

## **Mohd. Aman, Babu Khan And Another vs State Of Rajasthan on 8 May, 1997**

**Equivalent citations: AIR 1997 SC 2960, 1997(2)ALD(CRI)59, 1998(1)ALT(CRI)38, 1997CRILJ3567, JT1997(5)SC451, RLW1997(3)SC442, 1997(4)SCALE134, (1997)10SCC44, AIR 1997 SUPREME COURT 2960, 1997 AIR SCW 2980, (1997) 5 JT 451 (SC), 1997 CRILR(SC&MP) 452, 1997 (10) SCC 44, 1997 CALCRILR 256, 1997 UP CRIR 786, 1997 CRIAPPR(SC) 210, 1997 (4) SCALE 134, 1997 SCC(CRI) 777, 1997 (5) JT 451, (1997) ILR (KANT) 2783, (1997) 3 RECCRIR 293, (1997) 3 RAJ LW 442, (1997) 3 SCJ 257, (1997) 21 ALLCRIR 734, (1997) 4 SCALE 134, (1997) 35 ALLCRIC 121, (1997) 3 ALL WC 1480, (1997) 2 CHANDCRIC 86, (1997) 2 ALLCRILR 547, (1997) 1 CRICJ 713, (1997) 3 RECCRIR 243, (1997) 4 CURCRIR 188, (1997) 4 SUPREME 635, (1997) SC CR R 875, 1997 CHANDLR(CIV&CRI) 78, 1997 CRILR(SC MAH GUJ) 452, 1998 (1) ANDHLT(CRI) 38 SC, (1998) 1 ANDHLT(CRI) 38**

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**Bench: K. Venkataswami, M.K.Mukherjee**

ORDER

M.K.Mukherjee, J.

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

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

(a) Jafar Alam (the deceased), who was a widower and had no issue, was a resident of Mohalla Bas, in the town of Nagaur. He had no arrangement of his own for cooking food and his close relatives including Sabir Hussain (P.W. 10) who lived nearby used

to serve him daily. On April 13, 1983 at or about 10 A.M. when her niece Mrs. Manohar (P.W. 3), went to his house carrying his food she found the main door of the house open. She entered the house and called Jafar Alam but did not get any response. She then went to the inner room and found to her utter dismay that he was lying dead on the floor in a pool of blood. She rushed out of the house and informed Sabir Hussain and others. All of them then came back and noticed that there were a number of injuries on the person of the deceased, that his mouth was gagged with his tehmata and that the house was ransacked.

(b) Sabir Hussain then went to Nagaur police station and lodged a first information report (Ext. P/7). On that report a case under Section 302 IPC was registered and investigation was taken up. In course of the investigation the site was inspected and a number of articles were seized, some of which appeared to have finger prints on them. Besides, a foot print was noticed there, photographs of which were taken.

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

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

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

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

i) The three appellants and Mohd. Iqbal were seen by Habib Khan (P.W. 7) loitering near the house of the deceased at or about 10 P.M. on April 12, 1989;

ii) Hanif Khan (P.W. 8) saw all four of them at or about 3 A.M. on April 13, 1983 proceeding across his house towards Ginani;

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

iv) Foot print of Mohd. Yusuf were found in the house of the deceased;

v) Injuries were found on the persons of Mohd. Yusuf and Babu Khan when they were arrested by the police on April 20, 1983; and

vi) Four silver rings and a knife were recovered from the possession of Mohd. Yusuf and a pair of anklets from that of Babu Khan in consequence of informations furnished by them.

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

Referring to the facts and circumstances of the case, it may be stated that robbery was the motive for committing the murder of Jafar Alam. This conclusion is fortified by the condition of the house of the deceased found by the Investigating Officer at the time of the site inspection. The whole house was ransacked and various articles were found strewn all over the house. We have also stated that the deceased was not an easy victim of the gruesome murder and he offered resistance and during struggle, a piece of cloth of the bushshirt was torn and the assailants must have also sustained injuries on their persons. This fact is corroborated by the injury reports of accused Mohd. Yusuf, Mohd. Iqbal and Babukhan. The prosecution has also proved these injury reports. The articles stolen from the house of the deceased were also recovered in consequence of the informations furnished by the accused under Section 27, Evidence Act. The two knives used in stabbing the deceased and stained with human blood were also recovered at the instance of the accused-persons as stated above.

and then, relying upon the judgment of this Court in *Baiju v. State of M.P.* drew a presumption under Section 114 {illustration (a)} of the Evidence Act to affirm the convictions of the appellants.

