
(2016) 09 AHC CK 0029

ALLAHABAD HIGH COURT

Case No: Criminal Appeal No. 1523 of 2005

Sonu @ Shashank Tiwari

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Sept. 8, 2016

Acts Referred:

- Penal Code, 1860 (IPC) - Section 302, Section 34, Section 394

Citation: (2017) 98 ACrC 97 : (2016) 10 ADJ 7

Hon'ble Judges: Anil Kumar and Anil Kumar Srivastava-II, JJ.

Bench: Division Bench

Advocate: G.A, S.C. Shukla, Advocate, for the Respondent; R.K. Singh, Jan Laxmi Tiwari, Subodh Kumar Shukla and Yogendra Singh, Advocates, for the Appellant

Final Decision: Dismissed

Judgement

Anil Kumar Srivastava-II, J. - Since both the criminal appeals arise out of the common judgment, therefore, the same are being heard and decided together by a common judgment.

2. Heard Sri Subodh Chandra Shukla for the appellant/ Sonu @ Shashank Tiwari in Criminal Appeal no.1523 of 2005 and Sri R.N. Gupta, learned counsel for appellant/ Rahul Mishra @ Chulbul Mishra in Criminal Appeal No.1388 of 2005 and Sri Sharad Dixit, learned Additional Government Advocate.

3. Present Criminal Appeals have been preferred against the judgment and order dated 4.10.2005 passed by learned Additional Session Judge/ Fast Track Court-II, Pratapgarh in S.T. No. 292 of 2000 (Sonu alias Shashank Tiwari v. State of U.P.) and (Rahul Mishra alias Chulbul Misra v. State of U.P.) arising out of Case Crime no.86 of 2000 under Section 302,394 and 411 IPC, police-station Kotwali Nagar, District Pratapgarh whereby accused Rahul Mishra @ Chulbul Misra was convicted under Section 302 read with section 34 IPC and sentenced for life imprisonment and a fine of Rs.5000/- with default stipulation of further one year imprisonment, section 394

read with Section 34 I.P.C. for ten years rigorous imprisonment and a fine of Rs. 5000/- with default stipulation of further six months imprisonment whereas Sonu alias Shashank Tiwari was convicted under Section 302 IPC for life imprisonment and a fine of Rs.20000/- with default stipulation of further two years imprisonment and under section 394 read with section 34 IPC for ten years and a fine of Rs. 10000/- with default stipulation of further one year imprisonment and Section 411 IP.C. for two years rigorous imprisonment and a fine of Rs. 1000/- with default stipulation of further three months imprisonment. All the sentences were directed to run concurrently.

4. According to prosecution case, on 14.2.2000 at about 10.00 a.m., owner of Mishra Automobile, Sri Suresh Chandra Mishra was going on the scooter with Ashok Kumar Tiwari, a pillion rider, to deposit cash in State Bank of India. When they reached just before bridge of Sai river, two persons came with motorcycle and dashed the scooter and warned Suresh Chandra Mishra to give them cash. Complainant Ashok Kumar Tewari ran away and the accused snatched the suitcase containing cash of Rs. 400000/- from Suresh Chandra Misra and another accused person, who was pillion rider of the motorcycle, fired at Suresh Chandra Mishra, who sustained serious injury and he was admitted to Raj Nurshing Home, Allahabad where he succumbed to his injuries. Ashok Kumar Tiwari has lodged an FIR to the said incident at Police station Kotwali Nagar, District Pratapgarh which was registered as Case Crime No. 86 of 2000 under sections 302/394,311 IPC. The investigation was handed over to Station House Officer of P.S. Kotwali District Pratapgarh.

5. The Investigating officer prepared the inquest report. Postmortem of the dead body was conducted by the Doctor on 14.2.2000 at 5.00 p.m. According to doctor, death was caused due to antimortem fire arm injury. Statement of Suresh Chandra Tiwari was recorded under Section 161 Cr.P.C. by Investigating Officer on 14.2.2000, thereafter he succumbed to his injuries.

