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IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 246 OF 2007
STATE OF J&K

...APPELLANT(S)

VERSUS

VIJAY KUMAR & ORS.

...RESPONDENT(S)

O R D E R

This appeal has been preferred by the State of Jammu and Kashmir against the six accused-respondents, namely:

1. Vijay Kumar

S/O Khoju Ram

R/o Patrara Panchgrain

Tehsil Rajouri, Distt. Rajouri.

2. Mukesh Kumar S/o Khoju Ram

3. Shamlal S/o Khoju Ram

4. Mst. Bhijji Devi alias Poli W/o Khoju Ram

5. Mst. Babli Devi W/o Mukesh Kumar

6. Mst. Padma Devi W/o Tirath Ram

All the six respondents were accused of murder of Kamala Devi and were tried for offence of murder before the Court of Session Judge, Rajouri, J& K.

The prosecution case commenced on the complaint of PW-1

viz. Rajinder Kumar, father of the deceased on 14.05.1995 to the effect that the deceased Kamala Devi was married to Vijay Kumar two years prior to the incident. Due to her medical problem, she was unable to conceive, on account of which Vijay

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Kumar was planning to do away with her in order to solemnize second marriage. On 14.05.1995 PW-1 Rajinder Kumar got information that Vijay Kumar with his two brothers Mukesh Kumar and Shyam Lal, mother- Bhijji Devi, Sister-in-laws: Babli Devi and Padma Devi killed Kamala Devi on the intervening night of 13/14 th

May, 1995.

During the investigation the dead body was recovered from the Nallah near the house of the accused. After investigation, the accused were sent up for trial.

The prosecution examined as many as 31 witnesses. It will be suffice to refer to the main evidence. PW-1 father of the deceased, PW-2 mother of the deceased and PW-3 brother of the deceased described the circumstances in which the deceased was living with the accused and to prove the motive alleged against the accused for killing the deceased.

PW-11 Phanga Ram stated in his evidence that soon before the death of the deceased he heard noise in the Branda of the accused's house and thereafter saw lifting of the deceased by Vijay Kumar.

The trial Court noted the said evidence as follows:

That when he was passing through village Abran Khater on way to Village Khankari and was passing by the house of the accused after crossing the nallah he heard a noise in the Branda of the accused's house. That thereafter the accused and the deceased went inside their house. That accused Vijay Kumar lifted the deceased by catching from the neck and legs and carried her inside the house. That thereafter he ran away and the occurrence pertains to 10 or 10.15 p.m. of the said day. That he heard at that time the deceased saying "do not kill";. That after half an hour thereafter he reached

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his in-laws house at Khankari, stayed there for the night and on the next morning the returned to his house. That what happened thereafter is not known to him though on the next day he knew

about the death of the deceased in the evening. That on the next day thereafter he participated in the cremation of the deceased and thereafter deceased's father inquired from him as to what he observed when he had been to village whereupon he told the whole episode to the deceased's father as narrated by him above.

PW-26 Sita Devi who gave bath to the dead body for cremation found that the dead body had torture/burn marks of angle iron on the body.

PW-29 Dr. Khalid Mansoor, who conducted the post-mortem found following injuries:

1. A bruise on left cheek of dimension 2cm x 1 cm.

2. A lacerated wound of left ear lobule measuring 3 cm x 2 cm

3. A burn injury extending from left mammary gland upto left flank and extended posteriorly upto lumbar supine measuring 2 cm in width all along and life burn marks at the level of 4th, 5th lumbar supine measuring 2cm in diameter. No vesicles seen.

At the same time the following state of body has been described by the medical expert -

Eyes: The eye balls were prominent congested patrichial -

Ears : Deeply cynosed.

Nostrils : Cynosed blood stained water ooxing

Mouth : Tongue swollen bruised slightly protruded.

Anus : Faecal matter present.

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Head

Membrances: Congested cynosed patechial hemorrhage.

Brain : Congested with petechail hamorrhages.

Neck : The neck was swollen irregularly distribute finger and nail marks on front and sides of neck under chin and bruising on front and sides. On dissection epbentarcone tissue neck showed extra-vasaction of blood and bruising.

Thorax

Pleura, larynx, traceha for Bruising and laceration foreign bed of disease etc of larynans and trachea present and trachea contained blood stained fluid.

(ii) Lungs : Congested, engorged and -

Both right and left : for Congested angrageda appearance size shape, disease, and empty semafons weight, abnormality, colour, petechial hemorrhages constency adhesions etc. widely distributed in both lungs.

(iv) Pericardium : Fluid seen in paricardial side. Heard and blood vessels : The right side of the heart was distended and left side was empty and veins were full of dark blood.

Abdomen

(i) Walls, peritoneum peritoneal cavity contents:

Wall and

(ii) Liver Gall Bladder : Liver congested, gall bladder normal.

