

**MoinuddIn Vs. State of U.P.**

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**Court :** Allahabad

**Decided On :** Jan-22-1998

**Reported in :** 1999CriLJ2496

**Judge :** S.K. Phaujdar and ;N.S. Gupta, JJ.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302 and 307; Code of Criminal Procedure (CrPC) - Sections 313

**Appeal No. :** Criminal Appeal No. 2628 of 1980

**Appellant :** Moinuddin

**Respondent :** State of U.P.

**Advocate for Def. :** R.N. Pandey, A.G.A.

**Advocate for Pet/Ap. :** V.C. Tiwari, ;U.K. Misra, ;A.D. Giri, ;A.R. Gupta and ;S.S. Tiwari, Advs.

**Judgement :**

1. All the above matters were heard together as all of them arose from the judgment and order dated 18-11-1980 passed in S.T. 106 of 1980 recorded by the IVth Additional Sessions Judge, Azamgarh. In the trial four persons, namely, Moinuddin, Ejaz Ahmad, Auddus and Ali Ahmad stood a charge under Section 302 and 302/34. I.P.C. and while Moinuddin was found guilty of an offence under

Section 302. I.P.C. and was sentenced to life imprisonment, the other three were acquitted of the charges. Moinudin preferred Criminal Appeal No. 2628 of 1980 against the order of his conviction and sentence. The State preferred the Government Appeal No. 638 of 1981 against the order of the acquittal of the other three accused persons and the complainant preferred the Criminal Revision No. 236 of 1981 for setting the order of the acquittal and for remanding the case to the trial Court. In fact the scope of this criminal revision was certainly narrow as in the revisional jurisdiction this Court could not have imposed a punishment even if it held the acquittal order to be bad in law. When the State has preferred the government appeal against acquittal, not only the propriety of the order of the acquittal was open to be decided, the Court had also the right to impose a sentence if it found the concerned respondents guilty of an offence. The revision application was really not contested and the order in the government appeal would cover the grievance of the complainant.

2. The prosecution case was initiated upon an F.I.R. lodged by Mohammad Ismail at Phoolpur out post of district Azamgarh on 5-1-80 at about 1.45 P.M. He named all the four accused persons in his F.I.R. for an incident which had allegedly taken place at about 12.30 P.M. on that very day. The place of the occurrence was village Tewnga, three kilometers away from the police out post. Mohammad Ismail stated in his F.I.R. that the accused Moinuddin was his neighbour and there was an old enmity between Moinuddin and Abdul Rasheed, son of the complainant. On 5-1 -80 the deceased Abdul Rasheed was taking his meal while sitting on a charpai on the verandah of their house the complainant and two other persons namely, Mumtaz and Fazlur Rahman were also there on another charpai and they were talking amongst themselves. The deceased was facing the other three persons. It was at about 12.30 in the afternoon. A grandson of the complainant namely Minhaz was taking his bath near a hand pump outside the house near this verandah. Moinuddin and the other three persons came there and immediately Moinuddin shot at Abdul Rasheed on instigation by the other three persons. After firing, they left the place almost immediately. The deceased jumped towards the assailant but fell down on the ground. He was carried back to the verandah where he breathed his last. The report was written by one Abdul Jais on the dictation of the complainant and investigation was taken up.

3. Postmortem examination of the deceased indicated that the postmortem examination was done at about 11.30 a.m. on 6-1-80 and rigor mortis was present in both upper and lower extremities. There as a gun shot wound of Entry 3 cm x 3 cm x chest cavity deep on the right side of chest 17 cm. below the right mid auxiliary line. Scorching, tattooing and blackening were present, on the skin surrounding the wound. The right side of the chest wall was punctured. The ninth rib on the right side was fractured just below the wound site. Four metallic bullets and one piece of cork were found on the left side of chest cavity. The pericardium and the heart were found punctured. Semi-digested food was also found in the stomach.

4. During investigation police had examined the complainant, the witnesses named in the F.I.R. and has also seized blood stained earth and another relevant materials including broken pieces of a plate from which the deceased was allegedly taking food.

