

AFR

Court No. - 43

Case - GOVERNMENT APPEAL No. - 306 of 2021

Appellant - State of U. P.

Respondent - Brijesh and another

Counsel for Appellant - G.A.

Hon'ble Vivek Kumar Birla, J.

Hon'ble Subhash Vidyarthi, J.

(Per: Hon'ble Subhash Vidyarthi, J)

(Order on application for leave to appeal)

1. Heard Shri Ratan Singh, learned Additional Government Advocate for the Appellant - State of U.P., on the application under Section 378 (3) of the Criminal Procedure Code (herein after referred to as "Cr.P.C.") seeking leave to file appeal against the judgment and order dated 18.03.2021 passed by the learned Additional Sessions Judge, Court No. 8, Bulandshahar in Sessions Trial No. 352 of 2016, acquitting the accused-respondents of the charges of committing offences punishable under Sections 302/34, 328/34 of the Indian Penal Code (hereinafter referred to as "IPC") in Case Crime No. 265 of 2014, Police Station Chhataari, District Bulandshahr.

2. Briefly stated, the prosecution case is that on 16.08.2014 Ashok Kumar gave information (Exhibit A-1) to the police that his son (Sanna) had committed suicide at his home on the same day. No one is guilty for it, yet to ascertain the cause of his death, a post-mortem examination be conducted. On 25.08.2014, the informant filed an application under Section 156 (3) Cr.P.C. (Exhibit A-2) stating that his son Sanna used to work in Gujarat alongwith Brijesh (the respondent no. 1) of the same village and they used to do painting jobs in factories. About one month prior to the date of the incident i.e. 16.08.2014, Sanna had told the informant on phone that Brijesh has

made illicit relations with a girl at Surat and upon being forbidden, Brijesh threatened him of dire consequences. The informant had told him that he will talk to Brijesh when he would come to the village.

3. The informant's son Sanna and Brijesh were visiting the village on the occasion of 'Rakshabandhan'. On 16.08.2014 at 10:00 a.m. Brijesh and his relative Praveen had come to the informant's home. At that time the informant, his wife and other son Tota Ram were present there. In their presence, Brijesh called and took away the informant's son Sanna saying that they will go to the market to eat and drink something. Although, the informant objected to it, Brijesh and Praveen took away his son Sanna on a motorcycle to the tube-well of Praveen's uncle Laloo near the cremation ground in the village. They put some poisonous substance in liquor and made Sanna drink it and they took away Rs.6,000/- and a mobile from Sanna's pocket. At that very time, the informant's other son Tota Ram reached there to call his brother Sanna and he saw that Brijesh and Praveen were offering liquor to Sanna, but Brijesh and Praveen did not send him and asked Tota Ram to leave else they would kill him also. After killing Sanna by making him consume some poisonous substance in liquor and after causing injuries to his legs, they dropped him home on their motorcycle at about 4:00 p.m. Tota Ram sent an information of the incident to the police on 'Dial 100', upon which a constable visited his home and took Tota Ram to the police station for lodging an FIR. At a short distance from Pandawal Chowki, the said motorcycle met with an accident with another motorcycle, due to which Tota Ram and the constable suffered injuries and the report could not be lodged in Police Station Chhataari. Afterwards, police came to the informant's house and prepared an inquest report of the dead body of the deceased Sanna and got a post mortem examination done. Thus, the accused-respondent committed murder of the informant's son Sanna.

4. On the aforesaid application, on 16.09.2014, an FIR (Ex.K-4)

was registered as Case Crime No. 265 of 2014 under Sections 302, 328 IPC in the concerned Police Station against the accused-respondents.

5. The cause of death of the deceased could not be ascertained by the post mortem examination and his viscera was preserved and sent to the Forensic Science Laboratory. As per the Laboratory's report, Aluminium Phosphide, which is commonly known as Salphas, was found in the parts of viscera.

6. After examining the evidence on record and taking into consideration the rival contentions, the learned Court below recorded a finding that the deceased died due to consumption of poison. Regarding the informant's allegation that the accused persons took away his son Sanna, the Court below held that when the accused Brijesh (respondent No. 1) was allegedly threatening the deceased Sanna of dire consequences, the fact that the informant let his son to go with the accused-respondents for eating and drinking is unnatural and against common human behaviour. The Court below further held that the prosecution could not establish the motive for commission of the offence. The FIR of the incident was lodged with a delay of 9 days whereas in the application given to the police on 16.08.2014 (Ex. K-1), the informant himself had stated that his son has committed suicide. The fact of earlier report (Ex.Ka-1) was concealed in the application under Section 156 (3) Cr.P.C. On the basis of the aforesaid findings, the learned Court below gave a judgment and order dated 18.03.2021 acquitting the accused-respondents of charges of commission of offences punishable under Sections 302/34 and 328/34 IPC.

