HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on: 06.03.2025
Pronounced on: 13 .03.2025

Crl A(D) No.24/2023
c/w
Crl Ref (L) No.8/2023

Mohd. Shafi, aged 34 years S/o Mohd. Wasim
R/o Indh, Tehsil Gool District Ramban Presently lodged in District Jail, Udhampur, J&K ...Appellant(s)

Through:- Mr. Imtiaz Mir, Advocate

V/s

1. UT of J&K through SHO, Police Station, Gool District Ramban
2. Superintendent, District Jail, Udhampur ...Respondent(s)

Through:- Mr. Pawan Dev Singh, Dy. AG

Coram:
HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MS. JUSTICE MOKSHA KHAJURIA KAZMI, JUDGE

JUDGMENT

Sanjeev Kumar J

1. Instant criminal appeal filed by the convict-Mohd. Shafi under Section 410 of the Code of Criminal Procedure Samvat, 1989 ["Cr.P.C. 1989"] arises out of a judgment of conviction dated 16th August, 2023 and order of sentence passed on the same day by the learned Principal Sessions Judge, Ramban ["trial Court"] in File No.48/Challan titled *State v. Mohd. Shafi* (FIR No.89/2013). Vide judgment and order impugned, the appellant has been convicted for commission of offence punishable under Section 302 of Ranbir Penal Code (RPC) and sentenced to rigorous imprisonment for life and a fine of Rs.10,000/-. The appellant has been directed to undergo further

imprisonment for six months in case he makes default in payment of fine.

2. Before we advert to the grounds of challenge urged by Mr. Imtiaz Mir, learned counsel appearing for the appellant, we deem it appropriate to briefly state the prosecution case.

3) On 30th October, 2013, Police Post, Indh received an information through reliable sources that a minor boy, namely Mohd. Suleiman son of the appellant has died under suspicious circumstances and that his dead body was lying in the house of appellant. A report in this regard was entered in the Daily Diary Register of the Police Post and inquest proceedings under Section 174 Cr.P.C were entrusted to ASI Nizam Din, Incharge Police Post, Indh. Mr. Nizam Din went on spot, photographed the place of occurrence along with dead body of the deceased, prepared the site plan, seized the dead body and sent the same for postmortem at PHC, Gool. The postmortem on the dead body of the deceased was conducted by the Medical Officer present in PHC, Gool. The wearing apparels of the deceased having smell of insecticide (Nuvan) were also seized during the postmortem. Dead body, after completion of the legal formalities, was handed over to the relatives for performing last rites. Statement of mother of the deceased, PW-8 Rubina Begum was recorded by the ASI Nizam Din under Section 175 Cr.P.C. Viscera collected from the dead body of the deceased child was also sent for chemical examination.

4. In the inquest proceedings, it surfaced that mother of the deceased PW-8 Rubina Begum and appellant-Mohd. Shafi were husband and wife having contracted their marriage about 4/5 years prior to the occurrence. The deceased child, aged two years and one girl child aged 6/7 months were born out of their wedlock. It also came to fore that the relations of the husband and wife were strained, in that, the appellant was adamant to contract second marriage. The mother of the deceased, PW-8 Rubina Begum would insist that the appellant could not contract second marriage unless he provides her and her two children adequate maintenance. It also came to be divulged during the inquest proceedings that two months prior to the occurrence, the appellant- Mohd. Shafi had made the deceased child to drink kerosene oil. The child vomited the oil out and was, thus, saved. The matter was settled, but the relation between the two became more strained. It was further concluded during the inquest proceedings that when PW-8 Rubina Begum had gone to attend the call of nature in the washroom at about 5.30 a.m. on 30th October, 2013, the appellant got an opportunity, as per plan, and administered poison to the child with an intention to kill him in his bed. In the meanwhile, PW-8 Rubina Begum came back in the room and saw the child in restless condition. Froth was coming out of the mouth of the child. She took the child immediately to PW-3 Molvi Abdul Rashid to drive out evil spirit. However, Molvi Abdul Rashid advised her to take the child to the

doctor as the froth coming out of the mouth of the child smelled like poison.

