

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 18th January, 2010*
Judgment Delivered on: 1st February, 2010

+ **CRL.APPEAL No.385/2008**

Dost Mohd. & Anr.Appellants

Through: Mr.K.B.Andley, Sr. Advocate with
Mr.M.Shamikh, Advocate

Versus

STATERespondent

Through: Mr.M.N.Dudeja, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J.

1. Of the 7 accused who were sent for trial 5, namely, Tilak Ram, Hasan Ahmad, Mohd.Khalid, Shah Nazar and Mohd.Furkan have been acquitted. Appellants Dost Mohd. and Mohd.Gufran have been convicted.

2. The 7 accused were charged with the offence of entering into a conspiracy to murder Hassan Ali, his wife Rafat Jahan and their minor son Shehzad and in furtherance of the conspiracy to have kidnapped/abducted the said 3 persons in

the month of June 2000 and murdered the 3 at village Daulatpur under jurisdiction of P.S. Kakroli, U.P.

3. Against the co-accused who have been acquitted, the learned Trial Judge has held that the testimony of Mohd.Nabi PW-5 and that of Sarfaraz PW-6 who claimed that they saw accused Mohd.Khalid, Mohd.Furkan and the appellants in the company of the deceased in the second week of June 2000 did not inspire confidence for the reason the prosecution had admitted that deceased Rafat Jahan had made a complaint against Mohd.Khalid and Mohd.Furkan pertaining to the death of her son Ahsan who was murdered in the village and that pursuant to the said complaint Hassan Ali father of Mohd.Furkan had been charged as an accused. The learned Trial Judge has accordingly opined that it would be difficult to believe that Rafat Jahan, her husband and her son would be seen in the company of Mohd.Khalid and Mohd.Furkan.

4. Recoveries of ordinary articles such as a wrist watch stated to be belonging to deceased Hassan Ali and pieces of gold jewellery of low value stated to be belonging to Rafat Jahan pursuant to disclosure statements of the co-accused were held to be not inspiring confidence. There being no other incriminating evidence against said 5 co-accused, they have been acquitted.

5. The incriminating evidence against the appellants found established by the learned Trial Judge is that Ashraf Ali, father of Dost Mohd. and Mohd.Gufran had vide sale deed Ex.PW-4/DC purchased agricultural lands from Rafat Jahan for a consideration of Rs.3,57,000/- out of which only Rs.1,00,000/- was paid. The motive for Dost Mohd. and Mohd.Gufran was to kill Rafat Jahan so that no further money need be paid to her and it was also decided by the two that should Shehbaz and Hassan Ali, the minor son and the husband of Rafat Jahan claim the remaining money, even they were to be liquidated. Thus, a motive for the crime has been held established. The further incriminating evidence held established is that the appellants made disclosure statement Ex.PW-32/F (Mohd.Gufran) after he was apprehended and interrogated and Ex.PW-32/E (Dost Mohd.) in which two statements both disclosed that with a view not to pay further sum of Rs.2,57,000/- to Rafat Jahan it was decided that she, her husband and her minor son would be killed and knowing that Hassan Ali would be visiting the village to participate in the elections, some of the accused would bring Hassan Ali, his wife Rafat Jahan and their minor son to the village and kill all. In furtherance of the conspiracy, the three were brought to the village. Co-accused Khalid shot Hassan Ali whose wife and minor son were strangulated and the three dead bodies were

concealed beneath the soil by digging three ditches in the sugarcane fields. Further, the two jointly led the Police to sugarcane fields in village Daulatpur, P.S. Kakroli, District Muzaffar Nagar and both simultaneously pointed out a spot in the field as recorded in the pointing out memo Ex.PW-16/A pertaining to Dost Mohd. and Ex.PW-16/B pertaining to Mohd. Gufran and stated that the dead bodies were buried there; upon digging of which spot blood stained soil, hair attached with soil, pieces of red coloured bangles, some pieces of bones were recovered on 16.12.2000 as per seizure memo Ex.PW-21/A. As per the learned Trial Judge the disclosure statements made by the two appellants resulted in the recovery of afore-noted articles and as per the confessional statements the said place was where the three dead bodies were buried. Further incriminating evidence against appellant Dost Mohd. is that pursuant to his second disclosure statement Ex.PW-35/A wherein he disclosed that after burying the three dead bodies at the same spot he and his co-accused decided to remove the three dead bodies and bury them at different places, he took out one dead body i.e. that of Hassan Ali and buried it at another spot which spot he could identify. On 20.12.2000 he led the police to said spot and vide pointing out memo Ex.PW-48/A he pointed out the spot wherefrom, as recorded in the memo Ex.PW-48/B, a skeleton was recovered. The said

