
(2005) 03 AHC CK 0107
In the Allahabad High Court
Case No : Criminal Appeal No. 5857 of 2003

Virendra Upadhyay and Upendra Upadhyay	APPELLANT
Vs	
State of U.P.	RESPONDENT

Date of Decision : 04-03-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 82, 83
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2005) CriLJ 2333

Hon'ble Judges : M. Chaudhary, J;Imtiyaz Murtaza, J

Bench : Division Bench

Advocate : V.P. Srivastava, for the Appellant; G.S. Chaturvedi, S.B. Kochar, Shashank Shekhar, Surya Narayan and P.P. Srivastava and Rajesh Kumar Srivastava, A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

M. Chaudhary, J.—This appeal has been filed by accused appellants from judgment and order dated 17th of November 2003 passed by Additional Sessions Judge/Fast Track Court Ghazipur in Sessions Trial No. 358 of 1998 State of UP versus Virendra Upadhyaya & another u/s 302 read with Section 34 IPC and sentencing each of them to imprisonment for life and a fine of Rs. 10,000.00 and in default of payment of fine to undergd one year"s rigorous imprisonment. Co-accused Badri Upadhyaya died during pendency of the trial and his trial was abated.

2. Brief facts giving rise to this appeal are that at about 8:45 p.m. on 25th of July 1998 Manoj Kumar Upadhyaya along With his brother Ram Bilas Upadhyaya who was posted as Block Development Officer at Beruadwari Block in District Ballia and alighted from the jeep were going to their house at Gahmar Patti Govind Rai within the limits of police station Gahmar District Ballia; that as they reached in front of the house of Bhola Upadhyaya Virendra Upadhyaya and his brother Upendra Upadhyaya alongwith their father Badri Upadhyaya met them

and that at the exhortation of Badri Upadhyaya that Ram Bilas should be shot dead Upendra Upadhyaya fired at him with countrymade pistol but that shot did not hit him and in the meanwhile his brother Virendra Upadhyaya fired at him with countrymade pistol hitting at his throat and receiving that injury he fell down. The said incident was witnessed by one Ashok Upadhyaya, Shobha Bind and several others who rushed to the scene of occurrence in the electric light and then all the three assailants fled away Immediately Manoj Kumar Upadhyaya with the help of others took his injured brother Ram Bilas to Primary Health Centre Bhadaura where the doctor referred him to District Hospital Ghazipur as his condition was too serious and there was no time for recording his injuries. On reaching at the District Hospital injured Ram Bilas was declared dead by the doctor, Memo regarding the death of Ram Bilas Upadhyaya having received injuries was received at police station Ghazipur Kotwali from District Hospital Ghazipur at 10:40 p.m. the same night. Immediately Manoj Kumar Upadhyaya went to police station Gahmar and lodged an FIR of the said incident with the police there at about 00:30 midnight. The police registered the case u/s 302 IPC and made entry regarding registration of the crime in the general diary. Station Officer Shishir Trivedi who alongwith the police force was in his area received information on wireless regarding the murder of Ram Bilas Upadhyaya and registration of the crime regarding thereto at the police station. He also received papers regarding the said crime on the way while going back to the police station. He went to the scene of occurrence in the midnight and deputed two police constables at the site. Then he searched for the criminals named in the FIR. He again went to the scene of occurrence early in the morning and inspected the site and prepared its site plan map (Ext Ka 13). He also collected blood stained and simple earth from the scene of occurrence and also picked up identity card of Virendra Upadhyaya lying near the scene of occurrence (Ext Ka 1) and prepared their memo (Ext Ka 3) SI Bal Ram Yadav posted at police station Ghazipur Kotwali who received information regarding the memo sent by EMO from the District Hospital last night at 10:00 am, the following morning went to the mortuary at District Hospital Ghazipur and drew inquest proceedings on the dead body of Ram Bilas Upadhyaya and prepared inquest report (Ext Ka 7) and other necessary papers (Ext Ka 8 to Ext Ka 11) and handed over the dead body in a sealed cover alongwith necessary papers to constable Ramesh Tewari and H.G. Chandra Deo Yadav for being taken for its post mortem.

3. Autopsy on the dead body of Ram Bilas Upadhyaya was conducted by Dr Kamal Kumar Medical officer District Hospital Womens Ghazipur on 26.7.98 at 3:15 pm Which revealed belownoted ante mortem injuries on the dead body

1. A firearm wound of entry on upper part of anterior neck left side 3 cm x 1.5 cm situate 3 cm below left mandible angle elliptical in shape muscle bone deep with margins inverted and lacerated and tattooing mark present in an area of 3 cm around the wound; collar of abrasion present around rim of the wound. Profuse bleeding present.

