

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

% *Date of Decision: 13th January, 2010*

+ **CRL.APPEAL NO.288/2004**

AFSARAppellant
Through: Mr.Sumeet Verma, Advocate

Versus

STATERespondent
Through: Ms.Richa Kapoor, Advocate

CRL.APPEAL NO.698/2004

JAVED @ KALA @ MITHUNAppellant
Through: Mr.Sumeet Verma, Advocate

Versus

STATERespondent
Through: Ms.Richa Kapoor, Advocate

CRL.APPEAL NO.371/2004

ZAKIR @ NASRUDDINAppellant
Through: Mr.Bhupesh Narula, Advocate

Versus

STATERespondent
Through: Ms.Richa Kapoor, Advocate

CRL.APPEAL NO.738/2004

MOHD. SHAMSHADAppellant
Through: Mr.Bhupesh Narula, Advocate

Versus

STATERespondent
Through: Ms.Richa Kapoor, 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.(Oral)

1. With reference to the evidence on record, the learned Trial Judge has concluded against the appellants as under:-

“74. It is on record that none of the witnesses had seen any of the accused causing injury. In these circumstances, the case against the accused to be inferred on the basis of circumstances appearing on the file. These circumstances are as under:-

(i) PW-5 HC Veer Pal, PW-9, Ct.Ram Chander and Ct.Rajbir are in patrolling;

(ii) At about 8.30 PM, they heard the noise “Bachao Bachao” and rushed to the spot;

(iii) The three constables rushed to the spot and saw the victim lying on the ground and four accused snatching his belongings with accused Javed armed with a knife. On reaching the spot they saw the victim Sh.Ved Prakash Chakravarthy bleeding profusely;

(iv) The three constables chased the assailants and accused Afsar is caught on the spot and brief-case of the deceased is recovered from him;

(v) The victim Sh.Ved Prakash Chakravarthy was removed to the hospital where he expired shortly afterward;

(vi) On the disclosure statement of the accused remaining three accused i.e. Shamshad, Javed and Zakir were apprehended;

(vii) Thereafter, at the instance of these accused, the belongings of the deceased as well as the knife was recovered from them on the same day;

(viii) The belongings of the deceased recovered from the accused are identified by his family members.

75. These circumstances point out to one and only one fact that the death of the deceased Ved Prakash Chakravarthy was caused by the accused persons when they attacked him in order to rob him. The accused were armed with a deadly weapon Ex.P-9 which has subsequently been recovered from accused Javed.

76. In view of the above discussion I am satisfied that the prosecution have been successful in proving charges against all the four accused under Section 302/394/34 IPC beyond reasonable doubt for causing the murder of Sh.Ved Prakash Chakravarthy and robbing him while being armed with a deadly weapon. I am also satisfied that the prosecution has also been successful in proving the charges against the accused Javed of committing robbery on Sh.Ved Prakash Chakravarthy while being armed with a deadly weapon and causing him grievous hurt which ultimately led to his death, beyond reasonable doubt."

2. Vide impugned judgment and order dated 23.2.2004 the appellants have been convicted for the offence punishable

under Section 302/394/34 IPC, for which offence they have been sentenced to undergo imprisonment for life and pay fine in sum of Rs.500/- each. Appellant Javed has also been convicted for the offence punishable under Section 392 read with Section 397 IPC, for which offence he has been sentenced to undergo imprisonment for 10 years and pay a fine in sum of Rs.500/- each.

3. Learned counsel for the appellants urged that the testimony of the 3 police officers; HC Veer Pal PW-5, Const.Ram Chander PW-9 and Const.Rajbir Singh PW-15 does not inspire any confidence of the said 3 police officers having seen the faces of appellants Javed, Zakir and Mohd. Shamshad. Learned counsel highlights this submission, with reference to the site plan to scale, Ex.PW-17/A, which site plan pen profiles the scene of the crime.

4. We shall be highlighting the arguments pertaining to the site plan and the testimony of 3 witnesses while discussing the same soon hereinafter.

