

(2011) 02 SC CK 0012

In the Supreme Court Of India

Case No : Criminal Appeal No's. 200 and 201 of 2006

Wakkar and Another

APPELLANT

Vs

The State of U.P.
Sheikh Zakullah Vs Akhlaq and
Others

RESPONDENT

Date of Decision : 03-02-2011

Acts Referred:

Arms Act, 1959 — Section 25(4)
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 120B, 147, 148, 149, 201

Citation : (2011) 1 ACR 673 : (2011) AIRSCW 1215 : (2012) 2 ALT(Cri) 85 :
(2011) CriLJ 1639 : (2011) 1 Crimes 246 : (2011) 2 JT 502 : (2011) 3 KCCR 197
SN : (2011) 1 NCC 838 : (2011) 2 RCR(Criminal) 26 : (2011) 1 RCR(Rent) 911 :
(2011) 2 SCALE 198 : (2011) 3 SCC 306

Hon'ble Judges : S. S. Nijjar, J;B. Sudershan Reddy, J

Bench : Division Bench

Advocate : Nagendra Rai, Ajai Bhalla, Abhinav Jain, Abha R. Sharma, Dinesh Kumar Garg, B.S. Billowria, Abhishek Garg, Dhananjay Garg, B.P. Singh and Jatinder Kumar Bhatia, for the Appellant; R.K. Dash R.K. Gupta, Rajiv Dubey, Kamendra Mishra and Irshad Ahmad, for the Respondent

Final Decision : Dismissed

Judgement

B. Sudershan Reddy, J.—These three appeals by special leave arise out of a common judgment made in Criminal Appeal Nos. 445 of 2005, 701 of 2005 and Capital Sentence Reference No. 2 of 2005, dated 7th October, 2005 on the file of High Court of Judicature at Allahabad. The Appellants in Criminal Appeal No. 200 of 2006 along with other accused by name Akhlaq, Salman and Nanha Pahalwan were tried for offences punishable under Sections 148, 302 read with Sections 149 and 201, IPC and Section 25(4) of the Arms Act. The trial Court sentenced all the five accused persons to death for the offences punishable u/s 302 read with Section 149, IPC. Various other sentences have been awarded to the accused for the offences punishable under Sections 148 and 201, IPC. They were also sentenced to undergo rigorous imprisonment for six months each for the

offence punishable u/s 25(4) of the Arms Act. The aggrieved Appellants in Criminal Appeal No. 200 of 2006 along with co-accused Nanha Pahalwan and Salman have preferred their appeals in one set jointly being Criminal Appeal No. 445 of 2005 and the other accused Akhlaq preferred Criminal Appeal No. 701 of 2005 in the High Court. The High Court confirmed the conviction of the Appellants Akhlaq, Wakkar and Imtiaz for the offences punishable under Sections 302/149, 201, IPC and Section 25(4) of the Arms Act and commuted their sentence for the offences punishable u/s 302/149, IPC from death penalty to that of imprisonment for life. That, so far as the accused Nanha Pahalwan and Salman were concerned, they were convicted only for the offence punishable u/s 25(4) of the Arms Act and they were acquitted of the offences punishable under Sections 302/149 and 201, IPC. Hence, Criminal Appeal No. 200 of 2006 is preferred by the Appellants Wakkar and Imtiaz challenging their conviction and sentence for the offences punishable under Sections 302/149, 148 and 201, IPC and Section 25(4) of the Arms Act and Criminal Appeal No. 767 of 2006 is preferred by the State of U.P. pleading for award of death sentence against the accused. Likewise, Criminal Appeal No. 201 of 2006 is preferred by the complainant Sheikh Zakaullah (PW 1) challenging the decision of the High Court acquitting some of the accused and as well as reducing death penalty to that of imprisonment for life.