2. A firearm wound of entry circular in shape on left back at the level of left renal angle just lateral to vertebrae and 8 cm above left iliac bone 0.5 cm in diameter with collar of abrasion in rim of 1 cm with margins inverted and tattooing mark present in 6 cm in diameter around the wound On probing and dissection of injuries No. 1 and 2 one conical yellow metallic bullet was recovered in right supra scapular region and another; conical yellow metallic bullet from left kidney anterior parietes.

On internal examination larynx, trachea, carotid: artery and jugular vein were found lacerated. Abdominal cavity contained one and a half litre of blood. Peritoneum, oesophagus, small intestine, spleen and left kidney were also found lacerated. Stomach was empty. Large intestine contained faecal matter. The doctor opined that death was caused due to haemorrhage and shock as a result of ante mortem injuries about one day ago.

4. After completing investigation the police submitted charge sheet against the accused accordingly.

5. After framing of the charge against the accused the prosecution examined Manoj Kumar Upadhyaya (PW 1) and Shobha Bind (PW2) as eye witnesses of the occurrence. Testimony of rest of the witnesses examined, by the prosecution is more or less of formal nature. PW3 Ajit Kumar Tewari is the witness of recovery of identity card of Virendra Upadhyaya by the investigating officer from the scene of occurrence. PW4 Dr Kamal Kumar Medical Officer District Hospital Womens Ghazipur who conducted autopsy on the dead body of Ram Bitas Upadhyaya on 26. 7. 98 at 3: 15 p.m. has proved the post mortem report. PW5 HC Kedar Nath who prepared check report on the basis of the written report handed over to him at the police station and made entry regarding registration of the crime in GD has proved these papers (Exts Ka 6 & Ka 5). PW6 SI Bali Ram Yadav posted at police station Ghazipur Kotwali who drew inquest proceeding on dead body of Ram Bilas Upadhyaya has proved the inquest papers deposing that on 25. 7. 95 at 10:40 p.m. memo was received from the District Hospital Ghazipur at police station Ghazipur Kotwali regarding death of Ram Bilas Upadhyaya having received injuries. PW7 station officer Shishir Trivedi police station Gahmar who investigated the crime has proved the police papers deposing that in the mid night on 26.7.98 when he alongwith the police personnel was in his area received information through wireless regarding registration of the crime of the alleged murder and also that a constable was reaching alongwith the papers. He proved the police papers PW8 Constable Ramesh Kumar Tewari to whom dead body in sealed cover alongwith necessary papers was entrusted for being taken for its post mortem has proved the said fact, PW9 Dr Shyam Narain Singh; the then Medical Officer Primary Health Centre Bhadaura who examined injured Ram Bilas for emergency outdoor treatment deposed that since the injured had received firearm injuries and there was no time for his treatment as his condition was too serious he referred him to District Hospital Ghazipur. He proved the memo referring him to the District Hospital Ghazipur (Ext Ka 15)

6. Both the accused pleaded not guilty denying the alleged occurrence altogether attributing their false implication to long standing enmity as civil and criminal litigation was going on between the parties since long.

7. The accused examined DW1 Udai Narain Singh sub-station operator, Sahupuri Sub-station, Varanasi in their defence. He has stated that on 25.7.98 electric supply was disconnected at 7:05 p.m. and was resumed in the; midnight at 00:52 during the night between 25th and 26th of July, 1998. Implicit reliance could not be placed on the testimony of this witness as admittedly during the relevant time he was not on duty officially as he stated in his cross-examination that during the relevant time he was attending the job due to mutual compromise between the employees. Otherwise too the register produced by him was not a bound register and entries were on separate sheets.

8. On an appraisal of the parties' evidence on record the learned Additional Sessions Judge believing the evidence adduced by the prosecution recorded the finding of conviction against the accused appellants under Sections 302 read with Section 34 IPC sentencing each of them to undergo imprisonment for life and a fine of Rs. 10,000.00 and in default of payment of fine further undergo rigorous imprisonment for one year.

9. Feeling aggrieved by the impugned judgment and order the accused appellants preferred this appeal for redress.

10. We have heard the appellants' learned counsel and the learned AGA for the State respondent and gone through the record.