5. In the charge that was framed against Moinuddin, there was an allegation that on 5-1-80 at about 12.30 p.m. at the verandah of the house of Haji Ismail of village Tewnga he along with Ejaz Ahmad, Ouddus and AH Ahmad, and the furtherance of their common intention, shot at Abdul Rasheed. For the order three there was the same charge for an offence under Section 302/ 34. I.P.C. All of them pleaded not guilty.

6. At the trial the prosecution had examined Mohammad Ismail as P.W. 1, Eazlur Rehman, as P.W. 2, Mumtaz Ahmad as P.W. 3, Minhaj Ahmad as P.W. 4, Constable Jalil Ahmad as P.W. 5, Sri Acchey Lal S.I. of Police as P.W. 6, Dr. Kalika Singh as P.W. 7 and Abdul Jaish as P.W. 8. The report of the chemical examiner who had opined presence of blood on certain materials that were sent to him, was also proved. During trial the accused persons were examined under Section 313, Cr.P.C. wherein also they look up a plea that they were involved only due to old enmity and they were innocent.

7. Out of the aforesaid witnesses P.W. 2 Fazlur Rahman and P.W. 3 Mumtaz Ahmad were declared hostile and the prosecution) was allowed to cross-examine them. Fazlur Rehman and Mumtaz Ahmad were both named in the F.i.R. as

persons present at spot at the lime of the incident. P.W. 2 Fazlur Rehman had stated that Abdul Rasheed was done to death on 5-1-80 at about 12.00 or 12.30 p.m.'He claimed that he was sitting in the verandah of Rasheed at the relevant time and so were the complainant Ismail and witness Mumtaz. He has stated that Manu alias Moinuddin came there and shot at Rasheed. There were certain other with Moinuddin but he could not identify the others. This witness claimed that Minraj was bathing at a hand pump lying east of the verandah when the incident had taken place. He further claimed that after being shot Rasheed jumped towards the handpump and fell down there. He could not say if any weapon was held by the associates of Moinuddin. On the point of absence of identification of the associates of Moinuddin he was declared hostile and his attention to his previous statement was drawn by the prosecution. He denied to have stated before the police the names of Ejaz, Ouddus and Ali Ahmad. After the incident he had gone to the market. At about 2.00 p.m. he was called to the spot by the police. The Sub-Inspector had asked him as to where was he sitting and where the others were sitting and how the accused came and fled away. It was suggested to him, which he denied, that after the incident some pieces of food were placed near his mouth. He has stated in further cross-examination that Moinuddin had not covered his face with any cloth but the gun was kept concealed under a wrapper (Chadar). He did not see taking out of the gun and only after the sound of gun fire he could see the gun. He admitted that Minhaj was the husband of his sister Salma.

8. P.W. 3 Mumtaz was also declared hostile. His evidence indicates that at about 8 or 9 a.m. when he was returning from his field he heard the sound of gun fire. He had seen Moinuddin running away. Moinuddin was having a chadar and this witness did not see carrying of any gun. His cross-examination by prosecution shows that he does not claim to have stated to the police the names of the other accused persons nor does claim to have seen the gun in the hands of Moinuddin. Then he had reached the house of Rasheed he had seen soap bubbles on the person of Minhaj. His cross-examination indicates that he had heard the sound of gun fire while he was 50 yards away from the house of Ismail and Rasheed. He had seen only one person running away. To a Court question he had stated that he had seen Minhaj, Fazrul Rehman and Haji Ismail there.

