

* **HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on : 16.07.2009
Judgment delivered on: 21.07.2009

+ **Crl. Appeal No.225/2001**

BABUDDIN Appellant
Through : Mr.Sumeet Verma, Amicus Curiae.

VERSUS

STATE Respondent
Through : Mr.Pawan Sharma and
Ms.Richa Kapoor, APPs.

Crl. Appeal No.833/2001

IQBAL Appellant
Through : Mr.Sumeet Verma, Amicus Curiae.

VERSUS

STATE Respondent
Through : Mr.Pawan Sharma and
Ms.Richa Kapoor, APPs.

Crl. Appeal No.849/2001

YASIN @KALLU Appellant
Through : Mr.Sumeet Verma, Amicus Curiae.

VERSUS

STATE Respondent
Through : Mr.Pawan Sharma and
Ms.Richa Kapoor, APPs.

Crl. Appeal No.512/2001

ISMAIL @CHHUTKA Appellant
Through : Mr.Sumeet Verma, Amicus Curiae.

VERSUS

STATE

.....Respondent

Through : Mr.Pawan Sharma and
Ms.Richa Kapoor, APPs.

CORAM :-

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE INDERMEET KAUR

- (1) Whether reporters of local paper 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. With reference to the testimony of Daleep PW-11; holding that the same establishes that the deceased Pradeep was seen in the company of the appellants at 10:30 PM at Bhatara Chowk on 4.9.1998 and since the body of the deceased was found the next morning on 5.9.1998 at around 10:00 AM at DDA Park near Buland Masjid, Shastri Park, the learned Trial Judge has held that since the appellants have not explained when and how they parted company with the deceased, a conclusion could be drawn from said evidence that the appellants had murdered the deceased. It has further been held that evidence establishes that upon being apprehended, appellants Yasin and Ismail made disclosure statements giving information to the investigating officer that they could get recovered shirts worn by Iqbal and Yasin which

they were wearing when they murdered the deceased and thereafter got the same recovered on which blood was detected. The same has been held to be further incriminating evidence. Qua appellants Iqbal and Babuddin, it has been held that evidence establishes that pursuant to their disclosure statements in which they stated that they had hidden the knives with which the deceased was murdered and they could get the same recovered and pursuant thereto they got recovered the knife Ex.P-2 and the knife Ex.P-1; the former by Iqbal and the latter by Babuddin. On one knife blood was detected. The same has been held to be further incriminating evidence.

2. A dead body of a male was seen at Shastri Park near Buland Masjid by an unknown informant somewhere around 10:00 AM on 5.9.1998. He conveyed the said information to the police control room wherefrom it was conveyed to the duty officer of the concerned police station i.e. PS Seelampur and was recorded vide entry DD No.19-B Ex.PW-2/C, at 10:10 AM as recorded in the DD Entry. ASI Harbeer PW-14 accompanied by Const.Vijender Singh PW-4 reached the spot. It appears that the police control room had relayed the information of a dead body lying as aforementioned to the duty officer PS Welcome and from said police station SI Vinod PW-8 and Const.Brij Pal PW-6 reached the place where

the dead body was lying. Since the place where the dead body was lying fell within the jurisdiction of PS Seelampur, proceedings at the spot were conducted by ASI Harbeer PW-14. The other police officers assisted him.

3. A photographer was summoned. Const.Ashok Kumar PW-3, a photographer, reached the spot and took the photographs Ex.PW-3/A1 to Ex.PW-3/A6. ASI Harbeer Singh PW-14 lifted blood stained soil and grass from the spot as also from a spot at a distance of about 70 feet from where the body was lying as recorded in the seizure memos Ex.PW-9/A and Ex.PW-9/E. A pair of shoes from near the dead body were seized as recorded in the seizure memo Ex.PW-9/D. Since news of a dead body being found had spread in the colony, two persons Gopal PW-9 and Daleep PW-15 (we may note that two witnesses, both related to the deceased have been examined by the prosecution being Daleep PW-11 and Daleep PW-15) who happened to be the maternal uncle and the cousin brother respectively of the deceased reached the spot and identified the dead body as that of Pradeep.

