

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 23.04.2009

+ CRL. A. 108/2009

JAHID @ LAMBU

..... Appellant

versus

STATE (G.N.C.T. OF DELHI)

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Sumeet Verma (Amicus Curiae)

For the Respondent : Mr M.N. Dudeja

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE P.K. BHASIN

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

BADAR DURREZ AHMED, J (ORAL)

1. The present appeal is directed against the judgment dated 17.09.2005 and order on sentence dated 21.09.2009 passed by the learned Additional Sessions Judge, Delhi in connection with the case arising out of FIR No.228/2001 registered under Section 302 IPC at Police Station Jama Masjid. By virtue of the impugned judgment, the appellant has been found guilty of having committed the murder of the deceased Sanjay. Consequently, by the impugned order on sentence,

the appellant was sentenced to undergo imprisonment for life and also to pay a fine to the tune of Rs 1,000/- for the offence committed under Section 302 IPC. In the event of failure to pay the said fine, the appellant was directed to undergo further imprisonment for a period of three months.

2. The prosecution case is that on the night intervening 28th and 29th of August, 2001, to be precise, at 12.15 a.m. on 29.08.2001, the duty constable Mahender sent a message to the Police Station Jama Masjid that one Sanjay, son of Sh. Sunder Lal, resident of 128, Mohalla Chana Gaudam, Sadar Bazar, Meerut (U.P.) and aged about 25 years has been admitted to the hospital in a serious condition after having been stabbed by someone. Thereafter, a D.D. entry vide No. 3A was recorded. ASI Rishi Pal reached JPN Hospital, Delhi alongwith constable Rajeev and obtained the MLC of the injured Sanjay. At 2.10. a.m. on 29.08.2009, the doctor had declared the said Sanjay unfit for making a statement. Sanjay was operated upon, but he ultimately succumbed to his injuries on 29.08.2001 itself at 2.45 a.m. According to the learned counsel for the appellant, this is a case based purely on circumstantial evidence. The circumstances which have been considered by the trial court to be sufficient for the purposes of convicting the appellant for the offence of murder are:- (1) the alleged last seen evidence of PW-12 (Mohd

Faheem); (2) the oral dying declaration allegedly made by the deceased Sanjay before PW-1 (Abdul Sattar); and (3) the alleged recovery of a blood stained knife and blood stained clothes of the appellant pursuant to his disclosure statement made upon his arrest on 31.08.2001.

3. The learned counsel appearing for the appellant submitted that this is a case where no motive has even been sought to be established. He submitted that the last seen testimony of PW-12 (Mohd Faheem) cannot be relied upon inasmuch as he has turned hostile. Moreover, even if we disregard this fact, the testimony of PW-12 (Mohd Faheem) cannot be regarded as “last seen evidence” as it is normally understood. The learned counsel further submitted that the so-called oral dying declaration given to PW-1 does not create any link with the present appellant. All that PW-1 has stated is that one person by the name of ‘Lambu’ had allegedly stabbed Sanjay. No description whatsoever of the said person by the name of ‘Lambu’ has been provided. He also submitted that PW-1, in his testimony, stated that two other persons by the names of Jahuddin and Raju were also present when Sanjay is alleged to have made this oral dying declaration, but the prosecution has not produced the said two persons as witnesses. He submitted that even their statements under Section 161 of the Criminal Procedure Code, 1973 were not recorded. It is of further significance that these

two persons were not produced as witnesses even though they are the ones who took the injured Sanjay to hospital as recorded in the MLC (Exhibit PW-16/A). Consequently, he submitted that no reliance can be placed on PW-1's testimony.

4. Finally, the learned counsel for the appellant submitted that the alleged recovery of knife and blood stained clothes by themselves would not be sufficient to convict the appellant for the offence of murder. For this proposition, he placed reliance on:-

- 1) **Narsinbhai Haribhai Prajapati etc., v. Chhatrasinh and Others:** AIR 1977 SC1753;
- 2) **Surjeet Singh and Anr. v. State of Punjab:** AIR 1994 SC 110;
- 3) **Deva v. State of Rajasthan:** 1999 Cr. L.J. 265;
- 4) **Prabhoo v. State of U.P.:** AIR 1963 SC 113.