skeleton was sent for DNA analysis to be compared with the DNA of the mother of Hassan Ali, namely, Mst.Rashidan PW-28 with reference to her blood sample and that as per report Ex.PW-43/A, Dr.G.V.Rao a scientist at CDFD Hyderabad opined that with reference to the DNA of Mst.Rashidan it could safely be said that the skeleton belonged to her progeny i.e. of a person born to Mst.Rashidan.

6. We may note that though not specifically used as incriminating evidence against the appellants, at the hearing of the appeal, learned counsel for the State pointed out that as per the disclosure statements of the appellants they had stated that Hassan Ali was shot dead with a firearm. As deposed to by Dr.S.K.Verma PW-22 who conducted the post-mortem on the skeleton remains and the remnants of adipoceros formation in the thoracic, scalp and extermeteis, a bullet was recovered from the right thoracic area. It was urged that the further incriminating evidence is the knowledge of the appellants that Hassan Ali was shot with a firearm. Said knowledge is to be found in the disclosure statements of the appellants and confirmed with reference to the subsequent event i.e. of the doctor who conducted the post-mortem recovering a bullet from the chest cavity of deceased Hassan Ali.

7. During arguments in the appeal learned counsel for the appellants and the State conceded that no useful purpose would be served in reading the testimony of all the witnesses, we note the arguments advanced for the reason relatable to the arguments we intend to note the testimony of only such witnesses as would be relevant.

8. The first and the foremost argument advanced was that indisputably the sale deed Ex.PW-4/DC executed by Rafat Jahan in favour of the father of the appellants recorded that complete sale consideration in sum of Rs.3,57,000/- had been received by Rafat Jahan. Thus where was the question of there being any motive for the crime? It was urged that the testimony of Jaigam Ali, brother of Hassan Ali that Rs.2,57,000/- was yet to be received by Rafat Jahan could not be given precedence over what has been recorded in the sale deed. It was urged that the learned Trial Judge has erred in holding that the testimony of Jaigam Ali established a motive. Second contention urged was that the recoveries effected on 16.12.2000 as recorded in the seizure memo Ex.PW-21/A were meaningless inasmuch as it was not established that the blood staining the soil, the hair attached with the soil or the broken bones recovered from the soil or pieces of bangle were linked or belonged to any of the three deceased and hence there was no incriminating evidence against the appellants pertaining to

the seizure memo Ex.PW-21/A. It was also urged that it was not believable that two accused would jointly lead the police to a spot and simultaneously point out the same. Lastly, pertaining to the recovery of a skeleton pursuant to the second disclosure statement of appellant Dost Mohd. and the report Ex.PW-43/A of Dr.G.V.Rao, it was urged that a DNA analysis based on a sample of a single parent was not conclusive of the dead body being that of the progeny of the alleged parents. It was urged that the DNA sample of the biological father and the biological mother together constitute proof of the fact that the person in question is their offspring if the DNA samples matched.

9. As per the prosecution, deceased Hassan Ali was the second husband of Rafat Jahan. A son Shehbaz was born to them. The family was residing as a tenant in house No.55-C, Old Seema Puri, Delhi. Somewhere in the second week of June 2000 they left the tenanted house informing Tej Ram PW-1, their landlord, that they were going to the village as Hassan Ali had to cast a vote in the ensuing elections. They said that they would be returning after a day, but never returned. That Hassan Ali, his wife and his son went missing was first noted when Jaigam Ali PW-4, brother of Hassan Ali came to Seema Puri to meet his brother on 11.8.2000 and was informed by the landlady that Hassan Ali along with his family had gone to the

village and had not returned. Abdul Mazid, father of Jaigam Ali and Hassan Ali lodged a complaint of his son and his family missing on 26.8.2000 but no action was taken till on the directions of a learned Magistrate the FIR Ex.PW-2/A was registered on 4.5.2001. It was only thereafter that the Police swung into action. The accused were apprehended. Appellants made the disclosure statements pursuant where to recoveries were effected.