4. The dead body was taken into possession and SI Vinod accompanied by Const.Brij Pal deposited the body at the mortuary of G.T.B.Hospital where Dr.A.K.Tyagi PW-5 conducted the post-mortem on 6.9.1998. As noted on the post-mortem report Ex.PW-5/B the post-mortem commenced at 10:30 AM

and was completed at 11:40 AM. Under the caption "General Observations", Dr.A.K.Tyagi wrote on the post-mortem report as under:-

"Body of an average built young adult male of age about 22 years in advanced stage of decomposition. Both feet tied with shoe laces, body distended with gases. Eyes bulging out. Maggots crawling (illegible) and entering through the open wounds, degloving and peeling of cuticle present at places. Scalp hairs peeling of at places with gentle pull only....."

5. 12 external injuries, being incised and stab wounds were noted. It was opined that the cause of death was haemorrhagic shock and that injuries No.3 to 8 and 11 were sufficient to cause death in the ordinary course. With reference to the injuries he opined that they were suggestive of two weapons being used. He noted that the stomach contains about 250 CC of semi-digested food. It would be useful to note at this stage itself, that in the post-mortem report, Dr.A.K.Tyagi has not opined the likely time of death, but in his deposition in Court as PW-5 he deposed, with reference to the post-mortem report, that according to him the likely time of death was 2½ days prior to the day of the post-mortem.

6. The next day of the discovery of the dead body of the deceased, which as noted above, was discovered at around 10:00 AM on 5.9.1998, i.e. on 6.9.1998, Daleep PW-11

informed the investigating officer, as recorded in his statement Ex.PW-11/DA, that at around 10:30 PM on 4.9.1998 he had seen the deceased in the company of the appellants at Bhatiara Chowk. This led the investigating officer to apprehend the appellants. As claimed by Insp.Tejpal PW-17, who took over further investigation on 6.9.1998 itself, the appellants were apprehended apparently on being informed, as usually claimed by the police, on the information of a secret informer from Shastri Park at 7:30 AM on 7.9.1998. The usual story which we see in every case thereafter unfolded. Insp.Tejpal PW-17 interrogated the appellants at the spot itself and recorded their disclosure statements. Needless to state, as in each and every case, the appellants made confessions. The disclosure cum confessional statement of Iqbal is Ex.PW-12/E, that of Babuddin is Ex.PW-12/F, that of Yasin is Ex.PW-12/G, and that of Ismail is Ex.PW-12/H.

7. The confessional parts being inadmissible, we eschew reference to the same. The relevant part of the confessional statements is the statement of Iqbal as well as Babuddin in which they have apparently stated that the two knives used to murder the deceased have been hidden by them in bushes in a jungle adjoining the place where the dead body of the deceased was recovered and that they could recover the same and the statement of Yasin and Ismail as per

which the shirt being worn by Iqbal and Yasin got stained with the blood of the deceased when the crime was committed and that the two of them i.e. Yasin and Ismail had hid the shirts at a place where dirty water had accumulated in a field near Buland Masjid and that they could recover the same. Pursuant to the said disclosure statements, appellants Iqbal and Babuddin jointly and simultaneously led the police to a jungle near Buland Masjid and from the bushes produced two knives which were seized vide memo Ex.PW-11/A. Appellant Yasin and Ismail jointly and simultaneously led the police to a field near Buland Masjid and from a place having stagnant dirty water, produced/recovered two shirts which were seized vide memo Ex.PW-12/K.

8. We may note that as per the report Ex.PW-17/C and Ex.PW-17/D of the serologist, blood was detected on the two shirts which were recovered at the instance of appellants Yasin and Ismail and blood was detected on one of the two knives which were got recovered by Iqbal and Babuddin. The two shirts, on reaction, gave no result qua the origin of the specie i.e. it could not be gathered whether it was human blood. The knife on which the blood was detected, on further reaction, tested positive for human blood and even its group was detected i.e. group 'AB'. The same was the blood group of the deceased. The blood stained grass and the soil recovered

from the two spots i.e. where the dead body was recovered and at a distance of about 70 feet therefrom, on testing, resulted in blood being detected from the soil and the grass where the body was recovered, but specie of the blood or its group could not be detected. From the other soil sample, on reaction, no traces of blood could be detected.

