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**(2003) 04 AHC CK 0059**  
**In the Allahabad High Court**  
**Case No : Criminal Appeal No. 1610 of 1981**

Shakil Ahmad and Another (in Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

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**Date of Decision :** 08-04-2003

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 302

**Citation :** (2004) CriLJ 91

**Hon'ble Judges :** M.C. Jain, J;M. Chaudhary, J

**Bench :** Division Bench

**Advocate :** Vijai Bahuguna, Rishi Chadha, R.B. Singh, I.M. Khan and Samir Jain, for the Appellant; Shekahr Yadav, A.G.A., for the Respondent

**Final Decision :** Allowed

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## Judgement

M.C. Jain, J.—There are two appellants, namely, Shakil Ahmad and Raju who have preferred this appeal against the order of conviction and sentence of life imprisonment passed against them u/s 302 read with Section 34, I.P.C. on 18-7-1981 by Sri J.M. Srivastava, the then III Additional Sessions Judge, Fatehpur in S. T. No. 311 of 1980. There was third accused, namely, Ajai Kumar alias Chemin who was tried with the appellants but was acquitted having been given the benefit of doubt.

2. We have heard Sri R.B. Singh learned counsel for the appellant No. 1 Shakeel Ahmad and Sri I. M. Khan learned counsel representing the other appellant Raju. From the side of the State, Srt Shekhar Yadav learned A.G.A. has been heard.

3. The report of the incident was lodged on 31-3-1979 by Rais Ahmad PW-2 -- elder brother of the deceased Munna alias Shamim Ahmad. The prosecution case as unfolded by the F.I.R. taken together with the evidence of the witnesses was that the deceased and the informant Rais Ahmad PW-2 had gone to the house of one Qureshi at Bindaki in some marriage on 26-3-1979 at about 8.00 p.m. The informant stayed there in between that night till 3 O'clock and returned back.

The victim stayed there. However, he did not return even in the morning. The informant and other members of the family made a frantic search for him in Bindaki and at the places of different relations but without success. On 31-3-1979 when the informant had gone to make purchases from the market, he learnt from one Raj Kumar that a dead body was lying in Arhar field in Kewtra of Bindaki town. He went there and found only a skeleton of human body. However, from the shoes and dress he could identify that it was the dead body of Munna alias Shamim Ahmad. Actually, it was thereafter that the report was lodged by him at the police station Bindaki on 31-3-1979 at 4.30 p.m. The motive came to be unfolded during the course of evidence that the two appellants and the acquitted accused Ajai Kumar alias Chemin were on friendly and intimate terms. The house of the appellant Raju was situated in Mohalla Mughlahi. Quite close to his house, there was house of one Nandu Halwai, who had a young niece Geeta, aged about 14-15 years. He was her maternal uncle. Raju appellant fell in love with Geeta and the deceased used to act as go-between and messenger between the two, carrying the letters of each other. Subsequently, however, he also fell in love with Geeta, which was not liked by the appellant Raju. He asked Munna alias Shamim to keep himself away from Geeta but his command or advice was not heeded to by the deceased. The result was that the relations between Raju appellant and deceased grew highly strained on that account. The affair of appellant Raju with Geeta somehow leaked out along with the role of the deceased Munna as go-between and taking the letters of one for the other. The father of the appellant Raju protested against the conduct of Munna deceased with the latter's father and informed him that even Munna had developed illicit intimacy with Geeta. When Munna did not oblige Raju appellant by withdrawing himself from the affairs with Geeta, he (Raju appellant) with the help of the remaining two accused had been in search of a suitable opportunity to remove the thorn from his way permanently. The opportunity came their way on 26-3-1979 when Rais Ahmad PW-2 along with deceased had gone to attend the marriage at the house of Tufail Qureshi in Mohalla Qaziana of Bindki town.

