

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

% *Judgment Reserved on: 30th July, 2009*
Judgment Delivered on: 03rd August, 2009

+ **CRL.A.254/2001**

AMIR HAMJA ANSARI Appellant
Through: Mr. R.M. Tufail with Mr. Sunil Sagar
and Mr.Vishal Sehijpal , Advocates.

versus

STATE Respondent
Through: Mr. Pawan Sharma, APP.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J.

1. Vide impugned judgment dated 16.3.2001, the appellant Amir Hamja Asnari has been convicted for having murdered his wife Rukshana. He had been sentenced to undergo life imprisonment.

2. The facts as unfolded by the prosecution are that the appellant alongwith his wife, Rukshana and their three children i.e. one son Haroon Ansari PW-2, one daughter Ms.Haseena Ansari PW-4 and another daughter were occupying two jhuggies i.e. jhuggi no.C-596 and jhuggi No.C-556 at Bhoomiheen Camp, Govindpuri, New Delhi. The

deceased along with her two daughters were living in jhuggi No.C-596 where she had a tailoring shop and the kitchen was also being run from there. The other jhuggi i.e. jhuggi no. C-556 was in the occupation of the appellant and their son Haroon Ansari.

3. On 18.1.1999, PW-2 had left his jhuggi at about 6.00 AM to distribute newspapers. He returned back at 7.30 AM when his sisters had already left for school. His appellant father was found outside jhuggi no.C-596 filling water; he thereafter served him a cup of tea. He noticed that his mother was lying with her face covered with a quilt. PW-2 returned to his own jhuggi i.e. jhuggi no.C-556. At about 8.00 AM he saw his father, in jhuggi no.C-596, getting ready to go for work. PW-2 went out for a stroll and returned back after 15 minutes. At 9.00 AM when he went to jhuggi no. C-596 he saw his mother still sleeping with her face covered with a quilt; on removing the quilt, he found, her lying dead with her head battered and bleeding. He immediately informed his father who returned back from his factory.

4. Lady Const. Geeta PW-10 on duty in the PCR received information at 9.18 AM that one lady had been killed in the Bhoomiheen Camp, Kalkaji. She informed the police post Govindpuri where DD No.7 Ex.PW-1/A was recorded. This D.D. was marked to SI Anil Kumar PW-15 who alongwith Const. Giriraj, Const. Mahavir PW-11 and Const. Mange Lal

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PW-8 reached jhuggi no.C-596, Bhoomiheen Camp where they found a lady lying on a Thakhat; blood was oozing out from her head and she was having injuries on her head. Her name was revealed as Rukshana.

5. Statement Ex.PW-2/A of Mohd. Haroon Ansari son of the deceased who was present at the spot was recorded. Endorsement on the same was made at 10.05 AM Ex.PW-14/A, pursuant to which the formal FIR Ex.PW-14/B was registered by Lady SI Neeraj PW-14.

6. Photographer was called to the spot and Const. Girdhar Singh PW-13 took three photographs of the scene of crime, positives of which are Ex.PW-13/1 to 3 and the negatives are Ex.PW-13/4 to 8. Site plan Ex.PW-15/A was prepared at the instance of PW-2 and thereafter the site plan to scale Ex.PW-5/A was prepared by SI Madan Lal PW-5. Const. Naresh PW-9 had delivered a copy of the FIR to the Court of the concerned Magistrate on the same day itself.

7. From the spot one Takhat, one blood stained gadda, one pullover of the deceased, one table cloth all smeared with blood were seized vide memo Ex.PW-11/A which were sealed in a parcel having seal of AKG. Inquest papers were prepared. The dead body was sent to the AIIMS hospital for post mortem. The post mortem on the dead body was conducted by Dr.Sudhir Gupta PW-3 who had noted five injuries on her person having been caused by a blunt object, all being ante mortem in nature. The post mortem had been

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conducted on 18.1.1999 at 3.30 PM and had been concluded at 4.30 PM. The time since death was noted to be about half day plus/minus four hours i.e. between 8 to 16 hours. The dead body was thereafter handed over to PW-2.

