

(2017) 07 MP CK 0026
In the Madhya Pradesh High Court
Case No : 03 of 2016

MADHUSUDAN AGRAWAL

APPELLANT

Vs

STATE OF MADHYA PRADESH & OTHERS

RESPONDENT

Date of Decision : 28-07-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 366](#), [Section 100\(4\)](#) - Sentence of death to be submitted by Court of Session for confirmation - Person in charge of closed place to allow search

Citation : (2017) 07 MP CK 0026

Hon'ble Judges : S.C. Sharma, Alok Verma

Bench : Single Bench

Advocate : Vivek Singh, Milind Phadke

Judgement

1. This common judgment shall govern disposal of (i) Criminal Reference No.03/2016 made by 2 nd Additional Sessions Judge, Shajapur against the death sentence passed by him in judgment dated 10.06.2016, in Session Trial No.114/2013, wherein the learned Sessions Judge found the accused persons Aamin Kha S/o Kadar Kha, Mithun S/o Babulal, Sheikh Dawood S/o Kadar Kha and Sheikh Amjad S/o Kadar Kha guilty under Sections 302 / 34, 201 of IPC and sentenced them to death and rigorous imprisonment of 7 years respectively and fine of Rs.25,000/- and rigorous imprisonment for 1 year by way of default stipulation, thereafter, the reference is made under Section 366 of Cr.P.C. for confirmation of death sentence; and (ii) Criminal Appeal No.823/2016 preferred to this Court by all the

accused persons aggrieved by the aforesaid impugned judgment of conviction and sentence.

2. The prosecution story in brief is that Yunus Kha, brother of the deceased Yakub Kha lodged a report of missing person on 25.12.2012, in which, it was stated that his brother, deceased Yakub Kha went to Dhanana from Akodiya. He had to recover amount of loan from the accused Aamin Kha S/o Kadar Kha. He talked on phone from village Dhanana, and thereafter, he went to some other place from Dhanana and, thereafter, he was not traceable. His brother went to village Dhanana on a motorcycle bearing registration No.MP-04-NA-7558 and was carrying a mobile phone.

3. On 11.01.2013, a phone call was received by Station In-charge Salsalai, District Shajapur at 10:20 a.m. from some unknown person. On telephone, the Station Incharge was informed by the caller that the accused Aamin Kha resident of Dhanana alongwith his two brothers Sheikh Dawood Kha and Sheikh Amjad Kha and also with Mithun, their friend, committed murder of the deceased. They dismembered his body into pieces and put the body pieces into a dry tubewell situated on the land of accused Aamin. This information was recorded by the Station Incharge in Station Daily Diary on 11.01.2013 at Sr. No.197 at 10.20 a.m. He informed his senior officers and this fact was also recorded by him at Sr. No.198. He sent a letter for obtaining permission to Sub Divisional Magistrate to dig open the tubewell, and thereafter, he proceeded to village Dhanana in a official vehicle bearing registration No.MP-03-AC-529.

4. Reaching the place where the dry tubewell was located, he obtained permission from Tehsildar Ms. Asha Parmar and with help of an excavating machine, at 2.00 p.m., digging of the tubewell was begun. At about 4.00 p.m. pieces of body of the deceased and his clothes were visible. Two palms of the body were recovered in which

rings were present. Alongwith him, he took brother of the deceased Yunus Kha (P.W.-2) and also paternal uncle Gul Akbar Kha (P.W.-5) and Abdul Akbar (P.W.-14) cousin brother of the deceased. With help of the rings and clothes that came out of the dry tubewell, they identified the body of the deceased. Thereafter, he registered dehati merg Exb. P-13 and dehati nalish Exb.P-34 and sent them to police station for registration of the crime. On the basis of dehati nalish, the crime was registered and the First Information Report was prepared, which is Exb.P-35.

