

(2006) 06 UK CK 0018

In the Uttarakhand High Court

Case No : Criminal Appeal No. 1740 of 2001

Smt. Babita alias Neha and Others

APPELLANT

Vs

State of Uttaranchal

RESPONDENT

Date of Decision : 20-06-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 207, 313, 374(2)

Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 34

Uttar Pradesh Reorganisation Act, 2000 — Section 35

Citation : (2006) 3 UC 1992

Hon'ble Judges : Rajeev Gupta, C.J.; Prafulla C. Pant, J

Bench : Division Bench

Advocate : Lokendra Dobhal and Sudhir Singh, for the Appellant; H.C. Pande, A.G.A., Nishat Intezar, S.K. Agarwal and Gopal K. Verma, for Informant, for the Respondent

Judgement

Prafulla C. Pant, J.—This appeal, preferred u/s 374(2) of the Code of Criminal Procedure, 1973 (hereinafter for brevity referred as Code of Criminal Procedure), is directed against the judgment and order dated 15-04-1994, passed in Sessions Trial No. 68 of 1990 (along with Sessions Trial No. 107 of 1992) by the then learned Sessions Judge, Dehradun, whereby he has convicted Appellants Babita, Rukmani and Jhandu u/s 302 read with Section 34 of Indian Penal Code, 1860 (hereinafter referred as I.P.C.), and sentenced each of them to imprisonment for life. However, other two accused Smt. Prakasho and Ramesh have been acquitted of the charges framed against them.

2. Prosecution story, in brief is that about 5-6 days before the date of the incident, on 29-05-1990, accused Smt. Prakasho had a quarrel with deceased Smt. Kusum Thapa of which a report was got registered by both the sides in Police Station Cantt., Dehradun. Thereafter on 04-06-1990, at about noon, Smt. Kusum Thapa (deceased) had gone to a near by canal with her cow so that the cattle may have water. There, suddenly, accused/Appellants, Babita, Rukmani and Jhandu reached in a Maruti Van registration No. HYG 663, which was being

driven by accused Ramesh. Smt. Prakasho also came out of her house at that time and pointed at Kusum Thapa that she is the lady who quarreled with her. On this, accused/Appellants Babita, Rukmani, who were armed with knives, started giving blows with the weapons on the person of Smt. Kusum Thapa. On the shouts of Kusum Thapa, her husband Shivraj (P.W. 1), another eyewitness Sandeep (P.W.2), one Ajay Singh and Mohabbat Singh, rushed to the spot. They saw the two girls, named above, striking blows with knives on the person of Kusum Thapa while third accused Jhandu armed with revolver, was standing at some distance. He challenged the witnesses not to dare to come to the rescue of the deceased. On seeing the situation, P.W.1 Shivraj, P.W.2 Sandeep, Mohabbat Singh and Ajay Singh went inside their house and came out with lathies (rods). The accused persons left Kusum Thapa injured and fled away in the van. Immediately information was given to the nearby police station and Kusum Thapa was taken in a jeep to the hospital, where she succumbed to the injuries received by her in the incident. P.W. 1 Shivraj, thereafter lodged the First Information Report (Ext. A-1) on the very day i.e. 04-06-1990, at about 13:30 hrs with the police station Cantt, Dehradun. Check report (Ext. A-20), of the same was prepared by P.W. 9 Head Constable Bharose Lal, who also made entry in the General Diary (extract of which is Ext. A-17). On the basis of First Information Report, crime No. 390/1990 was registered against accused Babita, Rukmani, Smt. Prakasho and Jhandu relating to the offence punishable u/s 302 of I.P.C. P.W. 6 Sub-Inspector R.S. Rana, investigated the crime. He inspected the spot on the very day and prepared site plan (Ext. A-6). He also took the blood stained soil and sample soil and got prepared memo (Ext. A-4). The vehicle registration No. HYG 663, used in the crime was recovered on the very day. After recording the statements of the witnesses, the Investigating officer, arrested accused/Appellants Babita and Rukmani on 17-06-1990. During investigation, name of Ramesh (though not named in First Information Report) also figured and later on he too was arrested. A charge sheet was submitted against all the five accused persons before the Magistrate.