11. Manoj Kumar Upadhyaya (PW1) and Shobha Bind (PW2) have appeared as eye witnesses of the occurrence. PW1 Manoj Kumar Upadhyaya, brother of the deceased and the first informant narrated all the facts of the occurrence from the beginning to the end as stated above deposing that his brother Ram Bilas Upadhyaya who was posted as Block Development Officer in Ballia came in the jeep on 25.7.98 at about 8:45 p.m. and at that time he was returning from the northern side of the village from the "Gumti"; that his brother Ram Bilas Upadhyaya alighted from the jeep and both of them were going to their house and as they reached near the house of Bhola Upadhyaya Badri Upadhyaya alongwith his sons Virendra Upadhyaya and Upendra Upadhyaya met them and at the exhortation of Badri Upadhyaya his son Upendra Upadhyaya fired with countrymade pistol at Ram Bilas Upadhyaya from a distance of 2-3 paces from the back side and Virendra Upadhyaya fired at him with countrymade pistol from close range hitting him at his throat and bolted away; that he recognized all the three assailants well in electric light of the electric pole and the light which was coming from the houses situate on both the sides and in the light of torches flashed by the witnesses who flashing the torches rushed to the scene of occurrence; that immediately he with the help of Shobha Bind. Ashok Upadhyaya and others took his injured brother on a cot to the place where the jeep was parked and then they rushed him in the jeep to the Primary Health

Centre, Bhadaura where the doctor told that his condition was serious and he referred him to District Hospital Ghazipur and that then he was rushed to the District Hospital Ghazipur where he was declared dead by the doctor. Then he went to the police station Gahmar and handed over written report of the occurrence to the police there (Ext Ka1) and then returned back home and as he reached his village the station officer met him on the way. He fairly conceded that two Shots were fired but at the time of occurrence he could perceive the injury caused to his brother Ram Bilas Upadhyaya at his throat and it was only after the post mortem that he learnt that first shot fired at Ram Bilas Upadhyaya by Upendra Upadhyaya hit him at his back. PW2 Sobha Bind corroborated him stating likewise deposing that he had applied for a house in Indra Awas Yojna and the village pradhan had asked him to meet the Block Development Officer and at about 8:45 p.m. the alleged evening he was going to the house of Ram Bilas Upadhyaya that on the way he witnessed the incident. Both these witnesses were subjected to searching and gruelling cross-examination but nothing useful to the accused could be elicited therefrom. Testimony of the two eye witnesses stands corroborated by FIR of the occurrence lodged promptly at the police station and also by the medical evidence. The trial Judge has given cogent and convincing reasons for recording the findings arrived at by him and we find ourselves in full agreement therewith. However the appellants' learned counsel has assailed the findings recorded by the court below advancing the following arguments and now we will see that any of them has got any force in it.

12. Firstly, the appellants' learned counsel contended that the FIR was ante timed. He argued that according to the prosecution case memo from the District Hospital Ghazipur regarding death of Ram Bilas Upadhyaya having received injuries was received at police station Ghazipur Kotwali on 25.7.98 at about 10:40 p.m. but the inquest was drawn by SI Bali Ram Yadav on 26th of July 1998 at 11:00 a.m. and if the FIR was lodged at the police station Gahmar at the time it purports to be the inquest should have been drawn at least early in the morning that day. PW 6 SI Bali Ram Yadav deposed in his examination-in-chief that he received the information at the police station on 26th of July, 1998 at 10:00 a.m. and also received carbon copy of the FIR lodged at police station Gahmar and then he immediately proceeded for drawing inquest proceedings to the District Hospital, Ghazipur. He was not put any question by the defence counsel in his cross-examination as to at what time he reached the police station Kotwali on duty on 26th of July, 1998. A perusal of the testimony of both the eye witnesses goes to show that Ram Bilas was assaulted at about 8:45 p.m. and then they took the injured on a cot to the place where the jeep was parked and then he went to PHC, Bhadaura where the doctor examined the injured and since his condition was quite serious he was referred to the District Hospital, Ghazipur and then they took him by jeep to the District Hospital Ghazipur where he was declared dead by the doctor Memo regarding death of Ram Bilas Upadhyaya who had received injuries and brought by his brother Manoj Kumar Upadhyaya to the District Hospital Ghazipur sent from District Hospital, Ghazipur was received at

the police; station Ghazipur at 10.40 p.m. the same night. Thereafter Manoj Kumar Upadhyaya, brother of the deceased went to the police station Ghazipur and handed over written report of the occurrence to the police there at 00:30 midnight. He deposed, that after lodging the FIR he was returning back to his house and as he entered his village the Station Officer met him on the way who after receiving the police papers was going to the scene of occurrence. All these facts completely dislodge the appellants' plea that the FIR is ante-timed. The said argument advanced by the appellants' counsel therefore has got no substance and is repelled.