5. Digging of tubewell continued till 15.01.2013. In all 60 pieces of body were recovered, which were collected and sent for postmortem. Postmortem was conducted by Dr. N.K. Gupta (P.W.-13). Dr. N.K. Gupta was at that time posted at District Hospital Shajapur on the post of Medical Officer. After examining the pieces of the dead body, he referred the matter to Medico Legal Institute Bhopal. He alongwith other two doctors, Dr. Kelu Grewal and Dr. G.L. Gupta, who were specialists posted at Medico Legal Institute Bhopal, performed postmortem on the dead body of the deceased. In postmortem report, it was found that the death was homicidal. There were signs that injury on his head was caused by hard and blunt object and also on pieces of his neck, signs of throttling were present.

6. When the Investigating Officer- Manohar Singh (P.W.-16) reached on the spot, all the four appellants were present there on 11.01.2013. They remained with the police till 16.01.2013 when they were formally arrested. After their arrest, their disclosure memo were prepared. From their disclosure memo, some instruments known as "Baka" which was used for chopping of meat, axe and knives were recovered from a nearby field, which were kept hidden by the appellants. According to prosecution story, these instruments were used for dismembering the body of the deceased. One slipper

allegedly worn by the deceased, was also recovered, which was blood stained. Also the motorcycle of the deceased was recovered from a small pond located in Rajasthan adjacent to the border of Madhya Pradesh. This motorcycle was recovered on 18.01.2013. One register was also seized by the investigating officer from Himalaya Lodge located at district headquarter Agar, where it was alleged that accused Aamin and Mithun stayed for night when they were coming back after throwing the motorcycle of the deceased.

7. The piece of femur bone of the deceased Yakub Kha, his hair, his muscles, blood sample of Haji Kha, father of the deceased, blood sample of his brother Yunus Kha were sent for DNA examination. Other articles like blood stained soil, plain soil, clothes of the deceased, slipper of the deceased, which was recovered on memo, one axe, one knife and one baka were sent for serological examination to Forensic Science Laboratory.

8. After completing all the investigation as aforesaid, the charge-sheet was filed. The learned Judge of the trial Court framed charges under Sections 302 / 34 and 201 of IPC and after recording evidence of both the prosecution and the defence and also examining the accused under Section 302 IPC, the accused were convicted and sentenced as aforesaid.

9. Aggrieved by the judgment of conviction, the appellants filed this appeal on following grounds :-

(i) That the judgment is contrary to law and fact.

(ii) That the judgment passed by the learned trial Court is against the established principles of law.

(iii) The learned trial Court erred in discarding the defence version altogether.

(iv) The inferences drawn by the trial Court were unwarranted and not substantiated by legally admissible

evidence.

(v) There were material omissions and contradictions in the statements of the prosecution witnesses, which were not taking into consideration by the trial Court.

(vi) The conviction is bad in law.

10. Learned counsel for the respondent/State submits that the inferences drawn by the learned trial Court are based on evidence produced by the prosecution, which is admissible and lead to the conclusion that the present appellants committed the crime, and therefore, no inference is called for. He submits that the appeal filed by the present appellants may be dismissed and death sentence passed on them may be confirmed.

11. Before proceeding to examine the evidence produced by the prosecution, we may enlist here, what evidence is available against the appellants. The evidence that is available is as follows :-

(i) That the pieces of dead body of the deceased were found from a dry tubewell located on a land, which was allegedly in possession of the appellant Amin.

(ii) On disclosure memo of the appellants, one knife, one baka, one axe were recovered from the nearby field hidden under the crop.

(iii) One motorcycle belonging to the appellants was recovered hidden on their disclosure memo, one motorcycle belonging to the deceased, on which, the deceased travelled upto village Dhanana was recovered on disclosure memo of the appellants from Jhalra Patan, Rajasthan, village Kedla from a small pond.

(iv) During the postmortem, the team of doctor opined that the deceased was given a blow by hard and sharp object on his head which could be caused by the axe recovered on

disclosure memo by the present appellants.