5. PW-8, Rubina Begum rushed to the doctor but the child succumbed on the way. The inquest officer completed the inquest proceedings and delivered the file to the Police Station concerned with the request to register formal FIR in the matter. This is how FIR No.89/2013 for offence under Section 302 RPC came to be rregistered in the Police Station, Gool and investigation commenced. The SHO, Police Station, Gool, PW-15, Mushtaq Ahmed conducted the investigation. The inquest proceedings file containing the inquest proceedings submitted by the inquest officer was seized, the statement of witnesses under Section 161 Cr.P.C. and 164-A Cr.P.C. were recorded. Postmortem report was obtained by the Investigating Officer from PHC, Gool. The appellant was taken into custody and arrest memo was prepared. During his custody with the police, the appellant made a disclosure statement, which led to the recovery of a bottle (Nuvan container) having some left over Nuvan in it. The bottle was sealed and sent to FSL for chemical examination. Report from the chemical analyst from FSL was obtained. The Investigating Officer wrapped up the investigation with the conclusion that the death of the deceased child had occurred due to poison administered to him by the appellant-Mohd. Shafi. Accordingly, charge-sheet was laid before the Court of Chief Judicial Magistrate, Ramban on 28.01.2014, who committed the same for trial to the trial Court on 11.02.2014.

6. Charge for commission of offence under Section 302 RPC was framed by the trial Court against the appellant on 03.06.2014. Contents of the charge were read over and explained to the appellant, who pleaded not guilty to the charge and claimed to be tried. The trial Court directed the prosecution to produce its evidence. The prosecution examined in as many as 15 witnesses over a period of about four years and finally prosecution evidence was closed on 09.04.2018. One of the prosecution witnesses i.e. Chemical Analyst of the FSL in respect of the report submitted by him was examined later on 18.07.2022. The incriminating circumstances appearing in the prosecution evidence were put to the appellant and his statement under Section 342 Cr.P.C was recorded. The Appellant denied his involvement in the commission of crime and recorded the statements of DW-Gulam Mohd. and DW-Mohd. Rustam in defence. Thereafter analyzing the prosecution evidence and evidence produced in defence, trial Court came to the conclusion that there was sufficient evidence on record led by the prosecution to connect the appellant with the commission of offence under Section 302 RPC. Accordingly, the appellant was convicted for offence under Section 302 RPC and sentenced to imprisonment for life and fine as stated above in terms of the impugned judgment of conviction and order of sentence.

7. The appellant has challenged the impugned judgment of conviction and consequential order of sentence primarily on the following grounds:-

i) That the trial Court has failed to appreciate that the prosecution evidence was highly contrary, insufficient and inspiring no confidence of the Court. The trial court failed to take note of the fact that most of the witnesses cited by the prosecution had not supported the prosecution case and stood declared hostile by the prosecution.

ii) That the trial Court has put undue weightage and credence on the lone statement of PW-8 Rubina Begum, whose version before the Inquest Officer, Investigating Officer, before the Magistrate under Section 164-A Cr.P.C and before the trial Court was completely at variance with one another and, therefore not trustworthy. Statements of PW-Molvi Abdul Rashid, PW-Hakim Din, PW-Barkat Ali, PW-Bashir Ahmed, PW-Chirag Din do not support the version put forth by PW-8 Rubina Begum. The statement of PW-8 Rubina Begum was recorded by the Inquest Officer after 21 days whereas her statement under Section 164-A Cr.P.C. was recorded after more than 43 days of the occurrence and that puts the entire case of prosecution in the realm of grave suspicion.

