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Court : Allahabad

Decided On : Aug-17-2004

Reported in : 2005CriLJ3044

Judge : M.C. Jain and ;K.K. Misra, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34 and 302

Appeal No. : Criminal Appeal No. 383 of 1981

Appellant : MoinuddIn Alias Phakkar and anr. (In Jail)

Respondent : State of U.P.

Advocate for Def. : A.K. Dwivedi, AGA

Advocate for Pet/Ap. : V.P. Srivastava, ;Apul Misra, ;Amicus Curiae, ;B.N. Singh, ;K.S. Tiwari and ;K.K. Sharma, Advs.

Disposition : Appeal allowed

Judgement :

K.K. Misra, J.

1. This Criminal Appeal arises out of the judgment and order dated 10-2-1981, passed by Shri D.N. Sharma, the then Illrd Additional District and Session Judge, Varanasi in Sessions Trial No. 22 of 1980 State v. Moinuddin alias Phakkar,

convicting the appellants Moinuddin alias Phakkar and Qamruddin under and sentencing them to undergo Imprisonment for life.

2. Briefly stated, the facts of the case as narrated in the FIR are that the deceased Wahiduddin, on 24-9-1979 at 7-30 p.m. after taking his dinner, went out from the house. He did not return till 10.00 p.m. His father Hazi Walid Haq P.W. 1 started searching him. But he could not find his son Wahiduddin. He thought that he might have gone to see the circus and would come back at about 1 o'clock in the night. With this impression, he slept. In the morning, when he awoke, he found that the deceased Wahiduddin had not returned. Then he started searching for his son. The children of the Mohalla told him that his son was lying dead towards south of Chhoti Idgah near Shivrampur Police outpost. He went there and saw that his son was lying dead. About three days before this incident, the wife of the complainant had informed him that the accused Moinuddin alias Phakkar, Kamuruddin alias Kammu Kallu and Ratan (rickshaw puller), by befooling his son, had prevailed upon him to take her gold ornaments from the house. The demand of the ornaments from them by his son had given rise to enmity between the accused and his son. It was also stated in the FIR that in the night of the incident, many persons of the Mohalla had seen the son of the complainant with the accused. As per the FIR, the aforesaid persons had murdered his son.

3. On the FIR of the complainant, a case was registered. The Investigation of the case was entrusted to P.W. 17 Ram Dulare Tewari. The Investigating Officer recorded the statement of the complainant on the same day at the Police Station. Thereafter, he went to the spot where the dead body of Wahiduddin was lying on the road towards the south of Chhoti Idgah. The Investigating Officer held Inquest on the dead body. He prepared the inquest report. The dead body was sealed and along with necessary papers was sent to the Mortuary through constable Rajendra Prasad P.W. 2 and constable Atma Ram for post mortem examination. The Investigating Officer inspected the place of occurrence and prepared site plan. He also took into possession the samples of the blood stained and plain earth from the place of occurrence. The Investigating Officer recovered one pair of chappal and one lid of liquor bottle also from the spot.

4. P.W. 14 Dr. Ram Vilas Dubey conducted the post-mortem examination on the dead body of Wahiduddin. The age of the deceased was 16 years. No apparent injury was found on the dead body of the deceased. Therefore, the viscera was preserved and sent for chemical examination. The report of Chemical Examiner indicates that viscera contained alcohol and sodium cyanide. It is suggestive of the fact that poisoning was the cause of death.

5. The Investigating Officer arrested Moinuddin and interrogated him. On his pointing out, the Investigating Officer recovered 'Potash' (poison) kept in a piece of paper from inside Chhoti Idgah beneath a brick. On 6-10-1979, the Investigating Officer arrested another accused, namely, Qamruddin and interrogated him. On the pointing out of the accused Qamruddin, one gold ear stud was recovered from the north western corner of the room of his house by digging the floor of the room. It was subjected to identification. The first informant, his wife and Abdul Hasan correctly identified it.

6. The accused appellants denied the prosecution allegations and claimed to be tried. The accused appellants in their statements stated that they had been falsely implicated in the case due to enmity but they did not adduce any evidence in defence.

7. The prosecution examined 17 witnesses to prove its case. The case was of Circumstantial nature.

The trial Court found the case of the prosecution against the accused appellants as proved and convicted and sentenced them as stated above. But the learned trial Court acquitted the accused Kallu and Ratan Lal of the same charges levelled against them, holding that the circumstances found proved against them were insufficient to bring home the charge against them and gave them benefit of doubt.

