

(2005) 08 AHC CK 0254

Allahabad High Court

Case No: Criminal Capital Appeal No's. 5530 and 5075 of 2004 and Reference No. 17 of 2004

Naim and Another

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Aug. 22, 2005

Acts Referred:

- Arms Act, 1959 - Section 25(4)
- Criminal Procedure Code, 1973 (CrPC) - Section 313, 366
- Penal Code, 1860 (IPC) - Section 302, 34, 354, 452

Citation: (2005) 3 ACR 3031

Hon'ble Judges: Imtiyaz Murtaza, J; Amar Saran, J

Bench: Division Bench

Advocate: P.K. Srivastava, for the Appellant; I.M. Khan, R.K. Singh and A.G.A., for the Respondent

Judgement

Amar Saran, J.

Criminal Capital Appeal No. 5530 of 2004 has been filed by the Appellants Naim and Rafiq against the judgment of the Special Judge E. C. Act/Additional Sessions Judge, Bulandshahr dated 29.9.2004 convicting the Appellants Naim and Rafiq to death under Sections 302/34, I.P.C., two years R.I. u/s 354, I.P.C. and 7 years R.I. and a fine of Rs. 10,000 u/s 452, I.P.C., in default of payment of fine, the Appellants to undergo six months simple imprisonment. They have also been convicted u/s 25(4) of the Arms Act and sentenced to two years R.I. The sentences were to run concurrently. A Criminal Reference No. 17 of 2004 has also been sent by the Sessions Judge, Bulandshahr for confirmation of the death sentence u/s 366, Code of Criminal Procedure In connected criminal Appeal No. 5075 of 2004 the Appellant Habib has been sentenced to imprisonment for life and a fine of Rs. 50,000 u/s 302/34, I.P.C. and in default of payment of fine to undergo further one year simple imprisonment. He has also been convicted to 7 years R.I. and a fine of Rs. 10,000 u/s 452 I.P.C. and

in default of payment of fine to undergo six months simple imprisonment.

2. The prosecution version was that on 24.10.1998, the deceased Dilshad had gone to the house of his brother Tahir and thereafter Tahir had gone back with Dilshad in order to drop him home. At about 8 p.m. in the night when they were reaching near the door of Dilshad's house, they heard the alarm of Dilshad's wife Smt. Shahida. They saw the Appellants Naim and Rafiq armed with knives, catching hold of Shahida and pulling her. When Dilshad protested Naim and Rafiq left Shahida and clung on to Dilshad and told him that they would teach him a lesson. At that time the third Appellant Habib arrived there. He is said to have exhorted the Appellants to assault the "saale" and they had nothing to fear as he had arrived. Thereupon, Naim and Rafiq stabbed the deceased Dilshad with knives. On the cries of Dilshad and Tahir (P.W. 3), Salim, Irfan, Jamil and some other persons arrived there. On their alarm, the three accused persons left the deceased and climbed up the stairs of Dilshad's house, as they were being followed by the people of the mohalla. Thereafter they jumped down. After a chase the Appellants Naim and Rafiq were caught hold of with knives and were given a beating by the people of the mohalla. However, Habib is said to have run away. When the informant Tahir returned, he found his brother lying in a seriously injured condition. In that state the injured-Dilshad was brought by the people of the mohalla to the hospital along with the Appellants Naim and Rafiq, who had also received injuries while jumping down the roof on to the road. The Doctor declared Dilshad dead on examining him. An electric light was burning in the house. Naim, Rafiq and the dead body of Dilshad were lying in the hospital surrounded by the residents of the mohalla. The informant Tahir thereafter proceeded to P. S. Khurja Nagar, which was at a distance of 2 km., where he submitted a report (Ext. Ka-1) scribed by Shakir at 9.30 p.m. on the same date, i.e., 24.10.1998. Constable Clerk Onkar Singh, who was present in the police station prepared the chik report (Ext. Ka-7) on the basis of the written report given by the informant and also made a G.D. entry at 21.35 on 21.10.1998 (Ext. Ka-8). The informant also deposited the knives recovered from the Appellants Rafiq and Naim at the police station along with his report. Their recovery memo was prepared by C. C. Onkar Singh.

