

(2004) 09 AHC CK 0301
In the Allahabad High Court
Case No : Criminal Appeal No. 81 of 1982

Rudal Shahi and Others (in Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 13-09-2004

Acts Referred:

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

Citation : (2005) 1 ACR 101

Hon'ble Judges : Mukteshwar Prasad, J; M.C. Jain, J

Bench : Division Bench

Advocate : P.N. Mishra, Apul Mishra, T. Rathore, D.K. Singh and S.A. Sahai, for the Appellant; K.P. Shukla, A.G.A., for the Respondent

Judgement

M.C. Jain, J.—The three Appellants, namely, Rudal Shahi, Yogesh Shahi and Ashok Kumar Rai are before this Court in appeal, challenging the judgment and order dated 7.1.1982, passed by Sri C. L. Anand, the then II Ird Additional Sessions Judge, Gorakhpur in Sessions Trial No. 292 of 1979. They have been convicted u/s 302 read with Section 34, I.P.C. and sentenced to life imprisonment. There was fourth accused Ram Pratap Shahi (real brother of Appellant Rudal Shahi) who died in a boat accident after the framing of the charge. Rudal Shahi and Yogesh Shahi are cousins and third Appellant Ashok Kumar Rai is said to be their friend.

2. The incident took place on 29.12.1978 at about sun set in village Lakhnagar, P.S. Barhalganj, district Gorakhpur and the F.I.R. was lodged the same day at 6.45 p.m. by Kameshwar Shankar Tiwari P.W. 3. The deceased was one Bashishtha Tiwari. The background and facts leading to the trial are as follows.

3. Some four months before the incident, there had been an altercation between Bashishtha Tiwari deceased, Satyendra Tiwari, Chauthi Mishra alias Vinod and the complainant Kameshwar Shankar Tiwari on the one hand and Vinod Kumar Shahi on the other. Since then Vinod Kumar Shahi was in search of an opportunity to take revenge from them. He had formed a group of which the

accused Ram Pratap Shahi, Rudal Shahi and Yogesh Shahi were main members. On account of this enmity, the accused-Appellant Ashok Kumar Rai, Shyam Narain, accused-Appellant Yogesh Shahi, Vinod Shahi, Anand Kumar Shahi and Pramod Kumar Shahi had assaulted Ram Singar Pandey (of complainant's party) two days before the incident regarding which a report had been lodged.

4. On the fateful day of the present incident, at about 4 p.m., the complainant along with Bashishtha Tiwari went to see a movie at Shahi Cinema but they were a bit late and show had started. Therefore, they did not go to the cinema hall. Instead, they started sipping tea. Sometime thereafter, the three accused-Appellants and the deceased accused Ram Pratap Shahi also arrived there. They asked Bashishtha Tiwari not to support Chauthi Mishra, Bashishtha Tiwari replied that there could be no such question as Chauthi Mishra was his friend and relation. Then the accused-Appellant Ashok Kumar Rai suggested that the enmity should be put to an end. Bashishtha Tiwari told them that he, too, would not nurse any grudge in case the accused party would not attack him. A little thereafter, the complainant and the deceased started for their village. They reached Sahukhore Bazar where again they sipped tea. The three accused-Appellants and the deceased accused Ram Pratap Shahi also arrived there. It was going to be sun set. The deceased Bashishtha Tiwari picked up his bicycle from the shop of Narsingh Gupta in Sahukhore and started his homeward journey. The complainant stayed in the market for a while to buy some household articles. The accused-Appellants and deceased accused Ram Pratap Shahi also followed the deceased on cycles, saying that they were also going in the same direction. Shortly, thereafter, the sound of firearm shot was heard. The complainant, Rajendra Tiwari, Ram Jiyawan Mishra and Chhotkan Koiri hid in that direction. When they reached near the culvert situated at about one furlong from the trijunction of roads, they saw Bashishtha Tiwari lying bleeding with injury. His cycle was down by his side. He had sustained injury on his neck. The complainant and Rajendra Tiwari carried Bashishtha Tiwari on a Rickshaw to Barhalganj Hospital but the deceased breathed his last on the way. The F.I.R. also stated that the crime had been committed by the accused-Appellants and the deceased accused Ram Pratap Shahi in furtherance of their common intention. On lodging of the F.I.R., a case was registered and investigation was taken up by S.I. Parmeshwari Singh. S. H. Ghosal S.H.O. P.W. 6, also immediately reached the spot and took the charge of the investigation which was concluded by him.

5. After the preparation of the inquest report and completing other formalities, the dead body was sent for post-mortem which was conducted on 30.12.1978 at 2.30 p.m. by Dr. S. K. Srivastava (Deputy C.M.O.) P.W. 5. The deceased was aged about 20 years and about one day had passed since he died. The following ante-mortem injury was found on his person:

(1) Gunshot wound circular (1/4 cm. ? 1/4 cm.) ? muscles on the back of neck on upper part from middle towards right. No tattooing or charring present,

margins inverted, on cutting the bullet passed through muscle breaking Ist cervical vertebra lodged in the base part cranial fossa, marked haematoma present.

6. On internal examination, membranes were found fractured. A bullet was found in right side of skull. The death had occurred due to shock and haemorrhage resulting from the injury detailed above.