(iii) Spleen : Normal in appearance.

Organs of Generation : Uterus non gravid.

According to him the death of the deceased was due to asphyxia as a result of throttling which has been observed in his post mortem report Ex PW KM. In the cross-examination the medical expert has deposed that the deceased

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was brought to him by her relations and SHO P/S Rajouri and the dead body was identified by the persons introduced by the S.H.O. whose names have been disclosed in the post mortem report. That the S.H.O. disclosed the death being on account of drowning but he has not disclosed the cause in his post mortem report. Further he has stated that asphyxia is a mode of death in this case which could be caused by so many reasons including throttling according to him throttling is a strangulation caused by constriction which is a pressure on account of fingers and further that on the basis of the finger marks shown on the neck he was of the opinion that the death in the case was throttling coupled with other findings such as cyanosis on face ears, tip of nose, prominent eye balls, petechil hemorrhages swellness of tounge. However the medical expert has further stated that other factors mentioned by him excepting finger marks are not exclusively peculiar to the causing of death by strangulation, as such factors can also be present in the case of death by drowning. That he has not described the length, breadth and colour of the marks found on the neck which factors would definitely indicate as to whether the left or right hand was used in committing murder by throttling. Also he has deposed that the finger marks present on the neck are not only sufficient to establish cause of death by throttling. More so many signs of drowning and one of them the presence of water in stomach and swallowness of the tongue were also present and certain signs of drowning can disappear with the lapse of time as well as that occasionally death occurs from asphyxia caused by small amount of water entering the larynx. As in such a case the water does not enter the lungs and the signs of drowning would be absence though the death could still be by drowning.¶ The Trial Court rejected the prosecution version on the ground that there was no reliable eye witness account and thus the accused could not be convicted. The High Court dismissed the appeal with the following order:

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â- SThe prosecution has not proved the guilt against the accused with regard to his illicit relations with the wife of his brother and that the deceased was not medically fit to deliver a child. Motive has not been proved by the prosecution. Doctor has also not been examined to prove the injuries of the persons of the deceased. It is the story of the prosecution that the injuries had been caused on the person of the deceased with an iron rod. Iron rod also has not been seized. It is a case of patently wrong investigation of the case on the part of investigating officer. The prosecution has not proved its case against the accused for his conviction. Trial court has rightly appreciated the evidence and recorded the finding of acquittal, whicch we maintain. The appeal being meritless fails and is dismissedâ- \235.

Since the accused-respondents though served were not represented, we appointed Mr. Pijush K. Roy, Advocate, as amicus curiae.

We have heard learned counsel for the parties and perused the record.

It is obvious from the medical evidence that the death was homicidal and the body was thrown in the Nallah after killing. The body had torture marks including the burn marks. This is further established on record that immediately before the death, the deceased was living with her husband. In the light of evidence on record, it could be held that the burden would be on the husband under Section 106 of the Evidence Act to explain the circumstances in which the deceased living with him was killed and her body was thrown in the Nallah. Even if the benefit of doubt is given to other family members, there is no reason to doubt the involvement of accused - Vijay Kumar in the murder. The evidence of PW-11 also

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corroborates the involvement of accused Vijay Kumar. In view of above, we allow this appeal and set aside the acquittal of accused- Vijay Kumar and convict him under Section 302 of the Indian Penal Code and sentence him to undergo life imprisonment. The accused-Vijay Kumar be taken into custody to serve out the sentence.

However, we uphold the acquittal of other accused (except Vijay Kumar) in the absence of clinching evidence against them.

We place on record our appreciation for Mr. Pijush K. Roy, learned amicus curiae for assisting the Court.

â- |.....J.

[ADARSH KUMAR GOEL]

NEW DELHI â- |.....J.

14TH FEBRUARY, 2017 [UDAY UMESH LALIT]

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ITEM NO.101 COURT NO.11 SECTION IIC
S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Criminal Appeal No(s). 246/2007

STATE OF J &K

Appellant(s)

VERSUS

VIJAY KUMAR & ORS.

Respondent(s)

(With office report)

Date : 14/02/2017 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ADARSH KUMAR GOEL

HON'BLE MR. JUSTICE UDAY UMESH LALIT

For Appellant(s) Mr. Shoeb Alam,AOR

Ms. Fauzia Shakil,Adv.

Mr. Ujjwal Singh,Adv.

Mr. M. Karim Khan,Adv.

Mr. Ashok Mathur,Adv.

For Respondent(s) Mr. Pijush K. Roy,Adv.(AC)

Mrs. Kakali Roy,Adv.

Mr. Subhash Sharma,Adv. (NP)

UPON hearing the counsel the Court made the following

O R D E R

The appeal is allowed in terms of the signed order.

(Madhu Bala)

(Veena Khara)

Court Master

Court Master

(Signed order is placed on the file)