9. P.W. 1 is the complainant and the father of the deceased Abdul Rasheed. His statement indicates that the accused persons Ouddus, Ali Ahmad and Ejaz were brothers while Moinuddin was their nephew. Moinuddin's brother Parvez was killed and for that killing Abdul Rasheed and Minhaj and certain others were made accused persons. This was, according to the witness, a motive for Moinuddin to revenge the death of his brother. This witness described the situation of his house. The main door faced towards the east, beyond the door, there is a verandah flanked on the north and the south by two rooms, Beyond the verandah to the east, the land is laid with bricks. On this brick-laid land and to the north east of the verandah there is handpurnp. The house of the accused Moinuddin was towards the north from the house of Ismail. One Moin had lodged a case of theft against Moinuddin and others and Abdul Rasheed was a witness for the prosecution in that case. A day after the lodging of this report, accused Moinuddin had shot at Abdul Rasheed, (not the present incident) for which a case under Section 307. I.P.C. was under progress against Moinuddin. Out of this apprehension of danger to life from Moinuddin, Abdul Rasheed was sent to Bombay and he had come back only on 3-1-80 and within two days he was done to death. While describing the incident P.W. 1 stated that he along with Mumtaz and Fazlur were sitting on one charpai while Rasheed on another charpai and he was taking his meal, when the accused persons came from the north, Moinuddin being armed with gun and the others with lathis. While the other three exhorted Moinuddin, he shot at Rasheed. The deceased jumped towards them to a distance of 4 to 5 feet and fell down. He was brought to the verandah and he breathed his last there. Minhaz was bathing in the handpump. He had rubbed soap on his face. Dr. Madhu reached the spot through whom the report was written and was submitted to the police station. He was cross-examined in details and the relevant cross-examination related to the marriage of Minhaj with Salma sister of Fazlur Rehman. This witness however denied it, although P.W. 2 Fazlur Rehman accepted this relationship. He was cross-examined concerning his statement that Rasheed had come only a few days prior to the incident from Bombay. At one stage of the statement P.W. 1 stated that he and Rasheed were on the verandah, for 2 to 3 hours prior to the incident. But at a subsequent stage he admitted that Rasheed was in the field up to 12 noon. When asked about the reason for Mumtaz and Fazlur Rehman to be there, P. W. 1

stated that they were having casual talks with them regarding irrigation of fields. His cross-examination indicates that the three witnesses were facing Rasheed and the F.I.R. indicates that Rasheed was facing them. He further stated in cross-examination that immediately on looking to the accused persons he could apprehend that some untoward would happen. But he did not raise any hue and cry and the incident took place immediately on the arrival of the accused persons. Shooting was done by Moinuddin from a distance of 3 to 4 cobits. After the incident, Rasheed was not laid on the charpai rather he was laid on the floor of the verandah he was asked about certain words used in the F.I.R. which were beyond his comprehension.

P.W. 4 Minhaj Ahmad was bathing in the hand-pump in the house of Ismail while the deceased, Fazlur Rehman, Mumtaz and Ismail were gossiping on the verandah. He heard the sound of gun shot. He turned back to see Moinuddin holding a gun and Quddus, Ali Ahmad and Ejaz holding a lathi each. When the gun was fired he had applied soap on his face. He washed it and then turned towards the deceased and saw Moinuddin about 4 feet away from Rasheed. He saw Rasheed jumping towards them and he also saw the accused persons running away towards south. None of the accused persons had covered his face with chadar or cloth. Some cross-examination was made on to him on the point if he had seen and heard the instigation or exhortation and what was the sequence of the events. His cross-examination indicates that there was only one fire and he was bathing for about 4 minutes when the incident had taken place. His cross-examination indicates further that he was employed in a hotel run by Abdul Rasheed at Bombay and he had come to the village as he was to appear in a murder trial as an accused.

10. There are in all these four witnesses on the point of the alleged incident. It was argued by Sri Section 302. Tiwari in the appeal filed by Moinuddin that the prosecution case suffered from many loopholes which did not stand to reasons. It was contended that if the persons were chatting on the verandah, as indicated, and if the assailants came from the northern side, there could not have been an injury on the right side of the deceased. The position of the charpaies indicates that the charpai, on which Abdul Rasheed was sitting, was on the northern corner

of the verandah and the other charpai, where the witnesses were sitting, was to the south west of the aforesaid charpai. If Rasheed was facing the other three persons then his right hand should have been towards the north. The assailants came from the northern side. The deceased was engaged in taking meal in which lifting of the right hand is a normal posture and it may not, therefore, be stated that a shot under the right armpit was impossible. Moreover, it was argued by the learned State Counsel that when a man is taking meal and at the same time chatting with the other he may not always be in a stand still posture like a statute. In the absence of any cross-examination as to what was the posture of the deceased at the time of the shot, it may not be argued that an injury below the armpit was impossible.

