

(2000) 02 AHC CK 0178**Allahabad High Court****Case No:** Reference No. 7 of 1999 and Capital Cri. Appeal No. 1685 of 1999

Riyazat Ali

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Feb. 18, 2000**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 366
- Penal Code, 1860 (IPC) - Section 300, 302, 304

Citation: (2000) CriLJ 3055**Hon'ble Judges:** R.R.K. Trivedi, J; M.C. Jain, J**Bench:** Division Bench**Advocate:** Apul Misra, P.N. Misra and Prem Prakash, for the Appellant; A.G.A., for the Respondent**Final Decision:** Dismissed**Judgement**

M.C. Jain, J.

Sri Ram Jeewan Gupta, the then II Additional Sessions Judge, Kanpur Dehat has convicted accused-appellant Riyazat Ali u/s 302, I.P.C. He has sentenced him to death and to pay a fine of Rs. 5000/- within three months or to undergo rigorous imprisonment for six months in default. He has made reference u/s 366, Cr.P.C. to this Court for confirmation of the death sentence passed by him. The accused-appellant has also preferred appeal against his such conviction and sentence passed.

2. It was a double murder case of one Mushtaq aged about 35 years and Km. Reshma aged about 13 years (own daughter of the accused-appellant). The incident took place on 9-5-96 at about 10.00 A.M. in Mohalla Takia Gausganj. Police Station Musa Nagar, Kanpur Dehat. The report was lodged by Smt. Julekha Khatoon PW 2 wife of deceased Mushtaq the same day at 10.40 A.M. after getting it scribed by one Abdul Khalil. The distance of the Police Station from the place of occurrence was

about 2 furlongs. The prosecution case was that the accused-appellant was a weightlifter with the deceased Mushtaq in Radhey Govind Dal Mill. About six months before the incident, the mill owner had dismissed the accused-appellant for his allegedly being involved in some theft. The accused-appellant laid blame against the deceased Mushtaq that he was responsible for his dismissal. The accused-appellant also held out on 9-5-96 at about 10.00 A.M. that deceased Mushtaq had developed illicit relations with his (accused-appellant Riyazat Ali's) daughter Reshma. Mushtaq questioned back as to why he (accused-appellant) was defaming him. Thereupon, the accused-appellant lost his temper and retorted back that he would kill him as well as his daughter Reshma. Niyamat Ali PW 1. Smt. Julekha Khatoon PW 2, Kazim Ali and some other residents of the locality had come when such altercation was taking place between the accused-appellant and deceased Mushtaq. The accused-appellant quickly went to his house and reappeared with a country-made pistol and cartridges. He opened fire on Mushtaq in front of the shop of Shyamu and then he proceeded to the house of his own Sadhu Imami and shot his own daughter Reshma. He flaunted his weapon that he would kill anyone daring to catch him. He then ran away towards Musa Nagar Garh. Mustaq and Reshma were admitted in the Hospital in injured condition.

3. Reshma was medically examined the same day at 1.45 A.M. by Dr. K.K. Srivastava CW 1. As per her injury report Ka-22, the following injuries were found on her person:

1. Firearm wound of entry 3 cm. x 2 x cavity deep omentum coming out on midline of front of abdomen in epigastric region 7 cm. above from umbilicus at 12 O'clock position, margins inverted, blood oozing out. Blackening and tattooing present on whole of abdomen including lower part of chest in an area 30 cm. x 22 cm. kept under observation.

2. Firearm wound of exit 0.75 cm. x 0.5 cm. x cavity deep on right side back 4 cm. above from iliac crest 8 cm. away from midline of back. Blood oozing out. Margins everted. Injury kept under observation.

4. The injuries had been caused by firearm. They were fresh. She died the same day at 3.20 P.M. The post-mortem over her dead body was conducted on 11-5-96 at 11.00 A.M. by Dr. Narendra Kumar Jaiswal PW 6. The following ante-mortem injuries were found on her person :

1. Firearm wound of entry 2 cm. x 2 cm. 6 cm above the umbilicus, in epigastrium area, blackening, tattooing and charring present around the wound. Margins inverted.

