

Mohd. Aman and Another

Vs

State of Rajasthan

Babu Khan

Vs

State of Rajasthan

Criminal Appeals Nos. 1749 and 1833 of 1996

(M. K. Mukherjee, K. Venkataswami JJ)

08.05.1997

JUDGMENT

M. K. MUKHERJEE, J.

1. These two appeals have been heard together as they are directed against one and the same judgment rendered by the Rajasthan High Court while disposing of DB Criminal Appeal No. 118 of 1985. By the impugned judgment the High Court upheld the convictions and sentences recorded against Mohd. Aman (one of the appellants in Criminal Appeal No. 1749 of 1996) under Sections 302 and 460 IPC and against Mohd. Yusuf (the other appellant in Criminal Appeal No. 1749 of 1996), Babu Khan (appellant in Criminal Appeal No. 1833 of 1996) and one Mohd. Iqbal (who has not filed any appeal) under Sections 302, 460 and 380 IPC.

2. The prosecution case, briefly stated, is as under :

(a) Jafar Alam (the deceased), who was a widower and had no issue, was a resident of Mohalla Bas, in the town of Nagaur. He had no arrangement of his own for cooking food and his close relatives including Sabir Hussain (PW 10) who lived nearby used to serve him daily. On 13-4-1983 at or about 10 a.m. when his niece Mrs. Manohar (PW 3), went to his house carrying his food she found the main door of the house open. She entered the house and called Jafar Alam but did not get any response. She then went to the inner room and found to her utter dismay that he was lying dead on the floor in a pool of blood. She rushed out of the house and informed Sabir Hussain and others. All of them then came back and noticed that there were a number of injuries on the person of the deceased, that his mouth was gagged with his tehmata and that the house was ransacked.

(b) Sabir Hussain then went to Nagaur Police Station and lodged a first information report (Ext. P-7). On that report a case under Section 302 IPC was registered and investigation was taken up. In course of the investigation the site was inspected and a

number of articles were seized, some of which appeared to have fingerprints on them. Besides, a footprint was noticed there, photographs of which were taken.

(c) The three appellants were arrested in connection with the case on 20-4-1983 and pursuant to the statement of Babu Khan a pair of silver anklets belonging to the wife of the deceased were recovered and his bloodstained clothes were seized. Statement made by Mohd. Yusuf resulted in recovery of a bloodstained knife and four stolen silver rings.

(d) Specimen fingerprints and footprints of the appellants were taken by the investigating officer and they were sent to the Expert for comparison with the fingerprints and footprints earlier found in the house. The seized knives and the wearing apparel of Babu Khan were also sent for examination by the Forensic Science Laboratory. After receipt of the report of the experts and on completion of investigation the police submitted the charge-sheet against the four accused persons including the three appellants.

3. The appellants pleaded not guilty to the charges levelled against them and contended that they had been falsely implicated at the instance of the police.

4. In the absence of any eyewitness to prove its case the prosecution relied upon the following circumstances to connect the three appellants with the offences alleged against them :

(i) The three appellants and Mohd. Iqbal were seen by Habib Khan (PW 7) loitering near the house of the deceased at or about 10 p.m. on 12-4-1989;

(ii) Hanif Khan (PW 8) saw all four of them at or about 3 a.m. on 13-4-1983 proceeding across his house towards Ginani;

(iii) In the house of the deceased fingerprints of appellants, Mohd. Aman and Mohd. Yusuf were found on a brass jug and a glass tumbler respectively;

(iv) Footprints of Mohd. Yusuf were found in the house of the deceased;

(v) Injuries were found on the persons of Mohd. Yusuf and Babu Khan when they were arrested by the police on 20-4-1983; and (vi) Four silver rings and a knife were recovered from the possession of Mohd. Yusuf and a pair of anklets from that of Babu Khan in consequence of informations furnished by them.

5. On consideration of the evidence adduced by the prosecution in proof of the above circumstances the trial court held that it succeeded in establishing each of them and as, according to the trial court, those circumstances considered together unerringly pointed to the guilt of the appellants convicted them as stated earlier. In appeal the High Court reappraised the evidence and held that circumstances under items (i) and (ii) were not established but the others were. From proof of the above incriminating circumstances and other materials brought on record relating to the murder of Jafar Alam, the High Court first drew the following conclusion