8. On the following day i.e. 19.1.1999 since the role of the appellant had surfaced, the police party reached his jhuggi. The appellant was interrogated and he made a disclosure Ex.PW-6/A. He got recovered a danda from the tand inside his jhuggi which as per his disclosure statement was the weapon of offence by virtue of which he had inflicted the injuries on his deceased wife. The recovery of this danda had been made in the presence of a neighbour, Khalil PW-6 and was taken into possession vide memo Ex.PW-6/B.

9. Dr.Sudhir Gupta PW-3 vide his subsequent opinion on the examination, of this danda i.e. the alleged weapon of offence had opined that the injuries as noted by him in his report Ex.PW-3/A could have been caused by this weapon. He had proved this subsequent report as Ex.PW-3/B.

10. The blood stained clothes of the deceased including her blood sample had been sent to CFSL for examination which vide its report Ex.PW-15/G had opined that blood group 'AB' was detected on the clothes of the deceased as also on the gadda which had been seized from the spot. This was also the blood group of the deceased and was also

detected on the wooden piece/danda which had been sent for serological examination.

11. The trial Judge on the aforestated evidence had returned a finding of guilt against the appellant, holding him guilty of having committed murder of his deceased wife Rukshana.

12. On behalf of the appellant, it has been argued that the case of the prosecution is dented and not free from embellishments and ambiguities; attention has been drawn to the version of PW-2 the star witness of the prosecution, on whose statement the FIR had been registered. It is argued that in Court PW-2 on oath had stated that he had lifted the quilt under which his mother was lying at about 8.35 AM when he has found her in deep sleep and thereafter at about 9.00 AM when he again lifted the quilt from her body, he found her lying dead. It is argued that even as per the version of prosecution, the appellant had already left for his work at about 8.30 AM and as such he could not have been the assailant. Attention has also been drawn to the version of PW-4 the daughter of the deceased who had stated that her parents were having cordial relations. It is argued that PW-6 Khalil before whom the alleged recovery of danda was made is a planted witness as admittedly he is a resident of B-Block whereas the parties were living in C-Block and it has not been explained as to how and in what circumstances he had been joined as a witness and why the neighbours of C-

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Block had been ignored; it is argued that the testimony of PW-6 is even otherwise suspect as he has stated that he had received information about the death of Rukshana at about 8.30 AM when PW-2 himself had noticed his mother lying dead only at 9.00 AM. No sketch of the alleged recovered weapon i.e. of the danda had been prepared, dimensions had not been mentioned; whether it was a wooden danda or a phatta is not clear to the Investigating Officer himself. No motive has also been elicited by the prosecution as to why the accused would have committed such a barbaric act, the possibility of an intruder having entered the jhuggi in this intervening time between 7.30 AM to 9.00AM cannot be ruled out as PW-2 the son of the deceased had categorically stated that his father had already left for his work at 8.30 AM. These cumulative queries have not been answered by the prosecution which dent their version, entitling the appellant to a benefit of doubt and a consequential acquittal.

13. This is an unfortunate case where the offender and the victim are closely related family members; accused being the husband and deceased being his wife. The star witness is their son PW-2 Haroon Ansari on whose statement the FIR had been registered. Ex.PW-2/A is his statement which had been endorsed at 10.05 AM on 18.1.1999 for the registration of the FIR. It had been disclosed therein that on the fateful day at 6.00 AM in the morning PW-2 had gone out to distribute newspapers on his cycle; he returned back at

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7.30 AM by which time his sisters had left for their school. The family was occupying two jhiggies i.e. jhuggi no.C-596 and jhuggi no.C-556; the former was in occupation of his mother and his sisters whereas the latter jhuggi was being used by his father and himself for sleeping. When he returned back at 7.30 AM he saw his father outside jhuggi no. C-596 filling water. At 8.00 AM he went inside the jhuggi i.e. jhuggi no.C-596 where he noticed that his mother was lying with her face covered with a quilt. His father was getting ready to go to the factory. He went out for a stroll and came back after about 15 minutes. His father had already left for his work. At about 9.00 AM he went inside the jhuggi where his mother was still sleeping and when he lifted the quilt from her face he noticed that her head had been battered and blood was oozing out from her injuries. This version of PW-2 had formed the basis of the FIR.