8. *Per contra*, Mr. Pawan Dev Singh, learned Dy. AG, would argue that none of the grounds of challenge urged by the learned counsel for the appellant are tenable in the face of clear and clinching evidence on record with regard to the involvement of the appellant in

the commission of murder of his minor son. He would, therefore, support the reasoning given by the trial court in the judgment impugned to connect the appellant with the commission of offence punishable under Section 302 RPC.

9. Having heard learned counsel for the parties and perused the material on record, we are of the considered opinion that the prosecution has miserably failed to lead any cogent and trustworthy evidence to connect the appellant with the commission of offence punishable under Section 302 RPC. We do not find any reliable and trustworthy evidence on record, which proves beyond reasonable doubt that the murder of minor child was committed by the appellant and nobody else.

10. Indisputably, there is no eye-witness to the crime in which a minor child lost his life. It is true that in the inquest proceedings it has come to be established that the death of the minor child was homicidal. This is also substantiated by the postmortem report and the statement of PW-12 Dr. Sheikh Yasir Nazir and statement of PW Pawan Abrol, FSL expert. It is amply proved by scientific evidence led by the prosecution that the death of the minor child occurred due to consumption of poison i.e. organophosphourus insecticide. In the absence of contrary evidence, even suggesting that the poison was taken by the child accidently, it has to be taken as proved that the poison '*organophosphourus insecticide'* was administered to the child

by someone. Who has administered that poison to the child is a question that begs determination in light of the evidence on record.

11. PW-3 Molvi Abdul Rashid is an independent witness, who was approached by PW-8 Rubina Begum along with deceased son for treatment. As per his deposition, Rubina Begum came to his house at 7 a.m. on 30.10.2013. She was carrying her two years old child, who was critically sick. He states that he called the appellant and asked him to take the child to doctor, as the condition of the child was serious. While the appellant and his wife Rubina Begum were coming back home, the child expired. The witness states that on coming to know of the death of the minor child, he along with his neighbourers came to the house of the appellant for condolence. The wife of the appellant was saying that she would not allow the child to be buried till the police came on spot. The police was called and Rubina Begum demanded medical examination of the dead body of the deceased child. The dead body of the deceased child was shifted to Hospital, Gool. Appellant along with some other persons accompanied the police to the hospital. He further states that the appellant was arrested on 3rd days after the occurrence and this was done by the police on the PW-8 Rubina Begum expressing her doubts about the involvement of the appellant in administration of poison to the deceased child. He further states that after about one month i.e. on 2nd December, 2013, the police came to the house of the appellant and called the witness also. The appellant was brought at about 9 in the morning. The police

officials told the witness that one bottle had been recovered. He was called to the Police Station on 03.12.2013 and his statement was recorded and his signatures taken on the statement. The witness testified the correctness of the seizure memo of the dead body, clothes of the deceased and spurdnama of the ring. Since the witness did not support the prosecution case entirely, in particular, the recovery of the bottle containing left over poison, as such, on the request of the PP, he was declared hostile. During cross-examination by the learned PP, the witness clearly deposed that the appellant had not made any disclosure in his presence nor any recovery of any bottle containing the left over poison was made at the instance of the appellant in his presence.

12. PW-Hakim Din has deposed before the trial Court that he heard a rumour that the deceased child had died due to taking of some medicine. He, however, does not know anything about medicine nor about the person who had administered the same to the deceased child. He has also denied having any knowledge about the relation between the appellant and his wife Rubina Begum. Obviously, the aforesaid witness, too, was declared hostile by the prosecution and subjected to cross-examination. The witness, as is evident from his statement, has not changed his stance even during cross-examination by the PP. He has denied having seen the appellant making any disclosure statement. He is categoric in his statement that the bottle allegedly recovered by the Investigating Officer was already wrapped in a newspaper and was then sealed by the police in cloth.

13. PW-Abdul Rashid in his testimony before the trial court deposed that he heard that the appellant had administered Nuvam to his child but does not know why he did so to his child. He has further deposed that during the time, occurrence happened, the child was already sick. In short, this witness, too, is of no help to the prosecution.