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

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

8. After careful perusal of the evidence adduced in proof of the above circumstance we notice a glaring missing link, in that, the prosecution has failed to establish that the seized articles were not - or could not be - tampered with before it reached the Bureau for examination. Though evidence was led to prove that after seizure the articles were packaged and. then sealed, no evidence was led to indicate what was the mark given in the seals and whether the Bureau received the packages with the marked seals intact. Indeed, even the contemporaneous letters exchanged between them (Ext. P.59 and P.60) do not throw any light on this aspect of the matter. Rather, other circumstances appearing on record make the prosecution case doubtful in this regard : first, the articles were kept in the police station for five days without any justifiable reason, secondly the Investigating Officer (P.W. 20) admitted that the seal, mark of which was put on the articles, was with him since the time of seizure and lastly his letter (Ext. P.39) forwarding the seized articles to the Bureau contains admittedly, an overwriting as regards the date of its writing/dispatch and no satisfactory explanation is forthcoming for the same. Apart from the above missing link and the suspicious circumstances surrounding the same, there is another circumstance which also cast a serious mistrust as to genuineness of the evidence. Even though the specimen finger prints of Mohd. Aman had to be taken on a number of occasions at the behest of the Bureau, they were never taken before or under the order of a Magistrate in accordance with Section 5 of the Identification of Prisoners Act. It is true that under Section 4 thereof police is competent to take finger prints of the accused but to dispel any suspicion as to its bonafides or to eliminate the possibility of fabrication of evidence it was eminently desirable that they were taken before or under the order of a Magistrate. The other related infirmity from which the prosecution case suffers is that the brass jug, production of which would have been the best evidence in proof of the claim of its seizure and subsequent examination by the Bureau, was not produced and exhibited during trial - for reasons best known to the prosecution and unknown to the Court. For the foregoing discussion we are unable to sustain the convictions of Mohd. Aman.

9. To prove the role of Mohd. Yusuf (the other appellant in Criminal Appeal No. 1749 of 1996) the prosecution relied upon the find of his finger print on a glass tumbler and his foot prints in the house of the appellant, recoveries of four silver rings belonging to the wife of the deceased and knife pursuant to his statement. It is rather surprising that even though the investigating agency claimed to have made a searching examination of the house of the deceased on April 14, 1983 and, to have seized on that day sixteen articles, four of which contained finger prints, the glass tumbler containing the finger prints was seized and the foot prints were noticed on April 24, 1983. When considered in the context of the fact that he was in custody of the police at that time the possibility of fabrication of evidence to implicate him as contended by him, cannot be altogether ruled out. This apart, some of the reasons which weighed with us for not accepting the evidence regarding the find of finger prints, namely that there is a missing link between the identity of the articles seized and identity of the articles examined by the Finger Print Bureau and non-production of the glass tumbler during trial also persuade us not to accept the evidence adduced in proof of the above circumstance. So far as the foot prints are concerned, another reason for which we feel it unsafe to accept the evidence led in this regard is that the sample foot prints were not taken before a Magistrate. This apart the science of identification of foot prints is not a fully developed science and therefore if in a given case - unlike the present one - evidence relating to the same is found satisfactory it may be used only to reinforce the conclusions as to the identity of a culprit already arrived at on the basis of other evidence. That brings us to the evidence relating to the recovery of the four silver rings (Ext. P.5 to P.8) belonging to the wife of the deceased pursuant to the statement made by Mohd. Yusuf. To persuade the Court to hold that the above circumstance stood established the first and the foremost fact which the prosecution was required to prove was that those articles belonged to the wife of the deceased and that they were stolen at the time of the commission of the murder. Having gone through the evidence on record we are constrained to say that the prosecution has not been able to establish those two facts and, therefore, we need not go into the question whether the evidence led by the prosecution relating to their recovery from Mohd. Yusuf is reliable or not. The First Information Report, that was lodged by Sabir Hussain (P.W. 10), did not give any list of articles that were stolen. He however claimed to have later on given a written statement containing such a list to the Investigating Officer and this statement was exhibited. In our considered view the trial Court was not justified in entertaining the statement as an exhibit because it was hit by Section 162 Cr.P.c. Be that as it may, P.W. 10 and Bano (P.W. 2), another relation of the deceased, testified that within a day or two of the murder they could ascertain what articles were missing from the house. The evidence of these two witnesses on this aspect of the matter cannot be safely relied upon for they admitted that they did not have access to the house till May 1, 1983 as it was in custody of the police and therefore they could not have occasion to know what articles were stolen. Even if we proceed on the assumption that the seized articles belonged to the wife of the deceased the prosecution has led no evidence, either direct or circumstantial, to prove that they were stolen at or about the time when the murder took place. In other words, unless the prosecution conclusively establishes that the articles recovered were stolen when the murder was committed, and not on an earlier occasion, there would be a missing link in the chain so far as the specific accusation leveled against the accused is concerned. Once it is found that the evidence relating to find of foot prints and finger prints of the appellant and the recovery of the four silver rings cannot be safely relied upon, the proof of the other two circumstance, namely that a blood stained knife was recovered after fifteen days of the incident pursuant to the statement of the accused and that few simple injuries

were found on his person on April 20, 1983 when he was arrested would only raise a strong suspicion against him and not a conclusive inference of his guilt. The conviction of Mohd. Yusuf therefore cannot also be maintained.

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

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