3. The Magistrate, on receiving the charge sheet registered the same and after giving necessary copies to all the five accused persons, as required u/s 207 of Code of Criminal Procedure, committed the case to the Court of Sessions for trial. Learned trial court after hearing the prosecution and the defence, framed charge of offence punishable u/s 147 and 302/149 I.P.C. against the accused Jhandu (one of the present Appellants), Prakasho and Ramesh. The trial court framed charge of offence punishable u/s 148 and 302/149 I.P.C. against the accused/Appellants Babita and Rukmani. All the five accused persons denied the charge and claimed to be tried. On this, the prosecution got examined P.W.1 Shivraj (husband of the deceased) informant and eye-witness, P.W.2 Sandeep (eyewitness), P.W. 3 Dr. Kuldeep Dutta, who conducted autopsy on the dead body of Kusum Thapa, P.W.4 Dayal Singh Thapa (father-in-law of the deceased), P.W. 5 Krishan Pal Singh (a by-passer, who was declared hostile), P.W.6 Sub-Inspector R.S. Rana (who investigated the crime), P.W.7 Pravesh Kumar Mittal

(owner of the vehicle registration No. HYG 663), P.W. 8 Jagvir Singh Atri (S.H.O. Mussoorie, Dehradun) and P.W. 9 Head Constable Bharose Lal (who prepared check report and made entries in the General Diary). The oral and documentary evidence was put to the accused persons by the trial court u/s 313 of Code of Criminal Procedure. In reply the accused persons alleged that they have falsely been implicated in the crime and evidence against them is false. Learned trial court, after hearing the prosecution and the defence, convicted the accused Appellants Babita, Rukmani and Jhandu on the charge of offence punishable u/s 302 read with Section 34 of I.P.C. and sentenced (after hearing on sentence) each one of them to imprisonment for life, against which they have preferred criminal appeal No. 1740 of 2001 (old No. 620 of 1994). Rest of the two accused/Appellants Prakasho and Ramesh, were not found guilty of any of the charges and were acquitted. This criminal appeal was filed in the year 1994 before the Allahabad High Court wherefrom it is received by transfer to this Court u/s 35 of U.P. Reorganisation Act, 2000, for its disposal.

4. We heard learned Counsel for the parties and perused the entire record.

5. Before further discussions, it is necessary to mention the ante mortem injuries found on the person of Smt. Kusum Thapa. Dr. Kuldeep Dutta (P.W.3) conducted autopsy on the dead body and prepared post mortem examination report (Ext. A-2). According to the Medical Officer, following ante mortem injuries were found:

1. Incised wound 6cm ? 1 cm lateral to an outer angle of left eye muscle deep.
2. Incised wound 10cm ? 5cm on medial aspect of right forearm just below elbow.
3. Incised wound 3cm ? 2cm ? abdominal cavity deep on right side liver incised with blood in abdominal cavity.
4. Incised wound 9cm ? 4cm on left side of chest with cut in heart. 9cm below collar bone.

On internal examination, two incised wounds were found in the region of thorax and three incised wounds were found in the abdomen.

6. P.W.1 Shivraj is an eye-witness and informant, who lodged the First Information Report (Ext. A-1). He has stated on oath that deceased (Kusum Thapa) was his wife. He further states that on 04-06-1990, at about noon, he alongwith his brother Sandeep, Ajay Singh and Mohabbat Singh was sitting in courtyard of his house when Smt. Kusum Thapa (deceased) went to a near by canal with her cow so that the same may have water. Suddenly, accused/Appellants, Babita, Rukmani and Jhandu reached there in a Maruti Van registration No. HYG 663, which was being driven by accused Ramesh. RW. 1 Shivraj further states that Smt. Prakasho came out of her house at that time and pointed at Kusum Thapa that she is the lady who quarreled with her. On this, accused/Appellants Babita, Rukmani, who were armed with knives, started giving blows with the weapon on the person of Smt. Kusum Thapa. He further states that on hearing the shrieks of Kusum Thapa, he saw the two girls (accused/

Appellants), named above, striking blows with knives on the person of Kusum Thapa while third accused Jhandu armed with revolver, was standing at some distance. He further states that Jhandu (one of the accused) challenged him not to dare to come to the rescue of the deceased. This witness further stated that 4-5 days before said incident, accused Smt. Prakasho had a quarrel with deceased Smt. Kusum Thapa of which a report was got registered by both the sides in Police Station Cantt, Dehradun. He further stated that to save his wife, he alongwith his brother Sandeep and Ajay Singh and Mohabbat Singh, went inside his house and came out with "LATHIES" and "DANDAS" (rods). On this, the accused persons left Kusum Thapa injured and fled away in a Maruti Van (registration No. HYG 663). He further stated that meanwhile police came and Kusum Thapa (deceased) was taken in a jeep to the hospital, where she succumbed to the injuries received by her in the incident. P.W.1 Shivraj further states that thereafter he lodged the First Information Report (Ext. A-1) on the very day i.e. 04-06-1990, at about 13:30 hrs. with the police station Cantt, Dehradun. This witness has stated that witness Mohabbat Singh has since died.