2. According to the prosecution, on 9th August, 2000, the deceased Sujaullah @ Mintu left home at about 9 a.m. to his workplace and returned back at about 8 p.m. At 8.30 p.m., the accused Akhlaq gave a telephone call to the deceased whereupon, he told his wife Zebi (PW 3) that he was going to Akhlaq's shop as he must have called him to receive payment of money and would be returning within a short time, but the deceased did not return. At about 11 p.m., the complainant (PW 1), Sheikh Zakaullah, who is none other than the brother of the deceased got anxious and went out in search of his brother. At about 11.45 p.m., he came across Hamraj 'Furniture-wala' from whom he inquired about his brother. He told PW 1 that he had seen the deceased at about 10 p.m. at the accused Akhlaq's shop where he and the accused Imtiaz, Wakkar and Akhlaq were also present. PW 1 continued his search for his brother but could not trace him and he came back to his foundry and sat there for awhile. At about 12.15 am, he noticed the accused Wakkar, Akhlaq and Imtiaz along with two others coming down the stairs of first floor room of Akhlaq's shop. On seeing them, PW 1 inquired about his brother and the accused Akhlaq told him that the deceased Mintu, in all probability, might have gone to Chandigarh as told to him. Next morning, at about 9 a.m. when accused Akhlaq came to his shop, PW 1 once again inquired from him about his brother and the reply of Akhlaq was the same but Akhlaq looked quite disturbed which gave rise to some suspicion in the mind of PW 1 and as such he insisted Akhlaq to show his first floor room, but the accused Akhlaq avoided to show the room on the pretext that he was not having the keys of the room. Thereafter, PW 1 Zakaullah with the help of a ladder got into the roof of said first floor room of Akhlaq and found some blood lying on the

floor. He peeped into the room and saw that several pieces of dead body of his brother Sujaullah @ Mintu were lying there. These pieces were kept in bags. He was shocked at the scene and started raising alarm. He got down and told the people present there about what he has seen. It is at that point of time, Sompal (PW 6) told him that in the night at about 11 p.m., while he was present at his furniture shop, he heard some shrieks from the first floor room of Akhlaq. Thereafter, the door of the first floor room of Akhlaq's shop was broken open by the agitated crowd collected there and found the scene inside the room as horrifying where the pieces of the body of the deceased Sujaullah @ Mintu were lying on the floor. Immediately, PW 1 prepared the written report (Ext. Ka-1) and lodged it at the police station on 10th August, 2000 at 10 a.m.

3. On lodging of the first information report, the case under Sections 147, 148, 302, 149 and 201, IPC was registered and the Inspector, R.P. Sharma (PW 14) commenced the investigation. During the process of investigation, the Investigating Officer (PW 14) noticed that the body of the deceased Sujaullah @ Mintu cut into pieces was lying in the shop of Akhlaq. He prepared the inquest report (Ext. Ka-26). Site plan (Ext. Ka-25) was drawn and the pieces of the dead body were sealed and sent for postmortem. The next day i.e. 11th August, 2000, the I.O. arrested the accused Akhlaq and interrogated him. Relying upon the statement of Akhlaq, the scooter of the deceased was recovered. The blood stained knife was also found inside the box of the scooter. The other accused Nanha Pahalwan, Salman and Wakkar were absconding. However, Wakkar was arrested on 16th August, 2000 and one blood stained dagger used by him in the crime was recovered from a graveyard (Kabristan) in the presence of the witness Jeeshan and Zakaullah (PW 1). The recovery memo (Ext. Ka-4) was prepared by the I.O. and the recovered dagger was got sealed. The accused Imtiaz was arrested on 19th August, 2000 and knife used by him in the crime was recovered at a place called Kabir Nursery in the presence of the witnesses. Recovery memo (Ext. Ka- 48) was prepared on the spot and site plan of the place of recovery (Ext. Ka-49) was also prepared. Nanha Pahalwan surrendered himself before the Court on 30th August, 2000 followed by Salman's surrender on 2nd September, 2000. Blood stained knife used in the crime and blood stained watch of the deceased were recovered from the accused Salman.

