

State Vs. Ali Mohd.

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Court : Jammu and Kashmir

Decided On : Dec-24-2004

Reported in : 2006(3)JKJ505

Judge : S.N. Jha, C.J. and; S.K. Gupta, J.

Acts : Ranbir Penal Code (IPC), 1989 - Sections 302 and 304; ;Code of Criminal Procedure (CrPC) - Sections 161 and 342

Appeal No. : Acquittal Appeal No. 61/1999

Appellant : State

Respondent : Ali Mohd.

Advocate for Def. : J.S. Kotwal, Sr. Adv. and; S.C. Sharma, Adv.

Advocate for Pet/Ap. : P.C. Sharma, Adv.

Disposition : Appeal allowed

Judgement :

S.K. Gupta, J.

1. This appeal is directed against the judgment and order dated 12-07-1999 propounded by learned Sessions Judge, Udhampur, whereby he held that it appears doubtful that the accused caused the death of the deceased, and giving

benefit of doubt acquitted accused, Ali Mohd, of the offence under Section 304, Part-I, RPC with which he stood charged.

2. The sheet anchor of the prosecution case stemming out of the record, depicted in narration, is that on 21-01-1993, deceased Alaf Din, alongwith his sons Mohd. Hussain and Shera and other participants, accompanied the Barat and the Barat party proceeded towards village Jassar Kote where the marriage of sister of Noor Illahi was being solemnized. After the reception of the Barat, 'Nikah' was performed and thereafter feast started at about 6.15 p.m. on the roof of the house. Meal was served to the Baratis when deceased Alaf Din after having finished his meals inside the room at about 8.00 p.m. came out to wash his hands but found two boys standing in the door way. Since little space was left to pass through the door, the deceased got pushed and an altercation ensued with the boys. Accused, Ali Mohd, when saw deceased, Alaf Din, having a wordy duel with the boys intervened and started scolding the deceased in stating that the deceased was responsible for bringing the Barat late than the fixed time. The accused caught hold of deceased, Alaf Din, from his throat and kicked him on his testicles, as a result of which, deceased Alaf Din became unconscious and soon after was found dead. A report about the occurrence came to be lodged by Mohd Hussain with Police Post, Tikri, which led to the registration of an FIR with the Police Station, Udampur on 22-01-1993 for offence under Section 302 RPC. After conducting autopsy of the dead body of the deceased, recording of the statement of witnesses under Section 161 Cr.PC and on the conclusion of the investigation, challan against the accused to stand trial under Section 302 RPC came to be presented before the trial court. The trial court, after the frame of the charge, based on the material gathered during investigation, for offence under Section 304, Part-I, RPC, recorded evidence and after hearing the arguments, acquitted the accused in giving him benefit of doubt vide order and judgment impugned in this appeal.

3. Mr. P.C. Sharma, Government advocate appearing for the State, vehemently urged that the trial court has not appreciated the evidence in its proper perspective and there was overwhelming direct evidence of the eye witnesses connecting the accused with the commission of the offence. His further submission is that trial court seems to have impressed by the non-mention of the congestion of the lungs

of the deceased in the autopsy report and held that the cause of death has not been proved cogently and completely by the prosecution to be unnatural and renders the evidence of the eye witnesses also doubtful, which, in view of the unimpeachable evidence of the eye witnesses, is against all canons of criminal jurisprudence.

4. Mr. J.S. Kotwal, learned senior advocate appearing for the accused-respondent, on the other hand, argued that the witnesses examined by the prosecution are related to the deceased and their evidence being interested cannot be formed the basis of conviction unless corroborated by independent testimony with the ocular witnesses. Mr. Kotwal further submitted that ocular evidence was not in accord with the medical testimony and renders the entire prosecution case redolent with doubts and suspicion and is, thus, not sufficient to held the accused guilty.

5. We have heard learned Counsel Mr. P.C. Sharma, Government advocate appearing for the State, as well as Mr. J.S. Kotwal, learned senior counsel appearing for the accused-respondent, and also considered their rival contentions in context with the material on record.

6. It may be pointed out at the first flush that the case of the prosecution hinges on direct evidence of the eye witnesses, namely, Mohd Hussain and Shera sons of deceased Alaf Din, Mohd. Hussain alias Mangal, Jumman and Dalmir, PWs.

