

Nasim Alias Kallu Vs. State of U.P.

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Court : Allahabad

Decided On : Dec-06-1999

Reported in : 2000CriLJ3329

Judge : R.R.K. Trivedi and ;M.C. Jain, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302 and 328

Appeal No. : Cri. Appeal No. 1386 of 1980

Appellant : Nasim Alias Kallu

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : M.A. Zaidi, ;Atul Mishra and ;P.N. Misra, Advs.

Disposition : Appeal allowed

Judgement :

M.C. Jain, J.

1. This appeal is directed by the appellant Nasim alias Kallu against the judgment and order dated 24-6-1980 passed by Sri P. Chandra, the then Sessions Judge, Bijnor in Sessions Trial No. 148 of 1978. He has been convicted under Section 302, I.P.C. and sentenced to life imprisonment.

2. The appellant along with four others had been put on trial. His other four co-accused were acquitted but he was convicted and sentenced as stated above.
3. The incident took place on 15-3-1978 at 7 p.m. in Mohalla Jabtaganj, P.S. Nazibabad, District Bijnor and the report was made on 16-3-1978 at 4.45 a.m. by PW 1 Shamim. The prosecution case, as per the First Information Report and the evidence adduced in Court, in its broad essentials may be set forth. The accused used to carry on business of dealing with dead animals. They used to take Theka of jungles to collect dead animals. In the year 1977-78 the accused Mobin took Theka of certain jungle for Rs. 8,000/- and he entered into partnership with PW 1 Shamim by taking Rs. 10,000/- from him as his investment in the business. Rs. 8,000/- had been given to him by Shamim towards partnership of the Theka and Rs. 2000 for partnership in other works dealing with dead bodies of animals collected from other sources. It was agreed that they would divide the profits half and half. This partnership continued smoothly for 4 to 5 months. Later on the accused Mobin started doing partnership transactions secretly and refused to share the profits with PW 1 Shamim. On coming to know about it, PW 1 Shamim asked him either to give his share of the profit in transaction conducted clandestinely or to terminate the partnership and to return his capital of Rs. 10,000. It was disliked by the accused who threatened him about 7-8 days before the incident that not a single pie of his investment would be returned and if he raised his voice, he and his family would be finished off. This was said to be the background of the incident.
4. On the day of the occurrence at about 7 p.m. PW 1 Shamim and his uncle PW 2 Abdul Shami were sitting in their Sahan on a cot. At a distance of 5-6 paces towards the southern side Dal (pulses) was being cooked on a Chulha in an earthen pot. The pot was covered by an aluminum plate. They were engrossed in conversation. The accused-appellant Nasim alias Kallu came with a Chilam in his left hand. His right hand's fist was closed. He sat near the Chulha and placed his Chilam on the ground. The prosecution case is that he put something inside the cooking pot which was on fire by removing the lid. The attention of PW 1 Shamim and PW 2 Abdul Shami was drawn when there was sound produced by the replacing of plate on cooking pot. They saw at that time that palm of the right hand

of the accuse-appellant was open and it was no longer closed into a fist; The prosecution case is that right fist of the accused-appellant presumably contained poison which he dropped in the cooking Dal after removing the lid while filling his Chilam from the burning Chulha as a pretext. When the attention of PW 1 Shamim and PW 2 Abdul Shami was drawn by the sound of replacement of the plate from the cooking pot by the accused-appellant, they had asked him also as to what was he doing and he had replied that he was just seeing as to what was cooking inside the pot. After re-putting the plate on the cooking pot and filling his Chilam with fire, the accused-appellant went away. At that time the remaining four accused were standing in their Gher waiting for Nasim alias Kallu. Their Gher was in the southern side across the road.

5. In the night, all the members of the family excepting PW 1 Shamim took the food with Dal cooked in that pot. Just after half an hour all the six members of family of Shamim started getting ill. The meals had been taken by them at about 8.30 p.m. When the condition did not improve, he took all the six ailing members of the family to the hospital at Nazibabad. They were all vomiting and purging. Dehydration had taken in the bodies of all of them. Blood pressure was unrecordably low. Pulse of each of them was very weak. Their tongues and nails had turned blue. They were suffering severe stomachache, PW 8 Dr. Surendra Pal Singh attended the patients in the hospital. He stated that they were all having symptoms of administration of poison by mouth and the poison should have been a metallic compound. There was possibility of arsenic poisoning.