6. During investigation, on 16.2.2000 at about 11.30 a.m., investigating officer along with police personnel apprehended one Rahul Mishra alias Chulbul Misra. On his pointing out motorcycle bearing no. UP 45/ 5414 used in commission of crime was recovered. He confessed that it is the same motorcycle which was used in the commission of crime and also on his pointing out a black Ataichi (Suitcase) was recovered from the well. He also confessed that it is the same Ataichi which was looted on 14.2.2000 from Suresh Chandra Mishra after firing upon him. Some bricks were also found in the Ataichi.

7. On 18.2.2000 at about 12.20 a.m. Sonu alias Shashank Tiwari was apprehended by the police and on his pointing out one contrymade pistol used in commission of crime and a cash of Rs. 1,40,000/- was recovered in a box wherein a slip was attached on the bundle of rupees mentioning therein "Misra Automobile Pratapgarh". Rs. 40000/- was also recovered by the police at the pointing out of Sonu @ Shashank Tiwari .

8. Site plan of the incident was also prepared by Investigating Officer. Statements of witnesses were recorded. Accused/ appellants were also put for identification parade and they were rightly identified by the witnesses. After concluding the investigation, accused were chargesheeted under Sections 302, 394, 411 IPC.

9. In order to prove the case, prosecution has produced as many as ten witnesses, namely, P.W.1 , Shiv Prasad Pandey, P.W.2 Umesh Chandra Pandey, eye witness, P.W.-3 M.R. Premi, S.I., P.W.4 Sub Inspector Hemant Bhushan Singh, witness of recovery, P.W. 5 Ashok Kumar Tiwari, complainant and eye witness, P.W.-6 Pahup Singh, Investigating Officer P.W.-7 Dr. R.P. Singh who conducted the postmortem of the body of deceased Suresh Chandra Mishra on 14.02.2000 and found fire arm wound of entry measuring 1/1" x 1/2" of cavity deep on right side of head just behind right ear, margins inverted ,blackening and tattooing and scorching are present. There was fire arm exit wound measuring 1" x 1" cavity deep on the forehead left side 1 1/2" above. Lacerated wound 1/2" x 1/2" bone deep on outer surface of close to base of right index finger. According to Doctor, duration of death was about six hours. Death is due to coma as result of fire arm injury to brain. P.W.8 Constable Lakhan Pal, informal witness P.W.9 Ram Dev Gupta, conducted the identification parade. P.W.10 Head Constable Sarvejeet Verma, Head Moharir, who has prepared chik report and mentioned the same in the G.D.

10. Accused/ appellant Sonu @ Shashank Twari has stated in his statement under section 313 CrPC that he was arrested from the house of Mausli Asha Ojha in the night of 16.2.2000. He stated that he was falsely implicated due to enmity of P.W.2 Umesh Chandra Pandey with his Mausli Radhey Shyam whereas Rahul alias Chulbul Misra has denied the charges levelled against him and stated that he has been falsely implicated due to enmity of S.H.O. Police Station Kotwali Nagar, Pratapgarh.

11. In defence, Smt. Asha Ojha has been produced as D.W.1, who has stated that Sonu alias Shashank Tiwari is son of her sister Smt. Sarla Tiwari. On 26.2.2000 marriage of her daughter Km. Anita was fixed and Sonu alias Shashank Tiwari came to her house on 10.2.2000 and was staying there but on 16.2.2000 at about 11.00 p.m. police has taken away Sonu alias Shashank Tiwari from her house. No recovery was made from his possession or on pointing out of Sonu alias Shashank Tewari.

12. After appreciating the evidence on record and going through the material on record, learned trial court found accused persons/appellants guilty and sentenced them in the aforesaid sections.