3. At that time P.W. 7 S.I. R. D. Pathak, who was on patrol duty, received a wireless message about the incident, according to which a man was injured and two miscreants had been arrested at the spot who were taken to the hospital at Khurja Nagar. Thereafter, the informant reached the hospital, where he was told that a person by the name of Dilshad had been assaulted by the three accused, of whom two who had been caught by the mohalla people, were present in the hospital. The accused persons were even bandaged as they had received injuries. Dilshad who had been assaulted by the miscreants had died. P.W. 7 S.I. R. D. Pathak got the inquest conducted by S.I. Raja Ram Verma (P.W.6). The body had been sent for post-mortem to the mortuary, where Raja Babu, Taiyyab and other people were keeping watch on the accused persons Naim and Rafiq. They were taken into

custody by the police and brought to the police station. There was a report lodged by Constable Onkar Singh. He also recorded statements of C. C. Onkar Singh. After recording the statements of the witnesses Constable C. C. Onkar Singh, Smt. Shahida alias Shakila wife of the deceased and prepared exhibits. He visited the spot on 25.10.1998, prepared site plan (Ext. Ka-17). He also collected the plain and blood stained earth from the concrete farsh (flooring), which he sealed and in respect of which he prepared a recovery memo (Ext. Ka-18). On 26.10.1998, he obtained the post-mortem report of Dilshad. He recorded the statement of the Constable, who carried the dead body.

4. Post-mortem examination was conducted by P.W. 4 Dr. Awadhesh Kumar on 25.10.1998 at the mortuary of the District Hospital, Bulandshahr. He prepared post-mortem report (Ext. Ka-6). The age of the deceased was about 25 years and he had died about 3/4 days earlier. The deceased was of average built and rigor mortis was present over the whole body. Eyes/mouth were half open. In the nose and mouth there was some clotted blood. He found the following two ante-mortem injuries:

1. Incised wound 2 cm. x 1 cm. x cavity chest deep on back of left side chest 12 cm. below inferior angle of scapula.

2. Incised wound 1-1/2 cm. x 1 cm. x abdominal cavity deep on left lateral part abdomen upper part just below rib.

5. On internal examination, he found left pleura and left lung cut. There was 1-1/2 litre blood present in the pleural cavity. Spleen was cut. The cause of death was shock and haemorrhage as a result of ante-mortem injuries. He stated that the injuries No. 1 and 2 were result of some sharp edged weapon such as knife. The injuries could have been caused on 24.10.1998 at about 8 p.m. The injuries were sufficient in the ordinary course of nature to cause death of deceased Dilshad.

6. Apart from P.W. 4 Dr. Awadhesh Kumar, who conducted the post-mortem as above, P.W. 5 Constable Clerk C. C. Onkar Singh, who prepared the chik F.I.R. and made G. D. entries and S.I. R. D. Pathak, P.W. 7, I.O. of this case whose testimonies have been described above, P.W. 6 S.I. Raja Ram Verma was the remaining formal witness, who conducted the inquest on the body of Dilshad, which was marked as (Ext. Ka-12). The body was thereafter handed over to Constable Mahendra Singh and Constable Ram Pal Singh for taking it for post-mortem. He had gone to conduct the inquest on receiving the memo from the doctor.

7. Apart from the aforesaid formal witnesses, three witnesses P.W. 1 Shahida alias Shakila wife of the deceased, P.W. 2 Tahir informant and brother of the deceased, P.W. 3 Salim have been examined as eye-witnesses in this case.