10. Tej Ram PW-1 deposed that Hassan Ali was a tenant in his house C-55, Seema Puri, Delhi and in June 2000 left for a day to visit his village to cast a vote but never returned. Jaigam Ali PW-4 deposed that he came to Seema Puri on 11.8.2000 to see his brother Hassan Ali when the landlady told him that his brother had gone to the village and had not returned. He told his father Abdul Mazid the said fact who lodged a report on 26.8.2000 at P.S. Seema Puri. ASI Rakesh Kumar PW-2 deposed that on 4.5.2001 he registered the FIR Ex.PW-2/A pertaining to Hassan Ali and his wife and son being missing.

11. Jaigam Ali PW-4 as also Mst.Rashidan PW-28 proved that as recorded in the form Ex.PW-4/D and the memo Ex.PW-4/C blood sample of Rashidan was taken possession of by the Investigating Officer at Irvin Hospital where the doctor had taken the blood sample of Mst.Rashidan.

12. The disclosure statements of the appellants have been proved by SI Bhopal Singh PW-48 who claimed to have interrogated the appellants. SI Anil Kumar PW-32 as also the Investigating Officer Inspector Ram Pal PW-44 have corroborated the recording of the first disclosure statement by Dost Mohd. and the disclosure statements made by Mohd.Gufran and as recorded by SI Bhopal Singh PW-48. SI Dinesh Kumar PW-35 has corroborated the recording of the second disclosure statement made by appellant Dost Mohd. and as written down by SI Bhopal Singh PW-48.

13. Recoveries effected on 16.12.2001 have been proved through the testimony of PW-7, PW-11, PW-12, PW-13, PW-16 and PW-21. Recovery of the skeleton effected on 20.12.2001 has been proved through the testimony of PW-7, PW-12, PW-15 and PW-21.

14. Both recoveries afore-noted on 16.12.2001 and 20.12.2001 have additionally been proved through the testimony of PW-9 who video-graphed the digging operations in the fields on both dates and prepared the video cassette Ex.PW-9/A.

15. That a bullet was recovered from the chest region of the skeleton exhumed on 20.12.2001 has been proved by Dr.S.K.Verma PW-22 who conducted the post-mortem on the skeleton remains.

16. We may note at the outset that the recovery of the skeleton as recorded in the seizure memo Ex.PW-48/B on 20.12.2001 was not challenged during arguments in the appeal.

17. As noted hereinabove, the appellants have been convicted holding that a motive for the crime stood established. It has also been held that the recoveries effected as entered in the seizure memo Ex.PW-21/A as also the recovery of the skeleton as per seizure memo Ex.PW-48/B were pursuant to the disclosure statements made by the appellants and the said recoveries proved the knowledge of the appellant of the place where the dead bodies were concealed and thus the two circumstances were sufficient wherefrom the guilt of the appellants could be inferred.

18. The plea that motive has not been proved has been dealt with by the learned Trial Judge with reference to the testimony of PW-4 and we find no infirmity in the reasoning of the learned Trial Judge. The principle of civil law that no evidence can be led to contradict or vary the terms of a written contract are not applicable at a criminal trial relating to the offence of murder. The purity of commercial transactions is not the focus at a criminal trial. Indians in general and in the rural areas in particular are known to be callous and casual in their official dealings and thus it may happen that in good

faith, a person may receive less money on the assurance that the balance would be paid later on but executes a document acknowledging receipt of full payment. The issue can be looked at from another angle. That Rafat Jahan was claiming (assuming she was wrong), that full sale consideration had not been paid to her could also be the motive to silence her for the reason she had sworn affidavits to be submitted to authorities that full sale consideration had not been received by her.

19. Pertaining to the recoveries effected on 16.12.2000 pursuant to the disclosure statements Ex.PW-32/E and Ex.PW-32/F made by the appellants on the same date and upon the appellants leading the police to the same spot and simultaneously pointing out the same as recorded in the two pointing out memos Ex.PW-16/A and Ex.PW-16/B, suffice would it be to state that as held in the decision reported as AIR 2005 SC 3820 State NCT of Delhi Vs. Navjot Sandhu, there is nothing in law which does not recognize joint pointing out by two co-accused. Thus, the recoveries effected from the spot pointed out as per the said two pointing out memos and as recorded in the seizure memo Ex.PW-21/A cannot be doubted on said point alone. But, we note that the blood stained soil, hair attached with soil, some pieces of bones or the pieces of red coloured bangles have not been connected to the crime by independent evidence. The part of the disclosure statements made by the

appellant that they had buried three dead bodies at the said spot is not admissible under Section 27 of the Evidence Act for the reason what becomes admissible under Section 27 pertaining to a statement made to the police by an accused is the knowledge of the accused to a fact which was not in the knowledge of the police and the said fact is found to be correct with reference to the subsequent event of a recovery being made. Thus, in the absence of any DNA analysis of the blood stained soil, the hair or the bones recovered on 16.12.2000, it cannot be said that 3 dead bodies were buried at the said spot.