7. According to the appellant, the evidence provided by these witnesses is consistent as to the narration of the occurrence and their presence on spot has not been doubted. They are natural witnesses of the occurrence and nothing is found inherently improbable in their searching cross-examination to cast a speck of doubt on their veracity. The appellant's counsel also stated that where the ocular evidence of the eye witnesses is not in accord with the medical testimony on one or two points in the post mortem report, it does not render the evidence of the eye witnesses unbelievable or incredible. His further submission is that the evidence of the eye witnesses is a substantive evidence with regard to the commission of offence and the medical evidence is only the evidence of opinion having corroborative value. Medical evidence is neither substantive nor conclusive and, thus, does not, in any manner, outweigh the evidence of the eye witnesses

inculcating the accused in the commission of the offence beyond any pale of doubt.

8. In order to appreciate the rival contentions of the parties, it is essential to advert to the evidence assembled on record and relied upon by the prosecution in proof of its case. PW Mohd. Hussain, son of the deceased, alongwith Shera, his brother, accompanied his father with the Barat to participate in the marriage of the sister of Noor Illahi solemnized at Jassar Kote. They accompanied the Barat from the village alongwith other Baratis and reached Jassar Kote. The witness stated that after the 'Nikah'ceremony, meal was served on the roof of the house. It was at about 8.00 p.m. when his father came out to wash his hands, the deceased got pushed with two Thakkar boys who were standing in the door way. When his father deceased, Alaf Din, asked the boys as to why they are standing in the door, accused Ali Mohd came out from the room and enquired as to why he was in quarrel with boys in asserting that they were also invitees. The accused also threatened him to teach a lesson as the Barat had reached not on time as was decided by the 'Panchas' and caught hold of the deceased from his throat and pressed it, as a result of which his eyes stirred wide. The witness further stated that since his brother Shera proceeded to the rescue of his father, the accused left his throat and kicked him in his abdomen. When the pulse of the deceased was checked by Dalmir, Sarpanch, the latter found him already dead. The accused was detained in a room and he accompanied by Mohd Shafi and Mohd. Hussain proceeded to Police Post, Tikri and made an oral report about the occurrence. The Police repaired to the scene of the occurrence, took the dead body in possession vide seizure memo EXPWMH/1, got post mortem conducted and seized the clothes vide seizure memo EXPWMH. In cross-examination, the witness denied having any dispute with the accused. He further stated that the deceased did not suffer from any heart ailment or taken any medicine on the date of occurrence. The witness, however, denied when suggested that, in fact, when the wordy duel was going on between the accused and his father, they threw the accused on the ground and his father climbed over him. This witness further stated that his statement was recorded on the next day of occurrence, i.e., 22nd January, 1993.

9. Similarly, PW Mohd Hussain, bride groom, came in the witness box to depose that when deceased Alaf Din, who accompanied his Barat alongwith his two sons, after taking meals from inside the room came out to wash his hands got a push by two boys who were standing in the door way. The deceased when asked the boys as to why they were standing at the door, the accused came from the room at that moment and enquired about the cudgel the deceased was taking with the boys and asserted they were also invitees. It is also in his evidence that the accused when asked the deceased that the Barat should have come in time, the latter told that they got late on account of the ailment of his sister, which enraged the accused, who caught hold of the deceased from his throat and pressed the same. When Shera, his son, reached there for the rescue of his father, the accused kicked the deceased on his testicles due to which the deceased lost the balance and became unconscious, when he was caught by his son Shera. The deceased was taken to the room and when laid on a cot, PW Dalmir, Sarpanch, checked his pulse and declared him dead. It is also in the evidence of this witness that the accused caught hold of the deceased from his throat and pressed it for half a minute. In cross-examination, this witness also denied to have strained relations with the accused. He further stated that neither his relations with the accused nor that of the deceased were strained with the accused. He further stated that when the occurrence took place, two sons of deceased were present there. He, however, denied when suggested that when the wordy duel started between the accused and the deceased, the sons of the latter bet up the accused. He also stated that during altercation Ali Mohd, accused, also hit the deceased. To the same effect is the statement of PW Shera, another son of the deceased, who also participated in the Barat and was present at the time of occurrence when the accused caught hold of the deceased from his throat and pressed it. The witness also stated that the brawl started between his father and two boys, who were in the door way, when former and got pushed, as his father was going out to wash his hands after taking meals. He also stated that during the brawl between the accused and the deceased, the former kicked his father on the private parts. They took their father on their hands and laid him on the cot when Dalmir, Sarpanch, checked his pulse and found him dead. On cross-examination, this witness also stated about their relations with the accused to be cordial prior to the occurrence.

