

(1998) 12 AHC CK 0105

Allahabad High Court

Case No: Criminal Appeal No's. 663, 793 of 1980 and Govt. Appeal No. 1239 of 1980

Rajjo alias Gingin

APPELLANT

Vs

The State

RESPONDENT

Date of Decision: Dec. 10, 1998**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302, 304, 34, 393, 394

Citation: (1999) CriLJ 2996**Hon'ble Judges:** K.D. Shahi, J; G.P. Mathur, J**Bench:** Division Bench**Advocate:** D.S. Tewari and I.M. Khan, for the Appellant; Dy. Govt. Advocate, for the Respondent**Final Decision:** Disposed Of

Judgement

K.D. Shahi, J.

These three appeals arise out of judgment and order dated 20-3-1980 passed by Sri N.N. Sharma, the then learned Sessions Judge, Aligarh in S.T. N. 228 of 1979, whereby Rajjo alias Gingin and Radhey Shyam (hereinafter called as appellants) were convicted and sentenced to rigorous imprisonment u/s 394, IPC and life imprisonment to Rajjo alias Gingin u/s 302, IPC and also life imprisonment to Radhey Shyam u/s 302/34, IPC.

2. Against his conviction and sentence Radhey Shyam has filed Criminal Appeal No. 793 of 12980 while Rajjo alias Gingin filed criminal appeal No. 663 of 1980 against his conviction and sentence. The State was not satisfied by this judgment and it has also filed Government Appeal No. 1239 of 1980 for the enhancement of the sentence. It is alleged in the memorandum of appeal that in the offence u/s 302, IPC the accused has been awarded life imprisonment which is highly inadequate whereas rigorous imprisonment of 7 years is also inadequate u/s 394, IPC.

3. Since all the three appeals arise out of the same judgment, order, conviction and sentence arising out of one crime number and offence, therefore, all the three appeals have been taken together for disposal.

4. In brief the facts of the case are that Sri Suresh Chandra, son of Shanker, resident of Sadabad lodged the FIR on 27-1-1979 at 2.30 P.M. at police station Hathras, alleging therein that on 27-1-1979 at about 8.00 P.M. he was returning back to his house along with his brother Virendra Kumar after closing his Kirana shop. As soon they reached near their house in front of Central Bank, accused Rajjo alias Gingin, son of Sri Son Pal and Radhey Shyam, son of Daoo, all of sudden came from Gali and started to snatch the bag containing rupees from the hand of Virendra Kumar. The complainant made an alarm. On their alarm Ram Kishan Das and Paymatma Saran came to the spot. When all of these persons attempted to apprehend these two assailants, Gingin gave a knife blow to Virendra Kumar and Radhey Shyam attacked over the complainant, but the complainant could be able to save himself and was not injured. While the complainant and the witnesses tried to apprehend Gingin, his MAFLER fell down and Gingin threw away his knife. The assailants were fully identified in the light of electricity on the road. Thereafter, Virendra Kumar was removed to the dispensary of Dr. Pachauri, who declared him dead. The complainant Suresh Chandra took his brother Virendra Kumar and the MAFLER and KNIFE of Gingin and went to the Police station and lodged the FIR Ex. Ka.-1. Fard of MAFLER and knife was prepared at the police station which is Ex. Ka-2.

5. On the basis of the FIR Chik Report Ex. Ka. was prepared by Head Constable Suraj Singh at the police station. A case was registered in G.D. Copy of the G.D. is Ex. Ka. 9. The investigation of the case was taken up by P.W. 9, Surendra Pratap SI who inspected the spot and prepared the site-plan Ex. Ka-11.

6. The inquest report of the dead body of Virendra Kumar was prepared by P.W. 3, SI Har Prasad Verma which is Ex. Ka-4. Photof lash of the dead body and challan lash are Exs. Ka-5 and Ka-6. The dead body was sealed and sent for post mortem.

7. The post-mortem was conducted by P.W. 7, Dr. Krishna Kumar Agarwal. He found the following ante-mortem injuries at the person of the deceased :--

(1) Incised wound one and half inch x half inch x cavity deep on left side of illiac fossa on the abdomen; margins were sharp wound was oval shape two and half inch below and outer to umbilicus. Direction of wound was transverse upwards to inward.

(2) Lacerated wound I inch x one and half inch superficial fossa deep on front of left knee joint.

(3) Lacerated wound half inch x half inch x skin deep on upper part right leg inner side.