14. PW-Barkat Ali has in his deposition stated that when he heard about death of the minor child of the appellant, he went to his house where wife of the appellant Rubina Begum was saying that the deceased had taken some medicine, as a result whereof, the child had died. On the request of the PP, this witness, too, was declared hostile and subjected to cross-examination by the learned PP. He has maintained his stance even during cross-examination by the PP. He has also stated that the appellant was arrested and taken to the Police Station three days after the death of the deceased and that the appellant was arrested on the allegation of PW-Rubina Begum that it was the appellant, who had administered poison to the deceased child leading to his death.

15. These were some of the star witnesses of the prosecution, who have not supported the prosecution case at all and have instead stated in unison that nobody had seen any person administering poison to the child. These witnesses clearly rule out the presence of any eye-witness at the time of occurrence. PW-Molvi Abdul Rashid and PW- Hakim Din, the witnesses to the disclosure statement made by the appellant,

which led to the recovery of the Nuvan bottle from the field, have completely resiled from their statements recorded by the police. They have rather stated that no *Inqshaf* (disclosure) was made by the appellant in their presence nor any bottle recovered at his instance in their presence. They are categoric in their deposition that the seized bottle was already in possession of the police and they were only asked to sign the recorded statements in the Police Station.

16. PW-9 Chirag Din, too, is a witness, who was declared hostile by the prosecution, as nothing could be elicited by the prosecution from him. PW-Nizam Din, the prosecution witness, who has prepared the inquest report in terms of Section 174 Cr.P.C. He has explained the manner in which he conducted the inquest proceedings. Apart from saying many things about the incident, the witness has stated that when he visited the spot immediately after the occurrence, mother of the deceased PW-Rubina Begun did not make any statement with regard to the involvement of the appellant in the commission of the crime. She was, however, saying that she would not allow the child to be buried unless cause of his death is asserted. If we were to believe the statement of PW-Nizam Din, it is quite evident that the mother of the deceased, PW-Rubina Begum, who ultimately named the appellant as perpetrator of the crime, was not even aware about the cause of death and wanted it to be ascertained by the police. In the later part of his statement, he has, however, mentioned that the wife of the appellant had told him that the appellant was the person, who had administered

poison to the deceased child, however, he did not record her statement at that time, although he had the authority to do so.

17. From a reading of the statement of the Inquest Officer, PW-Nizam Din, it is abundantly clear that he has completely messed up the inquest proceedings. If we were to believe him that Rubina Begum had disclosed to him on spot that the child had died due to administering of poison by the appellant, the inquest proceedings could have been wrapped up then and there and FIR registered. This, however, has not happened. It is surprising to note that the Inquest Officer did not even think it proper to record the statement of the mother of the deceased, Rubina Begum wherein she had, as per the witness, clearly indicated the involvement of the appellant in the commission of crime. It is, thus, clear that this part of the statement of the Inquest Officer is not truthful. There is ample evidence on record to show that on the date of occurrence, mother of the deceased child, who was first to notice the froth coming out of the mouth of the deceased was not even sure about the cause of critical sickness of the child. As has come in deposition of PW-Molvi Abdul Rashid, the child in critical condition was first taken to him for warding off evil spirit and not to the hospital for medical treatment. It is, thus, clear that when the child passed away and was subjected to postmortem examination by the doctor, it came to fore for the first time that the death of the deceased had occurred due to administering of poison. It is at this stage, PW-Rubina Begum, who admittedly had strained relations with her husband, doubted the

involvement of the appellant in the commission of crime in question. It is because of this reason, it has come in the evidence of the prosecution that the appellant was arrested on the third day of the occurrence by the Inquest Officer, though his arrest has been shown much later in papers. He was formally arrested on papers in the month of November, 2013 when the FIR was formally registered at Police Station, Gool. Rubina Begum is, thus, the only prosecution witness left, who has to some extent tried to support the prosecution case.

