

Sardar Hussain and Another

Vs

State of Uttar Pradesh

Criminal Appeal No. 289 of 1978

(Jagannatha Shetty JJ)

05.08.1988

JUDGMENT

JAGANNATHA SHETTY, J. -

1. This appeal leave is from a judgment of the Allahabad High Court dated May 10, 1978 dismissing Criminal Appeal No. 213 of 1973.

2. The appellants were convicted and sentenced under Sections 302, 364 and 210 IPC by the trial judge. On appeal, the High Court maintained the said conviction and sentence of appellant 1, but reduced the same of appellant 2 to one under Section 201.

3. The prosecution case in brief is as follows :

Islam the deceased is the younger brother of Shabbir (PW 1). They were not living together. The former used to live with his mother. Islam had his own share of lands measuring 16 bighas. He was separately cultivating the same. The appellants were once his close associates. They were of bad character. So mother and brother advised Islam to part company with them. So Islam did and went on minding his own work. He was unmarried. The appellants had an evil eye on the property of Islam. They got executed a fraudulent sale deed (Ex. Ka-12). The deed was dated February 15, 1971. One Ahsan who has been examined as PW 12 has impersonated Islam before the Sub-Registrar. The deed purports to transfer the agricultural land of Islam in favour of the wife of appellant 1. It is said that the appellants in order to eliminate the possibility of this fraud being detected, murdered Islam.

4. Shabbir suspecting foul play of the appellants lodged a report on April 21, 1971. Zakir Ali appellant 2 was first arrested. He pointed out a dead body on July 18, 1971. It was recovered from a place deeply buried in a water logged pond. However, it was said to be identified as that of Islam. The identification was based on a shirt (Ex. 1) and a tahmad (Ex. 2).

5. Upon the post-mortem, the doctor was unable to give his opinion regarding the cause of death or its duration.

6. The evidence against appellants is purely circumstantial (i) motive for the crime (ii) the evidence as to last seen (iii) recovery of the body at the instance of appellant 2, and (iv) identification of the clothes with which the dead body was found.

7. We will first examine whether the motive which is of course relevant in this case has been satisfactorily established. Ex. Ka-12 is the sale deed by which the properties belonging to Islam were said to have been sold to the wife of Sardar Hussain appellant 1. Usman Ali (PW 11) who is the scribe of the sale deed has deposed to its contents. He has stated that one Sarfaraz (PW 20) along with the accused came to him with a request to draft the sale deed. They gave the particulars. He has written the sale deed of which the executant was Islam. In the court, he was identified Ahsan (PW 12) as the person who impersonated Islam and put his thumb impression. He has also identified Zakir Ali appellant 2 who affixed his thumb impression to the sale deed as a witness. But when Sarfaraz Hussain was examined as PW 20 in the court, nothing was elicited about the sale deed or the persons who accompanied him to PW 11. No question was put to him as to the contents of sale deed Ex. Ka-12 or to the identification of persons who affixed the thumb impression thereon PW 12 has, no doubt deposed that he had put his thumb impression on Ex. Ka-12. But the prosecution has not sent the thumb impression of the executant of Ex. Ka-12 with the admitted thumb impression of PW 12 for expert opinion. There is, therefore, no satisfactory evidence that the sale deed Ex. Ka-12 was executed by somebody impersonating Islam.

8. As to identification of the dead body, the evidence on record is equally unsatisfactory. Shabbir (PW 1) has deposed that about 14 months before, Islam was taken by Sardar Hussain and Yasin. Yasin is the father-in-law of Sardar Hussain. He has also stated when Islam went with them, he was wearing a shirt of green check and a black striped tahmad. Islam was taken on the pretext that they would get him married. He has further stated that Mian Jan (PW 2) and Sadiq (PW 3) and one other person called Majid had seen Islam going with Sardar Hussain and Yasin. But Mian Jan (PW 2) and Sadiq (PW 3) did not speak anything about the dress which Islam was wearing when he was taken by Sardar Hussain and Yasin. Secondly, how could Shabbir see all that he had stated. Islam and Shabbir were living separately. Islam was not taken after a meeting with Shabbir. It is not the case of Shabbir that Islam came to him and told him about the purpose of his going with the accused. If the purpose was to get Islam married, why did he allow Islam to go with the accused. Islam had by then parted company with them at the instance of Shabbir and mother, because they were of bad character. Is it understandable that such bad characters should arrange the marriage without the assistance or approval of Shabbir and mother ? It is difficult to believe Shabbir in the circumstances.

9. Islam was said to have disappeared on April 12, 1971. PW 1 lodged the report on April 21, 1971. The dead body was recovered on July 18, 1971. The post-mortem was done on July 20, 1971. It was more than three months from the date of alleged disappearance of Islam. Dr. D. P. Manchanda (CW 1) who conducted the post-mortem was not able to give the cause of death. He has stated that it was a skeleton of a young adult male. According to him, it would be difficult to tell correctly as to when the death of the deceased had taken place. There was no flesh left in the body. The eye-balls were missing. The vertebrae was not found attached to the skull. With this condition of the skeleton the doctor could not have given any better opinion.

10. Gulab Singh (PW 7) is a panch witness for the recovery of the dead body. He has deposed that when the body was removed, the tahmad and shirt were intact and they were taken out by Sub-Inspector. Man Singh (PW 8) is another panch witness. He has also stated that the shirt and tahmad were removed by the Sub-Inspector, washed, packed and sealed. The panch witnesses could not identify the shirt and tahmad as belonging to the deceased.

11. Those clothes are said to have been identified by Shabbir and his wife Smt. Bhoori (PW 13). The identification was conducted by Ramakant Dube (PW 9). He had mixed up the said clothes with five like clothes resembling with each other. He has stated that Shabbir and Smt. Bhoori correctly

identified them and did not commit any mistake. But if one carefully peruses his evidence, the identification was nothing but farce. The dead body was not recovered in the presence of Shabbir. He was called to the court of the Magistrate only for the identification of clothes and the body. He has stated that the dead body by appearance looked like that of his brother. We have earlier seen that the Sub-Inspector had removed the clothes, washed, dried and packed them separately with the seal of the panchas. Shabbir could not have seen the dead body with the clothes. The shirt (Ex. 1) and tahmad (Ex. 2) were no doubt mixed up with other similar clothes for the purpose of identification as deposed by PW 9. But the witness identified Ex. 1 because there was paperchit pasted on it. He identified Ex. 2 because it had a knot. That is why we said earlier that the identification was a farce. We are surprised that the courts below should rely upon this kind of evidence. The circumstantial evidence in the case thus falls short of the required standard on all material particulars. We are, therefore, unable to sustain the conviction of the appellants.

12. In the result, these appeals are allowed. The conviction and sentenced passed against the appellants are set aside. They are acquitted of all the charges. They be set at liberty if they are in custody, and if they are not required in any other case.

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