is an advocate and it is part of his profession to get the accused bailed out. The learned Counsel emphasised that Kailash Dubey being an accused in a case u/s 307 I.P.C. for attempting to kill the appellant Rinku alias Udai Shanker and scribe of a Will alleged to have been executed by the deceased Indrajeet Pandey in favour of the witness, resulted in false implication of the appellants. The witness Satish Chandra Pandey (P.W.I) has deposed that a case u/s 307 I.P.C. was registered at P.S. Kotwali District Ballia on the basis of First Information Report made by co-accused Chandan Mishra and appellant Rinku alias Udai Shanker was the injured of that case. He further stated that he was engaged as counsel in that case by the accused Kailash Dubey and Ramesh Dubey and got them bailed out. According to him the appellant Rinku alias Udai Shanker and co-accused Chandan Mishra bore enmity with him on account of his getting the accused Kailash Dubey and Ramesh Dubey bailed out and they had threatened him on a number of occasions. The motive remains locked up in the heart of the offender and he alone knows what moved him to commit the offence. The evidence of witness Satish Chandra Pandey (P.W.I) shows that the appellants were having strong enough motive to commit offence. The witness has categorically refuted the suggestion that there had been malice between himself and the brothers and other nephews of his uncle over his land. There is no evidence to show that the Will of the deceased is a subject matter of challenge by his daughter, brothers and nephews. It is needless to say that when there is acceptable evidence of eye witness to the commission of offence the question of motive does not loom large. At this juncture it would be appropriate to make a reference to the Apex Court decision in Thaman Kumar Vs. State of Union Territory of Chandigarh, wherein it has been held as below:

Where the ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for the commission of the crime has not been proved.

19. The witness Satish Chandra Pandey (P.W.I) has categorically stated about the motive for the commission of offence. The testimony of the witness with regard to time, place, manner and participation of appellants having been found by us

to be trustworthy and credible, the argument of the learned Counsel about motive does not stand close scrutiny.

20. The appellant Chhotu alias Mustaq came at the spot along with main assailant and was lying in wait since before and after commission of offence fled away with main assailant opening fire in the air to scare the witnesses. There was meeting of minds of all accused persons to commit the offence.

21. In view of the above discussion, we do not find any substance in the submissions of learned Counsel for the accused-appellants, assailing the testimony of the solitary eye witness Satish Chandra Pandey (P.W.I). We are in complete agreement with the trial judge that his testimony was reliable and creditable that it was appellant Rinku alias Udai Shanker who opened fire on the back of Indrajeet Pandey resulting in his death and murderous assault was mounted in furtherance of common intention of appellant Chhotu alias Mustaq and co-accused Chandan Mishra. With the result both the appeals fail and are dismissed.

22. The conviction and sentence awarded by the trial court to the appellants is affirmed. The appellant Rinku alias Udai Shanker is in jail. He shall be kept there to serve out the sentences awarded by the trial court and affirmed by us.

23. The appellant Chhotu alias Mustaq was released on bail at the time of admission of this appeal by an order dated 28.1.2005. The Chief Judicial Magistrate Ballia shall cause him to be arrested and lodged in jail to serve out the sentences awarded by the trial court and affirmed by us.

24. Certify the judgment to the lower court within a week. The record of the case be also transmitted to the court below immediately. The compliance shall be reported by the Chief Judicial Magistrate Ballia within four weeks from date of receiving the copy of this order.