

(2012) 10 AHC CK 0243
In the Allahabad High Court
Case No : Criminal Appeal No. 1037 of 1982

Faqira and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 05-10-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 116, 313, 374(2)
Penal Code, 1860 (IPC) — Section 302, 307, 34, 354, 380

Citation : (2013) 1 ACR 518 : (2012) 11 ADJ 9 : (2013) 2 ALJ 216 : (2013) 2 Crimes 480

Hon'ble Judges : Vinod Prasad, J; Surendra Kumar, J

Bench : Division Bench

Advocate : D.N. Wali and Ravindra Sharma, for the Appellant; Anand Tiwari and A.G.A., for the Respondent

Final Decision : Allowed

Judgement

Hon'ble Surendra Kumar, J.—Three accused persons Faqira (appellant No. 1), Rawahil @ Rawshil (appellant No. 2) (real brothers being sons of Tehsin) and their cousin brother Furkan (appellant No. 3), son of Yamin, residents of Village Khandrawali, Police Station Kithaur, District Meerut, have preferred this criminal appeal by invoking criminal appellate jurisdiction of this Court u/s 374(2) Cr.P.C. against the judgment and order dated 26.4.1982 passed by Vth Additional Sessions Judge, Meerut, in Session Trial No. 72 of 1980-State v. Faqira and two others, relating to Crime No. 367 of 1979, under Sections 302/307 I.P.C., Police Station Kithaur, District Meerut, whereby the appellants were held guilty and convicted and sentenced to imprisonment for life u/s 302 I.P.C. read with Section 34 I.P.C., seven years Rigorous Imprisonment u/s 307 I.P.C. read with Section 34 I.P.C., and four years Rigorous Imprisonment u/s 458 I.P.C. All the sentences were directed to run concurrently. Thus, the appellants have challenged their conviction and sentence recorded vide impugned judgment and order dated 26.4.1982. The story of the prosecution, as emerged from the written report (Ext. Ka-1) and the F.I.R. (Ext. Ka-3) lodged on its basis by first informant

Samiullah Khan PW-1 and also from the evidence unfolded during trial, is that Zahoor Khan had two sons Tehsin and Yamin. Tehsin had further two sons namely, Faqira and Rawahil (accused persons). Yamin had also one son Furkan (accused). Deceased Allaiddin was the father of the first informant Samiullah Khan PW-1. Before this incident of murder of deceased Allaiddin son of Azimuddin, the deceased had lodged an F.I.R. at Crime No. 236 of 1979, under Sections 452/354 I.P.C. against the accused Faqira showing occurrence of 31.7.1979 at 2.30 p.m. at Police Station Kithaur, District Meerut (Ext. Ka-14). According to the F.I.R. (Ext. Ka-14), on the date of occurrence i.e. 31.7.1979 at 2.30 p.m. one Smt. Amna wife of Samiullah was alone at her house as the other family members had gone to offer Namaz, when the accused Fakira entered into the house and tried to outrage the modesty of Smt. Amna. On her cries, the male and female members reached there and caught Faqira. When the accused Faqira in order to get himself released took out a knife for assaulting, then he was beaten with sticks and Faqira was taken alongwith knife to the police station. Thereafter the deceased Allaiddin had again lodged an F.I.R. against two accused persons Faqira and Rawahil at Crime No. 356 of 1979, u/s 380 I.P.C., Police Station Kithaur, District Meerut on 28.10.1979 showing occurrence of the intervening night of 27/28.10.1979 around mid night. The F.I.R. was lodged regarding theft of electric motor from the tube-well of deceased Allaiddin. Thus, prior to this incident of murder, two F.I.Rs. against the accused persons had already been lodged by the deceased Allaiddin and there was old enmity between the two sides. Thereafter proceedings u/s 107/116 Cr.P.C. were initiated against the accused Faqira.