13. Feeling aggrieved by the impugned judgment, appellants have preferred two separate appeals.

14. At the very outset, learned counsel for the appellants argued that accused were arrested by the police authorities and are in jail since February ,2000 and they have not been granted bail during trial by learned trial court as well as by this Court. Learned counsel for the appellants have not pressed the present appeals on merit

rather they have pressed the appeal on the point of sentence only with the prayer of remission of sentence.

15. Being the first appellate court, we are conscious of the duties of the first appellate court to reassess and re appreciate the evidence led by the prosecution before the learned trial court.

16. According to P.W. 7 Dr. R.P. Singh, deceased died due to fire arm injury sustained by him which supports the prosecution version that pillion rider fired at Suresh Chandra Mishra deceased and snatched the bag containing Rs. 4,00,000/-.

17. At this stage, it is relevant to mention that one of the co accused namely Edu alias Ateek son of Vakil Ahmad was absconding and was not put to trial. The trial court has only convicted and sentenced accused appellants Sonu alias Shashank Tiwari and Rahul Misra alias Chulbul Misra in the aforementioned sections.

18. Role assigned to accused Sonu alias Shashank Tiwari is of firing while role of co-accused Rahul Mishra was little different. He was at the jeep when the occurrence took place. After the occurrence he followed motorcycle in order to protect the accused who are driving motorcycle, hence his role was of common intention along with main accused Sonu alias Shashank Tiwari.

19. P.W.2 Umesh Chandra has given eye witness account of the incident. He has stated that at the time of incident he was going to his house on bicycle. He saw that the person, who was driving the motorcycle, snatched the bag from Suresh Chandra and pillion rider of motorcycle fired upon Suresh Chandra who fell down. This witness has correctly identified the Sonu alias Shashank Tiwari in identification parade as well as in court.

20. P.W.2 Umesh Chandra Pandey has also identified co accused Rahul Mishra alias Chulbul Misra. He has stated that one Commander Jeep was at the place of occurrence and followed the motorcycle and after the incident only the driver was driving the jeep, who was co-accused Rahul Mishra alias Chulbul Misra, who was known to him from earlier as he used to visit Misra Petrol Pump for taking fuel in the jeep.

21. PW-3 M.R. Premi was a member of the ruling party which has recovered an attachi from a well on the pointing out of the accused Rahul Misra alias Chulbul wherein accused had admitted that this is the same attachin which was robbed on 14.02.2000 after committing the murder of Suresh Chandra Misra. It was further stated by him that attachi was containing an amount of Rs.4,00,000/- . Lock was broken open after getting the amount out of the attachi. Bricks were kept in it and it was drowned in the well. PW-3 M.R. Premi has further stated that he was a member of the ruling party which have arrested Sonu alias Shashank Tiwari on 18.02.2000 at 12:30 PM and amount of Rs.1,40,000/- which was robbed were also recovered from the possession of the accused. Recovery memo was prepared on 23.02.2000. Police

party has recovered Rs.40,000/- on the pointing out of accused Sonu alias Shashank Tiwari. Recovery memo was prepared.

22. PW-4 S.I. Hemant Bhushan is also a witness of recovery, PW-5 Ashok Tripathi is scribe of the first information report and also eyewitness who has identified accused Rahul and Sonu in the jail. He has further identified Rahul before the trial court. PW-6 Inspector Pahunch Singh is the Investigating Officer of the case who filed the charge sheet against the accused. He is also witness of recovery.

23. PW-9 Ram Dev Gupta is Executive Magistrate who has conducted the identification parade of Rahul and Sonu alias Shashank in the jail wherein it is stated that the witnesses have correctly identified them. PW-9, PW-10 HCP Sarabjit Verma is a formal witness.

24. We have gone through the statement of the above prosecution witnesses wherein we found that the prosecution has successfully proved the charges levelled against the accused appellants. They have been correctly identified by the witnesses in the jail as well as in the trial court. No discrepancy or material contradiction was found by the learned trial court in the evidence of the witnesses. Recovery was also proved by the witnesses. Prosecution has successfully proved the charges against the accused appellants. Learned counsel for the accused appellants have also not pressed the bail on merit.