7. The accused-Appellants denied the prosecution story and claimed that they had been falsely implicated due to enmity.

8. The prosecution in all examined six witnesses including Doctor and Investigating Officer. Rukmani P.W. 4 was said to be the eye-witness of the incident and Chhotkan P.W. 1, Ram Pyare Tiwari P.W. 2 and Kameshwar Shankar Tiwari P.W. 3 gave evidence of the related circumstances to prove the guilt of the accused-Appellants. Kameshwar Shankar Tiwari P.W. 3 was also the informant of the case. The prosecution evidence appealed to the trial Judge who recorded the impugned judgment.

9. We have heard Sri P. N. Mishra, learned senior advocate for the Appellants and Sri K. P. Shukla, learned A.G.A. for the State in opposition of the appeal.

10. The submission of Sri Mishra is that there is no evidence worth the name to connect the accused-Appellants with this crime. No overt act, as argued by the learned Counsel, has been assigned to them. The previous background detailed in the F.I.R., or the fact that they belonged to the group of the deceased accused Ram Pratap Shahi could not be made the basis for their conviction in the absence of any evidence of concrete nature against them.

11. We find sufficient force in the submission of the learned Counsel for the accused-Appellants which learned A.G.A. could not counter on the basis of material and evidence on record. True, it is abundantly clear from the post-mortem report of the deceased that he died of a single gunshot wound on the back of the neck on the upper part wherefrom the bullet was recovered. So, it admits of no doubt that he was the victim of violence. But that alone would not prove the culpability of the accused-Appellants before us.

12. It is to be pointed out that according to the prosecution, Rukmani P.W. 4, was the eye-witness of the incident. She, however, became hostile to the prosecution and did not support it. To be precise, she stated that she did not see the incident of the shooting of Bashishtha Tiwari. She was subjected to cross-examination. She admitted to have been interrogated by the Investigating Officer but refuted to have made statement to him attributing shooting of Bashishtha Tiwari by Ram Pratap Shahi (deceased accused-Appellant). She having not supported the prosecution even in a bit, the so-called *res gestae* evidence coming through the testimony of Ram Pyarey Tiwari P.W. 2 that when he and others rushed up to the spot near the culvert where Bashishtha Tiwari was lying injured, Rukmani was shouting aloud pointing towards the accused-Appellants going to southern side

on bicycles that they were running after killing Bashishtha Tiwari, is meaningless. Needless to say, the *res gestae* evidence could be used in corroboration of primary evidence. In the absence of primary evidence, the so-called evidence as to what was stated by Rukmani at the spot immediately after the incident has no significance within the meaning of law.

13. No doubt, there is evidence of enmity between the accused and the deceased. It is also clear from the evidence of Kameshwar Shankar Tiwari P.W. 3, that he and the deceased had gone to see the cinema show which had already started. When he and the deceased were sipping tea, instead of seeing the cinema, the accused persons came there and required Bashishtha Tiwari to leave supporting Chauthi whereupon Bashishtha Tiwari replied that there could be no such question because Chauthi was his friend and relative. Ashok Rai then suggested to bury the old hatchet. To say in a word, there was some conversation between the accused and the deceased including this witness a little before the incident. He further stated that they had come to Sahukhore in a taxi where he became busy in buying household articles and the deceased picked up his bicycle from the shop of Narsingh Gupta and left that place. He further stated that the three accused along with Ram Pratap Shahi followed the deceased, saying that they, too, were going that side. After sometime, he heard a gunshot sound and rushed towards the scene of occurrence to find the deceased lying with the gunshot injury on neck. According to him, after 4-5 minutes of the departure of Bashishtha Tiwari, he had heard the gunshot sound. Ram Pyarey Tiwari P.W. 2 also deposed that he had seen the accused and deceased Bashishtha Tiwari. Chhotkan P.W. 1, a petty vegetable vendor, stated that he had gone to Sahukhore Bazar to sell vegetables. He deposed that he had seen Ram Awadh Shahi in the market. He further stated that the market had become congested when he had seen Bashishtha Tiwari moving in the bazar. He also saw four accused persons in the market and sometime thereafter, he heard a gunshot sound. He rushed towards the culvert and saw Bashishtha Tiwari lying in a bleeding condition.

14. The testimony of these witnesses goes no further than that there had been some conversation between the accused and Bashishtha Tiwari in the presence of Kameshwar Shankar Tiwari P.W. 3 a little before the incident. After reaching Sahukhore Bazar, Bashishtha Tiwari started homeward journey on his cycle. A little while later, a shot was heard. The witnesses ran towards the culvert and found Bashishtha Tiwari to be lying in injured condition. It may be stated at the risk of repetition that the eye-witness Rukmani P.W. 4 did not support the prosecution case. It has also to be kept in mind that the deceased sustained a single shot which, according to the prosecution, was opened by the deceased accused Ram Pratap Shahi. No overt act has been assigned to the present accused-Appellants. They cannot be deemed to have shared the common intention of the shooter Ram Pratap Shahi on a whimsical approach or on imagining premises simply because they had also participated in the conversation with Bashishtha Tiwari a little before and were going in the same

direction on the cycles when Ram Pratap Shahi shot him dead.

15. In the case at hand, it has come in evidence that the shooter Ram Pratap Shahi died in a boat accident after the charge was framed against him. It appears that God commanded justice in His own way. We are in the judgment that the trial Judge unnecessarily strained the evidence on record to hold the three accused-Appellants guilty with the aid of Section 34, I.P.C.

16. In view of the above discussion, we are inclined to allow the appeal. The appeal is allowed. The impugned judgment and order are set aside. The accused-Appellants are acquitted. They are on bail. They need not surrender.

17. The judgment be immediately certified to the lower court for necessary entries in the relevant register and reporting compliance to this Court within two months from the date of receipt of a copy of this order.