4. Postmortem examination was conducted on 10th August, 2000 at about 9.30 p.m. by Dr. K.K. Mehta (PW 4) who vide his report (Ext. Ka-4) found ten incised wounds which included the complete amputation of the left arm from elbow joint, right arm from the elbow joint, right leg from the knee joint, left leg from the knee joint. The head from the neck was cut through and through which neck bone was cut at Sl. No. 2. The head and face of the deceased had also several cut injuries. In the opinion of Dr. Mehta, the deceased had died about 18 hours before the autopsy. The death was on account of shock and hemorrhage as a result of aforementioned ante mortem injuries.

5. On completion of the investigation, charge sheet (Ext. Ka- 62) was laid against

the five accused under Sections 147, 148, 149, 302, 201 and 120B, IPC and additionally charges u/s 25(4) of the Arms Act were also framed.

6. The prosecution, in support of its case, has examined Zakaullah, the complainant (PW 1), Safullah (PW 2), a witness of recovery of the articles (scooter belonging to the deceased and blood stained knife used in the crime) on the disclosure made by the accused Appellant Akhlaq. The wife of the deceased Smt. Zebi (PW 3) and the Doctor who conducted the postmortem, Dr. K.K. Mehta (PW 4) were also examined. One Sompal (PW 6), the owner of furniture shop in the neighbourhood of the shop of accused Akhlaq was also examined. He is the witness who heard the human shrieks from the first floor room of the shop of Akhlaq.

7. A short question that arises for our consideration is whether the various circumstances available on record forms a chain pointing only to the guilt of the accused? Whether the evidence adduced by the prosecution proves particular facts relevant for the purpose of the case and further question arises whether the facts are capable of giving rise only to any inference of the guilt of the accused persons?

8. It is well settled and needs no restatement at our hands that the principle for basing a conviction on the basis of circumstantial evidence is that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. It is also well settled as held by this Court in more than one decision that the Courts have to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometime, unconsciously it may happen to be a short step between moral certainty and legal proof. "That there is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions" [see *Tanviben Pankaj Kumar Divetia Vs. State of Gujarat*,

9. Admittedly there is no eyewitness to the occurrence. The entire case of the prosecution rests only on certain pieces of the circumstantial evidence to substantiate the charges levelled against the Appellants. The circumstances formulated at page 19 of the judgment of the High Court are:

(1) P.W. 3, the witness Smt. Zebi has deposed about the fact that her husband, the deceased in the night of incident when came back from his karkhana (iron foundry) at about 8.00 p.m., he, soon after received a telephonic call from the Appellant accused Akhlaq at about 8.30 p.m. whereafter he intimated her about Akhlaq's call and immediately went to him by his scooter at 8.30 p.m.

(2) P.W. 1 Zakaullah when noticed that his brother Mintu did not return till late in the night, he has deposed before the court that he went out in his search and reached Akhlaq's shop nearby his foundry. There he was told by 'Hamraj Furniturewala' that he had seen Mintu at the shop of accused Akhlaq. After he

sat down at his foundry on the chair, he in the hours of mid night noticed the accused Akhlaq, Imtiaz and Wakkar along with two others coming down the stairs from first floor room of the accused. He also noticed that Akhlaq was extremely perplexed when he inquired from him about his brother. He was told by Akhlaq that Mintu, the deceased was telling him about his likely departure for Chandigarh.

(3) P.W. 1 remained in his foundry till morning and at 9.00 a.m. of 10.8.2000 when Akhlaq again visited the shop. P.W. 1 further inquired from him about his brother and at that juncture also the accused (Akhlaq) looked nervous giving rise to some suspicion in the mind of the complainant.

(4) P.W. 1 asked Akhlaq to show his first floor room which he avoided on the pretext of not possessing the key of locked room.

(5) On account of suspicion so arisen in the mind of P.W. 1, he, in hope of getting some clue in the room about his brother, ascended the roof of the said room through a ladder from the side of saw machine of Bhoora behind the building of accused Akhlaq. From the roof he got down through the stairs and found presence of blood there and when he peeped from the crevices of door in the room he was shocked at the sight of the pieces of his brother's dead body wrapped in the pvc bags and some cloth.

(6) P.W. 1 having been completely frightened at the scene of the room rushed down and raised alarm which attracted people from among whom P.W. 6 Sompal came to him and told of having heard the shrieks of man coming from the room of the incident.