8. We have heard Sri Apul Misra who was appointed as amicus curiae to argue the appeal on behalf of appellant Moinuddin. No one appeared on behalf of appellant No. 2 Qamruddin alias Kammu even on the revision of list although on record he is represented by Sri. B.N. Singh, Advocate. We have also heard Sri Ashok Dwivedi, learned A.G.A. for the State.

9. P.W. 1 Wali Haq is the father of the deceased and first informant of the case. He repeated the story mentioned in the FIR. He further deposed that about 3 days before the incident, his wife P.W. 13 Smt. Kamrulnisha had told him that accused persons had taken her ornaments by befooling the deceased. He admitted in his evidence that the deceased used to go to see movie without his knowledge and used to return in the morning. He could not name the shopkeepers from whom he had inquired in the night about his son. He further deposed that after coming to know of the loss of ornaments, neither he scolded his deceased son nor went to the accused persons to inquire about the ornaments. He also omitted to make reference of this fact to the Investigating Officer. It has also come in his evidence that present accused were also involved in a case of murder of his brother but they were acquitted.

10. P.W. 3 Mumtaz Ahmad deposed in his evidence that about 6-1/2 months ago in the evening he was sitting in Shastri Park with a friend. At about 7.15 p.m. 8 p.m. deceased Wahiduddin came there. He enquired about the welfare of the deceased. A couple of minutes later, accused Moinuddin alias Phakkar came there and called Wahiduddin. The deceased then went to accused Moinuddin and they had some talks and thereafter both of them went out of the park. They hired a rickshaw on which they proceeded towards the out-post of Shivrampur. He deposed that four persons in all were sitting in the rickshaw, besides the rickshaw puller. He further stated that next day at the tea shop, he learnt about a dead body lying near Idgah. He went there and found that the dead body was of Wahiduddin, the deceased of this case. There, he met Abul Hasan and told him about the events of the preceding night.

11. P.W. 5 Hazi Bafati deposed that about 6-1/2 months ago at about 8.15 p.m. he was returning from chowk. He stopped at the shop of Algu situate by the side of Chhoti Idgah. He chewed betel at the shop and thereafter proceeded towards his house along the road running adjacent to Chhoti Idgah towards south. After he had walked up to a distance of 10 or 15 paces and came near the gate of Idgah, he heard voices coming from inside Idgah. On looking towards Idgah, he noticed the presence of four or five persons there who were engaged in conversation. At that time a mercury rod was glowing at lamp-post which was at a little distance

from the corner of Idgah. He stepped back and called Algu. When Algu came, both of them stood on a culvert and from there they made a call as to who were there. When none responded, they again called around as to who were there and what were they doing. It was then that a boy came near the boundary wall of Idgah. He was accused Moinuddin whom he recognized as he knew him from before. He enquired from accused Moinuddin as to who were there and what were they doing. The accused Moinuddin told him that Kammu, Kallu, Wahiduddin and Ratan were there and all of them were sitting there and engaged in conversation. He scolded Moinuddin and told him that it was not a place for indulging in gossip. Then accused Moinuddin replied that all of them would be leaving the place. He then withdrew. He also saw a rickshaw parked at a distance of 15 paces from the culvert and when he enquired as to whom this rickshaw belonged, it was replied aloud from inside Idgah that it was their rickshaw and that they were leaving. He then saw two or three persons getting up and thereafter he went away. Next day, he learnt about the death of Wahiduddin. He went near the dead body where he found Abdul Hasan present whom he told about the events of the preceding night.

12. P.W. 6 Mohd. Hanif deposed that at 7.30 p.m. he came to Chauki of Shivrampur for strolling. He then took tea at a shop. After taking tea, he was going towards Shastri Park. He saw the accused persons along with the deceased Wahiduddin. They were on a rickshaw and were going towards Maldaniya. When he inquired from them, accused Moinuddin replied that they were going to see circus. There was light on the road. On the next day, he came to know that a dead body was lying near Idgah. He went towards Idgah and saw that dead body was of the deceased Wahiduddin. He told the uncle of deceased the story of last night. He further deposed that he was suffering from jaundice and used to walk regularly. He further deposed that he had seen the accused and the deceased in the mercury light. On the next day, when he went at the place of occurrence, about five hundred persons had assembled there. When he reached near the dead body, he saw that there were bloodstains on the face of the deceased and there was no apparent injury on his dead body.