He also placed reliance on a recent decision of a Division Bench of this court in the case of **Kaloo Passi v. State** [Crl. A. No.413/2001, decided on **01.04.2009**], wherein this court was of the view that mere recoveries of blood stained clothes, pieces of two daggers and a *rehri* at the instance of the appellants did not lead to the conclusion that the appellants were the perpetrators of the crime. Placing reliance on these decisions, the learned counsel submitted that mere recovery of the

alleged murder weapon and blood stained clothes of the accused would not be sufficient to return a finding of guilt and to convict the appellant for the offence of murder of the deceased Sanjay.

5. Mr Dudeja, the learned counsel appearing on behalf of the State, supported the judgment and sentence passed by the trial court. He submitted that the entire chain of circumstances was complete and the trial court had rightly convicted the appellant. He submitted that the last seen testimony of PW-12 (Mohd Faheem) coupled with the oral dying declaration given by the deceased (Sanjay) to PW-1 (Abdul Sattar) and the factum of the recovery of the knife and clothes at the instance of the accused lead to the inescapable conclusion that it was the appellant who committed the murder of the deceased Sanjay.

6. We have considered the arguments advanced by the counsel for the parties and have also gone through the evidence on record. We find from a reading of the trial court judgment that a great deal of weight was given to the dying declaration allegedly made by the deceased (Sanjay) to PW-1 (Abdul Sattar).

7. Similarly, the trial court was impressed by the fact that the deceased had been last seen with the appellant at the tea shop run by

Mohd Faheem (PW-12). These two circumstances, according to the trial court, were sufficient to lead to the irresistible conclusion that it was the appellant who had stabbed deceased (Sanjay) on the night intervening 28th/29th August, 2001.

8. Insofar as the testimony of PW-12 (Mohd Faheem) is concerned, we find that the said witness was declared to be hostile and was cross-examined by the learned Addl. P.P. for the State. In his examination-in-chief, this witness had only stated that the accused used to work with his father in the tea vendor's shop about one to one and a half months ago from the "date of incident". In cross-examination by the learned Addl. P.P., the following statements have been recorded:-

"It is correct that accused alongwith his companion Sanjay had come at our shop and sat their for 5/7 minutes and thereafter, they both had left towards Urdu Park nor I have stated so in my statement. (Confronted with statement ex. PW-12/A from portion A to A where it is so recorded). It is further incorrect to suggest that on the intervening night of 28/29.8.2001, accused Jahid came to me at about 11.30 PM and his pant and shirt were blood stained nor I have stated so in my statement. (Confronted with statement ex. PW-12/A from portion B to B where it is so recorded)."

On the basis of the aforesaid, the trial court came to the conclusion:-

"He also admitted that the accused alongwith the deceased Sanjay had come to their shop. After sitting for 5/7 minutes both Sanjay and accused Jahid had left towards Urdu Park."

9. It can be seen that the portion which we have extracted from the cross-examination of PW-12 (Mohd Faheem) clearly indicates that the said witness stated it to be 'incorrect' that the appellant alongwith his companion Sanjay had come to the said witness's shop and sat their for 5/7 minutes and that thereafter they both left towards Urdu Park. Although the statement shows the word "correct", it has to be read as "incorrect". This is because of the expression that is used in that sentence itself wherein we find the words "nor I have stated so in my statement". This last expression would not have been there had it been an admission on the part of the said witness that it was correct that the accused alongwith his companion Sanjay had come to their shop and had sat there for 5/7 minutes. This conclusion is further established by the fact that the said witness was confronted with the Section 161 statement of the said witness, being Exhibit PW-12/A, where it was otherwise recorded. Moreover, the following sentence also begins with the expression "it is further incorrect ...". This clearly means that the previous sentence also ought to be recorded as "it is incorrect ...". Therefore, the finding of the trial court that the said witness had admitted that the accused alongwith the deceased Sanjay had come to their shop and after sitting for 5/7 minutes both Sanjay and the accused Jahid had left towards Urdu Park is not borne out by the evidence on

record. In fact, it is contrary to the testimony of PW-12 (Mohd Faheem).