12. Learned counsel for the appellants submits that Gul Akbar Kha (P.W.-5), who is real paternal uncle of the deceased and Akbar (P.W.-14), who is cousin brother of the deceased, were made attesting witnesses of all the documents prepared by the investigating officer, at the time of investigation. From identification of the dead body, two disclosure memos under Section 27 of Evidence Act and various seizure memos, they were made attesting witness throughout.

According to him, Section 100 (4) of Cr.P.C . provides as under :-

"(3) (4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do. (5)" 13. This sub section provides that search should be in presence of

two or more independent and respectable habitants of the locality, where the search was made. Attesting witness could be of other locality, but for that a condition ought to be satisfied that no habitants of the locality was available to the investigating officer or that the persons who were available there were not willing to be witnesses to the search.

14. Learned counsel appearing for the appellants argues that there is nothing on any of the documents to show that no other person was available on the spot or the available persons were not willing to act as attesting witnesses. He further submits that the investigating officer did not make any search of the area near the tubewell while the JCB machine was excavating the tubewell to make sure whether any instrument or weapon of murder was available around. Baka, knife and axe recovered by the police were recovered from a place very near to the tubewell, and therefore, there was a lapse on part of the

investigating officer. He also submits that recovery of motorcycle is also doubtful. Commission of the crime was not in exclusive knowledge of the present appellants. Admittedly, some unknown persons informed the police about the incident. The investigating officer admitted in his statement in para 43 that before proceeding to village Dhanana, he knew the names of the accused persons and also knew how the crime was committed. Somebody must be knowing that the dead body was in the tubewell, and therefore, it is also possible that somebody knew that where the motorcycle belonging to the deceased was, and therefore, when factum of presence of a thing is in knowledge of some other persons also such piece of evidence is not relevant and cannot form basis of conviction.

15. In light of above submissions, we may now proceed to examine, the evidence produced by the prosecution in detail.

16. In this matter, oral evidence is not very important, as the prosecution case is purely based on circumstantial evidence. The family members of the deceased only deposed in respect of purpose for which the deceased visited village Dhanana. There are three main witnesses examined by the prosecution. Yunus Kha (P.W.-2) is real brother of the deceased. He stated that on 18.12.2012, he went to Kalapipal and left home at about 9.45 a.m. At about 3.23 p.m., he received a phone call from the deceased Yakub Kha. He informed him that he caught hold of accused Amin Kha near Gulana and he also informed him that accused Amin told him that he would repay the amount within 3 - 4 days. He informed his brother and father on phone, who told him that they would take money later on.

Subsequently, he called his brother (the deceased) at 5.00 p.m. on his mobile phone No.9926376059, but his mobile phone was switched off. Thereafter, he did not come back home, and therefore, from 19.12.2012, they started searching for him. Finally, after 6-7 days, he

lodged a complaint of missing person, which is Exb.P-3. A similar statement that the deceased went to village Dhanana to recover the amount back, which he lent to accused Aamin, also given by (P.W.-3) Haji Kha and wife of the deceased Soni Bee (P.W.-7). All these three witnesses basically deposed that the accused Aamin owed Rs.17,000/- to the deceased, which he obtained from the deceased to meet expenses of delivery of his wife and for recovery of which, the deceased went to meet him on 18.12.2012. This piece of evidence is presented by the prosecution to show that he was last seen together with deceased Aamin alive. However, strictly speaking, this does not amount to evidence regarding last seen together alive because the prosecution witnesses did not see him with the accused Aamin and only on phone, they came to know that he met him when he talked to them whether the accused Aamin was with him or not, was not proved. Once he left company of the deceased, the principle of last seen together cannot be used as a piece of evidence against the accused. This apart, oral information on phone by the deceased to his brother and father was not covered by Section 32 of Evidence Act and was a hearsay evidence, not admissible as such. Another important oral evidence is medical evidence of Dr. N.K. Gupta (P.W.-13), who performed postmortem on the basis of body recovered from the tubewell alongwith two other specialists doctors at Medico Legal Institute Bhopal. The important aspect of his evidence is that death of the deceased was homicidal and also that they found signs of one lacerated wound on his skull, which could be caused by hard and blunt object and also there were sign of strangulation found on his neck. Since, the body was cut into various pieces, there could be no doubt that the nature of death was homicidal and not accidental or suicidal, and accordingly, on this point, no further discussion is required.