25. Now we shall take up the second limb of the argument which is on the point of the sentence.

26. Learned trial court has sentenced the accused for imprisonment for life under section 302 IPC coupled with other sentences.

27. Now the second limb of argument comes to our consideration. Before proceeding further in the matter, we would like to mention the pronouncement of Hon'ble the Apex Court in the case of **Sangeet and Another v. State of Haryana reported in (2013) 2 SCC 452** and has observed in paragraph no. 61 to 64 and 77.6 to 77.7 as under:-

"61. It appears to us that an exercise of power by the appropriate Government under sub-section (1) of Section 432 of the Cr.P.C. cannot be suo motu for the simple reason that this sub-section is only an enabling provision. The appropriate Government is enabled to "override" a judicially pronounced sentence, subject to the fulfilment of certain conditions. Those conditions are found either in the Jail Manual or in statutory rules. Sub-section (1) of Section 432 of the Cr.P.C. cannot be read to enable the appropriate Government to "further override" the judicial pronouncement over and above what is permitted by the Jail Manual or the statutory rules. The process of granting "additional" remission under this Section is set into motion in a case only through an application for remission by the convict or on his behalf. On such an application being made, the appropriate Government is

required to approach the presiding judge of the Court before or by which the conviction was made or confirmed to opine (with reasons) whether the application should be granted or refused. Thereafter, the appropriate Government may take a decision on the remission application and pass orders granting remission subject to some conditions, or refusing remission. Apart from anything else, this statutory procedure seems quite reasonable in as much as there is an application of mind to the issue of grant of remission. It also eliminates "discretionary" or en masse release of convicts on "festive" occasions since each release requires a case-by-case basis scrutiny.

62. It must be remembered in this context that it was held in **State of Haryana v. Mohinder Singh reported in (2000) 3 SCC 394** that the power of remission cannot be exercised arbitrarily. The decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 of the Cr.P.C. does provide this check on the possible misuse of power by the appropriate Government.

Substantive check on arbitrary remissions:

63. For exercising the power of remission to a life convict, the Cr.P.C. places not only a procedural check as mentioned above, but also a substantive check. This check is through Section 433-A of the Cr.P.C. which provides that when the remission of a sentence is granted in a capital offence, the convict must serve at least fourteen years of imprisonment. Of course, the requirement of a minimum of fourteen years incarceration may perhaps be relaxed in exercising power under Article 72 and Article 161 of the Constitution and Section 433 of the Cr.P.C. but, as mentioned above, we are presently not concerned with these provisions and say nothing in this regard, one way or the other.

64. Section 433-A of the Cr.P.C. reads as follows:-

433-A. Restriction on powers of remission or commutation in certain cases.-- Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

77.6 Remission can be granted under Section 432 of the Cr.P.C. in the case of a definite term of sentence. The power under this Section is available only for granting "additional" remission, that is, for a period over and above the remission granted or awarded to a convict under the Jail Manual or other statutory rules. If the term of sentence is indefinite (as in life imprisonment), the power under Section 432 of the Cr.P.C. can certainly be exercised but not on the basis that life imprisonment is an arbitrary or notional figure of twenty years of imprisonment.

77.7 Before actually exercising the power of remission under Section 432 of the Cr.P.C. the appropriate Government must obtain the opinion (with reasons) of the presiding judge of the convicting or confirming Court. Remissions can, therefore, be given only on a case-by-case basis and not in a wholesale manner."

28. Keeping in view the aforementioned pronouncement, we consider it appropriate that necessary direction may be issued for forwarding the proposal of remission of sentence of the appellants to the competent authority for its consideration.

29. Accordingly, these appeal are hereby dismissed. We hope and trust that Jail Superintendent shall immediately send the proposal for remission of sentence of appellants to the appropriate authority, which shall be considered expeditiously by the competent authority in accordance with law.

30. Office is directed to certify this order to the learned trial court to ensure compliance. Office is further directed to transmit the lower court record forthwith.