5. Attacking the recoveries of the properties of the deceased from appellant Mohd.Shamshad and Zakir, learned counsel refers to the testimony of Umesh Chakraborty PW-2, the son of the deceased, as per whom, on 20.3.1999 he was

summoned to the police station and at the malkhana he identified the belongings of his father. With reference to the testimony of SI Vivek Pathak PW-25, the initial investigating officer, and the testimony of Insp.Jai Singh Saini PW-26, who took over the investigation in the morning of 20.3.1999, learned counsel point out that the recoveries from appellant Afsar, Shamshad and Zakir deposed to by said officers is with a statement that immediately after effecting recoveries, the exhibits recovered were sealed and deposited in the malkhana; it is urged that the testimony of PW-2 conclusively establishes that either the seals were broken and the exhibits were shown to him and resealed or nothing was sealed at the spot as claimed. Counsel concludes by urging that the purity of the seizure being affected, no credence can be given to the same, for the reason planting cannot be ruled out.

5. With reference to the finding returned that the various exhibits recovered were proved to be the belongings of the deceased, it is urged that for the reason the purity of the recoveries has been tainted, the said incriminating evidence has to be discarded and additionally that the pearl ring Ex.P-1, purportedly got recovered by appellant Mohd.Zakir has not even been identified either in Court or at a TIP by PW-2, the son of

the deceased and the only family member of the deceased to be examined.

6. Pertaining to appellant Javed, it is urged that if his identification by Veer Pal, Ram Chander and Rajbir is disbelieved, the recovery of the dagger Ex.P-9 at his instance, is the only solitary evidence against him and considering the fact that only human blood could be detected on the dagger, group whereof could not be ascertained, the said incriminating evidence falls short of the requisite evidence to convict appellant Javed of the offence.

7. It is apparent that the recoveries would assume importance, if testimony of PW-5, PW-9 and PW-15 regarding identification of the appellants is found to be wanting. For if, the testimony of the said 3 police officers is accepted by us, they having claimed to have witnessed the appellants assault the deceased with an intention to commit robbery, said evidence would be sufficient to sustain the conviction of the appellants.

8. We would thus proceed, at the first instance, to analyze the testimony of HC Veer Pal PW-5, Const.Ram Chander PW-9 and Const.Rajbir PW-15, with reference to the site plan to scale Ex.PW-17/A.

9. The 3 police officers have deposed that they were on patrolling duty on 19.3.1999 and at around 8:30 PM had reached Mahabat Khan Road behind Gandhi Peace Foundation Building when they heard noise of bachao-bachao from the service lane. They proceeded towards the service lane and saw a person lying on the ground. 4 persons were robbing him of his belongings. One of them snatched the brief-case from the hand of the victim. One of the 4 assailants was having a knife. One assailant put the brief-case under his armpit. All of them i.e. the three police officers rushed towards the place where the crime was being committed. The 4 assailants ran in the opposite direction and at the intersection of Mahabat Khan Road service lane and Deen Dayal Upadhyay Marg, 3 assailants ran towards the right and the fourth who was carrying the brief-case ran towards the left. The said fourth assailant crossed over Deen Dayal Upadhyay Marg and ran on the open space between Kamla Devi Bhawan and jhuggis. Veer Pal and Ram Chander continued the chase and Rajbir stayed back to remove the injured to the hospital. Veer Pal and Ram Chander apprehended the fourth assailant who had the brief-case with him at a spot outside the office of the Bar Council of India. Said fourth person was identified by them as Afsar.

10. According to the said 2 police officers i.e. Veer Pal and Ram Chander, they took possession of the brief-case from Afsar.

