

As Mohammad Vs. the State

As Mohammad Vs. the State

SooperKanoon Citation : sooperkanoon.com/761988

Court : Rajasthan

Decided On : Oct-01-1975

Reported in : 1975WLN(UC)436

Judge : C.M. Lodha and; P.D. Kudal, JJ.

Appeal No. : D.B. Criminal Jail Appeal No. 656 of 1971

Appellant : As Mohammad

Respondent : The State

Disposition : Appeal allowed

Judgement :

P.D. Kudal, J.

1. The accused-appellant as Mohammed has filed this appeal from jail against the judgment of the learned Addl. Sessions Judge, Bharatpur dated 28-4-1971, whereby the accused was convicted under Section 302, IPC, and sentenced to imprisonment for life.

2. The facts of the case, in brief, are that the deceased Gyani had two sons, namely, As Mohammed and Nihala. As Mohammad was aged about 30 years, and Nihala was aged about 20 years on the date of occurrence As Mohammad was married to Mst. Kashmiri. The prosecution case is that As Mohammad was

impotent and not worthy of his wife. The parents of Mst. Kashmiri after obtaining divorce performed 'nikka' of Kashmiti with Nihala As Mohammad used to quarrel with his father Gyani, and used to impress upon him the necessity and urgency of the treatment and cure of his impotency. It is alleged that on the night intervening 17th and 18th May, 1970, at about 10 p.m , when Gyani was at the 'badi' of Ram Rakha, the accused. As Mohammad beat him with lathis resulting in his death. Ram Rakha, it was alleged, had seen the accused be beating Gyani, and the witnesses. Tiddi mangal reached three soon after and they had seen the accused. As Mohammad running away after beating Gyani. The condition of Gyani was serious; and, as such, he was taken to the Hospital, Kama, where he died. First Information Report was lodged by Nihala and the police after due investigation charge sheeted the accused before the Munsiff-Magistrate, Deeg, who conducted the committal enquiry and committed the accused to stand his trial under Section 302, IPC before the learned Sessions Judge. The case was ultimately tried by the learned Additional Sessions Judge, Bharatpur, who found the accused guilty of an offence under Section 302, IPC, and sentenced him to imprisonment for life, and, hence this appeal.

3. On behalf of the accused appellant, it was contended that there is no direct or circumstantial evidence on the basis of which the conviction of the accused could be sustained. It was also contended that the occurrence is alleged to have taken place it about 10 p.m. in the night intervening 17th and 18th May, 1970. It was also contended that the said night was not a full moon- lit night. It was Vaisakh Sudi 11. As such, there was only partial moon-light. It was contended that from such a great distance neither the assailant could be identified, nor, could there be any identity of the weapon of offence used. It was also contended that the learned trial Court has seriously erred in relying on a extremely weak evidence. It was further contended that there is absolutely no direct evidence, and the circumstantial evidence is not of a character which could lead to the irresistible conclusion that it was the accused appellant alone who had caused the death of the deceased by striking him with lathi. It was also contended that the dying declaration is absolutely unnatural, and, as a matter of fact, it was never made.

4. On behalf of the State, it was contended that the accused. As Mohammad was highly prejudiced with the deceased Gyani, as he was instrumental in arranging the 'nikka' of Kashmiri with Nihala, the younger brother of the accused. It was also contended that the accused. As Mohammad was seen with the deceased Gyani just before the occurrence and he was seen going away with a lathi soon after the occurrence, and this would lead to the irresistible conclusion that it was the accused alone who had caused such injuries to Gyani which ultimately resulted in his death. It was. therefore, contended that the learned Additional Sessions Judge was justified in convicting the accused-appellant under Section 302, IPC.

5. The accused pleaded not guilty, and contended that the deceased Gyani had fallen from a Pipal tree as a result of which he received the injuries, and he succumbed to these injuries.