10. Apart from this, even if we assume that it had been so stated by PW-12 (Mohd Faheem), the same cannot by itself be regarded as the last seen evidence. There is no date or time mentioned in his testimony as to when the said witness had seen the appellant in the company of Sanjay and as to on which date and at what time they had left towards Urdu Park. Consequently, no reliance can be placed on the testimony of this witness. We may also note that technically, this could not be regarded as last seen evidence because Sanjay was found in an injured condition and he is alleged to have made an oral dying declaration. Normally, the evidence which is regarded as last seen evidence is such where the person is last seen alive and after that it is only his dead body which is recovered. So, the testimony of PW-12 (Mohd Faheem) has to be disregarded altogether. It may also be pointed out that in the cross-examination of PW-12 (Mohd Faheem) by the defence counsel, the said witness had stated that the appellant had left the service of his father one and a half months prior to the incident and thereafter had not seen him again and that he saw him for the first time in court on the date he was deposing, i.e., 16.08.2004.

11. With regard to the testimony of PW-1, who is supposed to be the recipient of the oral dying declaration made by Sanjay, we find that the same cannot be relied upon in the manner in which the trial court has done. There are several reasons for this. The first and foremost reason is that the alleged dying declaration only refers to one 'Lambu'. The said PW-1 (Abdul Sattar) has only stated as under:-

“He told me his name as Sanjay and he informed me that he had been stabbed with a knife by one Lambu. At that time, two other persons namely Jahuddin and Raju were also present there and in whose presence, injured Sanjay had named Lambu as assailants (sic). I then asked Jahuddin and Raju to take him to the hospital. Thereafter, both of them took the injured Sanjay in a Rickshaw to the hospital.”

Thus, apart from the fact that there is only mention of a person by the name of 'Lambu', there is nothing to connect that person with the present appellant as no description of that person other than the name 'Lambu' has been given. It is obvious that 'Lambu' is usually an *alias* and is not a given name. The appellant's name is Jahid (Zahid). It has also not come in evidence as to whether the petitioner was normally known as 'Lambu' or had the *alias* 'Lambu'.

12. The second circumstance is that the two other persons who could have corroborated the factum of the dying declaration, namely, Jahuddin and Raju were not produced as witnesses by the prosecution.

In fact, the I.O. did not even bother to record their Section 161 statements. This is all the more important because the said two persons were the ones who admittedly brought Sanjay in an injured condition to the hospital where the MLC (Exhibit PW-16/A) was prepared. Another circumstance, which is of significance, is the fact that PW-1 (Abdul Sattar) is said to be the *Chowkidar* in Fancy Market, Meena Bazar, Jama Masjid for the last 12-13 years. He, upon noticing the important circumstance of Sanjay having been stabbed and being the recipient of the alleged dying declaration, did not even bother to inform the police. His only contribution was to have gone to the place, having allegedly heard the dying declaration and instructed the other two persons who were present, namely, Jahuddin and Raju, to take the injured Sanjay to hospital and thereafter he continued to do whatever he was doing at that time. This also creates some doubt as to the correctness and truthfulness of the alleged dying declaration. Consequently, we are of the view that the testimony of PW-1 cannot be given that degree of credence, if at all, which the trial court has done.

13. This leaves us with only the circumstance of recovery of a blood stained knife and blood stained clothes at the instance of the appellant. We have gone through the decisions referred to by the learned counsel for the appellant on this point. We are in agreement with the

submissions made by him that without there being any other circumstance, the recovery of the blood stained knife and clothes by themselves would not lead us to the conclusion that the appellant is the perpetrator of the crime.

14. For all these reasons, we feel that there is a great deal of doubt which surrounds this case. There is also a complete absence of motive. Looking at the case as a whole, we are not led to the inescapable conclusion that the appellant was guilty of committing the murder of the deceased Sanjay. It is probable that he may have committed the murder, but it is also possible that he may not have. The prosecution case has not gone beyond the realm of probabilities. That is not sufficient to convict a person. There is a great deal of doubt and the benefit of this would go to the appellant. Consequently, we set aside the impugned judgment and the order on sentence and acquit the appellant. The appellant, who is in jail, is directed to be released forthwith.

The appeal stands allowed accordingly.

BADAR DURREZ AHMED, J

P.K. BHASIN, J

April 23, 2009

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