6. Km. Zarina aged about 16 years died at 2.20 a.m. Nazakat a boy of nine years died at 2.36 a.m. Km. Naima aged about 4 years died at 2.45 a.m. Smt Hashmi died at 4 a.m. and Smt. Allah Bandi died at 7.30 a.m. Km. Zahima aged about 8 years survived till 24-3-1978 and died that day at 8.50 p.m. Zarina, Naima and Zahima were the sisters of PW 1 Shamim, Nazakat was his brother, Smt. Hashmi was his mother and Smt. Allah Bandi was his grandmother. The doctor collected vomiting matter of all the six persons in one bottle, sealed it and send to P.S. Nazibabad. PW 6 PW 3 Dr. D.N. Prasad performed autopsy on the dead bodies of Smt. Hashmi, Km. Zarina and Nazakat on 17-3-1978. There were no external marks of injuries on their bodies. Viscera of each of them was preserved. PW 9 Dr.

Prabodh Kumar performed autopsy on the dead bodies of Smt. Allah Bandi and Km. Naima on 17-3-1978. There were no injuries on their dead bodies. Viscera of each of them was preserved. PW 4 Dr. R.K. Nigam performed autopsy on the dead body of Km. Zahima on 25-3-1978 at 12.30 pm. There was no injury on the body. Viscera was preserved. After the four victims had died PW 1 Shamim got prepared the First Information Report and took the same to the Police Station where he lodged it at 4.45 a.m. PW 12 S. I. Somdutt Sharma of Police Station Nazibabad had earlier reached the hospital on receipt of the memo therefrom. The investigation followed. The Investigating Officer inspected the spot, recorded statements of the witnesses, prepared a site plan and took into possession the cooking pot which was still there on the Chulha covered with a plate. It was the Dal cooked in that pot which was conspired by all the unfortunate victims. There was some Dal still present in the pot which too he took in possession and sealed. He collected the preserved vomits of the victims and their viscera which together with the cooking pot and its contents were sent the chemical examiner who found arsenic poison in the Viscera of all the deceased except Km. Zahima. He found arsenic poison in the vomits of Km. Zahima and the other five deceased. Arsenic poison was also found in the cooked Dal recovered from the spot by the Investigating Officer. After completion of the investigation charge sheet was laid against the accused-appellant and four others, namely, Yamin, Mobin, Zamir and Yasin, Yamin, Mobin and Zamir are brothers whereas Yasin and Nasim alias Kallu appellant are the sons of Yamin. The accused pleaded not guilty and denied the partnership with PW 1 Shamim and the allied allegations of the prosecution. According to them, they had been falsely implicated.

7. Material witnesses examined by the prosecution are informant PW 1 Shamim, his uncle PW 2 Abdul Shami, PW 3, Sharif, PW 5 Mohd. Hanif, PW 7 Abdul Aziz, PW 10 Shafiq Ahmad and PW 11 Rafiq Ahmad, apart from doctors and formal witnesses including the Investigating Officer. PW 3 Sharif (son of Mohd. Shafi) had a Baithak adjoining the Gher of the accused and in the evening of the occurrence he had seen all the accused standing in the Gher and heard them saying that Shamim was raising dispute about their Theka. PW 7 Abdul Aziz stated that about 8 days before the occurrence of poisoning at about 6 pm he was sitting at the Baithak of Shafi and all the five accused were sitting in their Gher. PW 1 Shamim

came and asked the accused either to return Rs. 10,000/- or to give his share of profits in the Theka. The accused refused either of the two things and threatened Shamim and offered threats to him. PW 10 Shafiq Ahmad turned hostile. PW 11 Rafiq Ahmad stated that in his presence partnership had been settled between PW 1 Shamim and five accused persons and Shamim had given Rs. 10,000/- to the accused Mobin (acquitted).

8. The learned Sessions Judge did not find it to be proved that the other co-accused (acquitted) had entered into a criminal conspiracy with the present accused-appellant for committing the crime. He held that the evidence only indicated suspicion against them which could not be deemed to be a substitute of proof. He accordingly acquitted them. However, he found the case to be proved beyond reasonable doubt as against the present appellant that it was he and none else, who had put the arsenic poison in the cooking Dal that evening, after consuming which six innocent lives were cut short. He accordingly found him to be guilty for the offences punishable under Section 302, I.P.C. as well as under Section 328, I.P.C. Since he was convicted for the major offence of murder, no separate conviction was recorded under Section 328, I.P.C. To come to the point, the learned Sessions Judge acquitted the four co-accused but convicted and sentenced the present accused-appellant under Section 302, I.P.C. for undergoing life imprisonment. Aggrieved by the judgment of the learned Sessions Judge, the appellant Nasim alias Kallu has preferred this appeal.