PW Jumman stated that the Barat when for the marriage of Mangal when reached Jassar Kote, 'Nikah' ceremony was performed in the house of Noor Illahi and the meal was laid on the roof of the house. Alaf Din deceased after taking meals when came out to wash his hands, he got pushed by two boys standing in the door way. The deceased became angry and when asked the boys to get aside from the door, the accused came from inside the room and enquired from the deceased as to why he is in altercation with the boys as they are also invitees. The accused caught hold of the deceased from his throat and pressed it about half a minute. When PW Shera, son of the deceased, proceeded for the rescue of his father, the accused also hit the deceased in his abdomen. The deceased was lifted by the witness and when laid on the cot, PW Dalmir checked his pulse and found him dead. Whereas evidence provided by Dalmir, Sarpanch, is to the effect that he also accompanied the Barat of Mangal alongwith the deceased to Jassar Kote. He also affirmed that when Alaf Din deceased came out to wash his hands after taking meals, got pushed by two boys standing in the door. When the deceased asked the boys as to why they are standing in the door, Ali Mohd, accused, sitting inside the room, came out and reprimanded the deceased for entering into cudgel with the boys and asserted that they are also the invitees. On this, the accused caught hold of the deceased from his throat and pressed it for half a minute and also kicked him in the abdomen. The deceased became unconscious but was taken on his hands by his son Shera, who had reached at that time near him and put him on the cot. The witness further stated to have when checked the pulse of the deceased, found him dead. He further stated that relations between the deceased and the accused had become little strained as the accused wanted the marriage to be solemnized at night, whereas the deceased wanted the same during day time. The narration of incident given by the witnesses examined by the prosecution, who happened to be the eye witnesses of the occurrence, is natural, consistent, straightforward, credible and trustworthy. Nothing inherent improbable or unnatural has been trotted out in their searching cross-examination. The presence of these witnesses has not been doubted. All these witnesses participated in the marriage ceremony and were present there at the time of occurrence. They had the occasion to see the occurrence when accused Ali Mohd caught hold of the deceased from his throat and pressed if for half a minute and

also hit him on his private parts with foot, as a result of which the deceased became unconscious and soon after found dead when his pulse was checked by Dalmir, Sarpanch.

10. It is well settled proposition of law that when the offence committed by the accused is established by unimpeachable corroborative evidence of the eye witnesses, there is no need to go in search of elusive independent witnesses. Direct evidence of the eye witnesses occupies a top position. The witnesses have given a cogent and consistent version about the manner in which the accused committed the crime. Nothing was elicited in their cross-examination to discredit their evidence. Such evidence inspires confidence in the mind of the Court. Their evidence was recorded most promptly by the Investigating Officer after the occurrence. When the version given by the prosecution is clearly in accord with what is narrated in the FIR, no further scrutiny with circumspection is required of their evidence by the Court. Their evidence is free from infirmities and doubts.

11. Ordinarily, the evidence of the truthful eye witnesses is sufficient without anything more, to warrant a conviction and cannot be made to depend for its acceptance on the truthfulness of other items of evidence which are only of corroborative nature, being neither conclusive nor substantial. Their testimony cannot be whittled down merely on the ground that they are related and their evidence is interested and, thus, incredible and unbelievable.

12. Testimony of related witnesses cannot be disbelieved merely on the ground that they are interested witnesses. In other words, testimony of the close relatives of the deceased cannot be dubbed as interested witnesses and their evidence refused to believe. They cannot be termed as interested witnesses. If they have seen the occurrence, they would certainly be interested to bring the offender of murder of their father/bread-winner to book. Normally, the kith and kin of the deceased, if they have seen the occurrence, would not absolve the real offender and involve an innocent person in the murder.

In the case of State of Rajasthan v. Hanuman AIR 2001 SC 282, the Apex Court while dealing with the evidence of the related witnesses, held as under:

Evidence of eyewitnesses cannot be discarded merely on the ground that they are relatives of the deceased. Normally close relations of the deceased are not likely to falsely implicate a person in the incident leading to the death of the relation unless there are very strong and cogent reasons to accept such criticism.

13. In order to appreciate the evidence, the Court is required to bear in mind the set up and environment in which the crime is committed, the level of understanding of the witnesses and the over jealousy of some of near relations, to ensure that every one even remotely connected with the crime be also convicted. Fact that some of the witnesses are the relatives of the deceased is, therefore, in our view, no ground to reject their evidence as untrustworthy. What is at the most expected is to analyse and scrutinize the same with due care and caution before accepting or acting upon the same. When their cross-examination or any other evidence does not show any reason to falsely implicate the accused, it warrants the acceptance of their testimony and legally admissible evidence. It is the totality of the evidence, in our view, which matters and when the same creates a confidence of acceptability of such evidence, question of rejection on being ascribed as 'interested witnesses' would not be justifiable. Similar view has been taken by the Apex Court in *Gangadhar Behera v. State of Orissa* : 2003 CriLJ41 and reads as under:

Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible. Thus ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance.