"Referring to the facts and circumstances of the case, it may be stated that robbery was the motive for committing the murder of Jafar Alam This conclusion is fortified by the condition of the house of the a deceased found by the investigating officer at

that time of the site inspection. The whole house was ransacked and various articles were found strewn all over the house. We have also stated that the deceased was not an easy victim of the gruesome murder and he offered resistance and during struggle, a piece of cloth of the bushshirt was torn and the assailants must have also sustained injuries on their person. This fact is corroborated by the injury reports of accused Mohd. Yusuf, Mohd. Iqbal and Babu Khan. The prosecution has also proved these injury reports. The articles stolen from the house of the deceased were also recovered in consequence of the informations furnished by the accused under Section 27, Evidence Act. The two knives used in stabbing the deceased and stained with human blood were also recovered at the instance of the accused persons as stated above"

and then, relying upon the judgment of this Court in *Baiju v. State of M. P.* ((1978) 1 SCC 588 : 1978 SCC (Cri) 142 : AIR 1978 SC 522), drew a presumption under Section 114 [illustration (a)] of the Evidence Act to affirm the convictions of the appellants.

6. It is not in dispute that Jafar Alam met with a homicidal death in the night intervening 12-4-1983 and 13-4-1983. It is also not in dispute that on the following morning his house was found ransacked. Indeed, this part of the prosecution case was not assailed by the appellants during trial or at the time of hearing of the appeal in the High Court. We, therefore, instead of dilating on the above aspect of the matter, proceed to consider whether the findings of the courts below that the prosecution succeeded in proving that each of the appellants had a role to play in the commission of the above crimes can be sustained or not.

7. As noticed earlier the only incriminating circumstance on the basis of which the High Court upheld the conviction of Mohd. Aman is that his fingerprints were found on a brass jug in the house of the deceased. From the evidence adduced in proof of the above circumstance it appears that the brass jug, together with other articles, was seized, packeted and sealed on 14-4-1983 and forwarded to the Fingerprint Bureau after five days - on 19-4-1983 to be precise - through Constable Mohd. Sadique (PW 4) along with a letter written by the investigating officer (copy of which was marked as Ext. P-59) On the following day, that is, 20-4-1983 the Bureau sent the articles back after taking photographs of the chance prints found on the jug and three other articles (out of the sixteen sent) with a corresponding letter (Ext. P-60). After Mohd. Aman was arrested on 20-4-1983 his specimen fingerprints were taken by H. C. Ramji Ram (PW 24) and forwarded to the Bureau on 24-5-1983. As the prints were not clear, the same were returned by the Bureau asking for better prints. Specimen fingerprints were thereafter again taken on 20-6-1983 and sent to the Bureau. These prints were also sent back and for the third time prints of Mohd. Aman were taken and sent to the Bureau on 30-6-1983. Thereafter the Bureau gave its report (Ext. 115) with the opinion that the chance fingerprints found on the brass jug were similar to and identical with his specimen fingerprints.

8. After careful perusal of the evidence adduced in proof of the above circumstance we notice a glaring missing link, in that, the prosecution has failed to establish that the seized articles were not - or could not be - tampered with before they reached the Bureau for examination. Though evidence was led to prove that after seizure the articles were packaged and then sealed, no evidence was led to indicate what was the mark given in the seals and whether the Bureau received the packages with the marked seals intact. Indeed, even the contemporaneous letters exchanged between them (Bxts. P-59 and P-60) do not throw any light on this aspect of the matter. Rather, other circumstances appearing on record make the prosecution case doubtful in this regard : first, the articles were kept in the police station for five days without any justifiable reason, secondly the investigating officer (PW 20) admitted that the seal, mark of which was put on the articles, was with him since the time

of seizure and lastly his letter (Ext. P-59) forwarding the seized articles to the Bureau contains admittedly, an overwriting as regards the date of its writing/despach and no satisfactory explanation is forthcoming for the same. Apart from the above missing link and the suspicious circumstances surrounding the same, there is another circumstance which also casts a serious mistrust as to genuineness of the evidence. Even though the specimen fingerprints of Mohd. Aman had to be taken on a number of occasions at the behest of the Bureau, they were never taken before or under the order of a Magistrate in accordance with Section 5 of the Identification of Prisoners Act. It is true that under Section 4 thereof police is competent to take fingerprints of the accused but to dispel any suspicion as to its bona fides or to eliminate the possibility of fabrication of evidence it was eminently desirable that they were taken before or under the order of a Magistrate. The other related infirmity from which the prosecution case suffers is that the brass jug, production of which would have been the best evidence in proof of the claim of its seizure and subsequent examination by the Bureau, was not produced and exhibited during trial - for reasons best known to the prosecution and unknown to the court. For the foregoing discussion we are unable to sustain the convictions of Mohd. Aman.