2. Firearm wound of exit 1.5 cm. x 1.5 cm. right side hand.

5. The death had occurred as a result of ante-mortem injury sustained by her.

6. Mushtaq was initially medically examined on 9-5-96 at 2.00 P.M. at U.H.M. Hospital, Kanpur by Dr. K.K. Srivastava CW 1. The following injury was found on his person :

1. Firearm wound of entry 5 cm. x 1 cm. x cavity deep on right side back of abdomen 26 cm. below from root of neck 1.5 cm. away from middle of back, oozing of blood present. Margins inverted. Blackening present surrounded by tattooing mark on back in an area of 30 cm. x 28 cm. Kept under observation.

7. The injury had been sustained by firearm and was kept under observation. The X-ray of abdomen and chest was advised. He ultimately died on 24-5-96 at 3.30 P.M. The post-mortem over his dead body was conducted by Dr. D. K. Vaisha PW 7 on 25-5-96 at 10.00 A.M. The following ante-mortem injuries were found on his person :

1. Firearm wound of entry 2 cm. x 1.5 cm. x chest cavity deep on right side back 1 cm. from midline and 8 cm. from inferior angle of right scapula, margins inverted. Black colour present on the margin of wound. Tattooing not present.

2. Lacerated wound 1 cm. x 1 cm. x chest cavity deep on left side chest 6 cm. from left nipple at 2 O'clock position.

3. Lacerated wound 1 cm. x 1 cm. x chest cavity deep on right side chest in mid axillary line 10 cm below axilla.

8. The cause of death was septicemia with shock.

9. After investigation, the accused-appellant was booked. The defence was of denial and of false implication. According to him, about 1 1/2 months before this incident, deceased Mushtaq had attempted to commit rape on his daughter Reshma and he had been informed about it by his daughter. As a responsible father, he did not air the said incident. But the day before the incident, Mushtaq's wife Julekha Khatoon quarrelled with his wife. With intervention of certain residents of the locality, he got the matter pacified. On the day of incident, he had gone to his work at 7 A.M. After about half an hour he was informed that Mushtaq and his wife were quarrelling with his wife. He came back to his house and learnt that Munna Cyclewala had opened fire on Mushtaq and Reshma, for he was having a love affair with Reshma and he had acquired knowledge that Mushtaq had committed rape on her. To be short, he laid blame on one Munna for the given offence that in a fit of rage he opened fire on Mushtaq as well as on Reshma.

10. At the trial, the prosecution examination in all eleven witnesses. Dr. K.K. Srivastava was examined as CW 1. Out of the witnesses examined, Niyamat Ali PW 1 and Smt. Julekha Khatoon PW 2 were the eye-witnesses. Rest were the police personnel including the Investigating Officer and Doctors. One Chandra Nath Singh Yadav, Pharmacist of U.H.M. Hospital was examined as DW 1.

11. The prosecution case and evidence found favour with the Court below. The guilt of the accused-appellant was found proved to the hilt. The learned Sessions Judge was of the opinion that it was the rarest of rare cases, calling for the extreme penalty of death. He accordingly passed the impugned judgment and order. The matter is now before this Court.

12. We have heard Sri P.N. Mishra, learned counsel for the appellant in support of the appeal and the learned A.G.A. in opposition thereof, besides carefully going through the material and evidence on record. It has first been argued for the accused-appellant that Niyamat Ali PW 1 and Smt. Julekha Khatoon PW 2 examined as eyewitnesses by the prosecution are not the natural witnesses. It has also been urged that they are close relatives of the deceased Mushtaq, former being his real brother and latter being his own wife. Though the relationship of these two eye-witnesses with deceased Mushtaq is an admitted fact, but we do not see any merit in the submission to brand them as unnatural witnesses of the occurrence. The factum of their close relationship of the deceased only requires testing of their testimonial assertions on the anvil of reliability with great caution and nothing more. Both of them were subjected to searching cross-examination, but nothing could be elicited from the testimony of any of them to create a dent in prosecution story. Niyamat Ali PW 1 is the eye-witness of both the murders by the accused-appellant i.e. of Mushtaq and thereafter of Reshma as part of the same transaction, whereas Smt. Julekha Khatoon PW 2 is the eye-witness only of the first murder of Mushtaq committed by him. We may point out that Smt. Julekha Khatoon PW 2 is also the maker of the F.I.R. which she lodged without loss of time at 10.40 A.M. on the day of incident itself after getting it scribed by Abdul Khalil. The Police Station was situated at a little distance of two furlongs. The incident having taken place at about 10 A.M. on 9-5-96, it is obvious that no time gap intervened for deliberation and concoction for the false nomination of the accused-appellant as the culprit of the crime. To us, both the eye-witnesses named above sound to be the most natural witnesses of the incident. The first Investigating Officer Mohd. Ahmad Ansari PW 10 had visited the scene of occurrence and blood and sample earth had also been collected by him from the spot where Mushtaq had been shot at. He had prepared a Fard in this behalf which is Ext. Ka-21. It has come in his testimony that the spot was only at a distance of 4 or 5 paces from the house of Smt. Julekha Khatoon PW 2. The distance so spoken by him was not challenged by the defence side. Thus, having regard to the distance from the house of Smt. Julekha Khatoon PW 2 of the place where Mushtaq had been shot at by the accused-appellant she appears to be a natural witness of the incident of the shooting of her husband. She clarified in her cross-examination that at that time she was standing near the shop of the elder brother of her husband. It could be recalled that the incident took place near the shops of Shyamu and Kalloo is the own son of Niyamat Ali PW 1, doing tailoring work in his shop. It has come to be stated by Niyamat Ali PW 1 that the incident of shooting of Mushtaq by the accused-appellant took place in front of the

