

(2007) 07 AHC CK 0218

Allahabad High Court

Case No: Criminal A. No. 4819 of 2003

Raj Kishore alias Chaukidar

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: July 13, 2007

Acts Referred:

- Arms Act, 1959 - Section 25, 27
- Criminal Procedure Code, 1973 (CrPC) - Section 161, 313
- Penal Code, 1860 (IPC) - Section 302, 304

Citation: (2007) 3 ACR 3525

Hon'ble Judges: R.N. Misra, J; Poonam Srivastav, J

Bench: Division Bench

Advocate: R.B. Singh, Kamal Krishna, Dashrath Prasad and R.K. Singh, for the Appellant;
Rajesh Kumar Singh and A.G.A., for the Respondent

Final Decision: Partly Allowed

Judgement

Poonam Srivastav, J.

The present criminal appeal preferred against the judgment and order dated 29.8.2003, passed Sri Subedar Yadav, Additional Sessions Judge, F.T.C. No. 3, Ballia in Session Trial No. 14 of 2001 u/s 302, I.P.C. Conviction of the Appellant is life imprisonment and fine of Rs. 10,000. In default of payment of fine, further imprisonment of six months.

2. The accused-Appellant was tried in Session Trial No. 15 of 2001 u/s 25 of Arms Act simultaneously but he was acquitted for the said offence.

3. The occurrence took place on 10.5.2000 at 8.30 p.m. regarding which first information report was lodged by Yadunandan Ram son of late Bhikhari Ram r/o of village Madhubani, P.S. Bairiya, district Ballia.

4. Facts of the present case are that the Appellant alongwith one Vashistha Ram son of late Lallan Ram were consuming toddy in front of house of witness Ashok son of Bali Ram. They were using abusive language, which was objected by Ashok. The deceased Anjani Kumar arrived at the scene of occurrence and tried to stop the Appellant from using abusive language. The Appellant Raj Kishore alias Chaukidar got agitated and took out his unlicensed gun and fired at the deceased Anjani Kumar, who died as a result of firearm injuries. On hearing the shots, Dashrath Ram son of Vasropan Dushadh and Ram Nath son of Mohan Ram arrived at the scene of occurrence but they were threatened by the accused and finally managed their escape.

5. The first information report was registered at 9.30 p.m. at Case Crime No. 123 of 2000 by Yadunandan Ram (P.W. 1). The investigation was taken over by the Sub-Inspector Ramji Yadav. He arrived at the scene of occurrence and performed panchayatnama Exhibit 5A and sent the body for post-mortem. The post-mortem report Ext. Ka-2 is dated 11.5.2000. The post-mortem was performed at 4.30 p.m. by Dr. B. K. Roy. According to the opinion of the doctor, cause of death is due to shock and haemorrhage as a result of ante-mortem injuries. The death was recorded half day old at the time when post-mortem was performed on 11.5.2000. According to the post-mortem report, the ante-mortem injuries are as follows:

(1) Firearm wound of entries on the left side of front of neck and 6 cm. above the left sterno-clavicular joint direction of wound is downward and lateral outwards. Margin inverted, blackening of wound is present. Charring around the wound is present. Size of wound is 3.5 cm. x 3.5 cm.

(2) Lacerated wound size 4.2 cm. x 4 cm. x cavity communicating under the injury No. (1) on probing on the left lower part of axilla. Margin everted.

6. On 24.5.2000, the accused surrendered in the Court of Chief Judicial Magistrate, Ballia. The prosecution also claims that recovery of firearm was made on 3.6.2000 at the pointing out of the accused from his house. The firearm recovered was a tamancha of 303 bore. The trial proceeded u/s 302, I.P.C. as well as Section 25 of Arms Act. The prosecution examined the complainant Sri Yadunanadan as P.W. 1, Ashok as P.W. 2. The occurrence is alleged to have taken place in front of his house. P.W. 3 Dashrath, P.W. 4 Ram Chandra Ram scribe, P.W. 5 Dr. B. K. Roy, P.W. 6 Head Moharrir 19 C.P. Rajdev, P.W. 7 Totil Prasad, P.W. 8 Investigating Officer Ram Ji Yadav, P.W. 9 S.I. Kabilash Thakur, Investigating Officer of the case u/s 25 of Arms Act, P.W. 10 Ram Saran Kushwaha, who proved the documents adduced in evidence.

7. The Appellant Raj Kishore was examined u/s 313, Cr. P.C. on 26.7.2003, who denied his participation in the crime and also recovery of firearm and cartridges. He claimed that he was involved falsely in the incident on account of enmity. The other accused named in the F.I.R. was examined as D.W. 1 on behalf of the accused.

