

(2003) 10 AHC CK 0175

Allahabad High Court

Case No: Government Appeal No. 469 of 1981

State of U.P.

APPELLANT

Vs

Military and Others

RESPONDENT

Date of Decision: Oct. 24, 2003**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 148, 149, 302

Citation: (2004) 1 ACR 559**Hon'ble Judges:** Onkareshwar Bhatt, J; M.C. Jain, J**Bench:** Division Bench**Advocate:** M.C. Joshi and Prem Prakash, A.G.As, for the Appellant; Sanjeev Ratan and Pushpendra Singh Yadav and C. S. Saran, for the Respondent

Judgement

M.C. Jain, J.

The State is in appeal against nine accused-Respondents who have been acquitted by judgment dated 17.9.1980 passed by Sri A. B. Hajela, the then IIIrd Additional Sessions Judge, Etah in Sessions Trial No. 139 of 1980. Out of them, Military faced trial under Sections 148, 302, I.P.C. and the rest for the offences under Sections 148 and 302 read with Section 149, I.P.C. The deceased was one Deshraj. The incident occurred on 17.10.1979 at about 9 p.m. in village Kelta, P.S. Aliganj, District Etah and the report was lodged by Shishpal Singh (brother of the deceased) P.W. 1, the same night at 10 p.m., the distance of the police station from the place of occurrence being six miles.

2. The relevant facts may be taken note of. The accused-Respondents Military, Natthu and Latoori are real brothers while the rest are said to be their friends and acquaintances. The accused-Respondent Roshan had a criminal background. As per suggestion made to Shishpal Singh P.W. 1 in his cross-examination, the deceased was an informant of the police and he too allegedly had criminal antecedents. Before the incident, the electric meter of one shepherd of village Harsari had

allegedly been stolen by Military and Roshan but at the intervention of the deceased the same had been returned. On the fateful date and time, Deshraj was taking dinner on the chabutra of his house. Upon the cots lying there, Shishpal P.W. 1, Nayab Singh P.W. 2, Mahendra P.W. 3 and Ramvir alias Jabbar Singh P.W. 6 were seated. A lantern was glowing at that chabutra as well as at that of Kashi Ram on the front side. All the accused-Respondents appeared there from the north of the street. Mahendra and Nekram had pistols whereas the rest were armed with guns. The deceased looked back and enquired as to who there was. But the accused-Respondent Military shot a fire on him as a result of which he fell down from the wall in the street. The accused-Respondents ran away.

3. The deceased, then in an injured state, was taken to P.H.C. Aliganj via police station where the F.I.R. was lodged by Shishpal P.W. 1. The medical examination was conducted by Dr. G. C. Agarwal P.W. 9 at 10.15 p.m. Apart from eight abrasions, fatal injury was in the form of seven gunshot wounds of entry in an area of 5 cm. x 4 cm., average size 3/4 cm. x 1/4 cm. and one being larger in size 1 cm. x 1 cm. (depth not probed) on middle of back, 11 cm. above upper border of hip bone. Margins were lacerated, inverted and ecchymosed. There was no blackening, tattooing or scorching. That injury was kept under observation and it was of firearm. It was fresh. After the fitness certificate Ext. Ka-17 given by the same Doctor, the dying declaration Ext. Ka-18 of the victim was also recorded in which he named the culprits as Military, Nekram, Natthu and Roshan, besides one Peshkar and other Kesari's son. Because of serious condition of the injured, he was taken to S.N. Hospital, Agra where he died on 18th October, 1979 at 12.45 p.m. After the necessary formalities, the dead body was subjected to post-mortem which was conducted by Dr. S. C. Sharma P.W. 5 on 20.10.1979 at 5 p.m. The ante-mortem injury responsible for his death was of firearm which has been made mention of earlier. The investigation was conducted by Rama Shanker Sharma P.W. 8.

4. The defence was of false implication owing to enmity and party faction of the village.

5. Apart from the formal evidence including of medical and investigation aspects, the prosecution relied on the testimony of Shishpal Singh P.W. 1, Nayab Singh P.W. 2, Mahendra P.W. 3 and Ramveer P.W. 6 as eye-witnesses of the incident as also on the dying declaration of the deceased.

6. Learned trial Judge did not believe the prosecution evidence. According to him, there was contradiction in the dying declaration and the testimony of the witnesses as to time of the incident and as to where the victim actually was at the time of the incident as also about the participants of the crime. All those named in the F.I.R. and implicated by the eye-witnesses were not named by the victim himself in dying declaration. The learned trial Judge was of the view that the testimony of the eye-witnesses as also dying declaration were under cloud of doubt and could not be made basis for the conviction. He accordingly passed the impugned judgment which

has been assailed by the State through this appeal.

7. We have heard Sri M. C. Joshi, learned A.G.A., from the side of the State. Shri Sanjiv Ratan for all the Respondents. Sri Pushpendra Singh Yadav only for Respondent Nos. 2 and 3 has also been heard in opposition of the appeal. According to the learned A.G.A., it was amply proved by the testimony of the eye-witnesses that all the nine accused-Respondents had formed an unlawful assembly in prosecution of common object of which Deshraj was shot dead by one of them Military, as a result of which he later on died. It has been reasoned that in any case there could not be any doubt at least in respect of the participation of Military, Natthu Singh, Roshan, Mahendra son of Kesari and Nek Ram as participant of the crime who were named by the victim also in his dying declaration. On the other hand, the submission of learned Counsel for the accused-Respondents is that the entire case becomes doubtful on the reasoning as adopted by learned trial Judge.