6. PW/8 Ram Rakha is the most important witness in this case. He has stated that it was about 10 p.m when Gyani was keeping a watch over the 'badi'. He has further stated that Gyani and As Mohammad were sitting with him and talking. Then ha asked Gyani to go on his duty of watching the fields. Thereafter, Gyani left, and was followed by his son As Mohammad. As soon as Gyani went to his cot, the accused. As Mohammad started beating him. The witness has stated that be does not know with what object, or, weapon of offence. As Mohammad beat Gyani He did not see lathi with him. The witness then ran towards Gyani, and saw. As Mohammad running away, who had a lathi in his bend. At the time when the accused started beating Gyani this witness was at a distance of 70 paces away from him. Gyani was crying with wails, and the witness also started crying. On hearing cries, PW/3 Kasim, PW/6 Tiddi, PW/7 Nihala and PW/5 Mangla came there and other persons of the village also assembled there. From there, Gyani was removed to the hospital, where he died. The witness has stated that there was no quarrel or exchange of hot words between Gyani and. As Mohammad when they were sitting with him. He has further stated that Tiddi. Mangla etc. reached there within ten minutes.

7. PW/3 Kasam has stated that when he reached near the cot of Gyani, he found him saying that his son has beaten him. But he had not stated the name of the son

who had beaten him. When this witness reached near the cot of Gyani he did not see As Mohammad running.

8. PW/5 Mangla has stated that he was sitting in the bungalow of Sitab. The bungalow of Sitab is just on the road near the entry to the village. He was accompanied with PW/6 Tiddi. When both these persons reached near the Cot where Gyani was lying, they heard Gyani crying that his son. As Mohammad has beaten left him, Ram Rakha was already present there. Both of them saw. As Mohammad running, as it was moon-lit night. They wanted to catch hold of him, but could not do so. Nihala and Kasim also reached there. The witness has further stated that. As Mohammad used to remain ill. probably, he was a patient of T.B. and that he was impotent and was unworthy of his wife, He was mentally deranged also. When Mangala and Tiddi were going to see Gyani they saw the accused. As Mohammad going at a distance of two fields He has further stated that he and Tiddi had gone there on bearing the cries of Gyani Kasim and Nihala also reached soon after. He did not call. As Mohammed when he was running.

9. PW/6 Tiddi has stated that it was at about 10 p.m when he was sitting at the bungalow of Sitab along with Mangala. On hearing the noise, he and Mangala went to wards the cot of Gyani, where Ram Rakha only was present Gyani told that. As Mohammad had beaten him. This witness did not find. As Mohammed near the cot of Gyani, nor did he see him running. This witness was declared hostile at the request of the Public Prosecutor.

10. PW/7 Nihala is the younger brother of the accused and the son of Gyani deceased. When he reached, Gyani was lying unconscious. Tiddi and Margala were only 7 or 9 paces ahead of him. All of them reached near the not of Gyani together. When this witness reached the cot of Gyani along with Tiddi and Mangala, Gyani was unconscious and did not speak.

11. Postmortem examination of the dead body of Gyani was performed by Dr. Nath Mal, (PW 10), on 18-5-1970. He found the following external injuries on his body:

1. Contused wound 2' x 1/6' x bone deep on the right side of head in the front to parietal region 2' above the hair line and 1/2' from the mid line.
2. Swelling 4' x 4' x 1/6' on the right temporal region.
3. Contusion 2' x 3/4' on the upper third portion of the left with fracture of the humerus bone.
4. Contused wound 3/4' x 1/6' x 1/6' on the left elbow.
5. Contused wound 1' x 1/4' x 1/6' on the front of left leg in the upper third portion.
- 6 Contusion 3" x 1' on the front and outer side of the left thigh at the upper and middle third junction.