8. Heard Sri Kamal Krishna, learned Counsel appearing for the Appellant and learned A.G.A. for the State.

9. First argument advanced by the counsel appearing for the accused-Appellant is that the occurrence is said to have taken place at 8.30 p.m. in the month of May, 2000. The first information report does not mention any source of light. In fact no one has seen the incident and the murder was committed in the darkness of night. It is pointed out in the F.I.R. that weapon of assault is mentioned as unlicensed gun whereas in the statement of complainant P.W. 1, gun has been changed to katta. Besides, another accused namely Vashistha is said to be present alongwith the accused. He is named in the F.I.R. but he was neither arrested nor charge-sheeted.

10. The complainant has stated in his statement that the present Appellant alongwith co-accused Vashishta were abusing Ashok. He has also admitted that there was no enmity between the present Appellant and co-accused Vashistha and Ashok. However, the co-accused Vashistha was drinking toddy with the Appellant on the scene of occurrence and both were abusing Ashok since the accused were reprimanded from sitting in front of his house and consuming toddy, this agitated the Appellant and Vashistha alleged to be with him, the deceased intervened, this annoyed the Appellant and he opened fire in a fit of anger which resulted in the death of Anjani Kumar.

11. Counsel for the Appellant has specifically pointed out the absence of any source of light as the incident occurred at night. It is submitted that P.W. 1 has admitted in his cross-examination that he had no torch with him, though it was a moonlit night but none of the witnesses had torch. It is also admitted in the cross-examination that when he reached the house of Ashok, he saw the dead body of Anjani Kumar. He was unable to give any reason why this fact was not recorded by the Investigating Officer in his statement u/s 161, Cr. P.C. P.W. 1 has admitted that the deceased Anjani Kumar was shot at by a katta but not by a gun. Counsel for the Appellant has emphasized on the admission of P.W. 1 in his cross-examination that he knows the difference between a katta and a gun. The complainant has specifically mentioned in the F.I.R. that weapon of assault was gun, therefore, his presence is doubtful.

12. P.W. 2 Ashok has stated in his statement in chief that the co-accused Vashistha ran away from the place of occurrence with the glass and jug from which they were drinking toddy but there was no recovery by the Investigating Officer of any glass or jug. On the basis of this statement, counsel for the Appellant submitted that the entire prosecution story that the Appellant alongwith co-accused Vashistha were consuming toddy in front of the house of Ashok stands belied. There was no occasion for the Appellant to be sitting in front of the house of Ashok. P.W. 2 has also admitted in his cross-examination that there was no bad blood between the accused and Ashok. They had never consumed toddy in front his house prior to the date of occurrence. They had not taken out any katta or firearm though they got

angry when P.W. 2 Ashok tried to stop them from consuming toddy in front of his doorsteps. On perusal of statement of P.W. 2, he has stated that there was light from a lantern on his door and also a bulb was lighted on the electric pole.

13. P.W. 4 Ram Chandra Ram admitted in his cross-examination that he had not witnessed the occurrence but whatever was dictated by Yadunandan, he had written out in the report. He has tried to explain that the word "najayaj bandokh" is generally used in the village for the katta or any country made firearm, though the weapon was not very specific yet what the complainant mean by "najayaj bandokh" was about the country made firearm, which may either be a gun or katta.

14. Next argument of the counsel for the Appellant is that recovery alleged to have been made cannot be said to be a recovery u/s 27 of Arms Act. The weapon was recovered from the house and not from an open place and the accused has also specifically denied the alleged recovery.

15. Learned Counsel appearing for the Appellant has placed report of the ballistic experty Ext. Ka-19 in support of his argument that barrel of the recovered weapon did not show any sign of firing and, therefore, the prosecution case does not get any aid from the said report. It is further argued that there was no motive to commit crime since it is admitted by the witnesses that there was no enmity whatsoever and without any motive, the entire incident stands belied.

16. Lastly, it has been argued by the counsel for the Appellant that according to the prosecution itself, it is a case of sudden quarrel and, therefore, neither there was any motive nor intention to kill the deceased and no offence u/s 302, I.P.C. is not made out.

17. We have heard learned A.G.A. on behalf of the State. Main emphasis of the State is on the statement of P.W. 1 where he has stated that prior to the present incident, the Appellant Raj Kishore was also involved in a murder case and he was convicted, therefore, he is not entitled for any mercy.

18. We have heard counsels for the respective parties at length and examined the record. Before we proceed to examine evidence and arguments, it is to be ascertained prima facie whether the present Appellant was convicted in a murder case prior to the present incident. We have gone through the record of the trial court and evidence as well as cross-examination of the witness but the record does not show or establish that the Appellant Raj Kishore was convicted in any case prior to the present incident.