17. There are two other witnesses Gul Akbar Kha (P.W.-5). He is real paternal uncle of the deceased and he alongwith Abdul Akbar Kha are the attesting witness of all the seizure memo and disclosure memo under Section 27 of Evidence Act etc. In respect of these witnesses, the counsel appearing for the appellants submits that as per the provisions of Section 100 quoted above, it is incumbent on the investigating officer to prepare the seizure memo before the local residence, in case, no such resident is available or those who were available, were unwilling to act as attesting witness, there should be a note on the memorandum. In this case, however, no such note was appended on the seizure memo, instead, same witnesses, who were closely related to the deceased, acted as attesting witnesses throughout and according to learned counsel for the appellants, this creates a doubt on the story of the prosecution.

18. Learned counsel for the State, however, submits that there is no bar in Evidence Act that a close relative of the deceased cannot act as attesting witness.

19. In our opinion, however, it is true that there is no bar that close relatives of the deceased can act as attesting witnesses, however, their probative value diminishes considerably. Being close relatives of the deceased, their oral evidence has to be subjected to close scrutiny.

20. In this case, so far as the facts of recovery of pieces of the dead body from the tubewell is concerned, such facts were not disputed and also identity of the deceased was also not disputed by the appellants. However, the case of the prosecution hinges on recovery of weapons, which were used for dismembering the body of the deceased, and axe, which was allegedly used for murder, and finally, the recovery of motorcycle from a bordering village located in the State of Rajasthan. Taking into consideration the recovery of instruments used for dismembering the body, the investigating officer Manohar Singh

Thakur (P.W.-16) prepared seizure memo on the basis of disclosure memo of accused Aamin Kha Exb.P-17. In his disclosure memo, he stated that the axe and other instruments were in the standing crop in his field. On the basis of this memorandum, one knife was recovered by Exb.P-20, one axe was recovered by Exb.P-21, one baka was recovered on disclosure memo by Dawood Kha by Exb.P-25 from the field of Aamin Kha on which there was crop standing. This apart, one slipper was recovered on the disclosure memo by Mithun from bushes near Rani Rupmati Tomb, Sarangpur, allegedly belonging to the deceased and stained with blood and also one motorcycle belonging to the accused persons was recovered hidden in a fodder.

21. These are the articles recovered after 17.01.2013 onwards.

22. Learned counsel for the appellants submits that when the investigating officer received information on telephone regarding commission of an offence, he was already knowing that offence was committed by the present appellants. This fact was admittedly informed to him on telephone by a stranger. He called all the accused persons on 11.1.2013 when digging of tubewell began. The appellants were with him throughout, but he did not make any search around the tubewell and in the adjacent field and only recovered the articles after 16.01.2013 when the present appellants were formally arrested. These indicates that he was already knowing the facts that such instruments were around the tubewell from where the dead body was recovered. Here, also no independent witness from village Dhanana was called and while preparing the seizure memos and disclosure memos, very close relatives of the deceased were made attesting witnesses of these documents, and therefore, their statements are doubtful.

23. Going through the statement of investigating officer, it is apparent that the present appellants were available on the spot when digging of tubewell started on 11.01.2013. By 6:00 o'clock, on

11.01.2013 body of the deceased was identified. Dehati merg and dehati nalish prepared by the investigating officer. There was no reason for not recording their disclosure memo because for recording disclosure memo, their formal arrest was not necessary and they may be formally arrested, as the body was identified. Instead the investigating officer waited upto 16.01.2013, and thereafter, he recorded the statements. The possibility cannot be ruled out that between 11-16.01.2013, he was already knowing existence of such instruments in the crop and there is also possibility that such instruments were implanted in the nearby crop to implicate the accused persons. It is also unnatural on the part of the present appellants that they would throw the instruments in the crop when parts of the body including clothes of the deceased were thrown in the tubewell and, as such, the instruments could also be thrown in the tubewell alongwith body. This appears unnatural.