8. P.W. 1 Shahida alias Shakila has deposed that she knew the Appellants from before, as the house of the Appellants was in front of her house. Eight months

before her testimony in Court at about 8 p.m. she was present in her house with her child. Her husband had gone to the house of her jeth. She was in the court-yard, where an electric bulb was burning. At that time Rafiq and Naim Appellants entered her house and started doing "chher chhar" (sexual harassment) with her. On her cries, her husband Dilshad and her jeth Mohammad Tahir arrived. Her husband questioned the Appellants as to why they had entered his house. At that moment the Appellant Habib also arrived. He exhorted Naim and Rafiq to assault Dilshad and that they would face the consequences. Thereupon Rafiq and Naim assaulted Dilshad with intention to murder him with their knives. On the cries of Shahida and the deceased, Jamil, Salim and Irfan and Ors. arrived there. The three Appellants climbed on her roof and they jumped down on the road outside. The people of the mohalla caught hold of Naim and Rafiq together with the knives carried by them, but Habib ran away. The condition of Dilshad was serious as a result of knife blows sustained by him. The Appellants Naim, Rafiq and Dilshad were taken to the hospital by the mohalla people.

9. P.W. 2 Tahir has deposed that he knew the Appellants from before, as they belonged to his mohalla. He resides with another brother, whereas Dilshad used to reside in a separate house. The incident took place about 7-8 months earlier. On the fateful evening his brother Dilshad had paid a visit to his house. He was accompanying Dilshad back to Dilshad's house. At about 8 p.m. near the house of Dilshad, they heard Shahida crying for help. When they entered the house, they saw Naim and Rafiq pulling and teasing Shahida, who was shouting and screaming. Dilshad challenged Rafiq and Naim. Thereupon they left Shahida and caught hold of Dilshad. At that time, Habib arrived there. Habib Appellant is said to have exhorted them to assault the "sala" and they would face the consequences. This resulted in Rafiq and Naim assaulting Dilshad with knives. On the cries of Dilshad and this witness, Tahir, Irfan, Jamil, Salim and other persons of the mohalla arrived there. On arrival of the mohalla people the three accused climbed on the roof of the house, and they all jumped down on the road from there. Then this witness and Ors. caught hold of the Appellants Rafiq and Naim, but Habib ran away. Rafiq and Naim were carrying knives. After that the apprehended Appellants and his injured brother Dilshad were all taken to hospital. There the doctor declared Dilshad dead. An electric bulb was burning on the spot. He got the report (Ext. Ka-1) scribed by Shakir in the hospital, to which he affixed his thumb impression. He also handed over the knives, which had been recovered from the Appellants at the police station when he went to lodge the report there.

10. P.W. 3 Salim stated that he knew the Appellants and the deceased from before because all they resided in his mohalla. The incident took place 8 months back. At about 8 p.m. he was sitting at the platform (chabootara) in front of his house. He heard cries from Dilshad's house. Thereupon he rushed there along with Jamil and Irfan where he witnessed the Appellants, Rafiq and Naim armed with knives assaulting Dilshad. Habib was exhorting them to beat the "sala". On the alarm

raised by the witnesses, Naim and Rafiq climbed up the stairs to the roof of the house, while Habib escaped from the door of the house on the ground floor. Naim and Rafiq jumped down from the roof on the road. The witnesses caught hold of Naim and Rafiq there along with their knives. They took Dilshad, Naim and Rafiq to the hospital, as Naim and Rafiq had also received some injuries. In the hospital Dilshad was declared dead. Naim and Rafiq were detained by Taiyyab and Ors. The report of the incident was lodged by Tahir. He also went to the police station with Tahir for lodging the report. Knives were also carried by them and they were handed over to the Investigating Officer. The Investigating Officer sealed the knives and prepared recovery memos. He affixed his thumb mark on the memos. He did not know the reason for the dispute. The incident took place before his eyes.

11. The case of all the three accused was of denial and they claimed that all the proceedings against them had been falsely initiated. However, they did not adduce any evidence in their defence.

12. We have heard Sri Prabhat Kumar Srivastava, learned Counsel for the Appellants and Sri R. K. Singh, learned A.G.A. for State.