7. P.W. 2 Sandeep (eye-witness) brother of the informant has stated that Kusum Thapa (deceased) was his "BHABHI" (brother's wife). He further states that on 04-06-1990 at about 12:30 P.M., he along with his brother Shivraj (P.W.1), Ajay Singh and Mohabbat Singh, was sitting in the verandah of his house and Kusum Thapa (deceased) had gone to a nearby canal with her cow so that the cattle may have water. Suddenly, a Maruti Van registration No. HYG 663 arrived and accused/Appellants Babita, Rukmani and Jhandu came out of it. He further states that on hearing the shrieks of Kusum Thapa, he along with Shivraj (P.W.1), Ajay Singh and Mohabbat Singh, came out on road and saw that accused/Appellants Babita and Rukmani were striking the blows of knives on the person of Kusum Thapa. On this, he went inside the house and came out with "DANDA" (rod). Thereafter on his returning back, all the accused/Appellants fled away in same Maruti van and left Kusum Thapa (injured). He further stated that meanwhile police came and Kusum Thapa (deceased) was taken in a jeep to the hospital, where she succumbed to the injuries received by her in the incident.

8. P.W. 3 Dr. Kuldeep Dutta, who conducted post mortem examination on the dead body on 05-06-1990 at 1:40 P.M., has stated that on external examination he found as many as four ante mortem incised injuries (quoted above) and on internal examination further found two injuries in thorax region and three incised injuries in abdomen, as mentioned in post mortem examination report (Ext. A-2). He further states that he prepared the post mortem examination report (Ext. A-2). Ante mortem injuries No. 1 to 4, and the incised injuries in thorax and abdomen, corroborate the prosecution story that death of the deceased could have been caused by pointed sharp edged weapon. The Medical Officer has opined that cause of the death was shock and haemorrhage as a result of injuries on the vital organ of the body. P.W. 4 Dayal Singh Thapa has stated that the dead body was sealed by police before him and the inquest report was prepared. P.W. 5 Krishan Pal Singh is the by-passer, who stopped at about 1:30 P.M. on seeing

crowd at the place of occurrence. This witness says that police officials were taking the blood stained soil and sample soil from the place of occurrence. They sealed it and prepared its memo (memo of said article is Ext. A-4). But, this witness was got declared hostile by the prosecution for the reason that according to him the recovery memo (Ext. A-5) was signed by him after the police told that the knife was recovered. However, in cross-examination, this witness says that the knife was recovered from Maharani Bagh at the instance of accused Rukmani.

9. P.W. 6 R.S. Rana is the Investigating Officer who inspected the spot, recorded the statements of the witnesses and prepared the site plan. This witness further states that the blood stained soil and sample soil were taken by him. Vehicle Maruti Van was recovered and recovery memo (Ext. A-7) was prepared. P.W.6 R.S. Rana further states that inquest report was prepared by Sub-Inspector Bhopal Singh and he is acquainted with his writing and signature. This witness has also proved inquest report (Ext. A-3). The witness further told that knife (Ext. 2) was recovered by him at the instance of the accused Rukmani and recovery memo (Ext. A-5) was prepared thereafter. The witness states that he submitted the charge sheet (Ext. A-10) against the accused persons. P.W.8 Jagvir Singh Atri, the then Station Officer of Police Station Cantt, Dehradun has stated that during investigation he was assigned to complete the identification proceedings against the accused Ramesh. This witness states that he submitted the supplementary charge sheet against the accused Ramesh. P.W. 9 Head Constable Bharosi Lal has stated that he recorded complaints brought in the police station on 29-05-1990 (regarding quarrel which took place between Prakasho and Kusum Thapa, 5-6 days before the date of incident) and made entry in the general diary (extract of which is Ext. A-15 and Ext. A-16).

10. P.W. 7 Pravesh Kumar Mittal is the owner of vehicle Maruti Van HYG 663, who has stated on oath that on 4th June, 1990, accused Ramesh took his vehicle at about 11:00 A.M. on the pretext that he needs it for couple of hours till 2:00 P.M. The witness further states that on the request of accused Ramesh, he handed over the keys of vehicle to him. This witness (P.W. 7) states that on receiving the notice from the police that the vehicle was recovered near New Empire Cinema, he gave reply (Ext. A-12) to the police.