2. The prosecution case further is that the first informant Samiullah, his father deceased Allaiddin and his uncle Barsat Ali were sleeping inside the Verandah of their house. In the intervening night of 2/3.11.1979 around mid night hearing some commotion, they got up and saw that the accused persons Faqira, Rawahil and Furkan entered into the Gher/enclosure of the deceased Allaiddin and challenged the deceased saying that he had lodged so many cases against them, hence they would immediately kill him. One unknown person accompanied them was holding lathi. At that time, the accused Faqira had a SBBL gun and accused persons Furkan and Rawahil each had country made pistols. The accused Faqira fired on the chest of the deceased Allaiddin and on receiving firearm injury on his chest, the deceased Allaiddin immediately died. Samiullah and his uncle Basarat Ali raised cries when two accused persons Rawahil and Furkan fired from their country made pistols towards them but the shots fire from the country made pistols did not hit anyone. The accused persons successfully managed to run away from the place of incident when they were seen by the witnesses Samiullah and Basarat Ali in the moon light and in the light of torches. Samiullah, the first informant dictated the written report (Ext. Ka-1) of the incident to scribe Istkhar Ahmad just after the incident and the same was scribed by the scribe which the first informant carried to the police station and handed over on 3.11.1979 at 7.30 a.m. after covering a distance of seven kilometers.

3. Head Moharrir Ishwar Singh, who was then posted with S.I. Baljor Singh PW-6, on receipt of written report from the first informant Samiullah, prepared chik report (Ext. Ka-3) and made entry thereof in the G.D. Ext. Ka-4. Exts. Ka-3 and Ka-4 were proved by Baljor Singh as he was posted with him and the chik report was in the handwriting of the said Moharrir. The case was registered in presence of S.I. Baljor Singh PW-6 and immediately then he started investigation of the case. He recorded investigatory statement of the first informant Samiullah at the police station and proceeded to the spot, where he recorded interrogatory statement of Basarat Ali PW-2. Thereafter he deputed five persons as Panches to conduct the inquest on the dead body of the deceased. Inquest report Ext. Ka-5 was prepared by this PW-6. He also prepared Photo Nash, Challan Nash (Exts. Ka-6 and Ka-7), sealed the dead body in a piece of cloth and handed over the dead body alongwith relevant papers to the constable Hukam Singh PW-5. The Investigating Officer PW-6 made spot inspection in the presence of witnesses, prepared site plan Ext. Ka-8 and collected bloodstained and plain earth from the place of incident by preparing memo Ext. Ka-9. Bloodstained Dutai (thick cotton bed sheet) (Ext.-2) was also taken by this PW-6. This PW-6 during spot inspection also discovered 9 pellets (Ext.-3), 3 wads (Ext.-4) and one empty cartridge (Ext. Ka-5) by preparing memo Ext. Ka-20. Thereafter statements of other witnesses namely, Bunyad Ali PW-3, Alamgir and others were recorded by this Investigating Officer and he took torches used by the witnesses Alamgir and Bunyad Ali and seized them by preparing memo Ext. Ka-11. The torches after inspection were returned to the witnesses. The accused persons could not be traced out during search and ultimately on 6.11.1979 they surrendered in the Court of Chief Judicial Magistrate, Meerut and then they were interrogated by PW-6. This PW-6 after completion of the investigation, submitted charge sheet (Ext. Ka-12) on 13.12.1979 against the accused persons. All these facts were proved by this PW-6 in his evidence during trial. The Investigating Officer in his cross examination candidly admitted that the aforesaid cases of theft and outrage of modesty were already recorded against the accused Faqira at the police station. He further stated that the accused Faqira also lodged a report against the first informant Samiullah.

4. Constable Hukam Singh PW-5 was handed over the dead body of deceased Allauddin in a sealed condition, which was taken by PW-5 and constable Radha Charan to the mortuary for post mortem. According to evidence of this constable PW-5, the seal of the dead body remained intact when the dead body was in their custody and none was allowed to touch or tamper with the seal of the dead body. The dead body in a sealed condition was given to Dr. P.N. Khanna, lecturer, Medical College, Meerut, in the mortuary of the Medical College, Meerut.

5. Dr. P.N. Khanna PW-4, who was lecturer in Medical College, Meerut on 3.11.1979 at 4.00 p.m., conducted autopsy on the dead body of the deceased Allauddin aged about 65 years. Dr. P.N. Khanna after conducting post-mortem on the dead body of the deceased, prepared postmortem examination report as Ka-2 and proved the same in his handwriting and signature. He found following

single ante-mortem injury on the dead body of the deceased:

Gun shot wound of entry 21/2 cm. x 21/2 cm. x chest cavity deep on the front of the middle of the chest between the both nipples. Blackening, scorching, and tattooing present around the injury. Oval irregular, lacerated margins.

On external examination, he found the dead body thin built. R.M. Present all over p.m. stg. Present on the back. Bloodstains (dry) were present on the whole of chest, abdomen and partly on both extremities.