11. It was further argued by Sri Tiwari that if a man suffered an injury, formally, he may be laid on a cot by his relative. There was no reason, according to him, to place him on verandah and, that too, with his face downwards. The witnesses, however, claimed that after the shot, the deceased jumped towards the assailants and fell down and was lifted back to the verandah and was kept with his face upwards. The witnesses have stated that in this posture only the police officer found the dead body. The police officer, however, found the dead body with the face downwards and the hand beneath the body. It was argued that the deceased might have been killed in that posture and none had witnessed the incident and only a known enemy was implicated. It was argued that there was no reason for stains of blood being there on the charpai. When, in an incident like the present one, a man who comes to help the injured normally becomes perplexed, his actions at that moment of tension may not always be explained by reasons. The police officer found the dead body with face downwards. It is quite possible that the dead body was kept in that position only in a hurry or it is also possible that the witnesses placed the injured with his face upwards but agony and pain made the deceased turn himself to face downwards. The situation of the dead body may not, therefore, affect the texture of the story if otherwise believed. The presence of blood stains on the charpai may also be explained easily as normally a gush of blood, would flow out and some blood may fall on the charpai at a close distance

12. The learned counsel submitted that no immediate motive was there for the incident and if at all Moinuddin had the intention to kill why he chose the house of Rasheed for the killing when ample opportunity was there to him to shoot him in the fields as admittedly, he had been to the field in the morning. It was further stated that for avenging the death of Parved. Moinuddin had a motive against Rasheed as also against Minhaj. There, was no reason why after killing Rasheed, Minhaj would be spared without any attempt on his life although he too was a helpless prey quite within the firing range. The evidence, however, indicates that the killing of Parvez was certainly the prime motive but there was a subsequent motive also for a case wherein Abdul Rasheed stood as a witness is a theft case against Moinuddin. There is evidence to the effect that Moinuddin had once attempted his murder and has assaulted Rasheed. The present incident took place within two days of his coming back from Bombay. The absence of motive may not be inferred. Rather motive is very much present although the same is not that important in view of the oral evidence on the point of the incident.

13. Of the four witnesses P. W. 1 is the maker of the F.I.R. It is true that he did not know the meaning of certain words used in the F.I.R. the F.I.R. was not written by him. It was written by a person apparently knowing the words necessary to draft an application. Although the F.I.R. was claimed to have been written word by word under his dictation it must mean that there was no addition so far description of the incident was concerned and it may not be inferred that every other word in the F.I.R. was the word of the complainant. If certain formal words were added like addressing the police officer or like making a prayer nor touching the incident, it may not be stated that the F.I.R. was not the statement of the complainant. The P.W. 1 has given the necessary details in the F.I.R. but carrying of arms by the three associates with Moinuddin was not stated therein. This must be deemed to be a vital omission and the prosecution may not be allowed to add any statement attributing carrying of arms by these persons. P.W. 1 has Stated how the incident had taken place, wherefrom shooting was done and where were the witnesses. He gets full support of his version from P.W. 2 who deviated from the prosecution story only on the question of identification of the associates of Moinuddin. P.W. 2 was certainly hostile but the defence has every opportunity of cross-examining him and it is never the law that the whole of the testimony of the hostile witness is to be

discarded. The evidence of P.W. 2 supports the prosecution version so far involvement of Moinuddin is concerned in killing Abdul Rasheed. P.W. 3 certainly deviates from the prosecution version but looking to the texture of the evidence of P.Ws. 1, 2 and 4, the statement of P.W; 3 may be discarded as prompted by some other motive P.W. 4 did not see the actual shooting but he turned his face towards the deceased and saw the, assailant immediately after the gun fire and saw Moinuddin carrying the gun and saw the deceased jumping and falling down. His version also lent support to the version of P.Ws. 1 and 2.