shop of Kalloo and at that time he himself was sitting at his shop. The shop of Shyamu is just after the shop of Kalloo. There is nothing unusual if Niyamat Ali PW 1 was present at the shop of his son Kalloo when his brother Mushtaq was shot at by the accused-appellant. Really speaking, both the eyewitnesses are of the same vicinity where the occurrence took place and their presence there was quite natural.

13. So far as the shooting of Reshma by the accused-appellant is concerned, the eyewitness thereof examined by the prosecution is only Niyamat Ali PW 1. It has come to be stated by him that after opening fire on Mushtaq, the accused ran towards the house of his Sadhu Imami and shot at his own daughter Reshma. He had followed him and had seen this incident of shooting also with his own eyes. We note that there was no sizeable distance between the spot where Mushtaq was shot at by the accused-appellant and the house of Imami where he opened fire on his daughter Reshma. Smt. Julekha Khatoon PW 2 stated in paragraph No. 7 of her testimony that the distance from the shop of Shyamu (near whose shop Mushtaq was shot at) of the house of Imami was only of one plot. She is an illiterate lady. Her above statement, which went unchallenged, was indicative that the two places were at stone throwing distance. The point that we wish to drive home is that the statement of Niyamat Ali PW 1 has the ring of truth when he says that after shooting of Mushtaq by the accused-appellant, he followed him who went to the house of his Sadhu Imami and opened fire on his own daughter Reshma in continuation and as part of the same transaction. It is also worthwhile to point out that the eye-witness account delivered by Niyamat Ali PW 1 and Smt. Julekha Khatoon PW 2 is in full agreement with the medical evidence also in that both the victims sustained firearm injuries, capable of being caused by a country made pistol made use of by the accused-appellant. To come to the point, we reject the argument of the learned counsel for the accused-appellant levelling criticism against the testimony of the two eye-witnesses examined by the prosecution and terming them to be unnatural witnesses. We find their testimony to be perfectly believable and in harmony with the medical evidence.

14. It has next been argued by the learned counsel for the accused-appellant that Mushtaq died on 24-5-1996 at 3.30 P.M. but his dying declaration was not recorded. Indeed, it would have been better, had dying declaration of Mushtaq been recorded. But remissness or negligence of the Investigating Officer in not arranging for recording of dying declaration of Mushtaq would not cease or take away the effect of the ocular testimony produced by the prosecution of two witnesses, namely, Niyamat Ali PW 1 and Smt. Julekha Khatoon PW 2 which we have found to be perfectly convincing and trustworthy, proving to the hilt that the culprit was the present appellant and none else. Therefore, non-recording of the dying declaration of Mushtaq does not adversely affect the prosecution case in the face of satisfactory eye-witness account of the incident coming from the mouths of Niyamat Ali PW 1 Smt. Julekha Khatoon PW 2. We, therefore, reject this second argument also advanced in support of this appeal by the learned counsel for the accused-appellant.