13. It has been argued by the learned Counsel for the Appellants that F.I.R. was delayed as it was said to be lodged on 24.10.1998 at 9.30 p.m. when the incident is said to have taken place at 8 p.m. The writer of the F.I.R. has not been examined to explain the circumstances in which the F.I.R. was lodged. The prosecution has failed to prove the injuries received by the Appellants Naim and Rafiq. The witnesses were chance witnesses. The knives and bloodstained earth were not sent for chemical examination. At the time of inquest, the Investigating Officer stated that he possessed a copy of the F.I.R. in which the names of accused were mentioned, yet the names are absent in the inquest report. The incident took place as a result of sudden provocation and they had no intention to kill. The Appellants were minors and they should be given the benefit of the Juvenile Justice Act. The complicity of Habib was doubtful, as there were some contradictions as to whether this witness escaped from the house through the main door or jumped down from the roof along with the other two Appellants. In any case the evidence of exhortation is not reliable. The sentence of death awarded to the Appellants Naim and Rafiq was not justified on the allegations of this case. The learned A.G.A. on the other hand says that there is no challenge to the place of occurrence and the fact is that the Appellants Naim and Rafiq were caught hold of by the witnesses and the people of the mohalla at the spot and there is no reason for the witnesses to implicate the Appellants while sparing the real assailants, as there was no earlier dispute between the parties who were neighbours.

14. In view of the fact that the incident took place in the house of the deceased and bloodstained flooring had even been collected there and the accused Appellants Rafiq and Naim were arrested there by the witnesses and Ors. who had arrived as soon as they jumped down on to the road from the house, and immediately

thereafter these two Appellants were taken to hospital by the informant and other witnesses together with the deceased Dilshad, who was injured at that stage, and there is no serious challenge to these points, the submissions about non-sending of the blood stained earth to the Chemical Examiner and other points such as a little delay in lodging the report etc. cease to carry much weight.

15. It has been stated categorically by P.W. 7 S.I. R. D. Pathak that he was on patrol duty when he received information on the wireless about the incident having taken place in Mohalla Kot, where some miscreants had entered into a house and two of those persons were even apprehended and taken to the hospital Khurja Nagar. Thereafter, after obtaining the chik report from Constable Tota Ram, he had reached the hospital and learnt that a man by the name of Dilshad had been assaulted by three accused persons by knives and two Appellants, who had been arrested at the spot by the mohalla people, were detained at the hospital. They were even bandaged at the places, where they had received injuries. He found the persons of the mohalla such as Raja Babu and Tayyab detaining these two Appellants, whom he immediately took into custody and after interrogating them he placed them in police lock-up. He also collected their medical reports. In view of the fact that the Appellants Naim and Rafiq were apprehended at the spot and thereafter even taken into custody by the Investigation Officer at the Khurja Nagar hospital, there can be no reason to doubt their presence. Significantly, the Appellants have not challenged their arrest from the spot, by putting any suggestion to the contrary to the witnesses and even to specific questions put to them u/s 313, Code of Criminal Procedure that they were arrested at the spot and the knives were even taken from their possession, they have simply denied this allegation. Dr. Awadhesh Kumar P.W. 4 who had stated on being shown the knives recovered from the Appellants Naim and Rafiq at the time of arrest that these injuries could have been caused by these knives, was not even suggested in his cross-examination that the injuries to the deceased could not have been caused by these knives. Such a bald a denial, and failure to explain this circumstance of spot arrest with the knives used for assaulting the deceased can offer little assistance to the accused in their defence. In these circumstances, minor flaws in the investigation process of not sending knives and blood stained earth for chemical examination or not proving the injury reports of these two accused persons, who were arrested at the spot, can only be considered to be small defects in the investigation process, which does not impair the prosecution case and testimony of the eye-witnesses at all. Likewise little value can be attached to the fact that the F.I.R. was lodged after 1-1/2 hours at 9.30 p.m. as the case of the informant Tahir was that immediately after the incident the Appellants Rafiq and Naim were arrested. They were taken to the hospital along with the deceased, who was initially injured. Even the Appellants Naim and Rafiq were detailed there by the mohallawalas till the police arrived and the report was scribed by Shakir at the hospital. Efforts may have been made to save the deceased Dilshad initially, but unfortunately, he was declared dead by the doctor who

examined him. Therefore, the alleged delay of about 1-1/2 hours in lodging the report, is of no consequence.