18. PW-Rubina Begum, who is a star witness of the prosecution, has in her deposition before the trial Court stated that she met her husband somewhere in Srinagar where both of them were working as domestic helps in two adjoining houses. They developed friendship, which led to contracting of marriage. She has further stated that out of the wedlock, two children were born. Girl child is alive whereas her son has been killed by her husband. She has tried to introduce motive in her statement by stating that the appellant had been pressuring her to go to the house of his married sister with a proposal of his marriage with the sister of his brother-in-law. She would state that she refused to do so and insisted that if he wanted to contract second marriage then he must construct a pacca room for her and give share of the property to her son. Her deposition, if taken as correct, on its face value, would clearly prove the fact that she was not an eye witness to the administration of poison by the appellant to the deceased child. In her deposition she has clearly stated that when she returned from the washroom, she saw

some blue colour water coming out of the mouth and nose of the deceased child. She also claims to have seen the appellant trying to hide Nuvan bottle in his pocket. When we look on the statement PW-Rubina Begum, who is cited as eye-witness by the prosecution, we clearly find that she has not stated the truth, particularly, with regard to the hiding of Nuvan bottle by the appellant in his pocket. Had this happened in her presence, she would have been the first person to disclose it to the PW-Molvi Abdul Rashid, who was approached in the first instance for treatment of the ailing child. She would have definitely told the police and the people gathered in her house to mourn the demise of her minor child. She would not have waited for twenty one days to make statement divulging that death of the deceased child had occurred due to administering of poison by the appellant.

19. From the evidence on record, it is clear that PW-Rubina Begum was not clear either about the cause of death or the person who has caused it till postmortem report revealed that death had occurred due to consumption of poison by the deceased. She expressed doubt about the involvement of the appellant. Although, the police did not record statement of the PW-Rubina Begum in this regard, yet on the basis of suspicion shown by her, the appellant was picked up on third day of occurrence for interrogation. It is a different matter that he was not shown arrested by the police and his arrest was shown only after registration of the FIR.

20. PW-Rubina Begum had projected a story in the statement recorded by the police that two months prior to the alleged occurrence, the appellant had made the child to drink kerosene oil but the said part of the statement was abandoned by her when she made her deposition before the trial Court. She has also stated in her statement that a night before she had been subjected to severe beating by the appellant but this was not so stated by her to ASI Nizam Din, who conducted the inquest proceedings, when he visited the place of occurrence. It is because of this reason, she was never medically examined to find out any injury on her body. The witness has made several improvements while making her deposition before the trial Court, which runs counter to what she stated before the Magistrate in her deposition under Section 164-A Cr.P.C. If we discord the testimony of PW-8 Rubina Begum, the entire case of the prosecution falls flat on the ground.

21. The scientific evidence i.e. testimony of the doctors, who conducted the autopsy and the statement of chemical analyst of FSL would only prove the cause of death of the deceased child and is not sufficient in itself to connect the accused with the administration of poison to the deceased child.

22. The trial Court has analyzed the evidence on record and has found established that the death of the deceased child had happened due to the administering of poison *organophosphourus insecticide*. This finding of fact has been arrived at by the trial Court on the basis

of oral testimony of the prosecution witnesses and the scientific evidence on record. We have also discussed the evidence herein above and see no reason to differ with this finding of fact returned by the trial Court. We, however, do not find any evidence, oral or scientific, which demonstrates beyond any reasonable doubt that the poison was administered by the appellant to the deceased child with an intention to kill him.

23. There is no direct evidence to the occurrence and the circumstantial evidence available on record is only in the shape of motive and the disclosure statement made by the appellant leading to the discovery/recovery of the bottle containing left over poison. So far as motive is concerned, it has come on record and sufficiently proved by the prosecution that the relations between the appellant and his wife PW-Rubina Begum were strained. Despite strained relations, they were still staying together. The motive, which is projected by the prosecution is that the appellant wanted to contract second marriage whereas his wife Rubina Begum wanted him to first settle the share of his children and make provision of construction of a room and maintenance.

