

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 28th August, 2009*
Judgment Delivered on: 1st September, 2009

+ **CRL.A.618/2008**

MOHD. AHMED Appellant
Through: Ms. Rakhi Dubey, Adv.

versus

STATE Respondent
Through: Mr. Pawan Sharma, APP.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. Vide impugned judgment and order dated 25.1.2008, the accused Mohd. Ahmed has been convicted for having committed murder of the deceased Mohd.Alam i.e. for the offence punishable under Section 302 IPC as also for the additional offence punishable under Section 328 IPC i.e for having administered an intoxicating/stupefying substance to the deceased. He had been sentenced to undergo life imprisonment and to pay a fine of Rs.100/-, in default of payment of fine to undergo RI for seven days for the offence punishable under Section 302 IPC. He had

been sentence to undergo RI for 10 years and to pay a fine of Rs.100/-, in default of payment of fine to undergo RI for seven days for the offence punishable under Section 328 IPC.

2. On 17.4.2000, at around 8.00 AM Insp.Satbir Singh PW-17 while on patrolling duty saw a dead body of a male person lying at the corner of Shashtri Park, Ramleela Ground. It was of an unknown person; the local police station was informed. Senior officers of the police station reached the spot. In the course of the inquest proceedings statements of Ravi Kumar, Ram Chander, Ram Kant and Phool Chander i.e. Ex.PW-17/B to Ex.PW-17/E were recorded but no clue of the identity of the deceased was obtained. The dead body was photographed and thereafter sent to the mortuary for preservation. Hue and cry notice was published to procure information about the identity of the deceased. SDM, Pahar Ganj was also informed. However, the dead body remained unidentified.

3. On 24.4.2000, the post-mortem on the dead body was conducted by Dr.Avneesh Gupta whose signatures had been identified by Dr.Vijay Dhankar PW-14; as per the post-mortem report Ex.PW-14/A there was blockage noted in the anterior descending coronary artery of the head of the patient; the Mitral valve shows thickening along with vegetations. No definite opinion on the cause of death had been given as the viscera had

been preserved to rule out the possibility of poisoning. Dead body was thereafter handed back to the police who in turn handed it over to the Delhi Wakf Board for the last rites as during the inquest proceedings it had been noted that the deceased appeared to be a muslim. The viscera of the deceased was preserved and thereafter seized by PW-17 vide memo Ex.PW2/A dated 16.5.2000. The clothes of the deceased were also seized vide memo Ex.PW-6/A dated 24.4.2000.

4. On 6.11.2001, PW-17 received some information from the U.P. Police which appeared to be related to the instant case which was recorded in DD No.24A Ex.PW-1/B. This DD was marked to Insp.Ravinder Kumar PW-19. On verification, endorsement Ex.PW-19/1 was made on Ex.PW-1/B by PW-19, pursuant to which the formal FIR Ex.PW-1/A was registered by ASI Anand Mani PW-1. Copy of the FIR was sent by Const.Ashok Kumar PW-8 to the Area Magistrate and to the senior officers. The rough site plan Ex.PW-19/2 was prepared.

5. PW-19, in the course of the investigation, recorded the statement of the officers of the U.P. Police from whom this information had emanated i.e SI S.P.Singh PW-4 and PW-18 SI B.D. Dubey. PW-4 has deposed that on 5.11.2001 he along with Const.Om Prakash PW-18 and Const.Samay Singh were on patrolling duty in the area of Sector 20, Noida, Ghaziabad when

they met one person by the name of Mohd.Salam. PW-4 accompanied by PW-18 proceeded towards jhuggi cluster, Sector 16, Noida along with Mohd.Salam where they found the accused who was apprehended. On his search, a knife was recovered for which a case FIR No.704/2001 under Section 25 of the Arms Act of PS Sector 20 Noida was registered against him. PW-19 got formal production warrants of the accused as he was in custody of U.P. Police. Accused was produced before the concerned court in Delhi on 3.12.2001. He was formally arrested. Accused made his disclosure statement Ex.PW-15/A. Pursuant thereto he pointed out the place of occurrence and got recovered attaché case lying in the jhuggi which contained the shirt and pant of the deceased; the clothes were identified by Mohd.Salam PW-7 and taken into possession vide memo Ex.PW-7/B. He further disclosed that the sum of Rs.10,000/- robbed by him of the deceased had been put in an FDR in the Bank of Baroda in village Banni. On 4.12.2001, PW-19 accompanied by SI Naveen Chandra PW-12 went to Islam Pur, District Khagaria and made local enquiries. Statement of Manager of Bank of Baroda Pradeep Kumar PW-10 was recorded who proved the account opening form Ex.PW-10/A in the name of Mohd.Ahmed showing that an FDR in sum of Rs.10,000/- dated 26.12.2000 had been issued to the accused. On 8.12.2001

Accused made a second disclosure statement Ex.PW-12/A but no recovery was effected pursuant thereto.