14. From the oral evidence on the points of the incident, as discussed, we get it without any shadow of doubt that it was Moinuddin who had shot at Abdul Rasheed while the deceased was sitting on a charpai in the verandah. Regarding participation of the other three, persons, the F.I.R. is silent about any arms being carried by them. P.W. 2, who is otherwise a witness supporting the prosecution story, failed to identify the associates of Moinuddin. There was no immediate motive for these three brothers to have joined Moinuddin simply for the purpose of exhortation. Moinuddin had already the gun with him. He had once in the past attempted on the life of Abdul Rasheed. No convincing reasons is there why he would require the presence of three unarmed associates simply for instigating him to open fire. In our view, the trial Court had rightly appreciated the evidence so far these three persons are concerned and had rightly come to a conclusion that their involvement in the matter was not proved.

15. The oral evidence against Moinuddin may now be seen against the other evidence on record. Blood stained-earth from the spot, blood-stained 'Sathi' from the charpai and blood-stained pieces of the broken plate were all sent for chemical examination and blood was found thereon. It is true that the sources of blood was not indicated in the report but the place is such where presence of blood from other source is negatived. The doctor P.W. 7 had found at 11.30 a.m. on 6-1 -80 that death was caused witfiin 24 hours and further confirmed that death could have taken place at 12.30 p.m. on 5-1-80. His cross-examination was aimed at placing the time of death ahead of 12.30 p.m. on the basis of semi-digested food found in the stomach. It is true that meal was being taken at 12.30 p.m. but there is no evidence of absence of taking any food in the morning and any argument to say

that the food taken by 12.30 p.m. could not be semi-digested immediately after taking it is of no consequence as there is no evidence of absence of taking food earlier.

16. The F.I.R. was lodged almost immediately and the Investigating Officer reached the spot by 2.00 p.m. Inquest was done, seizure was made and the witnesses were examined. It is true that the Investigating Officer does not say on whose identification the spot was seen, but the presence of the witnesses at the time of his visit sufficiently suggests that they had indicated the spot and at least what was found at the spot would be relevant if not what was gathered from the witnesses. P.W. 8 was the scribe of the F.I.R. He reached the village after hearing the incident and at the request of the complainant he wrote out the report. It was suggested to him that the support was made after deliberations. The promptitude of the F.I.R. goes against a theory of deliberations.

17. From what has been discussed above, it is found that the case against Moinuddin has been imply proved not only by P.W. 1 but also by P.Ws. 2 and 4 and the theory of murder got support from the statement of the Investigating Officer and the doctor and the chemical examiners report. The conviction of Moinuddin under Section 302. I.P.C. and the sentence thereon may not, therefore, be interfered with.

18. We have already held in the earlier paragraphs of this judgment that evidence against Ejaz Ahmad, Ouddus, and Ali Ahmad is not convincing so far their participation and motive is concerned. In the appeal against acquittal of these persons the State had to show perversity in the approach of the trial Court or in appreciating the evidence. There is nothing on record to infer that the trial Court had failed to consider any evidence against these persons. It was contended that when on some evidence one could be convicted there was no reason-to take a different view for the others. We have given our reasons for accepting the opinion of the trial Judge, so far these three persons are concerned and we found no reason to interfere in this finding of the trial Judge.

19. In the result Criminal Appeal No. 2628 of 1980, Government Appeal No. 638 of 1981 and Criminal Revision No. 236 of 1981 all stand dismissed. The order of the

trial Judge in convicting and sentencing Moinuddin and in acquitting Ejaz, Ouddus and Ali Ahmad is confirmed. Moinuddin is on bail. He is to surrender before the C.J.M. Azamgarh, within 15 days from today failing which the C.J.M. will issue all processes against him to compel his attendance before him to serve out the imprisonment. The C.J.M. will also take necessary steps to compel the sureties of Moinuddin and to produce him in Court.

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