9. As noted in para 1 above, the learned Trial Judge has very heavily relied upon the testimony of Daleep PW-11 to hold that the deceased were last seen alive in the company of the appellants at around 10:30 PM on 4.9.1998 and that the dead body of the deceased was noted at around 10:00 AM on 5.9.1998 and since the appellants have not rendered any satisfactory explanation as to when and how they parted company with the deceased, a presumption of guilt could be drawn against them. Further, in view of the report of the serologist that blood was detected on the two shirts which were got recovered by appellants Yasin and Ismail and that the blood of the same group as that of the deceased was detected on one out of the two knives got recovered by appellants Iqbal and Babuddin, the learned Trial Judge has reinforced his conclusion of guilt.

10. It is apparent that the first and foremost point which requires to be considered is whether the testimony of Daleep PW-11 is creditworthy and inspires confidence. If yes,

whether from the fact that Daleep PW-11 saw the deceased in the company of the appellants at Bhatiara Chowk at 10:30 in the night and the place of death of the deceased was a field near Buland Masjid, the dead body being found at 10:00 AM the next day, can an inference adverse to the appellants be drawn.

11. As per the testimony of Daleep PW-11, a fact admitted by him during cross examination, he was residing in the same house in which the deceased along with his mother and sister Arti and brother Sonu were residing. Daleep has stated in his examination-in-chief that the deceased was his cousin. He claims in his examination-in-chief that after he saw the deceased with the appellants at Bhatiara Chowk at 10:30 PM he spoke to the deceased and asked him if he would come with him to their house to which the deceased replied that he would come after sometime. Daleep claims that he went home and next morning went to work and returned back the next day. It is apparent that Daleep is buying time to explain the delay in his telling the police that he saw his cousin brother with the appellants at 10:30 PM on 4.9.1998.

12. Daleep has admitted that his statement was recorded by the police on 6.9.1998. Daleep is conscious of the fact that the dead body of his cousin was noted and information was passed on to the police at 10:10 AM on

5.9.1998. Daleep is conscious of the fact that it would be an unnatural conduct for him to be present in the house on 5.9.1998 and not inform the police that he saw his cousin in the company of the appellants the previous night. This is the reason why he claims to have left for work early in the morning of 5.9.1998 and returned on 6.9.1998.

13. The deceased has obviously not returned home in the night of 4.9.1998. It is strange that the mother of the deceased would not bother if her son i.e. the deceased would remain outside the house the entire night and would not come back. The natural reaction of a mother would be to be concerned if her son does not return by midnight and with each passing hour, the anxiety would grow. The mother is bound to express her concern to the other family members and such of them who had seen her son outside the house would certainly tell said fact to the mother. Daleep is conscious of the fact that he has to say something about said issue. He has done so. When cross examined whether he had told the mother of the deceased that he had seen the deceased at Bhatiara Chowk, he replied: *I had stated to the mother of deceased Pradeep in the evening on 5.9.1998 that deceased Pradeep met me at Bhatiara Chowk.* This is in direct conflict with his categorical statement in the examination-in-chief that *"I learnt this when I returned home on the next day".*

14. It is apparent that Daleep is vacillating. To justify his going to the police and getting his statement recorded on 6.9.1998, he claims to have left the house in the morning of 5.9.1998 and returning back the next day i.e. 6.9.1998. To explain the normal human conduct discussed by us in para 13 above, he claims to have told the mother of the deceased on the evening of 5.9.1998 itself that he had seen the deceased with the appellants. Both statements are mutually contradictory and are irreconcilable.

15. We may note that the mother of the deceased has not been examined as a witness and therefore we cannot discuss the issue with reference to the testimony of the mother of the deceased.

16. Under the circumstances, a reasonable doubt is bound to arise in a judicial mind of Daleep PW-11 being a truthful witness. His creditworthiness has been shaken. We have no other evidence of the appellants being last seen in the company of the deceased for the reason the other witness namely Sharafat PW-1 has so badly contradicted himself that even the learned Trial Judge has been compelled to ignore his testimony. Indeed, during argument of the appeals, learned counsel for the State conceded that the testimony of Sharafat has to be ignored. We note the reason why the learned Trial Judge has ignored the testimony of Sharafat is because at one

stage he claims that the deceased was a daily wager with him and that on 4.9.1998, at around 8:30/9:00 PM, appellant Iqbal came to him and enquired about the deceased and later on went on to state that the only reason he knew the deceased was because his mother i.e. the mother of the deceased used to sell wares on a handcart near his house.

17. We also have a problem on the probable time as also the day when the deceased died.

18. As noted above, during cross examination Dr.A.K.Tyagi PW-5 stated that as per his opinion the likely time of death of the deceased was 2½ days prior to the time of post-mortem of the deceased. Unfortunately, the reason for his opinion was not disclosed or stated by PW-5.