15. Pausing here for a moment, we think it worthy to mention that there does not appear to be any earthly reason as to why the accused-appellant would be falsely implicated by the eye-witnesses. It is a case of single accused. The two eye-witnesses produced by the prosecution had no motive or reason to falsely implicate him, giving clean chit to the real culprit. There could be some scope for such supposition in case there were more accused than one. In that eventuality, it could be said that along with real culprit, the accused-appellant had also been falsely implicated. That is not the situation here.

16. We also desire to say a few words about the defence case set up by the accused-appellant that one Munna Cyclewala was having a love affair with his daughter Reshma and on discovering that Mushtaq had committed rape on her, he opened fire on both of them in a fit of rage. This appears to be a cock and bull story. In fact, it seems to be stranger than Arabian Nights and is wholly unacceptable. One of the victims was the own daughter of the accused-appellant and in case of there being any grain of truth in his defence version, at least some members of the family of his Sadhu Imami (where Reshma was shot at) would have come forward to say so. We have not the slightest doubt that the accused-appellant had put forth an imaginary defence theory in an attempt to wriggle out of the difficult situation which was the creation of his own criminal act and to avoid the legal consequences thereof.

17. It has lastly been argued by the learned counsel for the accused-appellant that in any view of the matter, it was a case of culpable homicide not amounting to murder covered by Exception 1 of Section 300, I.P.C. On giving our anxious consideration to this aspect of the matter, we find substantial force in this argument. Let us elaborate. It has come in evidence that the accused-appellant and deceased Mushtaq were neighbours. Formerly they were working with the same employer. Smt. Julekha Khatoon PW 2 wife of Mushtaq deceased stated in paragraph No. 7 that only two houses intervened between her house and that of the accused-appellant. They were on visiting terms as spoken by Niyamat Ali PW 1. Deceased Mushtaq abused that position and cast libidinous eye on Reshma, (daughter of accused-appellant) who was of tender age of about 13 years and developed carnal relations with her, though he himself (Mushtaq) was aged about 35 years. Men and women of desperate ages have been found to be struck and swayed by the persuasive power of sex and have been found plunging or attempting to plunge in amorous affairs despite noticeable disparity of years of age on one side or the other. It was quite natural that the blood quickly rushed to the head of the accused-appellant on learning that deceased Mushtaq had ravished his tender aged daughter of about 13 years. He, as the father of the daughter, felt to be completely ruined and devastated by such dishonour heaped upon him and his daughter Reshma by deceased Mushtaq. The disgraceful act of Mushtaq committing rape on his tender aged daughter Reshma gave him such a grave and sudden provocation that he was deprived of the power of self control. It was in that state of agitated

mind that he first opened fire on Mushtaq and in continuation of the same transaction rushed up to the house of his Sadhu Imami (where his daughter Reshma was) and opened fire on her too considering her also to be responsible in some measure for Mushtaq's sexual relations with her. Judged in this background, we are in judgment that the present offence was committed by the accused-appellant whilst he was deprived of the power of self control by grave and sudden provocation occasioned by the reprehensible conduct of Mushtaq as also of his own daughter Reshma in developing illicit relations between them. We, therefore, find this case to be covered by Exception 1 of Section 300, I.P.C. We hold it to be culpable homicide not amounting to murder saved by Exception 1 of Section 300, I.P.C. The accused-appellant Riyazat Ali is, therefore, guilty of the offence of culpable homicide not amount to murder to be punished under Part I of Section 304, I.P.C., because the act was done by shooting viz., with intention of causing death of both the victims, one of whom was his own daughter Reshma. We shall order accordingly.

18. In view of the above discussion relating to the different aspects of the case, we partly allow this appeal and modify the impugned judgment and order. Instead of Section 302, I.P.C. the accused-appellant Riyazat Ali is convicted for culpable homicide not amounting to murder punishable under Part I of Section 304, I.P.C. The sentence of death and to pay a fine of Rupees 500/- passed against him is set aside and is substituted by a sentence of seven years" rigorous imprisonment for culpable homicide not amounting to murder under Part I of Section 304, I.P.C. It follows that the reference made by learned Additional Sessions Judge u/s 366, Cr.P.C. stands rejected.

19. Accused-appellant Riyazat Ali is in jail. He shall serve out the sentence of rigorous imprisonment of seven years awarded to him. The period of imprisonment already undergone by him shall be adjustable against the sentence of seven years" rigorous imprisonment passed against him.

20. Let a copy of this judgment along with the record of the case be immediately sent to the Court below for needful compliance under intimation to this Court within two months.