6. On 16.1.2002 Mohd. Salam PW-7 handed over two letters Ex.P-1 and Ex.P-2, addressed by the deceased to PW-12; these documents were taken into possession vide memo Ex.PW-17/C. PW-20 Ami Lal Daksh, the Handwriting Expert, vide his report Ex.PW-19/3, had examined the questioned documents i.e. the letters Ex.P-1 and Ex.P-2 purported to have been written by the deceased along with his admitted writings and opined that they were not of the same person; he had also on examination of the admitted/specimen writings of the accused opined that these letters were also not in the writing of the accused. Dr.Madhulika Sharma PW-13 had analyzed the contents of the viscera of the deceased on 13.11.2001 and vide her report Ex.PW-13/A opined that on chemical examination, the contents of the viscera i.e. liver, spleen and stomach tested positive for the presence of aluminum phosphide.

7. Mohd.Salam PW-7 was the star witness from whose version the role of the accused had surfaced. He has deposed that his brother Mohd.Alam was residing in Sector 16, Noida and the number of his jhuggi was number 50. On 5.11.2000, he had visited the jhuggi of his brother as the marriage of his sister was to be solemnized. His brother gave him Rs.2,000/- for the marriage

function and he left with the money for his native village. His brother i.e. the deceased Mohd.Alam told him that he will also reach for the marriage of the deceased's sister but he did not go there. The accused Mohd.Ahmed had joined the marriage celebration of his sister Angoori and had told them that the accused had gone to Bombay in connection with his employment and that is why he is not able to attend the marriage. After returning back from the marriage of his sister, he i.e. PW-7 went to the jhuggi of his brother where he saw the accused present there. On enquiry the accused told him that his brother had gone to Bombay and would write a letter to them. The brief case of his brother was lying in the jhuggi and on opening the same one shirt and pant of his brother were found there. Mohd.Ahmed informed PW-7 that his brother had sold the jhuggi to him for Rs.8,000/-. He i.e. PW-7 thereafter started residing in Ashok Nagar. PW-7 went to his village where his father told that he had received a letter from Mohd.Alam but on seeing that letter, he i.e. PW-7 came to know that it was not in the writing of his brother. He again returned back to his house and thereafter on his second visit to his village his father had showed him another letter purported to have been written by his brother but it was not in his handwriting. PW-7 came to the conclusion that these letters had been written by the accused. On 8.11.2001, he again visited the jhuggi of his brother

where he found accused present in the said jhuggi; he was told that his brother had gone to Bombay; in the course of an argument accused took out a knife and threatened him to leave the jhuggi or else he would be killed; on the way, on his reaching near Alka Cinema, he met some police officers and he told them about this incident; the accused was apprehended and thereafter interrogated; his disclosure statement was recorded and the matter was handed over to the Delhi Police. PW-7 has further deposed that the accused had got recovered from underneath a tiral an attaché case containing a shirt and pant of his brother. PW-7 also handed over a letter Ex.P-3 which had been written by the deceased to them. The said letters were taken into possession vide memo Ex.PW-7/A. He identified the dead body of his brother on the basis of the photographs Ex.PW-17/A1 to A4. In his cross-examination, this witness has stated that the accused was a good friend of his brother and he did not have a separate jhuggi but was living with him. He also used to reside with his brother and the accused in this jhuggi. He has stated that his brother used to earn about Rs.5000/- to Rs.5500/- per month and a sum of Rs.10,000/- had been kept in the jhuggi which had been stolen. His brother had no friend except the accused.

8. In the statement of the accused recorded under Section 313 Cr.P.C., he had stated that he has been falsely

implicated in the present case. He put forward the following defence:

“I and my family used to reside in Jhuggi No.50, Noida. Mohd.Alam used to reside in front of my jhuggi. He had received a letter from his native place that the marriage of his sister Angoori has been fixed. Mohd.Salam (PW) used to reside with his brother Mohd.Alam, in the same jhuggi. On receipt of the letter, Mohd.Salam had gone to his native village. A telephonic call from my native village about the illness of my sister had been received in the factory no.N-29. I used to work there. I then went to my native village with my wife and children. We had gone after 2 or 3 days of receipt of the phone call. I had stayed there for 27 days. Mohd.Alam had however not gone to his village to attend the marriage of his sister. I had however, attended the marriage of sister of Mohd. Salam. I left my wife and children in the village and came back to Delhi. Mohd.Salam then came to me and enquired from me about the whereabouts of Mohd.Alam. I told him that I do not know as to where Mohd.Alam has gone. Thereafter, I was falsely implicated in this case.