19. *Modi's Medical Jurisprudence and Toxicology: 23rd Edition* at page No.436 onwards discusses the evidence of putrefaction of a dead body. At page 437, the learned author records that flies are attracted to a dead body and lay eggs, especially in the wounds, and that the eggs hatch into maggots within eight to twenty four hours during hot season. These maggots turn into pupae in the next four or five days. Thus, if maggots are detected on a dead body it is apparent that the body is of a person who died at least a day prior. If the maggots have turned into pupae it is apparent that the dead body is four to five days old. The learned author,

accordingly, opines that when maggots are detected on a body, specimens of maggots should be taken for culture and preserved in formalin to check the stage of development. Unfortunately, PW-5 has been negligent in not preserving the maggots. Had he done so, upon being tested, the stage of development of the maggot could have thrown more light on the point of the likely time of the death of the deceased.

20. At page 438, the learned author records that as the body decomposes, after 48 hours of the death, the distinctiveness acquired by the body is of hair becoming loose and capable of being easily pulled out. The nails also become loose and hence easily detachable and this process continues till the next 24 hours, after which the next stage of decomposition which happens after 3 days sets in, i.e. the loosening of the bones and the teeth becoming loose in their sockets and falling off.

21. The third stage of decomposition of the body has not been detected by PW-5 for the obvious reason, had it been so he would have recorded said fact on the post-mortem report. The second stage of decomposition which commences after 48 hours of the death and continues to so exist over the next 24 hours i.e. hair becoming loose and capable of being easily pulled out and nails becoming loose and easily detachable has been categorically recorded by the doctor.

The opinion of the doctor that the likely time of death was 2½ days prior to the time of post-mortem is explainable on the Medical Jurisprudence. The mean average of 48 hours and 72 hours is $48 + 72 = 120 \div 2 = 60$ hours i.e. exactly 2½ days.

22. Now, the post-mortem was conducted between 10:30 AM to 11:40 AM on 6.9.1998. With reference to the post-mortem report and the Medical Jurisprudence, the body had reached the second stage of decomposition and the likely time of death was anywhere between 2 to 3 days prior to the time of post-mortem, and if this be so, the likely inference would be that the deceased had died between 10:00 AM to 10:00 PM on 3.9.1998. On this analysis, it would be difficult to believe Daleep PW-11 that he saw the deceased at 10:30 PM on 4.9.1998.

23. We have probablized the evidence by giving it a 360° looks from all side because we feel that in a case of the kind it would be advisable to center on a point with reference to more than one referral point, for the reason logic tells us, that commencing the journey from more than two referral points, if it takes the pilgrim to the same spot, it lends credibility to the path of the journey and reassures the pilgrim that he has reached the correct spot.

24. Assuming that Daleep had indeed seen the appellants in the company of the deceased as claimed by him

at 10:30 PM on 4.9.1998; that the dead body was noted at around 10:10 AM on 5.9.1998 is not in dispute: whether from said two facts, a conclusion can be drawn that the appellants had committed the crime, is the point for further consideration.

25. Unfortunately, we have on record no evidence of the distance between Bhataria Chowk where Daleep claims to have last seen the deceased in the company of the appellants and the place where the dead body was found.

26. The conviction of an accused on the evidence of being last seen in the company of the deceased is on the theory called the last-seen theory. The theory has been explained in various decisions of the Supreme Court which have been noted in the decision reported as 2007 (3) SCALE 740 State of Goa Vs. Sanjay Thakran & Anr. A passage (para 31) of an earlier decision in the decision reported as 2002 (8) SCC 45 Bodh Raj Vs. State of J & K has been quoted with approval, which reads: *The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen the*

accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases...”

27. To put it differently, where the circumstances of being last seen in the company of the deceased are such, which render it necessary for the accused to explain and establish when, where and how they left the company of the deceased, in the absence of any such explanation, any logical mind would un-hesitatingly reach the conclusion that the accused are guilty, only then on the theory of last seen an inference of guilt can be drawn.