7. The State has filed this appeal against the aforesaid order alongwith an application under Section 378 (3) Cr.P.C. seeking leave to file appeal mainly on the ground that the learned trial court has not properly appreciated the evidence of the prosecution and has committed a gross error in disbelieving the testimony of the

prosecution witnesses. The order of acquittal of the accused-respondent is perverse and the learned trial court did not weigh and assess the case in its proper perspective.

8. We have examined the lower court record to go through the evidence available on record of the case to examine the aforesaid grounds taken by the learned A.G.A.

9. PW-1 Ashok Kumar—the informant, has narrated the FIR version.

10. PW-2 Tota Ram said that he was at his home alongwith his parents and his deceased brother Sanna. The accused-respondents came to his house and called and took away Sanna with them at about 10:00 a.m. on the date of the incident. PW-2 was going to the fields. When he went to Laloo's tube-well near the cremation grounds. He asked Sanna to come home but the accused-respondents asked the PW-2 to leave saying that Sanna will come later on. At about 4:00 p.m., the accused-respondents dropped his brother Sanna at his home. When he reached home, he found his brother dead.

11. PW-3 Kumari Sheetal, aged about 12 years, is the sister of the deceased. She stated that she has not gone to any school. She does not know counting. She does not know the date of the incident. However, she stated that on the date of the incident at about 3:30 p.m., the accused-respondents had brought his brother Sanna home after killing him.

12. PW-4 Rajpal stated that on the date of the incident between 10:00 to 11:00 a.m., he had seen the accused persons and the deceased sitting in the cremation ground consuming liquor. Between 4:00-5:00 p.m., he saw Praveen driving a motorcycle. Sanna was sitting between Praveen and Brijesh and Brijesh was holding Sanna. Upon returning from the fields, he came to know that Sanna had died.

13. The accused-persons produced Veer Pal Singh as DW-1, who

was the real mama (maternal uncle) of the deceased Sanna. He stated that on 16.08.2014 at about 3:00 p.m., his brother-in-law i.e. the Informant Ashok Kumar, had informed him on phone that Sanna had committed suicide by consuming poison at home. Upon receiving this information, came to Ashok's house alongwith his wife and children. He reached there at about 5:30 p.m. Ashok asked him to give the information of Sanna's suicide and dictated a report and DW-1 scribed the report as per Ashok's dictation, which was marked as Ex.7A and proved by DW-1. He also proved the inquest report (Ex.Ka-10) prepared by the Police.

14. The learned Court below has referred the statement of PW-1 that one month prior to the incident, the deceased had informed the informant that Brijesh had entered into a relation with a girl at Surat. When Sanna forbade Brijesh, he threatened the former with dire consequences. In spite of the aforesaid alleged threats, the informant let his son go with the accused persons, which conduct is against normal human behaviour. If a person's son is being threatened by someone with dire consequences, he will not let his son to go with that person for eating and drinking.

15. PW-2 Tota Ram, who is stated to have seen the deceased with the accused persons at the Laloo's tube-well, has not made any statement about anything having been offered by the accused-respondents to the deceased for eating and drinking and he has not stated that they were eating and drinking together.

16. Another witness PW-4 said that the accused persons and the deceased were drinking together in the cremation ground. This statement is contradictory to the statement of PW-2 who stated the place of seeing the accused persons with the deceased at Laloo's tube-well.

17. Although PW-4 stated that he saw the accused persons taking the deceased on a motorcycle, no averment to this effect was made in

the application under Section 156 (3) Cr.P.C. which was filed after 9 days after the occurrence of the incident, obviously after obtaining legal advice and after due consultation.

18. As per the statement of PW-3 (Kumari Sheetal), she had her lunch at 12:00 Noon and at that time her parents and Tota Ram were in the fields. Half an hour after she had her lunch, the deceased asked her to bring fodder. When she returned with the fodder after another half an hour, the deceased was not there at his home. This indicates that the deceased was at his home even after the informant (PW-1), his other son Tota Ram (PW-2) and the informant's wife went to the fields.

19. Thus, there were serious discrepancies in the statement of the prosecution witnesses regarding presence of the deceased at the home or at the place of the incident.

20. The Court below also took into consideration the fact that the informant had alleged that the accused-respondents dropped the deceased home after killing him, which too is against the normal human behaviour. If a person commits murder of any other person, he would not take the dead body on the motorcycle to deliver it at the deceased's home.