The case under the Arms Act had been transferred to Delhi and was tried here. I do not know about the outcome of that case.”

9. Learned Trial Judge had held the accused guilty primarily on the report Ex.PW-13/A of the viscera of the deceased which had detected aluminum phosphide in its contents and this fact having been discovered pursuant to his disclosure statement which was admissible under the provisions of Section 27 of the Evidence Act. Motive for the crime i.e. motive of the accused to usurp the jhuggi of the deceased was also considered. Trial Judge had also noted that although the letters Ex.P-1 and Ex.P-2 were not concluded by the Handwriting Expert to be in the handwriting

of the accused yet on comparison of the writings by the naked eye it could be concluded that the said letters had been written by the accused. All these cumulative factors had crucified the accused.

10. On behalf of the accused it has been argued that admittedly this being a case of circumstantial evidence; every link in the chain has been broken and the Trial Judge has drawn an erroneous and incorrect conclusion and has not only mis-appreciated the facts but also mis-appreciated the legal position.

11. It is obvious that what has weighed in the mind of the Trial Judge is the revelation, in the disclosure statement by the accused that he had administered a poison laced biscuit to Mohd.Alam which version stood corroborated by the subsequent report of the CFSL which had detected aluminum phosphide in the contents of the viscera. Trial Judge had relied upon the judgment of Pulukuri Kottaya vs. Emperor AIR 1947 PC 67 to substantiate this finding.

12. We are not inclined to accept this finding. Dead body of the deceased had been recovered on 17.4.2000. Post-mortem had been conducted on 24.4.2000; contents of the viscera had obviously been retrieved on that day. On 16.5.2000, the Investigating officer PW-17 vide memo Ex.PW-2/A, in the presence of Const.Dev Narain PW-2 received the contents of the viscera duly sealed with the seal of MAM College Forensic Medicine along with the sample seal. This viscera was sent for chemical analysis

on 13.11.2001 i.e. after a gap of more than one and half years. PW-2 has stated that he had deposited this sealed parcel along with the sample seal in the Malkhana on 16.5.2000. The Malkhana Incharge, HC Vinod Kumar PW-3 in his deposition has not whispered a word about the deposit of any exhibit on 16.5.2000; it is obviously for the reason that the viscera was not deposited in the Malkhana on 16.5.2000. Where did it remain in this gap of one and half years; possibility of the tampering of this exhibit which presumably remained in the pocket of the Investigating Officer cannot be ruled out; benefit of this has to accrue to the accused. Judicial notice can also be taken of the fact that such a long gap in obtaining the viscera and finally sending it for chemical examination would cause the poison, if any, to be degraded and decomposed and even on this count the report would suffer from infirmity. There is also no evidence if any preservative was used to preserve its contents.

13. In Emperor vs. Sridhar Nana 1905 7 Bombay LR 640, it has been held that in a case of poisoning the evidence should be complete as to the history of such article and it should be shown that they were kept in proper custody throughout if they are to be relied on as supporting a conviction and there should be no possibility of any question being raised as to the identity of such article.

14. Even otherwise, it was incumbent upon the Investigating Officer to give a logical conclusion to his investigation; why was he waiting for such a long time to get the viscera examined. Possibility of getting a disclosure elicited and procuring a viscera to obtain a report of poisoning for the success of his case can also not be ruled out.

15. Version of the prosecution is that accused had administered a poison-laced biscuit to the deceased; Trial Judge has held that aluminum phosphide is available in the form of tablets and pellets; biscuit is a ready manufactured edible. It could be laced or coated only with a poison either in the liquid or semi-liquid form, definitely not in the form of tablets or pellets.

16. Pulukuri Kottaya's case (supra) specifically postulates that for the application of Section 27 of the Evidence Act there must be combination of the following twin elements i.e.

- (i) the fact discovered embraces the place from which the object is produced and
- (ii) the knowledge of the accused as to this and the information given must relate distinctly to this fact.

17. While relying upon the aforesaid decision Trial Judge in para 38 of the impugned judgment has held :

"38. It is not that the cause of death of Mohd. Alam was due to any other reason, other than poison. I am equating this particular disclosure statement of the accused with a statement where the accused discloses that he can

get the dead body of the deceased recovered and in fact, in pursuance of his disclosure statement he actually gets recovered the dead body. In those circumstances the disclosure statement becomes not only relevant but also a very vital piece of incriminating evidence. This is what had happened in the present case. The accused in the present case had disclosed a fact which was hitherto not known to anyone except to him. It is not his plea that he came to know about it from someone else or had seen someone poisoning the deceased. In my view this particular piece of evidence is decisive."