11. On the basis of evidence of eye-witnesses, as discussed above, which is corroborated by the ante mortem injuries on the dead body of Kusum Thapa, we are of the view that the accused/Appellants Babita and Rukmani have committed culpable homicide (amounting to murder) of Kusum Thapa with common intention in broad day light. However, from the entire evidence on record, in our opinion, it cannot be said that the charge against accused Jhandu is proved beyond reasonable doubt. It is pertinent to mention here that neither the pistol with which accused/Appellant Jhandu is said to have been armed is recovered nor used in the crime. Perusal of the First Information Report (Ext. A-1), clearly shows that the words (sic) are added later on in the First Information Report in the sentence in which role has been assigned to Jhandu that he challenged the

witnesses if anyone dared to come to the rescue of the deceased, he would kill them. Apart from this, had accused/Appellant Jhandu come on the spot with common intention to commit murder of Kusum Thapa, he could have done the job by firing a single shot at the deceased who was being brutally murdered by his sisters Babita and Rukmani with knives in their hands by striking several blows. It is possible that accused Ramesh drove the vehicle used in the crime and accused Jhandu might have come with his sisters at the spot but merely his presence like that of Ramesh do not constitute an ingredient of common intention to rob them in the crime. As such, we feel that while trial court has rightly acquitted accused Prakasho and Ramesh of the charges framed against them, the said court has committed error of law in convicting the accused/Appellant Jhandu u/s 302 read with Section 34 of I.P.C. as from the evidence and circumstances established on record, it cannot be said beyond reasonable doubt that accused Jhandu had a common intention with his sisters in commission of murder of Kusum Thapa.

12. On behalf of the learned Counsel for the defence, it is argued that the First Information Report is ante-time, as crime number and name of the accused are not mentioned in the inquest report. There is no column in the inquest report to mention the name of the accused or the crime number. Moreover, it is pertinent to mention here that Kusum Thapa on being taken to the hospital had succumbed to the injuries, where the police-man of Police Station-Kotwali, reached there on the request of hospital memo and prepared inquest report while the First Information Report was lodged with the police station Cantt.

13. Shri Lokendra Dobhal, learned Counsel for the Appellants, submitted that the eye-witnesses are brothers of P.W.1 Shivraj (husband of the deceased), as such they are related to each other, therefore, their testimony should not be believed. It is further contended that the independent eye-witness Ajay Singh and Mohabbat Singh, were not examined-by the prosecution. On examination of record, we are of the view that mere fact that the witnesses are related to each other, does not make their testimony shaky or doubtful, provided the same is otherwise trustworthy. It has come on the record that witness Mohabbat Singh has died and witness Ajay Singh was also related to the eye-witnesses examined by the prosecution. In the circumstances, testimony of P.W.1 Shivraj (husband of the deceased) and P.W.2 Sandeep (brother-in-law of the deceased), cannot be disbelieved, as they would not have spared the real culprits and implicated the innocent persons in the crime.

14. It is contended on behalf of the Appellants that Appellant No. 1 Babita was minor at the time of commission of crime. As such, she should have been tried by the Juvenile Court, as such the trial is vitiated. Lower court record shows that this plea was never raised by on behalf of the Appellant Babita that she was minor at the time of commission of crime, before trial court. For the first time it appears that the ground that Appellant Babita was minor at the time of commission of crime, is taken on the bail application after filing this appeal

before Allahabad High Court. Even in the grounds of the appeal, it is nowhere mentioned that Appellant Babita was minor at the time of commission of crime and trial by Sessions Judge is vitiated. However, since from the paper, annexed with the bail application, moved before the Allahabad High Court after filing this appeal, established that the Appellant Babita was 16 years and four months old on the date of the incident, which is clear from the mark sheet of Matriculation Board, annexed as Annexure-1 to the affidavit filed with the bail application. After four years of incident at the time of her examination u/s 313 Code of Criminal Procedure the trial court has recorded age of Babita as "20 years" old. That further corroborates the fact that on the date of commission of murder she was minor. Keeping in view the principle of law laid down in Upendra Kumar v. State of Bihar (2005) 3 S.C.C. 592 while maintaining the conviction, of Appellant Babita the sentence awarded against her deserves to be set aside.

15. For the reasons as discussed above, the appeal of Appellant Jhandu is allowed. He is acquitted of the charge of offence punishable u/s 302 read with Section 34 of I.P.C. He be" released on bail forthwith if not required to be detained in any other case. The appeal of Appellant Babita is allowed partly. Her conviction u/s 302/34 I.P.C. is maintained. But being a minor on the date of commission of crime, her sentence is set aside following the Apex Court judgment in Upendra Kumar's case (Supra). She is on bail. She needs not to surrender. The appeal of Appellant Rukmani alias Shilpi is dismissed. Her conviction awarded by the trial court u/s 302/34 I.P.C. as well as sentence awarded i.e. imprisonment for life, is maintained. She is on bail. Her bail is cancelled. She shall be taken into custody by the court concerned to serve out the sentence.