(7) P.W. 6 Sompal states that in the night of 9.8.2000 at about 11.00 p.m. he heard the shrieks of a man coming from the first floor room of the accused Akhlaq's shop.

(8) The last circumstance relating to the incident, which has come in the evidence before the trial court, is the evidence of recoveries of instruments used in the crime by the accused persons and also the recoveries of the scooter, watch and trouser all blood stained belonging to the deceased from the possession of those accused, as detailed above.

10. It is equally well settled that in a case which is based on circumstantial evidence, motive for committing the crime on the part of the accused assumes importance. The suggested motive is that the deceased Mintu joined a lottery/ money circulation scheme run by accused Akhlaq and invested a sum of Rs. 60,000/- in the said business. On some pretext or the other, the accused Akhlaq was postponing the payment due to the deceased. On 7th August, 2000, the deceased insisted for the payment whereupon the accused Akhlaq along with other accused told him that they would make the payment at their convenience and further threatened the deceased that they would eliminate him if he keeps insisting for the payment of money.

11. The only question that arises now for our consideration in these appeals is as to whether the circumstances and the chain of events conclusively establish the involvement of all the accused in committing the crime of murder of the deceased?

12. Shri Nagendra Rai, the learned senior counsel appearing for the Appellants in Criminal Appeal No. 200 of 2006, submitted that it would be unsafe to convict the accused based on the sole and interested testimony of PW 1, who is none other than the brother of the deceased. He also submitted that the circumstantial evidence is so weak and it is impossible to arrive at any proper conclusion that the Appellants, in any way, were responsible for the commission of murder of the deceased. There is not even an iota of evidence suggesting that the deceased and the Appellants were last seen together and there was no motive attributed to the Appellants herein for indulging in the ghastly crime of committing murder of the deceased.

13. Shri R.K. Dash, learned senior counsel appearing for the State and Shri Dinesh Kumar Garg, learned Counsel appearing for the Appellant in Criminal Appeal No. 201 of 2006 strenuously contended that all the accused including those who were acquitted by the High Court were responsible for the commission of murder of the deceased. The circumstantial evidence and the chain of events conclusively suggest the involvement of all the accused in the brutal murder of the deceased. They have pleaded for restoration of judgment of the trial Court and for convicting and sentencing all the accused with death penalty.

14. We have considered the rival submissions and perused the material available on record. Before we proceed further to discuss and consider the submissions made by learned Counsel appearing on behalf of their respective parties, it is just and necessary to notice that Akhlaq (A 1) who is stated to be the main culprit, did not prefer any appeal against his conviction and sentence of life imprisonment granted by the High Court. The entire case depends upon the evidence of P Ws 1, 2, 3 and 6 as examined by the prosecution. It is they who speak about incriminating circumstances and the chain of events. There is no dispute whatsoever that the prosecution has clearly established that the murder of deceased Sujallah @ Mintu took place in the room located on the first floor of a shop which was under the occupation of Akhlaq (A 1) and others. The pieces of dead body of the deceased Sujallah @ Mintu were recovered from that room. This is one of the strong circumstances suggesting the involvement of Akhlaq in the crime. There is no explanation whatsoever much less any cogent one forthcoming from the accused as to how the body of the deceased cut into pieces was found in the shop premises which is in the possession of Akhlaq and others. This is the strong circumstance which the prosecution has clinchingly established that the dead body was found in the shop belonging to Akhlaq where some business was being carried on by Akhlaq along with his kith and kin.

15. Secondly, there is absolutely no reason to disbelieve the evidence of Smt. Zebi (PW 3), wife of the deceased who in clear and categorical terms stated that

the deceased received a telephone call at about 8.30 p.m. on the fateful day from the accused Akhlaq to come over to the shop and receive the payment of lottery money which was due in respect of which persistent demands were there from the deceased. It is in her evidence that the deceased immediately after receiving the telephone call, left on his scooter but did not return back to home. It is further in her evidence that having waited till about 11 p.m. in the night, she informed Zakaullah (PW 1) who is none other than the elder brother of her deceased husband. Her evidence receives complete corroboration from the statement of PW 1 that he was informed by Smt. Zebi (PW 3) that the deceased left home on receiving telephone call from the accused Akhlaq but did not return thereafter.