11. The site plan Ex.PW-17/A marks the spot B as the spot wherefrom the 3 police officers commenced their chase when they heard sound of '*bachao bachao*' from the spot marked 'A' on the site plan. We may note that from the said spot 'A', human blood has been lifted. The distance between spot B and spot A is about 28 meters i.e. approximately 90 feet. Spot B is on Mahabat Khan Road. It is at an angle of about 30 degrees from the corner of the service lane and Mahabat Khan Road. Opposite to spot B, along the boundary wall of Gandhi Peace Foundation, which abuts the northern side of Mahabat Khan Road, exists an electric pole. No electricity pole has been shown on the service lane connecting Mahabat Khan Road with Deen Dayal Upadhyay Marg i.e. there is no electricity pole near spot A.

12. As per the testimony of PW-5, PW-9 and PW-15 when they ran towards the spot where the crime was being committed, the 4 assailants fled and separated at the junction of the service lane with Deen Dayal Upadhyay Marg which we find is at a distance of about 30 meters from spot A. At the

junction, 3 accused ran towards the right and the fourth ran towards the left. Veer Pal and Ram Chander claim to have come within 8 to 10 paces distance of the assailants before the assailants fled in the opposite directions i.e. at the junction of the service lane of Mahabat Khan Road and Deen Dayal Upadhyay Marg.

13. Learned counsel for the State urges that the 2 police officers having closed on to the accused and having reached within a distance of 8 to 10 paces, the identification in Court by the said 2 police officers pertaining to Mohd. Shamshad, Javed and Zakir needs to be accepted.

14. Per contra, learned counsel for the appellants urge that from the testimony of the 3 police officers, it is apparent that they saw all the accused from the rear i.e. could not have had a glimpse of their faces when two out of them closed on to the accused, for the reason, the accused started running from spot A towards the northern direction on the service lane of Mahabat Khan Road. The 3 police officers, who were at spot B on Mahabat Khan Road started the chase from the southern direction and ran towards the northern direction. Thus, the question of any of the police officers seeing the face of the accused when they were in the service lane does not arise.

15. It assumes importance that there is no street light on the service lane of Mahabat Khan Road and the fact that the time when the offence was committed was 8:30 PM and the date is 19.3.1999 is also of importance for the reason by 19th March, at 8:30 PM, it is completely dark in the city of Delhi save and except such areas which are illuminated by lighting.

16. We concur with the submissions urged by learned counsel for the appellants that under the circumstances it is difficult to believe that the 3 police officers could have identified Shamshad, Javed and Zakir, the persons who fled in the opposite direction at the junction of service lane of Mahabat Khan Road with Deen Dayal Upadhyay Marg when they were chased. The closest the 2 police officers i.e. Veer Pal and Ram Chander came to the said 3 accused is 8 to 10 paces, but at that point of time the accused had their back towards them. The 2 police officers chased the fourth accused i.e. Afsar as deposed to by them and gave up the chase qua Javed, Zakir and Shamshad.

17. We thus hold that the dock identification by the 3 police officers pertaining to appellant Shamshad, Javed and Zakir does not inspire any confidence. In this connection we may note that in the contemporaneous statements of the 3

police officers recorded by the investigating officer, none of them has given any description of Javed, Zakir and Shamshad.

18. Pertaining to appellant Afsar, we note that as per the 3 police officers he was apprehended by Veer Pal and Ram Chander at the point marked 'D' on the site plan, which point is on the road in front of the office of the Bar Council of India.

19. We have perused the cross examination of HC Veer Pal and Ct.Ram Chander with reference to the claim of the two of having caught appellant Afsar at the spot as claimed by them. Nothing has been brought out to discredit said testimony of the said 2 police officers.

20. We thus conclude by holding that whereas apprehension of Afsar at the spot has been successfully brought home by the prosecution, that Shamshad, Javed and Zakir were the other 3 assailants who fled from the spot has not been brought home beyond reasonable doubt through the testimony of the 3 police officers.

21. This takes us to the recovery effected from the appellants.

22. Information of the crime being committed was conveyed by somebody to the police control room, wherefrom it was transmitted to the local police station over the wireless,

where DD No.39, Ex.PW-12/A was recorded at 8:40 PM, that a thief has left a bag outside Manak Bhawan Foundation Office. Another information vide DD No.41 at 8:45 PM, being Ex.PW-12/B, was noted at the police station that somebody had been stabbed at Deen Dayal Upadhyay Marg.