9. We have heard Sri P.N. Mishra learned counsel for the appellant in support of the appeal and the learned A.G.O. from the side of the State in opposition of the appeal; We have also carefully gone through the evidence and material on record. The argument of the learned counsel for the appellant is that the prosecution evidence did not supply any firm basis for the conviction of the accused-appellant. It has been urged that the learned Sessions Judge has convicted the accused-appellant merely on suspicion, overshadowed by the big magnitude of the incident in which six persons lost their lives.

10. On a careful consideration, we are of the opinion that fate of the accused-appellant depends upon three factors. (1) the motive for the commission of this

crime, (2) exclusive opportunity to the accused appellant to pour poison in the cooking pot: Of the victims and (3) the reliability of PW 1 Shamim informant and PW 2 Abdul Shami who are the witnesses as to the pouring of the arsenic poison by the accused-appellant in the cooking pot as per the case of the prosecution. We intend to deal with these three aspects in the succeeding discussion one by one.

11. To begin with, motive is not a sine qua non for the commission of a crime, but at times it satisfies the judicial mind as to who the author of the crime was. The motive assigned by the prosecution against the accused-appellant for the commission of this crime of unusually big dimension taking the lives of six persons is too weak and tenuous. If PW 1 Shamim had entered into a partnership with the accused; in the business of dead animals and had paid Rs. 10,000/- as his share of the investment and the latter had turned dishonest, that could not provide sufficient motive to the accused to indulge in a crime of such a big magnitude. If what the prosecution 'alleges about the motive is taken to be on its face value, then the accused were having an upper edge. They had behaved in the manner they liked in the partnership business deceiving PW 1 Shamim by turning dishonest and refusing either to return his invested money or to give him his share in the partnership. The own admission of PW 1 Shamim is that after 15-20 days of his making over the money to the accused, he was paid Rs. 100/- as his share of profit and for the last time he was paid Rs. 250/- towards his share. In the intervening period also he was paid 4-5 times. In total, Rs. 1300/- had been paid to him. The partnership allegedly worked well for about 4 or 5 months. It is not the case of the prosecution that some legal writing had been executed in respect of partnership. What we mean to drive home is that PW 1 Shamim was not in a position to harm the accused over the partnership issue. He had not done anything to incur the displeasure of the accused after they had declined either to give him share in the partnership business or to return his invested money. Judged in this right perspective, there could hardly be any motive on the part of the accused-appellant to have taken it into his head to pour poison in the cooking pot of the family of the informant PW 1 Shamim so as to wipe off the entire family. The money involved was also not a big sum being only Rs. 10,000/-. It sounds to be against natural and probable conduct of an ordinary man to be driven to commit a

big crime like the present one wiping out an entire family.

12. The things may be judged yet from another angle. If the two sides had come to be on logger heads over the partnership issue and the accused had offered threats earlier, then the accused-appellant could not have gone to the Gher of the complainant to fill his Chilam with fire from his Chulha. It could be so only if the relations between the two sides were cordial and normal. In our opinion, the learned Sessions Judge lightly brushed aside this crucial aspect of the matter.

13. There is one more angle which should be taken note of in this regard. If the accused-appellant was of such a depraved character as to have taken a decision to wipe off the entire family of the complainant over a minor money transaction of Rs. 10,000/- only, then he would have done so at a time when no witness was around. It should be pointed out that as per the prosecution case the Sahan of the complainant was an open one in a corner of which there was a Chulha. The food used to be cooked there always. It was just by chance that PW 1 Shamim and PW 2 Abdul Shami were there engrossed in conversation. Indeed, the accused-appellant could avail of some other opportunity to pour poison in the cooking pot when none was around. It has to be kept in mind that the culprit of an offence like the present one would ordinarily act clandestinely. It is illogical that the accused-appellant would approach the Chulha of the complainant with Chilam in one hand and another closed fist, presumably containing the poison, in the presence of PW 1 Shamim and PW 2 Abdul Shami sitting nearby in the Sahan when there could be every possibility of their watching his activities and objecting to the same particularly when their relations had gone strained. Therefore, our view tuned by the evidence on record and the attending circumstances is that there was hardly any motive on the part of the accused-appellant to indulge in this crime.