14. It is a settled proposition of law that a first information report although not a substantive piece of evidence can nevertheless be used to corroborate the statement of its maker under Section 157 of the Indian Evidence Act or to contradict him under Section 145 of the Indian Evidence Act. Applying this proposition of law, the testimony of PW-2 while deposing on oath has to be tested.

15. On oath in Court PW-2 had made a variation qua his first version and had stated that he had uncovered the face of his mother at 8.30AM when he had found her in deep

sleep but on the second occasion i.e. at 9.00 AM when he removed the quilt from her face he had found her lying dead. Having been confronted by his earlier version Ex. PW-2/A, PW-2 had admitted that in his first version he had not stated that he had seen his mother sleeping at about 8.30 AM. In his cross-examination, he had, in fact, categorically admitted that he had lifted the quilt from his mother's face only once i.e. at 9.00 AM when he had seen blood lying near her and blood was also oozing out from the injuries on her head and she was lying dead.

16. From this version of PW-2, it has been established that when PW-2 had returned back to his jhuggi at 7.30 AM on 18.1.1999 his sisters had already left for school. His father was filling water outside jhuggi no.C-596 i.e. the jhuggi in use by his mother and sisters and which was also the place where the dead body of his mother was found. At 8.00 AM he had noticed his father getting ready to go for his work; this was in juggi no.C-596. PW-2 went out for a stroll and did not come back for the next 15 minutes. At 9.00 AM he had for the first time uncovered the quilt from the body of his mother when he noticed that she was lying dead.

17. From this sequence of events what follows is that if the offender was the appellant, he must have committed this offence between 8.00 AM to 9.00AM. At this point, it would be relevant to state that the post mortem of the deceased had been started at 3.30 PM and concluded at 4.30 PM on

18.1.1999; time since death had been reported to be half day plus/minus four hours i.e. 8 to 16 hours prior thereto. 8 hours from the time of the post mortem would approximately be 8.00- 8.30 AM in the morning.

18. In this context, version of PW-4 daughter of the deceased is also relevant. She has on oath stated that her mother had died in jhuggi no.C-596 due to head injuries on 18.1.1999. On that day she had left for school at 7.30 AM along with her younger sister. They had been informed about the death of their mother through their brother; they forthwith returned back from the school. PW-4 has further stated that when she left for school her mother was alive; she denied the suggestion that there was any ill-will between her father and mother or that they were not sharing cordial relations.

19. The question that has to be answered is that whether in this intervening period between 8.00 AM to 9.00AM when the offence had been committed, was there any possibility of any outsider having entered the place of occurrence and having committed the crime. Admittedly no suggestion had been given to any witness of the prosecution that this could have been a possibility or that the accused had been falsely implicated and the offender was some other person.

20. In his statement under Section 313 Cr. P.C., the accused has admitted that his wife Rukshana had been found lying dead in jhuggi no.C-596; he had admitted that

his son had left the jhuggi at 6.00 AM for distributing newspapers and had come back at 7.30 AM; it has also been admitted that the dead body had been noticed by PW-2 at 9.00AM which at that time was covered with a quilt; accused had been informed about the death of his wife by his son. He had further stated that he had left for his work at about 8.00AM to 8.30 AM.

21. Assuming that this version of the appellant is correct, as per his own saying he had left for his work at about 8.00 AM to 8.30 AM and his son had noticed his wife lying dead under the quilt at 9.00 AM. Even up to this stage i.e. till his statement was recorded under Section 313 Cr. P.C., it is not the case of the appellant that there was some outsider who had entered into the jhuggi and committed the crime in his absence; his only bald averment is that he is innocent.

22. The appellant had brought two witnesses in defence, both of whom were neighbours; DW-2 had admitted that he had appeared at the asking of PW-2 and had been tutored by him; DW-1 had stated that he had heard from his children that on the day of the murder the appellant had been taken away by the police; it is not the defence that the accused had been illegally detained or tortured by the police to confess to this crime as is the defence now propounded. Further their versions are to the effect that there was no ill-will between the husband and wife and the accused and the deceased were sharing cordial relations. It is not their case that they

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were anywhere in the vicinity of the jhuggi of the deceased between 8.00 AM to 9.00 AM on 18.1.1999 i.e. the time when the offence had allegedly been committed.