20. Pertaining to the recovery of a skeleton on 20.12.2000 as per seizure memo Ex.PW-48/B, the prosecution has successfully proved that pursuant to the second disclosure statement Ex.PW-35/A made by Dost Mohd. he led the police to a spot and pointed out the same as recorded in the pointing out memo Ex.PW-48/A and after digging the said spot, concealed in the womb of the earth was recovered a skeleton with remnants of adipoceros formation in the thoracic region. Thus, an object i.e. the skeleton of a dead body has been recovered by the police and the fact discovered is the mental knowledge of Dost Mohd. that a dead body was lying concealed at the spot. The report Ex.PW-43/A by Dr.G.V.Rao establishes that with reference to the blood sample of Mst.Rashidan taken possession of at Irwin Hospital as per

memo Ex.PW-4/C the skeleton was of the biological offspring of Mst.Rashidan.

21. The issue whether a DNA analysis with reference to the DNA of a single parent is conclusive or not on the issue of identification, it may be noted that maternity identification and paternity identification are different. When compared with the DNA of a female, the maternity of a child can be determined and when compared with the DNA of a male, the paternity of a child can be determined. As noted in para 20.6.1 (page 1142) in the book Forensic Science in Criminal Investigation and Trials by B.R.Sharma (4th Edition) a maternity identification of an offspring can conclusively be determined with reference to the DNA fingerprints obtained from the DNA fragments of a female. We note that the process of DNA analysis adopted by Dr.G.V.Rao has not been challenged either at the trial or in appeal.

22. Thus, it stands established that the skeleton remnants recovered on 20.12.2001 were those of Hassan Ali the son of Mst.Rashidan.

23. In the celebrated decision reported as AIR 1947 PC 67 Pulukuri Kottaya & Ors. Vs. Emperor (para 10) Section 27 of the Evidence Act is wholly applicable when a person in police custody produces from some place of concealment some object, such as a dead body. In the decision reported as 1989

Cri LJ (NOC) 200 (Gauhati) Chakidhar Pahlaria Vs. State of Assam, 1986 Cri LJ 220 Parimal Banerjee Vs. State and AIR 1963 SC 1074 Ram Lochan Ahir Vs. State of West Bengal the recovery of a dead body lying concealed is a highly incriminating evidence where it is found that the person was murdered. Such a recovery incriminates the person at whose instance the dead body was recovered.

24. It assumes importance that Dost Mohd. had disclosed to the police that Hassan Ali was shot. Thus, the fact that PW-22 noted a fire shot injury and recovered a bullet from the thoracic cavity of the skeleton i.e. the dead body of Hassan Ali is also incriminating against Dost Mohd.

25. Since the dead body of Hassan Ali was not recovered pursuant to the disclosure statement of Mohd.Gufran, the fact that he told the police that Hassan Ali was shot may not be a very incriminating evidence against him as he may have gained said knowledge from Dost Mohd.

26. Thus, we conclude by holding that the prosecution has successfully established that appellant Dost Mohd. is guilty of the crime of murdering Hassan Ali. We give the benefit of doubt to appellant Mohd.Gufran.

27. The appeal is dismissed qua appellant Dost Mohd. whose conviction and sentence is sustained.

28. The appeal is allowed qua appellant Mohd.Gufran who is acquitted of the charge framed against him. The sentence imposed upon him is set aside.

29. Since the appellants are in jail we direct that appellant Mohd.Gufran shall be set free if not required in any other case.

30. Two Copies of this order would be sent to the Superintendent Central Jail Tihar to be made available to the appellants.

**(PRADEEP NANDRAJOG)
JUDGE**

**(SURESH KAIT)
JUDGE**

**FEBRUARY 01, 2010
rk/mm**