12. On internal examination he found that there was coagulated blood in the scalp tissues of front to parietal and temporal region right side. There was fracture of the right frontal bone and also of right temporal bone. The membranes of the brain were covered with coagulated blood, and the brain was compressed due to it In the opinion of brain witness, Gyani died as a result of shock, has marriage and compression of brain due to fracture of right frontal and temporal bones, by some blunt weapon. Injuries No, 1 and 2 were sufficient in the ordinary course of nature to cause death.

13. PW/13 Prithvi Singh is the SHO, who conducted the investigation and registered the case against the accused. He has stated that Ram Rakha saw the incident from a distance of 100 yards, The accused gave him information under Section 27 of the Evidence Act which resulted in the recovery of the lathi.

14. The only eye-witness in this case is PW/8 Ram Rakha. He was 70 years of the age at the time of the incident. It was 10 p.m., and it was a partial moon light night being Vaisakh Sudi 11. The witness stated that he saw the incident from 70 paces, while the SHO stated that he saw the incident from a distance of 100 yards. Modi in his Medical Jurisprudence and Toxicology has observed as under:

According to Tidy, the best known person cannot be recognised in the clearest moon light beyond a distance of seventeen yards. Colonel Bary, IMS, is of opinion

that at distances greater than 12 yards the stature or outline of the figure alone is available as a means of identification. To define the features even at shorter distance is practically impossible by moonlight.

15. In Criminal Investigation by Dr. Hans Gross, the following observations have been made:

By moonlight one can recognise, when the moon is at the quarter, persons at a distance of from twenty one feet, in bright moonlight at from twenty three to thirty-three feet; and at the very brightest period of the full moon, at a distance of from thirty-three to thirty six feet. In tropical countries the distance for moonlight may be increased.

16. It, thus, appears that the statement of Ram Rakha that he could see the accused beating Gyani at a distance of 100 yards seems to be unbelievable. A person at the age of 70 years would, normally, not possess a full eye-sight, and even if he was possessed of full eye sight then too in a partial moon-lit night, it would not be possible to identify a person at a distance of 100 yards.

17. PW/3 Kasam has stated that Gyani did not mention as to who had beaten him PW/7 Nihala says that Gyani had become unconscious when he reached his cot at the time when Kasam, Tiddi and Mangala also reached. The story that the dying declaration was made by Gyani before Mangala PW/5 and Tiddi PW/6, also does not stand to reason. Tiddi has already been declared hostile by the prosecution.

18. Apart from this, the 'Nikka' of Mst. Kashmiri with Nihala cannot be a cause of annoyance to. As Mohammad on that day when he was already living happily with his father for the last three years after the Nikka of Mst. Kashmiri with Nihala. The treatment of T.B. or impotency cannot, therefore be a cause which should impel the accused to take to such extreme recourse of beating his father upto death.

19. The accused was got medically examined by the learned trial Court. Doctor has stated that it is a case of anxiety and neurosis.

20. Having given our most anxious consideration to the evidence on record, we are constrained to observe that there is no direct evidence worthy of credence on

record on the basis of which conviction can be sustained. The circumstantial evidence also falls short of the requisite standard. The evidence on record does not lead us to the irresistible conclusion that it was the accused alone who had caused the death of Gyani in the manner stated by the prosecution. In *Sarwan Singh v. State of Punjab* : 1957 CriLJ1014 it was observed as under:

It is no doubt a matter of regret that a foul cold blooded and cruel murder should go unpunished. There may also be an element of truth in the prosecution story against the accused. Considered as a whole, the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by the prosecution by legal, reliable and unimpeachable evidence before an accused can be convicted.

21. Suspicion, however, great cannot take the place of proof. In the present case, there is no positive evidence which may lead us to believe that the guilt of the accused has been brought home. Under such circumstances the accused is entitled to the benefit of doubt.

22. For the reasons stated above, the appeal filed by the accused-appellant is hereby allowed. His conviction and sentence under Section 302, IPC are set aside, and he is acquitted of the charge under Section 302, IPC. The accused is in custody. He shall be released forthwith, if not required in any other case.