23. It is a settled proposition that there are three stages at which the accused can put up his defence; the first stage is when the witnesses of the prosecution have to be cross-examined, the second stage is at the time when the statement of the accused is recorded under Section 313 Cr. P.C. and the last stage is the opportunity to the accused to lead his evidence in defence. All the three stages are independent of one another and at either of the three stages the appellant can dent the case of the prosecution. Unfortunately, in this case the appellant has not been able to use either of the three stages to his advantage.

24. Prosecution has clearly established that the accused and the deceased were last in the company of one another in jhuggi no. C-596 and this was in the intervening period from 7.30 AM to 9.00 AM of 18.1.1999. PW-4 daughter of the deceased had admitted that she and her sister had left for school at 7.30 AM and at that time their mother was alive. PW-2 had also admitted that when he returned back at 7.30 AM after distributing newspapers his sisters had left for school and his father was outside jhuggi no.C-596 filling water. At 8.00 AM, he noticed his father getting ready for work and this was in jhuggi no.C-596. PW-2 went out for a stroll. His father has left for work at 8.30 AM. This is also,

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in fact, the version of the accused himself who had stated that he had left for work at 8.00 AM to 8.30 AM on that day. The only persons in the jhuggi between 7.30 AM to 8.30 AM were the deceased and the accused. The deceased was found dead at 9.00 AM by her son PW-2; all these are admitted facts.

25. In our view, in these circumstances, the last seen theory come into play as the time-gap between the point of time when the accused and the deceased were last seen 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 is also not the case of the accused that some other person had entered their jhuggi at that time.

26. No doubt, Section 106 of the Indian Evidence Act does not cast any burden upon the accused, but when he does not throw any light at all upon the facts which ought to be specially within his knowledge which could support any theory or hypothesis compatible with his innocence, his failure to adduce any explanation has to be read against him.

27. On 19.1.1999, the appellant had been queried and he had made a disclosure statement, pursuant whereof he had got a wooden phatta recovered from a tand inside his jhuggi. The recovery memo of this wooden phatta is Ex. PW-6/B and it was attested by Khalid PW-6 a public witness as also two police officials Ct.Virender PW-7 and Ct. Mahavir PW-11.

28. PW-6 has on oath corroborated the version as documented in Ex.PW-6/B and identified his signature at point 'A'. He has stated that in his presence the accused had got recovered the wooden phatta/danda; merely because he is a resident of B-Block and not of the same lane where the deceased and her family members were residing is no reason to disbelieve his version or to draw a conclusion that he was a planted witness. PW-6 has in the cross-examination stated that the distance between his house and the jhuggi of the deceased was about one furlong and on the fateful day i.e. 19.1.1999 he was returning back after easing himself when the police saw him and stopped him asking him to join the proceedings. No suggestion has been given to PW-6 that he is stock witness or he is deposing for any ulterior purpose or motive. The other witnesses i.e. PW-7 and PW-11 have also corroborated the version of PW-6 on this recovery.

29. Dr.Sudhir Gupta PW-3 had opined that this danda/phatta could have been the cause of injury no.1 and 2 on the deceased which injuries were in the ordinary course of nature, sufficient to cause her death. The blood stained bedding which included the mattress, the table cloth, sweater of the deceased as also the weapon of offence all bore blood group 'AB' which was the blood group of the deceased.

30. Motive has not been elicited in this case; PW-2 and PW-4 children of the accused who had been set up by the prosecution to disclose the ill will between the appellant husband and his victim wife did not support this version; motive is always an additional relevant fact and especially so in a case of circumstantial evidence but non-proof of the same would not render the otherwise well established version of the prosecution suspect.

31. The evidence available on record has clearly and fully established the close connectivity between the accused and the crime which has been committed. No interference is called for in the impugned judgment. The appeal is without any merit. It is dismissed.

(INDERMEET KAUR)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

August 03rd, 2009
Nandan