14. The contention raised by Mr. J.S. Kotwal, learned senior advocate, that the witnesses examined by the prosecution being related and their evidence interested, thus, cannot be accepted, in our view, is neither sound nor convincing nor legally sustainable.

15. Another leg of argument advanced by Mr. Kotwal is that ocular testimony of the eye witnesses being not supported by the medical testimony, crumbles the prosecution case like a pack of cards. It has been found in the consistent evidence of the eye witnesses that the accused had caught hold of the deceased from his throat and pressed it for half a minute and also kicked him on his abdomen, which proved fatal. PW Dr. Nathi Ram Angral, senior Assistant Surgeon, conducted the post mortem examination of deceased, Alaf Din, at the instance of the Police and found the following external injuries on his body:

1. A small abrasion on the lower lip.
2. Three soft bruises of finger marking one above the other with normal skin lining in between on right side of the center of neck oblique, downwards and outward in direction.
3. A soft bruise of thumb impression on left side of neck above the cricoid cartilage.

16. The doctor further stated that as regards internal injuries found on the dead body, there were the rings of trachea ruptured below the level of cricoid cartilage. He also found extravasations of blood in the subcutaneous tissue present in the neck. He also found on autopsy that the right side of the heart was filled with blood as dark fluid. According to Dr. Nathi Ram Angral, deceased, Alaf Din, had died of asphyxia due to throttling. On a Court question, the doctor further stated that in case of death by throttling, lungs must be congested. He, however, explained that due to inadvertency, he omitted to make mention of the same in the post mortem report. The witness has emphatically stated that he opened up the whole body at the time of post mortem examination. In re-examination, the witness further clarified that he had mentioned the colour of the lungs in the post mortem report but omitted to mention that the lungs were congested. On going through the statement of the doctor, it is clearly elicited that, in his opinion, death of the deceased has been caused by asphyxia due to throttling, which is clearly in accord with the narration of the occurrence given by the ocular witnesses that the accused caught hold of the deceased from his throat and pressed it for half a minute, as a result of which he became unconscious and when laid on a cot and

checked by PW Dalmir from his pulse found him dead. The basis for formulating this opinion, viz., death of the deceased by throttling due to asphyxia, was by examining the external and internal injuries found on the body of the deceased during post mortem. The doctor has explained his omission to make mention about the 'lungs congested' in the post mortem report, but had given the colour of the lungs in the post mortem report. Mere omission to make mention of some of the injuries or position of an organ in the post mortem report, though subsequently in his evidence in the Court explained to have been omitted due to inadvertency, would not affect the ocular testimony of the eye witnesses as to its reliability and acceptability, which is otherwise trustworthy, credible, convincing and inspires confidence in the Court. In other words, expert evidence is only an evidence of opinion, which is neither substantive nor conclusive and, thus, conviction/acquittal cannot be based on it. Even in a case where the ocular testimony is in contradiction with the medical evidence, i.e., between the evidence of the eye witnesses and the post mortem report, it is the former which will outweigh the latter and not the vice-versa. When there are alleged eye witnesses of physical violence said to have caused the death, the value of medical evidence is only corroborative. We may further point out that when there is inconsistency between the ocular evidence and the medical evidence only about the doctor having not mentioned 'the lungs congested' though its colour indicated in the post mortem report and also giving the cause of death in accord with the manner in which the violence has been caused to the deceased which resulted in his death, the ocular evidence need not be rejected. Where the eye witnesses' account of occurrence is found credible and trustworthy, the medical evidence is only corroborative and neither conclusive nor substantive. Even otherwise also medical evidence but one omission, which subsequently stood clarified by the doctor in his evidence on oath, is also showing that the murder was caused by the manner suggested by the prosecution even due to asphyxia by throttling. So, the fatal injury can clearly be fixed to the accused-respondent.