23. ASI R.K.Tiwari left the police station with a copy of DD No.39 and SI Vivek Pathak accompanied by Const.Arvind left the police station with a copy of DD No.41.

24. SI Vivek Pathak and Const.Arvind reached Deen Dayal Upadhyay Marg where HC Veer Pal and Const.Ram Chander handed over custody of the appellant Afsar to him as also the brief-case recovered from Afsar. In respect of the brief-case, SI Vivek Pathak drew up the seizure memo Ex.PW-5/C, recording therein that he had seized the brief-case which contain a passbook issued by Saraswati Kunj Cooperative Group Housing Society in the name of Ved Prakash Chakraborty i.e. the deceased as also a steel tiffin box and Rs.332/- in cash.

25. As deposed to by SI Vivek Pathak, he immediately sealed the contents of the bag. As deposed to by SI Vivek Pathak, he left the spot for LNJP hospital where Const.K.A.Babu handed over to him the belongings of the deceased Ved Prakash Chakraborty, who we note was then unconscious and injured;

being cash in sum of Rs.4,213/-, a purse, keys, railway pass and a pen which he seized as recorded in the memo Ex.PW-14/A.

26. Inspector Jai Singh Saini PW-26 took over the investigation at around 8:00 AM on 20.03.1999. He did so for the reason the injured V.P. Chakraborty died at the hospital at around 3:00 AM in the intervening night of 19-20.03.1999. As per him, appellants Shamshad, Javed and Zakir were apprehended by him since their names and whereabouts were disclosed in the disclosure statement made by appellant Afsar.

27. He apprehended the three on 20.03.1999. As recorded in the seizure memo Ex. PW-21/E a silver ring Ex.P-1 with a pearl was got recovered by Zakir. As recorded in the seizure memo Ex.PW-21/F, a purse, a passbook issued by Bank of India in the name of the deceased, a visiting card of the deceased, Rs.430/-, key and three revenue tickets were got recovered by Shamshad. A blood stained dagger was got recovered by Javed as recorded in the seizure memo Ex. PW-21/H, who pursuant to his disclosure statement led him to a place near Gandhi Peace Foundation and from the pavement pointed out the spot wherefrom the dagger was recovered.

28. The blood control earth, the blood stained clothes of the deceased, the blood sample of the deceased as also the

dagger were sent for serological examination and as per the report of the serologist human blood could be detected on the dagger and group thereof could not be detected.

29. As noted hereinabove, purity of the seizures of the exhibits recorded in various seizure memos have been attacked by learned counsel for the appellants, who have referred to the testimony of Umesh Chakraborty PW-2 as also that of Inspector Jai Singh Saini PW-26.

30. It may be recorded that no test identification proceedings were conducted in respect of the various exhibits seized by the police during investigation, and for the first time, some of the exhibits were identified by Umesh Chakraborty PW-2, the son of the deceased, when he deposed in Court in the month of August, 1999.

31. Umesh Chakraborty has, inter alia, deposed as under :-

“On 20.03.1999, I received a message from Inspector Pathak from JPN Hospital that my father Shri Ved Prakash had died there. I went JPN Hospital and from there I went to P.S. I.P.Estate. I was taken to the malkhana of the police station. I identified the belongings of my father which consisted of one brief-case, some papers, golden chain, golden ring, one pen, purse of brown colour and Rs. 4213/- in cash. I had taken into possession those articles on 03.03.1999 as per the order of the court.”

32. Inspector Jai Singh Saini PW-26, on being cross-examined, admitted that son of the deceased identified the belongings of the deceased at the police station, but stated that he did so on 07.6.1999.

33. The malkhana in-charge, ASI Surender Singh PW-24, proved exhibits PW-24/A and PW-24/B, being the entries in the malkhana register at serial number 1043 and 1149, as per which the first entry pertained to the receipt of four parcels handed over to him on 20.03.1999 and the second pertained to when the parcels were handed over to Ct.Jaiveer on 01.06.1999 for onward transmission to the FSL Malviya Nagar.