13. Secondly, the appellants' learned counsel contended that there is discrepancy between the ocular testimony and the medical evidence. On this count his argument is twofold . (i) PW1 Manoj Kumar Upadhyaya, brother of the deceased and the first informant mentioned in the FIR lodged at he police station that the shot fired by the Upendra Upadhyaya from the back side did not hit Ram Bilas and subsequently the shot fired by Virendra Upadhyaya from the front side hit Ram Bilas at his throat whereas autopsy revealed two ante mortem firearm wounds of entry on the dead body one on the upper part of anterior neck and the other on back (ii) both the eye witnesses deposed that when the victim was fired at he was in standing position stepping forward whereas PW 4 Dr Kamal Kumar who conducted autopsy on the dead body stated that the injuries received by the victim could not be caused to him in standing position. No doubt that PW1 Manoj Kumar Upadhyaya, brother of the victim and the first informant mentioned in the written report that the shot fired by Upendra Upadhyaya at his brother Ram Bilas Upadhyaya from back did not hit him but he frankly conceded in his deposition that since the entire incident occurred within few seconds and as Upendra Upadhyaya fired at his brother from back side Virendra Upadhyaya fired at him from the front side in quick succession hitting Ram Bilas at his throat which caused profuse bleeding the injury received by his brother at his back could not be perceived by him at the time of occurrence as he also fell down by his back at the scene of occurrence and that subsequently after post mortem he learnt that both the shots fired by the two accused who are real brothers hit Ram Bilas one at his back and the other at his throat. It appears that on hearing the shouts of Badri Upadhyaya . that he should be killed Ram Bilas might have got confounded. It has come in the evidence that the kaccha lane where the murderous assault was launched is uneven and it is quite possible that apprehending imminent danger to his life he might have got stumbled or. tottered and in the meanwhile first shot fired by Upendra Upadyaya at the his back near iliac bone causing wound measuring only 0.5 cm in diameter went upwards and after receiving the injury at his back as he would have been in the process of falling down that shot fired by Virendra Upadhyaya in quick succession from the front from close range hit him at his throat going upwards and then, downwards. It appears that the victim apprehending imminent danger to his life could not have walked straight as getting confounded he might have bent downwards in order to save himself and receiving the firearm injury at the vital part of his back as he was in the

process of falling down another shot fired in quick succession from the front hit him at his throat and the bullet damaging jugular vein and carotid artery and then lacerating larynx and trachea got embedded in supra scapular region and the entire incident took place within seconds and that during this short span it was very difficult for the witnesses to perceive the minute details if the victim kept standing or stumbling or falling down as the incident of firing took place within seconds. Since the size of firearm Wound received at the back was only 0.5 cm in diameter and abdominal cavity contained one and half litre of blood this injury would not have bled much and because the injury received by the victim at his throat damaging the jugular vein and carotid artery bled profusely so much so that his shirt, vest and trousers put on by him got smeared with blood the witnesses could not perceive the injury received by the injured at his back at the time of occurrence. Thus virtually there is no inconsistency or discrepancy in the ocular testimony and the medical evidence.

14. Thirdly, the appellants' learned counsel further argued, that PW6 SI Bali Ram Yadav who drew inquest proceeding on the dead body is not a truthful and a straightforward witness as he stated that initially at the time of inquest proceedings he found two firearm wounds of entry on the dead body and noted the same in the inquest report whereas PW4 Dr Kamal Kumar who conducted autopsy on the dead body noted in the post mortem report that since the autopsy revealed two ante mortem firearm wounds of entry on the dead body and in the inquest report only one firearm wound of entry on throat was mentioned he immediately contacted the SP and sub-inspector drawing the inquest proceedings and then the sub-inspector drawing the inquest proceedings added the injury No. 2 in the inquest report Statement of the doctor conducting autopsy on the dead body appears to be correct as he mentioned the said fact in the post mortem report. No doubt that PW6 SI Bait Ram Yadav Has not spoken the truth on the point but on account of his this fault the prosecution case cannot be thrown over board. Since due to profuse bleeding from the neck injury entire clothes put on by the victim got smeared with blood injury on the back measuring 0.5 cm in diameter might not have come to the notice of the sub-inspector drawing inquest proceedings on the dead body. But he should have admitted frankly that it could not be noticed by him due to profuse bleeding on the dead body at the time the inquest proceedings were drawn and that he noted injury on the back when his attention was drawn by the doctor as at the time of autopsy blood was cleaned and therefore he added second injury in the inquest report subsequently. But under the circumstances this mistake of the sub-inspector conducting inquest proceedings does not affect the prosecution case adversely at all .

