

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

% *Judgment Reserved on: 26th August, 2009*
Judgment Delivered on: 4th September, 2009

+ **CRL.A.393/2001**

ANEES AHMED Appellant
Through: Ms. Charu Verma, Adv.

versus

STATE Respondent
Through: Ms. Richa Kapoor, 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. On 22.8.1996 at 8.20 PM an attempt had been made to strangulate Chanda Bi wife of Mukesh at Kardampuri, Azad Chowk. This information was recorded in D.D.No.27. SI R.C. Sharma PW-14 along with Const. Kewal Singh PW-8 armed with this D.D.Ex.PW-11/A reached the spot i.e. House No.397, Gali No.4, Kardampuri where they met Chanda Bi. Her statement Ex.PW-1/A was recorded wherein she disclosed that she was residing in the aforesaid house along with her family members. On that day at about 7.00 AM her

husband Mukesh Khan had left with his friend Anees Kabari for purchasing material from Okhla. Her husband was also a Kabari by profession. She knew Anees from before as he had been visiting her house. At about 3.00 PM Anees came to her house. She enquired from him about the whereabouts of her husband and why he had not returned. Anees told her that he had left Mukesh at the bus stop as he i.e. the deceased stated that he would be going to Wazirpur. She i.e. PW-1 went to purchase vegetables and returned back at 6.00PM. Her husband had not returned even by that time. Anees was still sitting in her house. She again made enquiry from him as to why her husband had not returned back. Anees became perplexed and started running. Chanda Bi i.e. PW-1 accosted him as to why he was running away upon which Anees gave her a push and fled. Her children telephoned the police. She suspected that her husband had been kidnapped by Anees and action should be taken. Upon this statement, endorsement Ex.PW-8/A was made by PW-14 and at 11.50 PM rukka was sent through Const.Kewal Singh PW-8 for the registration of the case. The formal FIR Ex.PW-13/A was recorded by Const.Devender PW-13 which was initially under Section 365 of the IPC.

2. At about 7.00PM on the same day Chanda Bi had informed her brother Hazi Anwar Khan PW-2 about missing of her husband. He i.e. PW-2 reached the house of his sister and they

tried to locate Mukesh Khan as also the accused but they could not be found.

3. On 27.8.1996 SI R.C. Sharma received information that the accused Anees would be reaching the bus stop at Anand Vihar. SI R.C. Sharma along with Const.Nawal Singh PW-12 and Const. Kewal Singh PW-8 accompanied by Chanda Bi and Hazi Anwar Khan reached the spot where at the pointing out of Chanda Bi accused Anees was apprehended. His personal search was conducted vide memo Ex.PW-2/A. A sum of Rs.150/-, one pocket diary and one key was taken into possession. The accused made a disclosure statement Ex.PW-2/B wherein he disclosed that he could get the dead body of Mukesh recovered. He led the police party to House No.CPA 94, Purana Ghurshal, New Seelampur, Shahdara. The house was locked, the lock of which was opened by the key which had been recovered from the personal search of the accused. Foul smell was emanating from the room. Towards the taand in the room a dead body in a decomposed state was lying wrapped in a gunny bag, which Chanda Bi identified as that of her husband. A coconut string was tied around the neck of the deceased. The clothes i.e. the underwear, vest, shirt and pant worn by the deceased were identified by her. She also identified the pair of shoes lying in the room. The dead body and the clothes of the deceased were taken into possession vide memo Ex.PW-1/D. The shoes were taken into possession vide memo Ex.PW-1/C. These recoveries were

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witnessed by Lal Chand PW-10, a resident of the opposite house. Site plan Ex.PW-14/C was prepared. The photographer Const.Surender Singh PW-15 accompanied by H.C. Sheo Ram Singh PW-9 reached the spot who took 12 photographs Ex.P-15/1 to 12 of the dead body from different angles, negatives of which are Ex.P-16/1 to 12.

4. On the same day the accused led the police party, accompanied by Ashgar Ali Khan PW-3, and Putan Khan, PW-4 to E-67, New Seelampur. From the said room one pant, shirt, under vest and a lungi were seized; from the pocket of the pant a sum of Rs.3000/- and one wrist watch of Seiko make was recovered. The said articles were taken into possession vide memo Ex.PW-3/A.