4. The news of the dead body of the deceased being lying in the Arhar field as aforesaid spread all around. While Rais Ahmad PW-2 was busy in lodging the report with the police, the other members of the family collected the bones and brought the same to the tall of one Kalloo where they hung it on a pole in a piece of cloth.

5. The investigation followed at the hands of Swarajya Prakash PW-6. Inquest report was prepared, the bundle of bones of different parts of the body came to be subjected to post mortem by Dr. B.K. Agarwal, PW-1 on 1-4-1979 at 4.15 p.m. They were of a male aged about 15 years and the probable time of death was estimated to be about five days. The cause of death could not be ascertained, as it was simply a heap of bones of different parts of a male body with tags of skin and ligaments which were hard at places. Bones had been gnawed by animals at places.

6. It should be related here as to how the accused appellants came to figure. One Shamsheer @ Mannu PW-4 went to the house of Rais Ahmad PW-2 on 2-4-1979 and informed him that he had seen his brother Munna in the company of the three accused persons at Kanpur in Mohalla Chamanganj on 27-3-1979. He had gone there in connection with the marriage of one Nayaz about three days prior to 27-3-1979. Being resident of Mohalla Mughlahi of Bindki town, he knew all the accused persons and deceased Munna quite well. When he met them in Chamanganj on 27-3-1979, he enquired from them the purpose for which they were there. The deceased Munna requested him not to divulge the fact of his visit to Kanpur as he had gone to enjoy the company of his friends. From there the witness Shamsheer @ Mannu PW-4 proceeded to Lucknow where he stayed for about four days and thereafter he came back to Bindki. There he learnt about the murder of Munna and he narrated the above facts to Rais Ahmad PW-2. Later on, he narrated it to the Investigating Officer that he had seen the deceased in the company of the accused persons in Mohalla Chamanganj of Kanpur on 27-3-1979. Aroused on getting this information from Shamsheer @ Mannu PW-4, Rais Ahmad PW-2 along with his brother went to the accused appellant Shakil Ahmad, who was incidentally found present in his house. He enquired from him as to why he did not inform him that Munna had gone to Kanpur in the company of all the three accused on 27-3-1979. The accused appellant Shakil Ahmad lost his wits and was taken completely perplexed. He reacted in a queer manner by asking Rais Ahmad and his brother not to get near him. else he would shoot them down. His conduct aroused the suspicion of Rais Ahmad PW-2 and his brother, who pounced upon him (Shakil Ahmad) and caught hold of him. Then the accused appellant Shakil Ahmad begged for his life and offered to narrate everything correctly, provided he was let off. On being promised the safety of his life, he narrated to Rais Ahmad PW-2 and his brother that Munna had been taken by him, Raju appellant and the other co-accused Ajai Kumar to Kanpur on 27-3-1979 where they enjoyed the movie from 3 to 6 p.m. They had their dinner at Kanpur and came back by truck to Bindki, getting down near the temple of Jwalaji. Thereafter, they adopted the route from behind the temple and they were coming through pathway of the fields. When they reached near the Arhar field of Ram Dutt Misra, he and his two companions strangled Munna to death and threw his body in the Arhar field. Rais Ahmad PW-2 and his brother then took the accused appellant Shakil Ahmad to the police station on 2-4-1979 and handed him over to the Investigating Officer. Kalloo PW-5 also indirectly lent support to the version of accused Shakil Ahmad regarding strangulation of Munna to death on 27-3-1979 in the Arhar field of Ram Dutt Misra as confessed by the accused appellant himself. It so happened that she-goat of Kalloo was missing and he was trying to track her down. He had seen the three accused persons and the deceased Munna near the grove of Hashim, situated adjacent to the field of Ram Dutt Misra. All of them were going towards the south. He had flashed his torch to locate his she-goat. Though he failed to spot her out, but found all the three accused persons and the deceased Munna going together. Kalloo had to wait near the pond to attend the

call of nature and to ease himself. When he got up, he saw that only the three accused persons were going towards south and Munna was not seen by him in their company. For the first time, Kafloo PW-5 learnt about the death of Munna on 2-4-1979. He then met Rais Ahmad PW-2 on 2-4-1979 and narrated to him all that he had seen in the night of 27-3-1979. Rais Ahmad PW-2 then brought this fact to the notice of Investigating Officer who recorded the statement of Kalloo PW-5. Later on, he examined his torch also and prepared Phard thereof.