16. In this context, the evidence of PW 1 assumes significance that in pursuance of the information received from his sister-in-law (PW 3), he left the house in search of his brother (the deceased) and ultimately leading to discovery of the dead body of the deceased from the place of occurrence i.e. the first floor of the shop belonging to Akhlaq. The evidence of PW 3 read together with that of PW1's statement, unerringly establishes that the deceased had gone to the shop belonging to the accused Akhlaq on receiving a telephone call from Akhlaq in connection with the payment that was due to him from Akhlaq and others.

17. There is nothing to disbelieve the evidence of Sheikh Zakaullah (PW 1) that till midnight he could not trace the deceased and out of desperation he returned to his work place and by midnight he noticed the accused Akhlaq, Imtiaz and Wakkar along with two other persons coming down from the stairs of the first floor room of the shop of Akhlaq where the dead body was later on found. It is in his evidence that he enquired from Akhlaq about his brother and Akhlaq gave an evasive answer. There is no dispute whatsoever that the murder of the deceased took place during that night only at the shop belonging to the accused where all the three accused Akhlaq, Imtiaz and Wakkar were seen coming from the scene of offence. It is undoubtedly a very strong circumstance which unerringly points towards the culpability and involvement of these three accused. The High Court, in our considered opinion, on reappraisal of the evidence available on record, believed the evidence of P Ws 1 and 3 in this regard and rightly taken circumstances into consideration leading to an irresistible conclusion that these three accused namely Wakkar, Akhlaq and Imtiaz were involved in the commission of the crime. It is also crucial to note that upon suspicion, PW 1 insisted Akhlaq to show the first floor room of his shop but there was no response whatsoever as the accused just avoided stating that he was not in possession of the key of the locked room and at that point of time, the accused Akhlaq was very nervous. It is at that time, PW 1 became suspicious about the whole thing and in the process, PW 1 with the help of a ladder, climbed to the roof of the said first floor room of the shop from behind and on reaching the roof got down through the stairs of the first floor and noticed scattered blood on the floor and found pieces of dead body of his brother. The trial Court and as well as the High Court have properly appreciated the evidence of PW 1 in this regard and

there is nothing on record to disagree with the view taken by the Courts below.

18. PW 6 is one Sompal who heard the human shrieks coming out from the first floor room of the shop belonging to the accused Akhlaq. This witness has a furniture shop in the neighbourhood of the shop of Akhlaq. It is in his evidence that he told Zakaullah (PW 1) that in the previous night he had heard human shrieks coming out of the first floor room of the shop. This witness was not subjected to any cross examination except by the counsel representing the accused Akhlaq. We cannot disbelieve the presence of this witness in his own shop at about 9 p.m. on the fateful night. It is in his evidence that on that fateful night of the incident, there was some 'pooja' in the vicinity and therefore, he stayed back to have some prasad after pooja. His presence at that time in the neighbourhood of the place of incident cannot be doubted. No particular reason suggested to him in the cross examination as to why he should give a false statement.

19. The last one of the foremost circumstances which is brought on record through the evidence of the witnesses examined on behalf of the prosecution relates to the recoveries of incriminating articles made from the accused Akhlaq, Wakkar and Imtiaz. It is on record that blood stained knives and daggers allegedly used in the crime and the blood stained scooter, trouser and watch belonging to the deceased were recovered and these articles have contained human blood stains on them. These articles are said to have been recovered on the disclosure made by the Appellants to the police. There was some criticism that there were no independent witnesses to the recovery except PW 1 and the Investigating Officer, R.P. Sharma, PW 14. But, we are not inclined to reject the evidence of PW 1 merely because he happened to be the brother of the deceased. It is true that recovery of certain incriminating articles at the instance of the accused u/s 27 of the Evidence Act by itself cannot form the basis of conviction. The recovery of incriminating articles and its evidentiary value has to be considered in the light of other relevant circumstances as well and the chain of events suggesting the involvement of the accused. The trial Court and as well as the appellate Court did not rest the conviction of the Appellants solely based on the recoveries. The fact remains that the recovery of articles used in the commission of offence has been taken into consideration together with other incriminating circumstances brought on record by the prosecution.