24. So far as slipper of the deceased is concerned, the slipper was recovered on the basis of disclosure memo of Mithun on 17.01.2013. This slipper was sent for serological examination to Forensic Science Laboratory. It was not sent for DNA test and in the serological examination, no blood was found on the slipper. No identification was done by the family members of the deceased to show that the slipper belonged to the deceased. The family members were available throughout and they identified clothes and rings worn by the deceased, but the investigating officer failed to get the slipper identified by them and, in this situation, it cannot be said that slipper recovered by the police during the investigation belonged to the deceased. Over the instruments recovered from the nearby field, in the FSL report, human blood was found. However, blood group could not be ascertained and results were inconclusive, and therefore, it was also not proved that they were the same instruments used for

dismembering body of the deceased.

25. This brings us to the another important piece of evidence produced by the prosecution i.e. recovery of motorcycle belonging to the deceased. The motorcycle was recovered from village Bagdal, State of Rajasthan from a small pond, which is located near a blue coloured temple and which is located at 7 km. before Jhalra Patan on Dhar Road. According to Investigating Officer- Manohar Singh (P.W.-16), he proceeded to village Bagdal on 18.01.2013 alongwith two attesting witnesses Gul Akbar (P.W.-5) and Akbar (P.W.-14) and they recovered a Hero Honda motorcycle bearing registration No.MP-04-NA-7558, which belonged to the deceased and on which, he travelled to village Dhanana. To show that the appellants- Aamin and Mithun travelled upto village Bagdal on this motorcycle, prosecution has examined Pirulal Soni (P.W.-1), owner of Himalaya Lodge at Agar Malwa. In his examination-in-chief, he turned hostile, however, he stated that Sheikh Dawood and Sheikh Amjad came to his lodge at about 6-8 months before the date on which his statement was recorded and they stayed in his lodge for the night. The police came to his lodge subsequently. They enquired about the appellants, and thereafter, they seized one register, seizure memo which is Exb.P-1. He signed the seizure memo.

26. This witness was declared hostile, however, in cross examination, he admitted that he gave statement to the police which is Exb.P-2. In his statement which is marked as Exb.P-2, this witness stated that on 19.12.2012 at about 9.30, two boys came to his lodge and when he asked their names, they gave their names as Mithun S/o Babulal and Aamin Kha S/o Kedar Kha Musalman. They also told him that they were coming from Ramganj Mandi, Rajasthan and they would go to Baiyar Nagar. Next morning, they left the lodge. On close examination of the register, which is marked as Article A-11 and the

statement of Perulal (P.W.-1), Exb.P-2, there appears to be some discrepancy in the register. The room, where they slept was shown as Room No.12 and date of arrival was 21.11.2012. No explanation was sought by the prosecution in respect of date mentioned in the register. However, looking to the earlier entries even if it is assumed that the date is 21.12.2012, it did not match with the statement, he gave on 18.01.2013 when register was with him stating that the appellants came to stay on 19.12.2012. This apart, no time of leaving the lodge is mentioned in front of their names and also one more customer was shown as staying in the same room. Whether the room which was allegedly given to the appellants contained three beds or two beds or it was a dormitory hall, was not clarified by the prosecution. Moreover, there was no explanation from the investigating officer as to how he came to know that two appellants stayed in Himalaya Lodge while they were coming back from village Bagdal. In their disclosure memo under Section 27 of Evidence Act, which are marked as Exb.P-16 and P-17, the two appellants Mithun Malviya and Aamin Kha did not disclose anything about their stay in Himalaya Lodge and this made the entries in the register highly suspicious. This apart, the attesting witnesses as stated earlier were close relatives of the deceased and their statements cannot be easily relied upon. It is also very strange that no person from village Bagdal was examined by the prosecution to show that the police came to village Bagdal. They took out the motorcycle from the small pond with help of a rope. Who brought the rope, who went inside the pond, who tied the rope to the motorcycle was not proved by the prosecution. No intimation was given to the local police station while conducting investigation in different state, in territory of a different police station, in which the I.O. had no authority to investigate. These aspects were not explained by the investigating officer and this creates a doubt whether infact they went

to the village Bagdal to recover the motorcycle or they created a false evidence merely to implicate the present appellants, and therefore, this recovery of motorcycle from village Bagdal from a small pond is not reliable.