21. The informant - PW-1 had submitted an information of the incident on the date of the incident itself i.e. 16-08-2014, stating that his son had committed suicide in his home and nobody was guilty for it, yet a post mortem examination be conducted for ascertaining the reason of his death. A mention of this fact was recorded in the general diary on 16-08-2014 at 18:45 p.m. and on the basis of this report, the police went to the spot and prepared an inquest report (Ex.Ka-10), which mentions that the informant Ashok Kumar and the informant's brother-in-law Veer Pal were also present at the time of inquest. Veer Pal Singh has appeared as DW-1 and has stated that on 16-08-2014, the informant had informed him on phone that Sanna has committed suicide by consuming poison at home. When he reached

the informant's house at about 5:30 p.m., the informant dictated a report to him, thereafter, the informant put his thumb impression on the report scribed by the DW-1 on his dictation. The DW-1 was also a witness of the inquest.

22. In the present case, there is no direct evidence of the incident and the case is based on the circumstantial evidence that the deceased had allegedly been last seen with the accused-persons drinking alcohol and thereafter he died and ALP (sulphas) was found in the examination of his viscera.

23. In **Sharad Birdhichand Sarda v. State of Maharashtra**, (1984) 4 SCC 116, the Hon'ble Supreme Court laid down the following conditions which must be fulfilled before a case can be said to be established on the basis of circumstantial evidence: -

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) *there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.”

24. In the same judgment, the Hon'ble Supreme Court explained the mode and manner of proof of cases of murder by administration of poison, in the following words: -

“164. We now come to the mode and manner of proof of cases of murder by administration of poison. In Ramgopal case¹⁸ this Court held thus: (SCC p. 629, para 15)

“Three questions arise in such cases, namely (firstly), did the deceased die of the poison in question? (secondly), had the accused the poison in question in his possession? and (thirdly), had the accused an opportunity to administer the poison in question to the deceased? It is only when the motive is there and these facts are all proved that the court may be able to draw the inference, that the poison was administered by the accused to the deceased resulting in his death.”

165. So far as this matter is concerned, in such cases the court must carefully scan the evidence and determine the four important circumstances which alone can justify a conviction:

(1) there is a clear motive for an accused to administer poison to the deceased,

(2) that the deceased died of poison said to have been administered,

(3) that the accused had the poison in his possession,

(4) that he had an opportunity to administer the poison to the deceased.”

25. In the present case, there is neither any clear motive for the accused to administer poison to the deceased, nor has it been proved that the accused had the poison in their possession and, therefore, there is no sufficient evidence to prove that the accused persons committed murder of the deceased by administering poison to him.

26. In **Jaipal v. State of Haryana, (2003) 1 SCC 169**, the Hon'ble Supreme Court held that ALP on account of its very pungent smell (which can drive out all inmates from the house if left open) cannot be taken accidentally. Therefore, the learned Court below held that Aluminum Phosphoid could not be administered deceitfully or accidentally. The only possibility remains that the accused administered it forcibly, but neither any witness has given any evidence to this effect nor the post mortem report mentions any injury on the person of the deceased which could indicate any resistance made by him against this forcible act.

27. Keeping in view the aforesaid facts which emerge from the

statement of witnesses as well as other material available on record, particularly the application given to the police on 16.08.2014 (Ex. K-1) and the application filed by the informant under Section 156 (3) Cr.P.C. (Ex.K-2), we find that the prosecution has miserably failed to establish that the accused-respondents have committed murder of the deceased by administering poisonous substance.

28. In **Jayamma Vs. State of Karnataka (2021) 3 SCC 213**, the Hon'ble Supreme Court was pleased to reiterate the well settled law that the power of scrutiny exercisable by the High Court under Section 378 Cr.P.C. should not be routinely invoked where the view formed by the trial court was a "possible view". The Hon'ble Supreme Court held that unless the High Court finds that there is complete misreading of the material evidence which has led to miscarriage of justice, the view taken by the trial court which can also possibly be a correct view, need not be interfered with.

29. Examining the impugned judgment and order passed by the learned court below, we are of the view that the findings of the Court below forming basis of its judgment are based on a correct evaluation of the evidence available on the record of the case. The judgment dated 18.03.2021 passed by the learned Additional Sessions Judge, Court No. 8, Bulandshahr in Sessions Trial No. 352 of 2016 does not suffer from any illegality or infirmity so as to warrant a further scrutiny by this Court in exercise of its appellate jurisdiction. There is no good ground for grant of leave to appeal to the State-appellant. The application seeking leave to file an appeal is, accordingly rejected.

(Order on Appeal)

30. Since the application seeking leave to file an appeal is rejected, the appeal also stands **dismissed** summarily at the admission stage.

Order Date - 18.2.2022

Jaswant