On internal examination, the peritoneum was found lacerated and clotted blood was present. Cavity contained clotted blood one and half lb., one blood vessel was found cut on the surface of lumbar vertebra; cavity contained 2 oz. Of watery fluid; small intestines were cut through and through and large intestine contained faecal matter; bladder was half filled.

8. The doctor has reported the death of the victim due to shock and haemorrhage as a result of injuries No. 1 and 2, vide post-mortem report Ex. Ka-10.

9. After completion of the investigation the Investigating Officer submitted the charge-sheet to the Court.

10. After hearing the learned Counsel for the parties on the charge, the learned Sessions Judge charged accused Rajjo alias Gingin under Sections 394 and 302, IPC while Radhey Shyam was charged of the offence under Sections 394, IPC and 302 read with Section 34, IPC. The charges were read over and explained to the accused persons in Hindi. They pleaded not guilty and claimed to charge.

11. In support of his case the prosecution examined PW 1, Sri Suresh Chandra. He is the informant of the case. He lodged the FIR and he stated that on the date of occurrence he was coming to his house from the shop along with his brother Virendra Kumar (deceased). Virendra Kumar was having the bag containing rupees and when they reached in front of their house near the Central Bank, all of sudden both the accused came out. They started to snatch the bag from Virendra Kumar, but he did not leave the bag and Gingin attacked over him.

12. It is said that Radhey Shyam also attacked over the complainant, but the complainant could save himself. He stated that there was sufficient light of the electricity on the road. The MAFLER of Gngin fell there and he also threw his knife. He proved the FIR and also the factum of death of Virendra Kumar. Similar is the statement of P.W. 2, Rama Shanker, who is said to be an eyewitness. It is stated that when Virendra Kumar did not leave the bag, Gingin assaulted him.

13. P.W. 3, Har Prasad Verma proved the inquest report and other police papers.

14. P.W. 4, Parmatma Saran was the SARHU of Virendra Kumar. He is also said to be an eyewitness and proved the occurrence.

15. P.W. 5, Sri Kishan is an eye-witness and stated that Radhey Shyam was trying to snatch the bag from Suresh Chandra and Gingin was trying to snatch bag from Virendra Kumar and Gingin attacked over Virendra Kumar.

16. P.W. 6, Suraj Singh, Head Constable has proved the Chik in the G entry and P.W. 7, Dr. Kishan Kumar Agarwal had proved the injuries and post-mortem of Virendra Kumar as also postmortem report Ex. Ka. 9.

17. P.W. 8, Udai Veer Singh, Head Constable took the dead-body of Virendra Kumar and sent to Sadar mortuary in sealed condition for postmortem.

18. P.W. 9, Surendra Pratap was the Investigating Officer of the case and has proved the investigation and police papers.

19. P.W. 10, Padam Singh arrested the accused persons in the night of 28-1-1979. After this the prosecution closed its evidence.

20. In their statements u/s 313, Cr. P.C. Rajjo alias Gingin admitted that Suresh Chandra and Virendra Kumar used to carry on "Kirana" business in partnership. The question No. 1 was replied in affirmative by accused Gingin. The other facts were denied. They stated that they had been implicated due to enmity of THEKEDARI.

21. In their defence both the accused persons had examined one witness each to prove their alibi.

22. D.W. 1, Jagdish Prasad was the resident of police station Brahmapuri, district Jaipur and he had stated that on 25-1-1979 Rajjo alias Gingin and Radhey Shyam had come to his house and at about 8.00 P.M. both of them had shifted to hotel "Highway" at Jaipur.

23. D.W. 2, Bishan Swaroop stated that Radhey Shyam along with other persons had stayed in the hotel at Jaipur on 27 -1 -1979 at 10.00 P.M. and the police arrested them on 29-1-1979.

24. D.W. 3, Sri Rajendra Kumar was a THEKEDAR and stated that he was informed by Jagdish that Radhey Shyam and Gingin had stayed in "Highway" hotel at Jaipur.

25. After appreciating the entire evidence on record the learned Sessions Judge found that the case of the prosecution is fully established and, therefore, convicted both the accused persons and sentenced them as mentioned above.

26. The appellants Radhey Shyam and Rajjo alias Gingin preferred their appeals separately against their conviction and sentence while the State has filed an appeal for enhancement of sentence. All the three appeals have been taken together for disposal.