20. Now the only question that remains for our consideration is whether the case on hand is one of over implication?

21. Learned senior counsel for the Appellants strenuously contended that there is no evidence available on record to show the involvement of these Appellants in the crime. The submission was that no motive has been suggested as against these Appellants as to why they should commit the murder of the deceased. We shall consider the same.

22. It is in the evidence of PW 1 that the accused Nanha Pahalwan, Salman and

Imtiaz are real brothers. Wakkar is none other than the son of their step brother Irshad. The evidence available on record shows that the deceased Sujaulah invested a sum of Rs. 60,000/- in the lottery/money circulation scheme which was being run by these persons along with Akhlaq. The deceased was repeatedly demanding for return of his amount from all the accused. In the circumstances it becomes difficult to accept the submission of learned senior counsel that the Appellants Wakkar and Imtiaz were in no way involved in the conduct of business of lottery/money circulation scheme along with the accused Akhlaq at the shop belonging to Akhlaq. For the aforesaid reasons, we hold that the trial Court and as well as the High Court have rightly concluded that the immediate impelling motive on the part of the Appellants which led them to commit the crime in question is traceable to their involvement in the business and persistent demands from the deceased for return of his money. We are not inclined to accept the submission made by the learned senior counsel that there is no evidence suggesting that the Appellants were also involved in the said finance business along with Akhlaq. Like Akhlaq, the Appellants also had the impelling motive which led them to commit the crime in question. It is not a case of any over implication. In this context, the evidence of PW1 becomes relevant that he noticed the accused Akhlaq, Imtiaz and Wakkar along with two other persons coming down from the stairs of the first floor room of Akhlaq's shop where the dead body of the deceased was later on found. The findings recorded by the trial Court and confirmed in appeal by the High Court finding the Appellants to be guilty of the charged offences along with Akhlaq are unassailable. Both these Appellants have been rightly convicted for the offences so charged.

23. What remains for our consideration is whether the High Court committed any error in acquitting the accused persons Salman and Nanha Pahalwan. They were convicted only for the offence of illegal possession of the illicit arms punishable u/s 25(4) of the Arms Act. The High Court rightly refused to convict them based only on the recovery of incriminating material objects. The High Court has noted that their names did not find place in the FIR (Ext. Ka-1) initially given at the police station by PW 1 which consists of the names of three accused persons Akhlaq, Wakkar and Imtiaz and two more persons whom PW 1 was not able to identify. The names of Nanha Pahalwan and Salman have figured on subsequent information received by PW 1. The circumstance pressed into service that the deceased was last seen in the company of the accused including Nanha Pahalwan and Salman has been rightly disbelieved by the High Court. The statement of Irfan `panwala' which is the root suggesting that the deceased was last seen with the accused including Nanha Pahalwan and Salman is of no consequence since he has not been examined as a witness by the prosecution. Thus, there is no evidence whatsoever to connect Nanha Pahalwan and Salman with the commission of the crime. The High Court, in our considered opinion, rightly acquitted both the said accused.

24. Whether the case falls in the category of `rarest of rare' for awarding death sentence? There is no direct evidence as to the manner in which the gruesome

murder had taken place. It is not possible to discern and arrive at any definite conclusion as to the role played by each of the accused in the commission of the dastardly crime. No doubt they committed the crime in cold blood but did it quite stealthily. The entire case rests on the circumstantial evidence. The High Court having taken all relevant factors into consideration rightly came to the conclusion that the case is not the one which falls in the category of 'rarest of rare'. We are in agreement with the conclusion arrived at by the High Court and its decision to award life imprisonment alone and not the death sentence.

25. For all the aforesaid reasons, we confirm the judgment of the High Court and accordingly dismiss all the appeals.