9. To prove the role of Mohd. Yusuf (the other appellant in Criminal Appeal No. 1749 of 1996) the prosecution relied upon the find of his fingerprint on a glass tumbler and his footprints in the house of the appellant (sic deceased), recoveries of four silver rings belonging to the wife of the deceased and a knife pursuant to his statement. It is rather surprising that even though the investigating agency claimed to have made a searching examination of the house of the deceased on 14-4-1983 and, to have seized on that day sixteen articles, four of which contained fingerprints, the glass tumbler containing the fingerprints was seized and the footprints were noticed on 24-4-1983. When considered in the context of the fact that he was in custody of the police at that time the possibility of fabrication of evidence to implicate him as contended by him, cannot be altogether ruled out. This apart, some of the reasons which weighed with us for not accepting the 4 evidence regarding the find of fingerprints, namely that there is a missing link between the identity of the articles seized and identity of the articles examined by the Fingerprint Bureau and non-production of the glass tumbler during trial also persuade us not to accept the evidence adduced in proof of the above circumstance. So far as the footprints are concerned, another reason for which we feel it unsafe to accept the evidence led in this regard is I that the sample footprints were not taken before a Magistrate. This apart the science of identification of footprints is not a fully developed science and therefore if in a given case - unlike the present one - evidence relating to the same is found satisfactory it may be used only to reinforce the conclusions as to the identity of a culprit already arrived at on the basis of other evidence. That brings us to the evidence relating to the recovery of the four silver rings (Exts. P-S to P-8) belonging to the wife of the deceased pursuant to the statement made by Mohd. Yusuf. To persuade the court to hold that the above circumstance stood established the first and the foremost fact which the prosecution was required to prove was that those articles belonged to the wife of the deceased and that they were stolen at the time of the commission of the murder. Having gone through the evidence on record we are constrained to say that the prosecution has not been able to establish those two facts and, therefore, we need not go into the question whether the evidence led by the prosecution relating to their recovery from Mohd. Yusuf is reliable or not. The first information report, that was lodged by Sabir Hussain (PW 10), did not give any list of articles that were stolen. He however claimed to have later on given a written statement containing such a list to the investigating officer and this statement was exhibited. In our considered view the trial court was not justified in entertaining the statement as an exhibit because it was hit by Section 162 CrPC. Be that as it may, PW 10 and Bano (PW 2), another relative of the deceased, testified that within a day or two of the murder they could ascertain what articles were

missing from the house. The evidence of these two witnesses on this aspect of the matter cannot be safely relied upon for they admitted that they did not have access to the house till 1-5-1983 as it was in custody of the police and therefore they could not have occasion to know what articles were stolen. Even if we proceed on the assumption that the seized articles belonged to the wife of the deceased the prosecution has led no evidence, either direct or circumstantial, to prove that they were stolen at or about the time when the murder took place. In other words, unless the prosecution conclusively establishes that the articles recovered were stolen when the murder was committed, and not on an earlier occasion, there would be a missing link in the chain so far as the specific accusation levelled against the accused is concerned. Once it is found that the evidence relating to find of footprints and fingerprints of the appellant and the recovery of the four silver rings cannot be safely relied upon, the proof of the other two circumstances, namely that a bloodstained knife was recovered after fifteen days of the incident pursuant to the statement of the accused and that few simple injuries were found on his person on 20-4-1983 when he was arrested would only raise a strong suspicion against him and not a conclusive inference of his guilt. The conviction of Mohd. Yusuf therefore cannot also be maintained.

10. As against Babu Khan the prosecution principally relied upon the recovery of a pair of anklets of the deceased's wife from his possession and his (Babu Khan's) bloodstained trousers from the house of one Asgar pursuant to his statement. For the reasons for which we were unable to accept the evidence relating to recovery of alleged stolen articles from Mohd. Yusuf the circumstance relating to recovery of the anklets has to be left out of consideration. As regards the trousers we find that it was recovered not from the house of the appellant but from the house of one Asgar (PW 9) who turned hostile and did not support the prosecution case. This apart, such a recovery after 10 days of the incident is of no moment. The only other circumstance which the prosecution alleged against Babu Khan is that at the time of his arrest on 20-4-1983, he was found to have some injuries on his person. On perusal of the injury report we find that the injuries were simple in nature and the doctor could not give any definite opinion from which it could be said that those injuries were caused at or about the time when the murder took place. In any view of the matter the above circumstance does not by itself establish his guilt.

11. On the conclusions as above, we allow both the appeals, set aside the convictions of the three appellants and acquit them. Let the appellants be released forthwith.