7. The defence was of denial and of having been roped in falsely due to enmity. The defence of the accused appellant Shakil Ahmad was that on 2-4-1979 he had been assaulted by Habib, Ganga and Jamil and he had lodged a report at 5.30 p.m. against them at P.S. Bindki the same day u/s 323, I.P.C. He also filed his injury report of the said date of 7.30 p.m. It shows that on 2-4-1979 at 7.30 p.m. he had been examined by Dr. Y. Vishwakarma, Medical Officer at Bindki Dispensary, District Hamirpur. One lacerated wound 3 cm x 1/2 cm x 1/2 cm (scalp tissue deep) on left side of scalp 6 1/2 cm above the left ear was found besides a contusion 5 cm x 3 1/2 cm on right side of face, 4 cm above the angle of mouth right side. Both the injuries were simple and fresh. According to him, he had been falsely involved in this case on that account. The defence of accused appellant Raju was that he was employed at Kanpur at a shop carrying on the business of grains. He was not present in Bindki when the dead body of Munna was found in the Arhar field of Ram Dutt Misra. He claimed that there was enmity between his father and the father of the deceased Munna. The defence of the third accused Ajai Kumar alias Chemin (acquitted) was also of false implication due to enmity.

8. It is manifest from the above that the material testimony was of Rais Ahmad PW-2 and Habib Ahmad PW-3. The former was the elder brother of the deceased and the latter his cousin. Both these witnesses were allegedly present with Munna on 26-3-1979 to attend the marriage at the house of Tufail Qureshi in Bindki town. The accused appellant Shakil Ahmad also allegedly admitted the fact that he and the other co-accused had strangulated Munna to death. We have already made mention of the testimony of Shamsher @ Mannu PW-4 having last seen the deceased in the company of the accused persons in Kanpur on 27-3-1979 and that of Kalloo PW-5 of having last seen all of them together near the field of Ram Dutt Misra in the night of 27-3-1979 and after some time only the three accused persons minus the deceased Munna.

9. As would be clear from the above, the case is of circumstantial nature with no direct and ocular account of the incident, On the basis of circumstantial evidence, the prosecution has tried hard to make out that the deceased was murdered by the two accused appellants and their companion Ajai Kumar alias Chemin (acquitted on being given the benefit of doubt) in the night of 27/28th March 1979, he having been left by his brother Rais Ahmad PW-2 in between the night of 26/27th March 1979 at about 3" O clock at the house of Tufail Qureshi. On consideration, it is found that there are several dark spots and the circumstantial

evidence, on the basis of which the conviction has been recorded, is too weak to be believed with many unbridged gaps and holes in the chain.

10. It has first to be pointed out that it is not even mentioned in the F.I.R. lodged on 31-3-1979 by Rais Ahmad PW-2 that he deceased and the cousin of both of them namely, Habib Ahmad PW-3 had gone to the house of Tufail Qureshi in the night of 26-3-1979 and they had left the deceased at about 3" O clock. This theory came to be introduced later on with a purpose so that the deceased could have been shown to be with them till 3" O clock in the night of 26/ 27th March 1979 so as to be last seen with the accused persons by Shamsheer @ Mannu PW-4 at Kanpur the following day (27-3-1979). In natural and ordinary course, this factum would have found place in the F.I.R. that the deceased was with Rais Ahmad PW-2 and Habib Ahmad PW-3 at the house of Tufail Qureshi in between the night of 26/ 27th March 1979. This important fact is missing from the F.I.R., though it states that the informant had no suspicion on anybody.