27. The learned Counsel for the accused Radhey Shyam and Rajjo alias Gingin, namely, Sri P.N. Misra did not argue the appeals seriously on merits, likewise, the learned Counsel for the appellant, Radhey Shyam, namely, Sri Sameer Jain, brief holder Sri I.M. Khan also did not seriously press the appeal on merits, but rather both the counsel for the appellants argued about the offence made out and quantum of sentence.

28. On merits, if we, enter into the evidence of the case, we find that the learned Sessions Judge was perfectly justified in finding both the accused persons guilty of the offence. There was no previous enmity between the parties. This is admitted fact that both Virendra Kumar (deceased) and Suresh Chandra were real brothers. They had a "Kirana" shop. Naturally, the shop was to be closed at about 8.00 P.M. They were returning to their house. All of sudden the accused persons came out. Their

real intention was to rob. For robbery motive is not necessary. A robber can loot any person who has some money. Their only motive was to get money and for that old and previous enmity is not necessary. It was not stated that the informant and the victim were not coming from their house. The place of occurrence, time of occurrence, the weapon of assault etc. has not been challenged. The FIR is also prompt in this case. Suresh Chandra is admittedly partner of Virendra Kumar (deceased) and, therefore, they were returning to the house together is fully natural.

29. In their statements the accused persons stated that they have been implicated due to enmity. No enmity whatsoever has been suggested.

30. P.W. 2, Rama Shankar also have a "Patta" shop and he was also coming back to his house after closing the shop. He was also a natural and probable witness. So is the statement of P.W. 4. There was absolutely no reason to give false statement and to implicate purely innocent persons. The occurrence is fully proved by the statements of these witnesses.

31. Now the only question is what offence is made out against the accused persons. As the FIR and the statements of the witnesses are both Suresh Chandra and Virendra Kumar, were coming together, all of a sudden both the accused came out. Gingen started to snatch the bag of Virendra Kumar. Virendra Kumar resisted. On this the accused gave a knife blow at the person Virendra Kumar. It is said that Radhey Shyam attacked over Suresh Chandra, but Suresh Chandra was not at all injured. The statement does not speak of any previous enmity. Therefore, the entire motive was only to commit robbery. There was no motive to commit murder and only in order to make the robbery successful assault was made by knife.

32. There is nothing in evidence that the bag of the victim could be snatched. The accused persons could not be successful to loot anything. They made only an attempt to commit robbery.

33. According to Section 394, IPC. If any person, in committing or attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, is guilty u/s 394, IPC.

34. It was argued by the learned Counsel for the appellant Sri P.W. Misra that only offence u/s 393 is made out but according to the provisions of Section 394, IPC, robbery may or may not be successful even in attempting robbery if hurt has been caused, offence u/s 394, IPC is made out and not only the person who had voluntarily caused the hurt, but any person jointly concerned in attempting to commit such robbery is equally responsible. The word "Jointly concerned" speaks two distinct classes persons (I) those who actually cause hurt (II) those who are jointly concerned to that offence. Common intention is not necessary if the accused persons are jointly concerned in committing robbery. Even if one person causes hurt all shall be jointly responsible because they were jointly concerned. Therefore, the

offence made out against both the accused persons in relation to causing hurt while attempting to cause robbery is u/s 394, IPC and the learned Sessions Judge has rightly convicted and sentenced them. In our opinion where a death has been caused in attempting the robbery, the imprisonment for 7 years is not harsh but is rather adequate.

35. The main grievance of the learned Counsel for the parties was regarding the conviction and sentence u/s 302, IPC and 302/ 34, IPC. Admittedly, there was no earlier enmity between the parties. Admittedly, there was no motive for any murder and only in order to snatch or make their escape good. Gingin all of a sudden took out his knife and stabbed Virendra Kumar. He gave only a single injury. The assault was not at all repealed. In the FIR it is only written when the complainant and the witnesses wanted to apprehend then Gingin assaulted Virendra Kumar and Radhey Shyam wanted to attack informant. The exact words are-- "HUM LOGO NE OON DONO KO BAKADNA CHAHA TO GINGIN NE MERE BHAII VIRENDRA KUMAR KO CHAKUMARA VA RADHEY NE MERE OPPEER CHAKU KA WAR KIYHA JISSE MAI BACH GAYA AUR WAH DONO HUM SE CHHOOT KDER LAHRA WALIGALI ME BHAG GAYE." These wording specifically show that the assault was only to make the escape good and there was no intention to kill. Therefore, Gingin shall be liable of his individual act and Radhey Shyam shall be liable of his individual act. There was absolutely no intention to kill, although the assailants had got full knowledge that an assault by knife in the abdomen may also cause death. Therefore, Gingin shall be guilty u/s 304, Part II, IPC. There was absolutely no abetment, provocation, common intention, exhortation by Radhey Shyam to Gingin to attack over Virendra Kumar.