16. In such a situation similarly no importance can be given to the fact that the scribe was not examined, as the informant who had apprehended the Appellants at the spot, has come forward to support the prosecution case and he is the best witness. There is no necessity in law to multiply witnesses, who are not expected to throw any further light on the prosecution case.

17. P.W. 1 Smt. Shahida alias Shakila deposed that the Appellants Rafiq and Naim were trying to molest her and P.W. 2 Tahir, who was the brother of deceased Dilshad had gone to drop him at her house cannot said to be a chance witness. But they were all the most natural witnesses at the place on incident. Likewise P.W. 3 Salim, who had arrived at the place of incident on the cries raised by the deceased and witnesses is also a natural witness, being a person who resided in the neighbourhood. Moreover, presence of these witnesses at the spot is confirmed by the fact that they even succeeded in apprehending the Appellants Naim and Rafiq at the spot.

18. There is also no merit in the submission that the inquest report did not mention the name of the accused as there is no column in the inquest report requiring mention of the names of the accused persons, and it is immaterial that the officer who prepared the inquest had a copy of the F.I.R. with him. There is also no merit in the argument that the incident took place as a result of sudden provocation, if the Appellants Naim and Rafiq had gone to the house of deceased in order to molest his wife and at the nick of time the deceased and his brother arrived there and raised a cry, that can certainly not constitute any kind of provocation to the Appellants to commit this crime. Evidently, the Appellants offered no explanation for their presence in the house and therefore, the accused, who visited the house with the intention to commit an offence can never plead provocation as a defence. Thus, if the Appellants visited the house of the deceased for the purpose of teasing or molesting his wife, and on arrival of the deceased Dilshad, who raised a protest, they stab him to death, they cannot claim benefit of any general or special exception either for acquittal or for converting the conviction from Section 302, I.P.C. to any other provision.

19. One other submission raised by the Appellants' counsel was that the Appellants Naim and Rafiq were 20 and 23 years in age on 7.8.2004, the date of their statements u/s 313, Cr. P.C. This would make the Appellants Naim 14 years in age on the date of incident (24.10.1998) and the Appellant Rafiq 17 years and 2 months of age on that date, as there is no observation to the contrary by the Sessions Judge and it is provided in Rule 50 of the General Rules Criminal that if the Court considers the age given by a witness or accused to be an underestimate or over-estimate, it should form its own estimate and mention it also in the record. It also provides for getting the medical examination of the accused done, if the Court entertains any

doubt about the age as mentioned by the accused in their statements. However, it is questionable whether these rules which have been framed by the High Court and not the Legislature are actually observed or only observed in their breach. We may take notice of the fact that when trials are delayed, (in the present case itself the matter remained pending for six years before the 313, Code of Criminal Procedure statement was recorded and the trial concluded at that stage), it is quite probable that the concerned court may not have attached any significance to the age mentioned by the accused, as the Court may not have anticipated that the accused might claim the benefit of the Juvenile Justice Act, 1986, as the accused Naim and Rafiq had never claimed to be a juvenile earlier. In fact in their earlier bail application moved by the Appellants Naim and Rafiq before the Sessions Judge on 29.11.1999, which is on the record of this case, the Appellants had declared their ages to be 21 and 22 years. It is for this reason that this plea of age has also not very vehemently raised by the learned Counsel for the Appellants. In [Om Prakash @ Raja Vs. State of Uttaranchal,](#), the Apex Court has held that where an accused had given his age as 20 years on the date of his examination u/s 313, Code of Criminal Procedure in order to take the benefit of being juvenile on the date of offence, but the evidence was received in the Court that he had opened an account in a Nationalized Bank where he had described himself as a major at the time of occurrence, it is apparent that the age of the Appellant mentioned u/s 313, Code of Criminal Procedure was incorrect and the Apex Court agreed with the High Court and trial court that the said claim of being below age could not be accepted and the Appellant could not be treated as a juvenile on the date of offence.