19. Learned A.G.A. was allowed time to enquire the matter and to ascertain as to whether there was any such F.I.R. against the present Appellant regarding any previous murder. On a close scrutiny, it appears that neither details of any case nor case crime number or any judgment or order has been placed before us in support of the said submission. The prosecution has though tried to question Vashishtha

Ram son of late Lallan, who was arrayed as an accused in the F.I.R., but he was neither arrested nor charge-sheeted. He was produced as defence witness and question was put to him regarding any prior conviction of the Appellant, which was specifically denied by co-accused Vashistha Ram. The accused was not asked any question as well when he was examined u/s 313, Cr. P.C. The learned Sessions Judge also failed to examine this aspect, therefore, we are of the considered opinion that there was nothing in support of the allegation that the accused was convicted previously in a murder case and this is second murder case.

20. Argument has been advanced on behalf of the Appellant regarding source of light at the time of occurrence. No doubt, P.W. 1 has admitted that he had no torch with him and has not tried to elaborate presence of light when he witnessed the occurrence. The incident took place in front of house of P.W. 2 Ashok, who has admitted that there was light on the electric pole as well as a lantern was lighted in front of his door.

21. We have also examined the site plan prepared by the Investigating Officer, which shows an electric pole and, therefore, just because the F.I.R. failed to mention source of light. It cannot be said that there was no light and there was complete dark and no one has witnessed the incident. Besides it has come in evidence that it was a moonlit night (chandani raat). In fact the prosecution witness complainant and P.W. 2 Ashok as well as P.W. 3 have specifically stated that the Appellant had fired at the deceased, which resulted in his death. Therefore, we are not inclined to accept the argument of the counsel for the Appellant that there was no source of light and no one has seen the actual weapon of assault. Mention of the gun in the F.I.R. and subsequently use of katta and denial by the Appellant regarding recovery thereof is not sufficient to disbelieve the prosecution story. This fact has also been clarified by one of eye-witness P.W. 4 namely Ram Chandra Ram. He has clearly stated that the villagers in general term used the word bandokh for katta or pistol or any other country made firearm as they are not well versed with the specification of the weapons.

22. P.W. 3 has also stated in his statement that the Appellant fired with katta. In the circumstances, mere use of word gun in the F.I.R. and then katta subsequently is not sufficient to doubt the entire prosecution story specially when eye-witnesses have corroborated the incident as narrated in the F.I.R., which is very much prompt in time. There is no reason to disbelieve the first information report.

23. So far the question of motive is concerned that is also not very material because according to the prosecution itself, the accused was consuming toddy and when the deceased tried to stop him from using abusive language, he fished out firearm, which was in his possession and fired at the deceased as he was agitated on account of intervention of Anjani Kumar (deceased).

24. Sri Kamal Krishna, advocate, has very emphatically tried to convince us that it was not premeditated or pre-planned murder, which calls for conviction u/s 302, I.P.C. On own showing of the prosecution, firing was resorted to, on sudden provocation. The first information report itself shows that the shot was fired in the state of agitation since Ashok was trying to stop them from drinking toddy in front of his house, which resulted in exchange of abusive language. Anjani Kumar arrived at the scene, he tried to stop them. The Appellant got infuriated and fired at the deceased.

25. In the circumstances, we are in agreement with the argument advanced by the counsel for the Appellant that the conviction at the maximum cannot go beyond the purview of Section 304, I.P.C. Admitted case of the prosecution is that the death of deceased Anjani Kumar as a result of firing by the Appellant was on account of the reason that he was agitated by intervention of the deceased but there was no intention or plan to do away with the life of the deceased. Neither there was any enmity between them. The accused got annoyed and in an agitated state, he opened fire which resulted in the death of Anjani Kumar. It is also the prosecution case that the Appellant was consuming toddy and was under intoxication, therefore, was not able to control himself. Therefore, conviction u/s 302, I. P.C. recorded by the learned Sessions Judge, appears to be excessive. The conviction u/s 302, I.P.C. and sentence of life imprisonment is not warranted in the instant case. Taking into consideration entire facts, circumstances, evidence, we are of the opinion that the conviction cannot go beyond the purview of Section 304, I.P.C.

26. Sri Kamal Krishna, advocate, has brought to our notice that the accused is in jail since seven years and the period of seven years stands completed on 24.5.2007. However, request of the counsel for the Appellant that sentence may be converted to the period already undergone is not acceptable. In the facts and circumstances, sentence of ten years is sufficient. We set aside the judgment and order of conviction of the accused-Appellant u/s 302, I.P.C. dated 29.8.2003, passed by the Additional Sessions Judge, F.T.C. No. 3, Ballia and convict him for a period of ten years R.I. Amount of penalty of Rs. 10,000 is reduced to Rs. 5,000. The present appeal stands partly allowed.