18. This is an incorrect and fallacious reasoning. In the instant case, dead body had been recovered on 17.4.2000; disclosure statement of the accused was recorded on 3.12.2001; much thereafter. The co-joint twin elements which are the necessary ingredients for the application of Section 27 of the Evidence Act are absent.

19. Further case of the prosecution is that the deceased had been poisoned in the area of Ramleela ground, Delhi. Dead body had been recovered lying near Hamdard Chowk, Shastri Park Page, Asaf Ali Road which is miles away; this is the finding in para 2 of the judgment.

20. The role of the accused has surfaced in the testimony of PW-7, the brother of the deceased. He had first approached the U.P. Police i.e. PW-18 and PW-4 on 5.11.2001 wherein he narrated that he had met the accused in the jhuggi of his brother, his brother was missing and he suspected the accused. PW-7 has started his deposition by stating that on 5.11.2000 he had gone to

the jhuggi of his brother where he met him i.e. his deceased brother Mohd.Alam. Dead body of Mohd.Alam had been recovered on 17.4.2000. Presuming that there was a typographical error and PW-7 meant to speak of a date prior to the period of 17.4.2000, yet even in the statement under Section 313 Cr.P.C. it has been incriminated against him that he met his deceased brother on 5.11.2000. We wonder if this could again be a typographical error. Be that as it may, from the further version of PW-7, it is borne out that he visited the jhuggi of his brother three times; on each of the first two dates he went back to his native village where on each occasion his father gave him a letter (Ex.P-1 and Ex.P-2) purported to have been written by the deceased to their father. Father of PW-7 gave him yet another letter (Ex.P-3) written by the accused in the year 1999 and which his father had presumably kept in safety up to November 2001 when he handed it over to PW-7. PW-7 was an attesting witness to the recovery of the suitcase containing the clothes of his deceased brother recovered on 3.12.2001 and the recovery memo is Ex.PW-7/B. PW-7 has however testified that this recovery was effected on 8.11.2001. As per PW-7, this jhuggi was owned by his deceased brother; yet even after the arrest of the accused on 6.11.2001 he did not stake his claim on his brother's jhuggi; he went back to his residence at Ashok Nagar.

21. In our view, on the reading of the testimony of PW-7, we are convinced that he is a confused man; his version is vague and bereft of all or any particulars; he has controverted the documents of the prosecution; his testimony does not in any manner inspire confidence; it can be discarded safely.

22. Edifice of the prosecution case has crumbled.

23. Trial Judge had discarded the recovery of the suitcase containing the clothes of the deceased and held it to be not incriminating.

24. The handwriting expert vide its report dated 19.3.2002 opined that admitted writing of the deceased Ex.P-3 and questioned letters Ex.P-1 and Ex.P-2 were not in the handwriting of the same person; it had further opined that Ex.P-1 and Ex.P-2 are also not in the writing of the accused. Specimen writing of the accused was taken by the Investigating Officer while the accused was in police custody and without taking permission of the court. In view of the ratio of the judgment reported as Sukhvinder Singh and Ors. Vs. State of Punjab JT 1994 (4) SC 1 such a specimen writing cannot even otherwise be considered by the court.

25. Trial Court had rejected the motive of the robbery; deposit of FDR on 26.12.2000 being too distant in time to be connected with the alleged robbery in April, 2000. Partial motive of the accused was to usurp the jhuggi of the deceased. On this

count PW-7 has admitted that both the accused and deceased used to reside in the said jhuggi; neither had any papers of title; finding that since the accused had failed to produce the title documents; inference being that the jhuggi was owned by the deceased is not only an illogical reasoning but also fallacious. When a fact is alleged by one party; onus is always on that party to prove it; it was for the prosecution to establish that the jhuggi was owned by the deceased; it has failed to do so. Accused has all along adopted the defence that this was his jhuggi. Motive also fails.

26. In Ramgopal vs. State of Maharashtra AIR 1972 SC 656, the Supreme Court has held that where undoubtedly the deceased died by poisoning but neither the motive nor the administration of poison nor its possession on the part of the appellant was proved, he was entitled to be acquitted. In Sarad Birdhi Chand Sarda vs. State of Maharashtra AIR 1984 SC 1622, it has been reiterated by the Supreme Court that before a person can be convicted for murder by poisoning, it is essential to prove that the death of the deceased was caused by poison, that the poison in question was in the possession of the accused, and that the poison was administered to the deceased by the accused.

27. It is clear that there is nothing left with the prosecution on which it could have sustained the conviction of the accused.

28. Appeal is allowed. Accused is acquitted of the charges leveled against him. He is on bail; his bail bond is canceled; surety is discharged.

**(INDERMEET KAUR)
JUDGE**

**(PRADEEP NANDRAJOG)
JUDGE**

1st September, 2009
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