15. Fourthly, the appellants' learned counsel laid much emphasis; upon the fact that according to the prosecution case assault, was "witnessed by several residents of the vicinity but no independent witness was examined by the prosecution in its support. No doubt it would have been better and desirable if the prosecution would have examined any of the independent witnesses but non-

examination of any of them would not cause any ripple affecting the prosecution case. Once the evidence of two eye witnesses examined by the prosecution is believed the fact that no independent witness has been examined would not go to demolish or produce an element of doubt in the prosecution case. Otherwise too it is a matter of common experience and knowledge that generally the people keep themselves away from the Courts unless it is inevitable as they do not want to invite trouble for themselves.

16. Fifthly, the appellants' learned counsel laid much emphasis upon the fact that since both the eye witnesses examined by the prosecution are interested witnesses their testimony should not be relied upon. No doubt PW1 Manoj Kumar Upadhyaya is real brother of the deceased and PW2 Sobha Bind is his close associate but their testimony cannot be discarded merely because one of them is a related witness and the other closely associated if on close scrutiny their testimony, is found to be above reproach of suspicion. Both these witnesses have given truthful and honest account of occurrence witnessed by them stating boldly that it was a case of two shots each fired by both the accused who are real brothers but at the time of occurrence they could not perceive if the, shot fired by Upendra Upadhyaya from behind hit the victim as the second shot fired in quick succession by Virendra Upadhyaya from the front hit the victim at his throat which caused profuse bleeding and the clothes put on by the victim got smeared with blood and sustaining the fatal injuries Ram Bilas fell down by his back in the lane. Both these witnesses were subjected to searching and gruelling cross-examination but nothing advantageous to the accused could be elicited therefrom. There is apparently no reason to doubt their testimony nor the trial court which had the opportunity, to watch the demeanour of these two witnesses castigated their testimony in any manner. Moreover if the witness is related to the deceased it would add to the value to his evidence if, found reliable because he would naturally be interested in ensuring that the real culprits are punished and not screened.

17. Lastly, the appellants' learned counsel contended that the theory of recovery of identity card is not believable, if that piece of evidence is left out of consideration sworn testimony of the two eye witnesses corroborated by FIR of the occurrence lodged at the police station promptly and the medical evidence and other facts and circumstances attending the case have sufficiently and convincingly established the guilt of the accused appellants. For the sake of arguments even if there was no electric light at the time of occurrence (though in our opinion it was not so) the incident took place in the residential locality in the lane at about 8:45 p.m At that time it can not be pitch dark as in the houses situate on both the sides of the lane inmates must be doing their household work and children studying and there was also light of glowing stars and known persons could well be recognised from a distance of 6-7 paces at that hour. Thus in our opinion the findings arrived at by the court below are quite cogent, well reasoned and too consistent to be carped at.

18. The very fact that none of the three accused named in the first information report of the occurrence was available at his residence in the night on 26th of July 1998 after the occurrence nor available anywhere in the village to the investigating officer in the day even and the provisions of Sections 82 and 83 of the Code of Criminal Procedure had to be resorted to by the investigating officer and it was only thereafter that accused Badri .Upadyaya and Upendra Upadhyaya surrendered in the court of Chief Judicial Magistrate concerned on 28th of July 1998 speaks volumes against the accused appellants.

19. For the foregoing discussion we find ourselves in agreement with the finding of guilt recorded by the trial judge against the accused appellants. We therefore find that the accused appellants have rightly been convicted u/s 302 read with Section 34 IPC for the murder of Ram Bilas Upadhyaya and each of them sentenced to imprisonment for life and a fine of Rs. 10,000. 00 thereunder.

20.The appeal has got no substance and is dismissed. Conviction of the accused appellants u/s 302 read with Section 34 IPC and sentence of imprisonment for life and a fine of Rs 10,000. 00 awarded to each of them thereunder are affirmed. Accused Virendra Upadhyaya is already in jail. Accused Upendra Upadhyaya is on bail. He shall be arrested and lodged in the jail to serve out the sentence imposed upon him.

21. The office shall send copy of the judgment alongwith record of the court below to the court concerned to ensure compliance under intimation to this court within two months.