34. It is thus apparent that there is a problem with the purity of the seizures affected as per afore-noted seizure memos. It is apparent that either the exhibits which were ostensibly seized were never sealed at the spot as claimed by the investigating officers or that the seals were tampered with. PW-2 and PW-26 have admitted that various exhibits were shown in the police station to PW-2 by the investigating officer. The 2 have differed on the date, but that would not matter, for the reason admittedly, the exhibits were shown to PW-2 in the police station and we do not find any record maintained that the seals were broken after taking back delivery of the parcels from malkhana in-charge and thereafter the same were re-sealed. The

possibility of the exhibits being tampered or planted cannot be ruled out.

35. Under the circumstances, appellant Shamshad and Zakir have to be given the benefit of doubt with respect to the recoveries affected at their instance.

36. As noted above, a blood stained dagger was recovered pursuant to the disclosure statement of appellant Javed. As held in the decisions reported as Narsinbhai Haribhai Prajapati vs. Chhatrasinh & Ors. AIR 1977 SC 1753, Surjit Singh Vs. State of Punjab AIR 1994 SC 110, Deva Singh Vs. State of Rajasthan 1999 CriLJ 265 and Prabhoo Vs. State of U.P. AIR 1963 SC 1113, recoveries of ordinary articles such as blood stained clothes and blood stained knives, are insufficient evidence and unless there is some further link evidence, conviction cannot be sustained on the sole incriminating circumstance of a recovery of a blood stained knife pursuant to the disclosure statement of an accused. In the instant case it has additionally to be noted that the knife in question was detected only with blood of human origin, group whereof could not be determined i.e. the blood on the knife has not been linked as that of the deceased.

37. Thus, we find that the learned Trial Judge has glossed over vital evidence as also the testimony of PW-2 and PW-26 with respect to the recoveries affected at the instance of Shamshad

and Zakir. We also note that the learned Trial Judge ignored the law pertaining to recoveries of ordinary articles such as knives. Thus, appellants Shamshad, Javed and Zakir would be entitled to an acquittal.

38. As regards appellant Afsar, notwithstanding the fact that recoveries affected from him at the time of his apprehension have become tainted, the fact that he was spotted by PW-5, PW-9 and PW-15 as a part of group of four who were assaulting the deceased and was a part of the group of four who were chased by the said police officer and was the person who parted company with three friends and ran towards the left at Deen Dayal Upadhyay Marg and was continued to be chased by HC Veer Pal and Constable Ram Chander who never lost sight of him till he was apprehended outside the office of the Bar Council of India, is good enough evidence wherefrom the involvement of Afsar in the crime and the commission of the offence stands proved against him beyond reasonable doubt. It stands proved that Afsar along with his three associates intercepted the deceased with an intention to rob him and in the process one of the three associates stabbed the deceased.

39. To summarize Crl.Appeal No.288/2004 is dismissed. Crl.Appeal No.698/2004, Crl.Appeal No.371/2004 and Crl.Appeal No.738/2004 filed by Javed, Zakir and Shamshad are allowed.

Three are acquitted of the charges framed against them.

40. Appellant Zakir and Mohd. Shamshad are on bail. The bail bond and surety bonds furnished by them are discharged.

41. Copy of this order be sent to the Superintendent Central Jail, Tihar for necessary action pertaining to Afsar and Javed.

42. Before concluding, we may note that Afsar and Javed jumped interim bail and have not been apprehended. Since Javed has been acquitted by us, no further action needs to be taken against him pertaining to the instant case and we discharge the bail bond and the surety bonds furnished by him. As regards Afsar, he would have to suffer the remaining sentence, for which the police would ensure that effective steps are taken to apprehend Afsar and he be sent to prison.

**(PRADEEP NANDRAJOG)
JUDGE**

**(SURESH KAIT)
JUDGE**

**JANUARY 13, 2010
MM / dk**