13. P.W. 13 Smt. Kamrulnisha deposed that her son Wahiduddin after taking meal at 7.30 p.m. went out of house. She waited till 10.00 p.m. in the night but he did

not return. The father of the deceased went to find him out. She was not aware about the loss of her ornaments kept in a box. She came in Court to identify the ornaments. She identified her ear stud. One ear stud of the pair was with her. She had seen that ear stud 6/7 days before. Her son could have taken away the other ear stud, she found that her other gold ornaments were also missing. She came to know about the loss of ornaments when she was about to go in a marriage party. She searched for the key of the box but did not find the same. She broke the lock of the box and saw that all the gold ornaments were missing. When her son came back, she asked about the ornaments. In reply, her son told her that the aforesaid ornaments had been taken by the accused persons and the same would be returned after 4 or 5 days. When she pressed her son for the ornaments, he requested not to disclose it to his father, otherwise he would run away from the house. She, therefore, did not disclose this to any body.

14. It is apparent that there is no direct evidence of this crime and the case is of circumstantial evidence. The prosecution has relied upon the following circumstances :

1. The accused Ratan Lal on 24-9-1979 at about 4.00 p.m. hired Rickshaw No. 6610 from P.W. 4 Ashok Kumar and that at that time he was accompanied by accused Moinuddin.

2. The deceased was last seen alive in the company of the accused at three different places viz. Shastri Park, on the road running close to the park and inside Chhoti Idgah, a couple of hours before his death.

3. Recovery of the powder at the instance of accused Moinuddin in consequence of the disclosure made by him while in police custody which was described as 'potash', but as a result of analysis by the Chemical Examiner was found to be sodium cyanide.

4. Recovery of one (ear stud) belonging to Smt. Kamrulnisha from the possession of the accused Qamruddin on his pointing out.

15. Keeping aside other aspects, this being a case of poisoning, the following ingredients are required to be established by the prosecution to sustain conviction of the accused appellants :--

1. that the death took place by poisoning;
2. that the accused had poison in his/ their possession; and
3. that the accused had an opportunity to administer the poison.

16. It is not in dispute that the death of deceased was caused by poisoning by sodium cyanide. As regards the second ingredient, we find that the prosecution has not been able to bring material on record to show that the accused persons had poison in their possession. P.W. 15 Bismilla is the witness of the recovery of poison at the pointing out of accused Moinuddin while in police custody. P.W. 15 Bismilla deposed that one Puria of poison was recovered at the instance of accused Moinuddin kept, beneath a brick near a Neem tree in Idgah. He further deposed that the Investigating Officer sealed the poison in a Dibiya. The same was found by the Chemical Analyst to be sodium cyanide. The place from where Puria of powder at the pointing out of accused Moinuddin was recovered was not a solitary place. It was a place situate in Idgah where other persons also had access. Otherwise also, the poison having been administered and the crime having been accomplished, there was no use of keeping the Puria below a brick. The accused could have thrown it away. It is not the case of the prosecution that the accused were habitually involved in cases of poisoning. In these circumstances, the recovery of poison at the instance of accused Moinuddin becomes doubtful. The prosecution has also not been able to prove the source from which the accused persons got poison. Thus, we find that the prosecution could not establish the second ingredient mentioned above. The circumstance that the deceased was last seen alive in the company of the accused at three different places viz. Shastri Park, on the road running close to the park and inside Chhoti Idgah, a couple of hours before the death of the deceased is not sufficient to establish the guilt of the accused-appellants that they, in furtherance of their common intention committed the murder of the deceased by poisoning.

17. Further, when all the four accused had equal opportunity to administer poison to the deceased, the trial Court erred in convicting the present accused appellants while acquitting the other two accused persons, namely Ratan Lal and Kallu on the same set of circumstances. There is no evidence on record to specifically prove that the present accused appellants exclusively had the opportunity to administer poison to the deceased. In these circumstances, when two of the accused persons had been acquitted by the trial Court giving them benefit of doubt, the conviction of the present appellants on same evidence was not justified. Moreover, we find that the motive alleged in the present case is very weak. It is also very surprising that after coming to know of the loss of ornaments, P.W. 1 Haji Wali Haq, father of the deceased, neither scolded his deceased son nor went to the accused persons to inquire about the ornaments. The alleged recovery of ear stud alone, which the accused appellant Qamaruddin denied, was insufficient to fix up the culpability on his head.

18. In view of the above discussion, we find that the prosecution has not been able to prove the alleged guilt of the two accused appellants beyond all reasonable doubt. They, too, deserved to be acquitted. We would allow this appeal.

19. In the result, the appeal is allowed and the order of conviction and sentence passed against the accused appellants is set aside. They are already on bail.

Sri Apul Misra, Advocate who argued the appeal, as amicus curiae shall get Rs. 1000/- as his fee.

Judgment be certified to the lower Court.

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