36. It is also stated that Radhey Shyam had attacked over Suresh Chandra but could not cause any injury. In his statement Virendra Kumar (Suresh Chandra) stated that Radhey Shyam attacked over him with knife but he came back, therefore could not suffer injury but the eye-witness Rama Shanker stated that Radhey Shyam chased Suresh Chandra with knife but, that is not the prosecution case. P.W. 4, Parmatma Saran stated that Radhey Shyam and Gingin were snatching and, thereafter, Gingin gave a blow of knife and they ran away, but that is not the prosecution case that Radhey Shyam was snatching something from Suresh Chandra. RW. 5, Kishan stated that Gingin was snatching the bag from Virendra Kumar and Radhey Shyam was snatching bag from Virendra Kumar. It is not the prosecution case that Suresh Chandra had not any bag. If he was not having bag, there is no question of snatching it and if bag was not snatched from Suresh Chandra, there is no question of resistance and assault by Radhey Shyam over him. Therefore, the plea of assault by Radhey Shyam over Suresh Chandra is not proved. Although, the entire prosecution theory that Suresh Chandra and Virendra Kumar were going, Radhey Shyam and Gingin came. Gingin attempted to snatch bag from Virendra Kumar, when resisted Gingin gave a knife blow to Virendra Kumar is fully proved. Thus, for the act of robbery and assault by Gingin to Virendra Kumar, both are guilty u/s 394, IPC but for the death of Virendra Kumar only Rajjo alias Gingin is guilty u/s 304, Part

II, IPC. This offence is not made out against Radhey Shyam. Thus, Radhey Shyam is to be acquitted of his charge u/s 302 read with Section 34, IPC.

37. The conviction and sentence of the appellants u/s 394, IPC is to be upheld. As regards conviction and sentence u/s 302, IPC to Gingin the charge u/s 302 is not made out. However, the offence u/s 304, Part II, IPC is a minor offence of the charge u/s 302, IPC, therefore, Gingin can be safely convicted and sentenced u/s 304, Part II, IPC without a formal charge. Both the appeals are to be allowed only to this extent that the convictions and sentences of Rajjo alias Gingin is to be modified and converted u/s 304, Part II, IPC and Radhey Shyam is to be acquitted of the charge u/s 302 read with Section 34, IPC.

38. As regards sentence to Rajjo alias Gingin u/s 304, Part II, IPC in the circumstances in which he gave a knife blow to Virendra Kumar in the abdomen, sentence of 7 years shall meet the ends of justice.

38A. As regards the appeal of State to enhance the sentence, the maximum punishment in an offence u/s 394, IPC is 10 years and the sentence and punishment for 7 years is appropriate, just and proper in the circumstances of the case; when the appeal is going to be disposed of after about 20 years from the date of offence.

39. As regards the offence u/s 302, IPC it is not at all made out. Therefore, there is no question of even imprisonment for life what to say of death punishment. Therefore, the appeal of the appellant State is fit to be dismissed and is accordingly, dismissed.

40. As regards appeal No. 663 of 1980 (Rajjo alias Gingin v. State), his appeal is partly allowed and partly dismissed. His conviction and sentence u/s 302 IPC is set aside rather his conviction is converted u/s 304, Part II, IPC and he is sentenced to rigorous imprisonment of 7 years u/s 304, Part II, IPC. His sentences of 7 years u/s 304, IPC is confirmed. Both the sentences shall run concurrently.

41. As regards appeal No. 793 of 1980, the appeal of Radhey Shyam is partly allowed and partly dismissed. His conviction u/s 394, IPC is hereby upheld while his appeal for his conviction and sentence u/s 302 read with Section 34, IPC is hereby allowed. He is not found guilty of the charges u/s 302 read with Section 34, IPC and accordingly his conviction and sentence of life imprisonment on this charge is hereby set aside. He is acquitted of this charge u/s 302 read with Section 34, IPC.

42. Both the appellants are on bail. They have to undergo rigorous imprisonment for 7 years as directed above. Their bail bonds are cancelled and sureties shall stand discharged after both the appellants have been taken into custody to serve out the sentence.

43. Office is directed to issue a copy of this order to the Chief Judicial Magistrate, Aligarh to make compliance of this order and to report compliance within three months positively to this Court.