27. Apart from this, the trite law is that recovery should be from such place which is exclusively in knowledge of the appellants. When there is possibility of knowledge of the place to some other person, such recovery is of no use. On this point, the learned counsel for the appellants relied on judgment of Chhatisgarh High Court in case of Bhoklo vs. State of Madhya Pradesh; 2013 Cri.L.J. 2858 in which the Chhattisgarh High Court placing reliance on judgment of Hon"ble Apex Court in various cases observed that when there is possibility of third person, other than accused, being assailant and knowing the place where such property was hidden, this piece of evidence cannot form basis of conviction in the present case. It is admitted that some stranger informed the police about the presence of body in the tubewell. Investigating Officer Manohar Singh Thakur (P.W.-16) in para 43 of his statement said that the source which informed him about the crime, also informed names of all the accused persons and also how the crime was committed. There is possibility that he was also informed about the motorcycle of the deceased, and therefore, when fact of the article, which was recovered on the basis of the disclosure memo under Section 27 of Evidence Act was already in knowledge of some persons other than the appellants, such pieces of evidence is not reliable.

28. Last aspect of the prosecution case is the motive. The motive in this case is shown to be the amount of Rs.17,000/- which the deceased lent to accused Aamin Kha and as per the prosecution story, the deceased went to recover the amount from Aamin. However, the amount of Rs.17,000/- appears to be too meagre to commit a murder

of a person. There was no evidence of enmity between the appellants and the deceased. It did not instill any confidence in this Court to believe that a person would kill only because he owed him Rs.17,000/-. The appellant Amin Kha is stated to be owner of Agricultural land, may be on a particular time, he was in need of money, so he obtained the loan from the deceased. However, he would kill the deceased for such a small sum makes no sense.

29. Learned counsel for the appellants placed reliance upon the case of Sharad Birdhichand Sarda vs. State of Maharashtra ; (1984) 4 SCC 116 in which the Hon"ble Apex Court laid down the requirement when the case is purely based on circumstantial evidence. On the similar aspect, he cited judgment of Aghnoo vs. State of Bihar ; AIR 1966 SC 119, Kansa Behera vs. State of Orissa ; (1987) 3 SCC 480 and Sangili @ Sanganatham vs. State of Tamil Nadu ; AIR 2014 SC 3756.

30. As stated earlier, in this case, the evidence produced by the prosecution is not reliable. The circumstances in this case are not fully established which conclusively indicate towards the guilt of the appellants and also they are not consistent with hypothesis of guilt of the appellants. There are possibilities that some other person who informed the police regarding commission of the crime, was the actual culprit. The investigating officer Manohar Singh Thakur failed to identify and locate the person to ascertain how he came to know about the incident.

31. In such a situation, we are of the opinion that the appeal filed by the appellants deserves to be allowed and accordingly allowed. The appellants are acquitted from charges under Section 302 / 34 and 201 of IPC.

The fine if deposited by the appellants may be refunded to them.

The mobile phone recovered from appellant- Amjad Kha may be returned to him and other property mentioned in para 78 of the judgment of the trial Court shall be destroyed.

The motorcycles are already on supurdaginama to Sheikh Dawood and Haji Kha. The supurdaginama of these motorcycles are hereby discharged.

As a result of allowing of appeal filed by the appellants bearing No.Cr.A.823/2016, the criminal reference No.03/2016 fails and answered accordingly.