About 1/2 day elapsed before postmortem of the dead body. The death of the deceased was due to shock and haemorrhage as a result of gun shot injury. In the dead body 47 shots and pieces of wad from heart were found. Sternum was punctured and fractured.

6. After submission of charge sheet, the learned Chief Judicial Magistrate, Meerut committed the case to the Court of Sessions as it was triable by Court of Sessions, after furnishing relevant copies of the documents to the accused persons. In the Sessions Court, the case was registered as Session Trial No. 72 of 1980 and trial proceeded as per procedure provided for sessions trial cases.

7. The accused Faqira was charged u/s 302 I.P.C., 307/34 and 458 I.P.C. by the Sessions Court. The remaining two accused Rawahil and Furkan were charged under Sections 302/34, 307 I.P.C. and 458 I.P.C. The charges were read over and explained to the accused persons, who pleaded not guilty and claimed to be tried on the said charges.

8. In order to establish the guilt and prove the charges levelled against the accused persons, the prosecution examined seven witnesses, out of them, first informant Samiullah Khan PW-1, his uncle Basarat Ali PW-2, Bunyad Ali PW-3 were eye-witnesses. Dr. P.N. Khanna PW-4 was examined to prove the post-mortem examination report of the deceased and also to prove the injury on the dead body of the deceased. The prosecution also examined constable Hukam Singh PW-5 to prove that dead body of the deceased alongwith relevant papers was entrusted to him and one constable Radha Charan and they handed over the same to Dr. Khanna for post mortem examination alongwith relevant papers. The seal of the dead body remained intact till the same was handed over to Dr. Khanna and when the dead body was in their custody, none was allowed to touch or tamper with the seal of the dead body.

9. S.I. Baljor Singh PW-6 Investigating Officer was also examined by the prosecution to prove the evidence collected during investigation and also to prove that the statements of the witnesses were recorded by him without unnecessary delay.

10. Constable clerk Mahfuj Khan PW-7 was examined to prove the old enmity of the accused persons with the deceased. He also proved the chik F.I.R. of the theft case as Ext. Ka-13 and chik F.I.R. of the case u/s 452/354 I.P.C. as Ext. Ka-14.

11. The appellant Rawahil in his statement recorded u/s 313 Cr.P.C. stated that he was not prosecuted in any case u/s 354 I.P.C. and he was challaned u/s 107/116 Cr.P.C. in collusion with police. The false F.I.R. of theft case was lodged which ended in filing of the final report. He denied other allegations made against him saying that he did not make any fire from any pistol. He also took the plea of alibi, saying that he was not present at the place of incident. He has pleaded his false implication-due to old enmity. According to this appellant, his elder brother Faqira had enmity with the deceased and his family and he had been roped in due to being real brother of Faqira.

12. One Majid Khan DW-1 was examined on behalf of the accused persons in the trial Court to prove that DW-1 was posted as Junior Engineer at Sub Station Power, Hasanpur from where supply of electricity was given to village Khandrawali on the relevant date namely, 2.11.1979 at 10.00 a.m. and the supply continued till 6.00 p.m. On 3.11.1979, the supply of the electricity was given at 11.00 a.m. The evidence of DW-1 is that there was no supply of the electricity from. 2.11.1979 at 6.00 p.m. to 3.11.1979 at 11.00 a.m. from any Feeder.

13. It is necessary to mention here that the appellant No. 1 Faqira and appellant No. 3 Furkan have died pending consideration of their appeal and on account of their deaths, their appeal has been abated vide order dated 8.5.2012. Now we have to consider the appeal of sole surviving accused appellant Rawahil against whom the role is that of making fire from his country made pistol at the witnesses but fire did not hit anyone.

14. We have heard Sri Ravindra Sharma, learned counsel for the sole surviving appellant Rawahil and Sri Anand Tiwari, learned A.G.A. for the State respondent and perused the evidence available on record, in the light of the arguments advanced by learned counsel for both sides.

15. Now we consider the evidence of the aforesaid three eye-witnesses namely, Samiullah Khan PW-1, Basarat Ali PW-2 and Bunyad Ali PW-3.