17. It is well settled that positive evidence in a case is that of the eye witnesses and medical evidence is merely an opinion corroborating the same. It only proves that the injuries could have been caused in the manner alleged and nothing more. The impression gathered by the trial court that the cause of death having not been

proved by the prosecution to be unnatural merely on the ground that the doctor has omitted to indicate that 'the lungs congested' in the post mortem report and rendered the story of the eye witnesses doubtful, in our opinion, is clearly erroneous both legally and factually, when there is overwhelming evidence provided by the eye witnesses that the accused caused the murder of the deceased by pressing his throat with the intention of causing such bodily injury as is likely to cause death. It cannot, therefore, in any manner, be said to be a glaring inconsistency between the direct evidence and the medical evidence, as pointed out by Mr. J.S. Kotwal, learned senior counsel, in his debate. That apart, the omission to indicate 'lungs congested' in the post mortem report having been reasonably explained by Dr. Nathi Ram Angral in his deposition on oath, does not render his evidence totally inconsistent with the ocular testimony of the eye witnesses when the cause of death given by him was due to asphyxia by throttling based on the examination of the injuries specified in the post mortem report being in accord with the manner in which such injuries had been effected in the account of occurrence given by the eye witnesses in their respective evidence, so as to discredit and whittle down the prosecution case in entirety. So, this contention of the learned senior counsel appearing for the accused-respondent, on any count, cannot be accepted being devoid of legal force.

18. So far as defence version is concerned, the accused has not taken any specific plea under Section 342 Cr.PC except bare denial to the incriminating evidence of having caught hold of the deceased from his throat and pressed it besides hitting him in the abdomen, as a result of which the deceased became unconscious and soon after died. The accused-respondent further stated that when the deceased entered in the wordy duel with two Thakkar boys, his sons arrived there and quarrel started. He, however, denied to have known as to who bet the deceased, Alaf Din, at that time. The accused-respondent, however, examined two witnesses, namely, Mohd. Shafi and Mohd. Yousuf, in his defence. Both these witnesses in their respective evidence have given a different story as to the occurrence and stated that the deceased fell down in a grappling with two Thakker boys and as a result of which he died, and ruled out the involvement of the accused in any manner whatsoever. The evidence provided by the defence witnesses pales into insignificance for two reasons; firstly, that no such defence is

spelt out from the statement of the accused under Section 342 Cr.PC and, secondly, no such question has been put to the witnesses in cross-examination. Moreover, no reasonable inferences can be drawn but theoretical possibilities particularly when plea of denial by the accused in the statement under Section 342 Cr.PC stood modified by the witnesses in their evidence by colourful and plausible defence. Their evidence, therefore, is of little value and being of inconsequential nature and hence can neither be believed nor accepted. For another reason, defence evidence cannot be believed as none of the witnesses examined in the case have stated about their participation in the marriage and presence at the time of occurrence.

19. As regards the rule of benefit of doubt asserted strenuously by Mr. Kotwal, accused-respondent's advocate, the matter has been considered by the Apex Court in case *Dharm Das Wadhvani v. The State of Uttar Pradesh* : 1974 CriLJ1249 and held as under:

The rule of benefit of reasonable doubt does not imply a frail willow bending to every whiff of hesitancy. Judges are made of sterner stuff and must take a practical view of legitimate inferences flowing from evidence circumstantial or direct.

20. Undoubtedly, doubt feeds on itself. But here in this case, facts established by evidence of sterling nature on which implicit reliance can be placed.

21. On realistic appraisal of the evidence and turning to the merits of the case, the only conclusion to which we can reach is that link after link is forged so firmly in the testimony of the ocular witnesses and further supported by medical testimony that it forms a strong chain of sure binding the guilt of the accused. Each link when taken together and hooked on to the next and on again manacles the accused inescapably with the commission of the crime. The entire concatenation of the incriminating facts, in our view, sufficiently proved the guilt of the accused to have caused the death of deceased, Alaf Din, by throttling, beyond hilt. Their evidence is eminently sound and makes so strong a mesh that the innocence of the accused is wholly excluded and on every reasonable hypothesis the guilt of the accused is the only inference.

22. The cumulative effect of the guilt binding evidence produced by the prosecution in this case is such that the Court can conclude and only conclude that the accused must be guilty in causing the death of the deceased due to asphyxia by throttling.

23. Taking a practical view of the legitimate inferences flowing from the direct testimony of the ocular witnesses, the medical testimony and other incriminating circumstances, we allow the appeal, set aside the impugned judgment and order of acquittal passed by the trial court and hold the accused-respondent, Ali Mohd, guilty of offence under Section 304, Part I, RPC. The accused-respondent is, accordingly, convicted and sentenced under Section 304, Part I, RPC, to undergo seven years rigorous imprisonment and a fine of Rs. 25,000/-. In case of non-payment of fine, the accused shall further suffer one year's imprisonment.

24. The accused shall be taken in custody forthwith to undergo the sentence awarded. A copy of the judgment be provided to the accused free of cost.

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