28. Friends sit around and loiter around. In their youth they do so even late in the night. Parting company, each goes to his house. Anything may happen to anyone of them on the way. Interestingly, in Sanjay Thakran's case (supra) a somewhat similar situation had arisen. The accused, a married couple as also the deceased, also a married couple, were known to each other. Accused No.1 and deceased No.1 were seen walking towards a beach and 2¼ hours thereafter the dead body of deceased No.1 was found at the beach. Accused No.2 and deceased No.2 were seen walking on the road and thereafter nobody saw deceased No.2 till her dead

body was found with a gap of 8½ hours of her being last seen alive with accused No.2. We may note that accused No.1 was the husband of accused No.2. Deceased No.1 was the husband of deceased No.2.

29. Though not so expressly said in so many words, while upholding the acquittal of the accused, it is apparent that what has weighed with the Lordships of the Supreme Court is the fact if two friends go to a beach there is no presumption that both of them would stay together at the beach. There is every possibility of a third party being the assailant. Similarly, where two friends are seen walking on a street, there is every possibility of the two parting company, and somebody else being the assailant. In this context the issue of time gap becomes relevant. The issue of the place where the two were last seen alive becomes relevant.

30. On the facts and circumstances of the instant case, we hold that even otherwise, the circumstance of the deceased being last seen in the company of the appellants, being the only incriminating evidence, is insufficient evidence wherefrom the only conclusion possible is that of the guilt of the accused.

31. Our reason for saying that the only incriminating evidence against the appellants, if at all, is the evidence of last seen, for the reason we find the evidence pertaining to the

recoveries of the knives and the blood stained shirts at the instance of the appellants, most unconvincing and unreliable. Firstly for the reason the two shirts which have been shown as recovered at the instance of appellants Ismail and Yasin have not been detected with the presence of human blood thereon. As per the report of the serologist the same have been found to be stained with blood. We note that the blood has not been connected to a particular specie. Further, save and except the confessional statement of Yasin and Ismail that one shirt belonged to Iqbal and the other to Yasin, which statements are inadmissible in evidence, we have no evidence that the said two shirts were worn by Yasin and Iqbal. Lastly, the place wherefrom the shirts have been recovered is an open field accessible to one and all. Similarly, qua the two knives which have been shown to have been recovered at the instance of appellants Iqbal and Babuddin, one out of the two knives did not have any blood being detected thereon. No doubt, human blood of the same group as that of the deceased was detected on the other knife, but we note that the place of recovery of the two knives is a jungle adjoining Buland Masjid, Shastri Park. We note that the recovery memo does not mention that the knives were lying concealed or hidden in a manner that save and except a person having special knowledge about their presence, none could detect the same. The recovery

memo Ex.PW-11/A simply records that after leading the investigating officer to a jungle adjoining Buland Masjid, from the bushes, Iqbal and Babuddin took out two knives. Lastly, there is considerable confusion as to wherefrom the two knives were recovered. As per Daleep PW-11, a witness to the recovery memo Ex.PW-11/A the two knives were got recovered by Iqbal and Babuddin from mud (the witness has used the expression in vernacular “*keechad*”) ahead of a mazar, but the recovery memo records otherwise; it records that the two knives were recovered from within the bushes in a jungle. Thus, we are constrained to hold that the evidence pertaining to the alleged recoveries is not only highly tainted but is even otherwise worthy of no credit.

32. Last but not the least, though lack of proof of motive may not be a ground to acquit an accused even in a case of circumstantial evidence and where the circumstances proved on record satisfy the panchsheel of the law pertaining to circumstantial evidence a Court would be justified in returning a finding of guilt. But in a case where last seen evidence alone is sought to be projected as vital to a conviction, it assumes significance whether the accused had a motive to do what they did i.e. murder the deceased. In a case of the kind at hand with which we are dealing, absence of proof of motive becomes relevant. We note that the

prosecution has not even attempted to prove any motive. If we go by the testimony of Daleep PW-11, the appellants and the deceased were friends. Why should the appellants kill their friend? The prosecution has not even attempted to search for the answer.

33. That takes us to our destination. It is a happy journey for the appellants for the reason the destination of our journey is the acquittal of the appellants.

34. The appeals are allowed. The impugned judgment and order dated 29.1.2001 convicting the appellants as also the order of sentence dated 29.1.2001 are set aside. The appellants are acquitted of the charges framed against them.

35. The appellants are on bail. Their bail bonds and surety bonds are discharged.

(PRADEEP NANDRAJOG)
JUDGE

(INDERMEET KAUR)
JUDGE

July 21, 2009
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