16. The first informant Samiullah Khan PW-1 deposed that the accused persons belonged to his village and were of one family. About one year back, he was sleeping with his father Allaiddin and his uncle Basarat Ali was in the verandah of the Gher and when at about 12.30 or 1.00 a.m. he heard some persons saying that they will kill Allaiddin as he had lodged several cases against them. In the moon light and in the light of torches, the witness saw the accused Faqira armed with gun, accused persons Furkan and Rawahil each armed with country made pistols alongwith fourth unknown man holding lathi. The accused Faqira fired shot towards Allaiddin and Allaiddin on receiving fire shot, fell on the ground and died at the spot. This witness and his uncle made cries. Two accused persons Rawahil and Furkan fired shots from their country made pistols towards witnesses but the witnesses were not hit. On the cries, other persons namely, Bunyad Ali, Alamgir and Khalil came with lathies and torches and seeing the

witnesses, the accused persons ran away giving threat. The witness also deposed about the cases which had been lodged by the deceased against the accused persons Furkan and Faqira, including the proceedings u/s 107/116 Cr.P.C. The testimony of PW-1 Samiullah Khan finds support from the testimony of Basarat Ali PW-2 who was uncle of the first informant Samiullah Khan PW-1.

17. Basarat Ali PW-2 also deposed that the deceased Allauddin was his real brother. On the date of incident around mid night, he (PW-2), Samiullah Khan and deceased Allauddin were sleeping in Verandah. When they heard Faqira saying that he will not spare the deceased today, they got up and sit on their cots and recognized all the three accused persons alongwith one unknown man holding lathi. Faqira had gun and Rawahil and Furkan each had country made pistols. The accused Faqira fired at the deceased and as a result of firing made by accused Faqira, the deceased Allauddin died at the spot. Remaining two accused persons fired at the witnesses but they were not hit by fire and on their cries, Bunyad Ali and other persons holding torches came there.

18. Bunyad Ali PW-3, who knew the deceased Allauddin prior to the incident and was resident of same village, also deposed that in the night of incident, he was irrigating his field. When the electricity went off the wire, the witness came to his village. When the witness around 12.30 a.m. reached near the house of Faiyaz in order to go to his house, he heard three fire shots from the side of Gher/enclosure of the deceased Allauddin. This PW-3 alongwith Alamgir reached in the Gher/enclosure of the deceased where he saw Faqira armed with gun and two accused persons Furkan and Rawahil each armed with country made pistols alongwith fourth unknown man holding lathi, coming out from the Gher/enclosure of the deceased, in the torch light. On reaching inside the Gher/enclosure of the deceased, this witness found the deceased lying dead on the cot. This PW-3 clearly admitted in his cross examination that he was recorded as history-sheeter at the police station and history sheet was opened due to his enmity with many persons. This PW-3 denied his arrest and conviction in any case of dacoity.

19. Now we deal with the contention raised by the learned counsel for the rival parties during the course of argument of this appeal.

20. The first submission of learned counsel for the surviving appellant Rawahil is that long standing enmity between the parties prior to the incident of murder is established from record and also admitted by surviving appellant Rawahil. It is also established on record that three accused persons belonged to the same family. It is also established and admitted that the deceased Allauddin had filed a report u/s 354 I.P.C. about three months prior to the incident of this murder case and case of violation of modesty was going on, thereafter proceeding u/s 107/116 Cr.P.C. were initiated at the instance of the deceased Allauddin. It is also proved on record that five days prior to this incident of murder, the deceased had lodged the F.I.R. against the appellant Faqira for theft of his electric motor and the accused persons were very much annoyed having sore feelings against the

deceased. Elaborating the argument on these facts, learned counsel for the surviving appellant Rawahil has contended that role against the surviving appellant Rawahil and Furkan is that of making fires from their respective pistols and it was the appellant Faqira who admittedly fired shot from his SBBL gun at the deceased Allaiddin and due to firearm injury, the deceased Allaiddin died at the spot. The main role, according to the prosecution, was assigned to non surviving appellant Faqira and single fire was made at the deceased, which proved fatal. No other injury was found on the dead body of the deceased Allaiddin, even the witnesses did not sustain any fire-arm injury or any other kind of injury in the said incident and if two appellants were making fires from their respective pistols at the witnesses, in the search of their escape from the place of the incident, no witness or other persons present there was hit by the fire shots. This is a case in which no witness or any member of the prosecution side sustained any kind of injury including firearm injury.