24. Motive, in the instant case, as projected by the prosecution, is double edged. This could be possible motive for the appellant to take extreme step of committing murder of his son and sparing his daughter but it could also be a motive for the wife of the appellant-Rubina

Begum to falsely implicate the appellant. That apart, we do not find that motive sought to be proved by the prosecution for the commission of crime in question by the appellant is so strong that a person of ordinary prudence would believe the reason for commission of murder of his own child by the appellant. If the appellant wanted to get rid of his children then he would not have spared his other child i.e. daughter.

25. Even if, we were to accept that the prosecution has succeeded in proving motive, yet in the absence of other circumstances constituting an unbroken chain leading to the only hypothesis inconsistent with the innocence of the appellant, the appellant cannot be convicted for the offence, he was charged with by the trial Court.

26. We are aware and as has been held by the Hon'ble Supreme Court in the case of **Bhupinder Singh v. State of Punjab, AIR 1988 SC 1011,** the murder by poison is invariably committed under the cover and cloak of secrecy. Nobody will administer poison to another in the presence of others. The person who administers poison to another in secrecy will not keep a portion of it for the investigating officer to come and collect it. The person who commits such murder would naturally take care to eliminate and destroy the evidence against him. When we examine the case in hand in the light of legal position adumbrated in Bhupinder Singh's case (supra), we clearly find that though the prosecution may have succeeded in establishing that the death of the deceased child occurred due to administering of poison

(organopharphorous) to child, yet there is no evidence on record to prove that the poison was administered by the appellant. The disclosure statement and the recovery of the bottle having left over poison have not been proved at all.

27. In light of the evidence on record, it is difficult for us to believe the prosecution story that the appellant administered poison to the child, which he had brought in a small Nuvan bottle and that after administering the poison, the appellant kept the bottle with left over poison hidden in the fields, which the prosecution recovered after more than one month of the occurrence. As is rightly pointed by the Supreme Court in Bhupinder Singh's case, a person who administers poison to kill a person will not keep the left over poison, if any with him for months together and wait for the police to come and recover it from him. The natural conduct of such person is to destroy the evidence by throwing away the left over poison, if any, after administering the same to his victim.

28. Viewed from any angle, we do not find the judgment of conviction recorded by the trial Court in conformity with the evidence on record and in consonance with law. In the absence of ocular evidence, it was incumbent upon the prosecution to prove its case on the basis of circumstantial evidence. Law with regard to proving the case, which rests on circumstantial evidence, is well settled.

29. In **Sharad Birdichand Sarda v. State of Maharashtra, AIR 1984 SC 1622**, Hon'ble the Supreme Court elaborated the five golden principles of circumstantial evidence laid down in **Hanumant v. State of M.P., AIR 1952 SC 343**, which are being followed consistently in the later cases. These five principles are as follows:-

> "1. The circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> 2. That facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
>
> 3. The circumstances should be of a conclusive nature and tendency.
>
> 4. They should exclude every possible hypothesis except the one to be proved, and
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> 5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability that act must have been done by the accused."

30. When we examine the case on hand in light of the settled legal position, we are convinced that the prosecution has not established the circumstances forming an unbroken chain leading to the only hypothesis inconsistent with the innocence of the appellant.

31. For the foregoing reasons, we are inclined to accept this appeal ad reverse the judgment of conviction passed by the trial Court.

32. Ordered accordingly.

33. As a result, the impugned order of sentence is also set aside. The appellant is directed to be set at liberty forthwith.

33. Reference received from the trial Court stands disposed of accordingly.

(Moksha Khajuria Kazmi)
Judge

(**Sanjeev Kumar**)
Judge

JAMMU
13.03.2025
Vinod,PS

Whether the order is speaking : Yes
Whether the order is reportable: Yes