11. In the post-mortem report which was conducted on 1-4-1979 at 4.15 p.m. by Dr. B.K. Agarwal, PW-1, the probable time of death is given as five days before. Going by the prosecution evidence, he was murdered in between the night of 27/28th March, 1979 as he was last seen at Kanpur by Shamsheer @ Mannu PW-4 on 27-3-1979. However, the statement of Shamsheer @ Mannu PW-4 does not stand the test of scrutiny and it cannot be believed that he had actually seen the deceased in the company of the accused persons on 27-3-1979. According to him, he had gone to Kanpur in connection with some marriage and was there for the last three days before he met the deceased in the company of the accused persons. On the day following his meeting the accused persons and Munna he came to Lucknow and his statement is that from Lucknow he returned after 7-8 days and then he met Rais Ahmad and his family members on 2-4-1979 that he had met the accused persons and the deceased together at Kanpur on 27-3-1979. The other witness Kalloo PW-5 who claims to have last seen the deceased in the company of the accused persons also cannot be believed. According to him, he had also gone in the feast at the house of Tufail, which was 2-3 days before the night he was searching his she-goat. He contradicted himself in the very next breath that 4-5 days after the feast at the house of Tufail he had gone to Khutla Sijauli for cutting wood and remained there for 2-3 days. Thereafter, he had returned to his house at about 7 p.m. to learn that his she-goat had got lost. Then he set out to search it and it was during such search that he happened to meet the accused persons and the deceased. Indeed, the day on which he could inform Rais Ahmad PW-2 would be later than 3-4-1979, though he has insisted that he learnt about the murder of Munna on 2-4-1979 and met Rais Ahmad on 3-4-1979 to narrate what he had seen. Resultantly, the evidence of Shamsheer @ Mannu PW-4 and Kalloo PW-5 of their having last seen the deceased in the company of the accused persons slips out. Therefore, there could be no question of Rais Ahmad PW-2 going to the house of the accused appellant Shakil Ahmad on 2-4-1979 and of the later making confession before him.

12. There is yet another incongruity that Rais Ahmad has. insisted that he handed over the accused appellant Shakil Ahmad at the police station to the custody of the Investigating Officer on 2-4-1979. The Investigating Officer Swarajya Prakash PW-6 has, however, clearly stated that it was on 7-4-1979 that Shakil Ahmad had been arrested on the intelligence supplied by an informer.

13. Further, it is a matter of record that on 2-4-1979 at 5.30 p.m. the accused appellant Shakil Ahmad lodged an F.I.R. of Marpit u/s 323, I.P.C. (non-cognizable offence) regarding an incident of that date of 5 p.m., naming Habib Ahmad PW-3, amongst others, as the assailants and his medical examination had also been conducted on that date at 7.30 p.m. This factum belies the statement of Rais Ahmad PW-2 and Habib Ahmad PW-3 that they handed over Shakil Ahmad at the police station on 2-4-1979 after he had made confession of the guilt to them. It also makes it clear that Habib Ahmad PW-3 can only be deemed to be a partisan witness against whom the accused appellant Shakil Ahmad had lodged an F.I.R. on 2-4-1979 at 5.30 p.m.

14. In view of the above discussin, it comes to the fore that the case against the accused appellants is only built on suspicion with no clinching and conclusive evidence. Suspicion, as is well known, is not the substitute of proof which is required to pronounce someone guilty of an offence. The circumstantial evidence relied upon by the prosecution is too weak to be believed to form the basis of conviction. We would, therefore, allow this appeal.

15. The appeal is hereby allowed. The order of conviction and sentence passed against the appellants Shakil Ahmad and Raju is set aside. Out of them the appellant Raju is in Jail. He shall be set at liberty it not wanted in any other connection. Appellant Shakil Ahmad is already on bail.

16. A copy of this judgment along with the record of the case be sent to the trial Court for consequential needful action under intimation to this Court within two months.