21. The next submission of the learned counsel for the surviving appellant Rawahil is that he was named in the F.I.R. of theft case but the theft case resulted into final report and the appellant Rawahil was not found involved in the said theft of electric motor. The appellant Rawahil was not named as accused in a case u/s 452, 354 I.P.C. and that F.I.R. was lodged against non surviving appellant Faqira. It was non surviving appellant Faqira who was nursing a deep rooted enmity against the deceased Allaiddin. The false implication of surviving appellant Rawahil has been argued by learned counsel for the surviving appellant taking us through different aspects of the case and through the evidence of the eye-witnesses on record.

22. The consistent evidence of all these three eye-witnesses Samiullah Khan PW-1, Basarat Ali PW-2 and Bunyad Ali PW-3 is that both the accused persons Rawahil and Furkan fired at the witnesses including the deceased from their respective pistols but none of the fires allegedly made by duo did not hit or cause any injury to any witness or any person present at the spot. It is evident from the testimony of first informant PW-1, particularly, from page 11 thereof, that three other companions of main accused Faqira were 4-5 steps away from the cots of the witnesses and Rawahil and Furkan fired their pistols at the witnesses, all the witnesses including Samiullah Khan PW-1 and Basarat Ali PW-2 continued sitting on their respective cots. Thus, the evidence of PW-1 makes it clear that the eye witnesses remained sitting on their respective cots when these two accused persons fired their pistols at them, even then these witnesses did not sustain any injury. The witnesses raised cries only after the accused persons had left the place of incident. To the same effect is the evidence of Basarat Ali PW-2 stating that the deceased Allaiddin immediately died on receiving firearm injury but the fires made by Rawahil and Furkan did not hit deceased or PW-2 or any other witness.

23. The last contention of the learned counsel for the surviving appellant Rawahil is that the first informant Samiullah Khan PW-1 is son of the deceased, Basarat

Ali PW-2 is real brother of the deceased and Bunyad Ali is history sheeteer. Considering the role of the surviving appellant that none was injured from the fires allegedly made by surviving appellant Rawahil and his escape from the scene of occurrence and lack of motive are the circumstances, which make his presence at the spot doubtful and also indicate his false implication in this case of murder due to his being younger brother of the main accused Faqira. Gun-shot wound of entry, chest cavity deep on the body of the deceased was immediately caused by non surviving appellant Faqira. No other injury was found on the body of the deceased.

24. Per contra, learned A.G.A. has submitted that some pellets and one empty cartridge were found at the place of occurrence giving rise to the possibility that the appellants, who were holding pistols, also fired but the fires made by them did not hit or cause any injury to any one.

25. From the facts and circumstances and evidence available on record, it is established that there was no motive and intention of the sole surviving appellant Rawahil with main accused Faqira for committing murder of the deceased Allauddin or for attempting to murder the eye witnesses. Even though accused Rawahil fired from his country made pistol repeatedly, even then none from the prosecution side or any eye-witness was injured by such fires. The witnesses continued sitting on their respective cots inspite of repeated fires made by surviving appellant Rawahil but the said fires did not cause any injury to the eye-witnesses. The eye-witnesses did not try to run or take shelter in order to save their lives from the repeated fires made by surviving appellant Rawahil from his country made pistol. Thus, the circumstances clearly indicate towards false implication of the surviving appellant Rawahil. His participation in the said incident appears to be improbable and undoubtful and evidence of the eye witnesses in this respect appears to be uncreditworthy and unreliable. There is every possibility of the false implication of the surviving appellant Rawahil in this case of murder. The sole surviving appellant Rawahil being younger brother of Faqira seems to have been falsely implicated. The aforesaid charges levelled against the surviving appellant Rawahil are not proved beyond shadow of reasonable doubt and the prosecution has not been able to successfully establish the said charges against the surviving appellant Rawahil. The appeal has merit and deserves to be allowed. The impugned judgment and order of conviction and sentence awarded by the trial Court as stated above, is not substantiated or borne out from the evidence adduced by the prosecution. The findings recorded in the impugned judgment and order are not based on proper appreciation of evidence on record particularly, with regard to the surviving appellant Rawahil.

26. Concluding the discussion, the appeal of the surviving appellant Rawahil is hereby allowed. The conviction and sentence of the surviving appellant Rawahil recorded by the impugned judgment and order dated 26.4.1982 is hereby set aside. He is acquitted of the charges under Sections 302/34, 307 and 458 of the Indian Penal Code. The surviving appellant Rawahil is on bail, he need not

surrender, his bail bonds and surety bonds are discharged. Let a copy of this judgment be certified to the trial Court for its intimation.