20. Lastly a contention was raised by the learned Counsel for the Appellants that there was little reason for the Appellant Habib to participate in this offence as Habib was an old man, 65 years in age at the time of his examination u/s 313, Cr.P.C., and there was no reason for him to have exhorted the Appellants to commit the crime. He was also not arrested at the spot unlike the Appellants Naim and Rafiq. We find force in this contention of the learned Counsel for the Appellants. There is a clear contradiction in the versions mentioned by the witnesses as to whether Habib escaped from the house through the main door on the ground floor or whether he also jumped down from the roof on the road. Whilst injuries were received by the Appellants Naim and Rafiq, who were also arrested on the spot, there is no injury on Habib and he was also not arrested at the spot by the witnesses. There is also little reason for the Appellant Habib, who was an old man compared to the younger Appellants Naim and Rafiq, to have arrived at the place of incident, and to have exhorted the Appellants Naim and Rafiq to stab the deceased. In this view of the matter we are of the view that the prosecution has not been able to establish the case against the Appellant Habib beyond reasonable doubt and he is entitled to the benefit of doubt. So far as the other Appellants Naim and Rafiq are concerned, the prosecution has succeeded in proving the case against them beyond reasonable doubt in respect of all the offences for which they have been charged.

21. However, one last question remains as to whether the sentence of death awarded to the Appellants would be appropriate in the circumstances of this case. Although as held above, the Appellants Naim and Rafiq have not been able to show that they were below 16 years in age on the date of offence entitling them to the benefit of the Juvenile Justice Act, 1986. However, they do appear to be young men. Further although the allegations against these two Appellants are of attempting to molest Smt. Shakila alias Shahida, we do not know what transpired at the precise time when her husband Dilshad arrived home along with the informant. It cannot be ruled out that some kind of argument might have broken out between the parties, resulting in the Appellants giving only two knives blows to the deceased, which caused his death subsequently. Of course any such quarrel may not be an exonerative circumstance, so as to provide the Appellants benefit of any of the general or special exceptions. But we do find that thereafter the Appellants ran up the stairs and jumped down, which resulted in injuries to them and they were even apprehended by the people of the mohalla. These factors do suggest that the Appellants could not be hardened criminals and they may have taken it into their heads to tease Smt. Shakila, but on sudden arrival of the deceased, they attacked him. In this background, it cannot be said that awarding of death sentence was the only course and the other option of awarding a life sentence was unquestionably foreclosed. In this view of the matter, while upholding the sentence awarded to the Appellants Naim and Rafiq under all the other counts the sentence of death awarded to them u/s 302/34, I.P.C. is converted to sentence of imprisonment for life. The rest of the sentences awarded to the Appellants Naim and Rafiq by the trial court under Sections 354, 452 and 25(4) of the Arms Act are upheld. The sentences shall run concurrently.

22. The result is that Capital Criminal Appeal No. 5530 of 2004 preferred by Appellants Naim and Rafiq is partly allowed. The sentence of death u/s 302/34, I.P.C. is substituted with by sentence of imprisonment for life. The sentences of two years R. I. u/s 354, I.P.C., 7 years R.I. and a fine of Rs. 10,000 (in default six months simple imprisonment) u/s 452, I.P.C., two years R.I. u/s 25(4), Arms Act are upheld.

23. The Reference No. 17 of 2004 by the Sessions Judge is rejected.

24. Criminal Appeal No. 5075 of 2004 preferred by Habib is allowed. He is acquitted of all the charges framed against him. His bail bonds are cancelled and sureties are discharged. He need not surrender before the court below.