8. We have considered the evidence carefully. Indeed, it is beyond controversy that Deshraj was shot at in between the night of 17/18.10.1979. So far as the discrepancy about the time of incident as per the F.I.R. and the evidence of the eye-witnesses and as stated by the deceased in his dying declaration is concerned, suffice it to say that time is not the essence of life for the villagers. It is also clear that there is no significant difference between the time of incident as given in the F.I.R. and supported by the eye-witnesses and as stated by the deceased in his dying declaration. He was a rustic villager and could give the time of incident as about 10 or 10.30 p.m. in the dying declaration. His medical examination was conducted in P.H.C. at 10.15 p.m. where he was taken after the lodging of the F.I.R. at the police station at 10 p.m. and it is certain that incident had taken place earlier thereto. A little difference about hour of the incident as mentioned in the F.I.R. and supported by the witnesses and in that spoken by the deceased in his dying declaration could not at all justify the throwing away of the entire prosecution case overboard on hyper-technical ground.

9. We also note that the place of incident could also not be doubted. The deceased was taking his dinner sitting at the boundary of his Baithak as per F.I.R. The deceased's brother Shishpal Singh P.W. 1 (informant) stated that Deshraj was taking his meal sitting on the boundary of the chabutra. In the cross-examination, his version was that he was sitting on the sapeel while taking dinner. Nayab Singh P.W. 2 also stated that Deshraj was taking food sitting on the boundary of his chaupal. Mahendra P.W. 3 described that place as the fersh of chabutra. In the dying declaration, the victim scribed sapeela as fersh of chaupal. It has come down in the cross-examination of Shishpal P.W. 1 that the chabutra was at a height of 1-1/2 ft. of the level of street. In the site plan, the Investigating Officer mentioned perforated wall of the chabutra to be of the height 2-1/2-3 ft. We do not think that there is any meaningful difference in the place of incident as stated in the F.I.R. spoken by the eye-witnesses and as disclosed by the deceased in his dying declaration. The

reasonable and logical interpretation would be that the deceased was taking his food sitting on his chabutra when he was shot at by Military and fell down in the street. The description of the place of occurrence with mathematical accuracy cannot be expected from truthful witnesses. Undoubtedly, after receiving shot he could fall down from the chabutra in the street. The Investigating Officer had also found blood at point "A" in the street as shown in site plan. It has to be kept in mind that the victim had not died then and there. Naturally, he must have suffered excruciating pain on receiving the shot and could fall down in the street, bleeding. Learned trial Judge, in our view, viewed the evidence in a pedantic and unrealistic manner.

10. The source of light was also necessarily there. There was glowing lantern regarding which the Investigating Officer prepared a fard also after examining it. The deceased at the time of incident was taking food and, indeed, he could not do so in utter darkness. Further, the assailant(s) could also locate the target only if there was light. Therefore, the availability of light was to be believed.

11. No doubt, the testimonial assertions of the eye-witnesses and dying declaration did not reconcile as to the participation of the accused/ Respondents other than Military, but they were completely in harmony as regards the place of occurrence, availability of light and that the actual shooter was accused-Respondent Military. Therefore, the benefit of doubt could be afforded to the accused-Respondents other than Military who was actual shooter. The dying declaration of the deceased had been proved on record. Sanctity is attached to the dying declaration on the pious belief that a dying man's conscience compels him to speak only truth. It is made in extremity when every hope of this world is gone and when every motive to falsehood is silenced. At that time, the mind is induced by the most powerful consideration to speak the truth.

12. The concept of benefit of doubt should not become a fetish. Exaggerated devotion to it is likely to result in miscarriage of justice.

13. In the present case, judicial, proper and reasonable scrutiny of the evidence of the eye-witnesses and dying declaration of the victim did not leave the slightest doubt that the actual shooter was Military. Of course, the doubt came to arise as to the participation of the other accused-Respondents, having regard to the apparent conflict in this behalf between the testimonial assertions of the eye-witnesses and the dying declaration, but that did not justify the rejection of the eye-witness account and dying declaration in this regard also that it was Military who had fired fatal shot upon the victim. The benefit of doubt should go only to those whose participation in the crime came to be under cloud, but not to Military accused-Respondent who fired the fatal shot. The fact that Military was actual shooter found support from the medical evidence also that the deceased had received a single shot (besides eight abrasions attributable to his fall on receiving shot) ultimately resulting in his death. We are of the firm opinion that the finding of

the learned trial Judge acquitting Military too is not at all justified on proper appraisal of the evidence on record including the dying declaration of the deceased.

14. In the result, we would partly allow this appeal as against the accused-Respondent Military whom we hold guilty of murder being shooter of Deshraj Singh.

15. In net conclusion, we partly allow this appeal. We partly set aside the finding of acquittal. While upholding the acquittal of eight accused-Respondents (other than Military), we reverse the finding of acquittal in respect of accused-Respondent Military. The impugned judgment of acquittal is quashed so far as he is concerned. We find him to be guilty of an offence u/s 302, I.P.C. for the murder of Deshraj. We, accordingly, convict him u/s 302, I.P.C. and sentenced him to imprisonment for life. As per the report of Chief Judicial Magistrate, Etah dated 6.10.2001, he was in jail in some other case.

16. A copy of this judgment is directed to be immediately sent to Chief Judicial Magistrate, Etah who shall ensure that the said accused-Respondent No. 1 Military is lodged in jail to serve out the sentence of life imprisonment passed by us. If he is not in jail, he shall be arrested and sent to jail to serve out the sentence of life imprisonment. The Chief Judicial Magistrate concerned shall report compliance within two months.