14. Secondly, it does not appear that exclusive opportunity was there for the accused-appellant alone to pour arsenic poison in the cooking pot. It should be recalled that the two sides were dealing in dead animals. It has also come in the evidence of P.W. 1 Shamim that he had once been prosecuted for administering poison to certain cattle. Keeping this view, the possibility could not be ruled out of his being in possession of arsenic poison at some point of time. Dal was being

prepared in the open Sahan. The possibility cannot be ruled out that mistaking as salt arsenic poison might have been put accidentally by some child, lady or other family member. What he stated in Paragraph 25 of his statement is also noticable that 'HAMARE YAHAN TIKWA NAAM KA KOI NAUKAR NAHI THA. TIKWA VALD LATIF HAMARE PAROS MEIN RAHATE HAIN. USKA CHALLAN JANWARON KO ZAHAR DENE MEIN HUATHA.' Considering all the evidence, attending circumstances and the related background it cannot be held that the accused-appellant alone had the exclusive opportunity of pouring arsenic acid in the cooking pot in the Sahan of the complainant where Dal was in the process of cooking in the open Sahan in the presence of P.W. 1 Sahmim and P.W. 2 Abdul Shami.

15. Accidental cases of poisoning by arsenic sometimes occur from its admixture with drink or articles of food. There have been instances where white arsenic has been mistaken for baking powder, soda, sugar, salt or flour and has caused mass accidental poisoning.

16. Thirdly, the testimony of P.W. 1 Shamim and his uncle P.W. 2 Abdul Shami does not stand the test of scrutiny. It is to be noted that both of them are closely related persons. It is possible that their minds have simply worked on suspicion against the accused-appellant as one of them P.W. 1 Shamim had a dispute with one of them Mobin over partnership business. There are reasons as to why the testimony of these two witnesses is unworthy of belief as to the main story of the prosecution that the accused-appellant came with a Chulam in his left hand with his right fist closed, sat near the Chulha, removed the lid of the cooking pot, peeped into it, answered to their question that he was simply seeing as to what was cooking and at that time his closed fist was in open state and further that P.W. 1 Shamim had followed him upto the door and then returned. The fact that he had gone with him upto the door means that he as well as P.W. 2. Abdul Shami had become suspicious of what he had done near the Chulha. In that eventuality they would have been alarmed and put on their guard particularly in view of the earlier threats offered by the accused to exterminate the entire family. They would have naturally caused the cooking pot to be emptied to be on the safer side against any foul act of their enemy-accused-appellant. It was more so required of them

because they had allegedly seen that his right fist was closed when he came near the Chulha and the same was in open state when they had questioned him while replacing the lid over the cooking pot getting the reply that he was just watching as to what was cooking. This is in addition to what we have related while dealing with the aspect of the motive above, as to the difficulty in believing the activities imputed by P.W. 1 Shamim and P.W. 2 Abdul Shami to the accused-appellant Nasim alias Kallu as regards the manner of pouring arsenic poison in the cooking pot.

17. There is yet another reason which renders the presence of P.W. 1 Shamim to be doubtful. It is to be noted that all other members of the family consumed the Dal cooked in that pot while taking the dinner in the night excepting himself. The excuse put forth by him that he was not hungry and, therefore, he had not partaken the dinner, does not appeal to logic. It was the month of March and all other members of the family had taken their dinner with that Dal but not him. Ordinarily, he would have also taken his dinner with that Dal. The possibility cannot be ruled out that the arsenic poison got mixed in the Dal accidentally at the hands of someone else, may be a family member and all the members of the family who were present and partook the dinner got ill. P.W. 1 Shamim being not present did not take the dinner with that Dal and that was the reason for his being not the victim of the fatal consequences that defell the other members. He came to be there subsequently and managed to take all the ailing members of the family to the hospital and lodged the First Information Report too.

18. In the result, on scrutinizing the evidence and the attending circumstances in judicial manner cautiously, we find that the case against the accused-appellant was based on suspicion only and it could not be deemed to be proved to the hilt by cogent and convincing evidence which is required according to judicial standard to hold someone to be guilty. It would be a matter of regret for everybody including ourselves that as many as six innocent persons lost their lives in this incident, but as we have indicated the possibility of its being an accident cannot be ruled out. The shocking consequences alone produced by the incident cannot induce an instinctive reaction against dispassionate examination of the facts and evidence.

19. For the foregoing discussion, we find that the conviction and sentence passed against the accused-appellant cannot be sustained. We allow this appeal and set aside the conviction and sentence passed by the learned Sessions Judge against the accused-appellant Nasim alias Kallu. He is on bail. He need not surrender. His personal bond and bail bonds are cancelled and sureties discharged.

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