5. On the following day i.e. on 28.8.1996 the post-mortem of the dead body was conducted by Dr.K.K. Banerjee PW-5 who vide post-mortem report Ex.PW-5/A noted that a ligature of coconut fiber rope had been tied around the neck of the deceased. Except for this ligature material tied around the neck along with the ligature mark, no other injury could be found on the dead body. The breadth of the ligature in front was 3 cm, on the left side of the neck below left ear lobule was 2.5 cm, on the right side of the neck the breadth was 3 cm below right ear lobule. Total number of strands of ligature were four, the knot of the ligature was 5 cm to the left of mid line below the left angle of the mandible. The cause of death

was opined as asphyxia as a result of the ante mortem constriction

of the neck likely to be produced by a ligature. On 19.11.1996 PW-5 had given his subsequent opinion Ex.PW-14/F on the ligature material which had been produced before him and had opined that this material could be sufficient to strangle the neck of the deceased.

6. This is the sum total of the evidence collected by the prosecution.

7. The trial Judge has convicted the accused primarily on the evidence of the accused and the deceased having been last-seen together on 22.8.1996 and this has been reflected in the versions of Chanda Bi PW-1 and Lal Chand PW-10. The recovery of the dead body found lying in a gunny bag from the locked house, the key of which had been produced by the accused was the additional incriminating circumstance besides the recovery of a pant containing the sum of Rs.3000/- which was his share of the booty. The post-mortem report coupled with the opinion of the doctor on the ligature, being the weapon of offence, were the other incriminating circumstances taken into account by the Trial Judge to hold the accused guilty for the offence for which he had been convicted. Motive was also attributed to the accused i.e. for having committed murder of Mukesh to rob him of Rs.1,05,000/- which he had taken with him for the purchase of burada of steel.

8. On behalf of the accused, it has been argued that the version of the prosecution is suspect and the last seen theory is

demolished in the view of the fact that PW-1 is an interested witness being the wife of the deceased and PW-10 is a stock witness of the prosecution; no reliance can be placed upon their versions. Attention has been drawn to the personal search memo Ex.PW-2/A wherein it has been recorded that the lock and key had been taken into possession; it is submitted that this document clearly evidences that the lock and the key had been recovered from the search of the accused and as such the theory of the prosecution that the dead body had been recovered from the house which was locked and the key of which had been produced by the accused is nullified. This recovery has failed and in the absence of which there is nothing else left with the prosecution to nail the accused. It is argued that the accused has been falsely implicated at the instance of PW-2 in collusion with PW-1 as Anees had certain disputes with PW-2 over some money account.

9. We have scrutinized the record.

10. The circumstance of the accused and the deceased having been last seen in the company of one another on 22.8.1996 has been unfolded in the versions of Chanda Bi PW-1 and Lal Chand PW-10. PW-1 had deposed that her husband and the accused both are Kabaris by profession and they were known to each other. At about 7.00 AM on 22.8.1996 Anees came to their house and her husband accompanied him to Okhla for purchase of certain articles.

At about 3.00PM Anees returned back to her house. She enquired

from him as to why her husband had not returned. The accused replied that he had left her husband at the bus stop as he wanted to go to Wazirpur. PW-1 went to the market to purchase vegetables; on her return she found Anees still sitting in her house. It was 6.00PM; she again enquired from Anees about the whereabouts of her husband and he repeated the same reply. She i.e. PW-1 became agitated and she caught hold of the hand of the accused and persistently asked him as to why her husband not returned; upon this Anees pushed her and ran away; she fell down. Her children informed the police. Neighbours also gathered there. Her statement Ex.PW-1/A was recorded. On 27.8.1996 accused was apprehended by the police. He made a disclosure statement and led the police party to House No.94, CPA Block, Purana Ghurshal, New Seelampur where the house was found locked. The key which had been recovered from the personal search of the accused was used to open the lock. The dead body of her husband was lying wrapped in a gunny bag. She was subjected to a lengthy cross-examination wherein she reiterated that the dead body of her husband had a rope around his neck. She had become unconscious and she returned to the house. She admitted that personal search of the accused had also been taken in her presence and a key had been recovered from him. The shoes of her husband were also taken into possession. She had signed certain papers prepared by the police. PW-1 has further volunteered on oath in Court that a

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sum of Rs.1,05,000/- had been taken by her husband when he had accompanied Anees to Okhla for the purchase of certain material and her husband had been killed by Anees to rob him of the said money and out of the said money she had identified Rs.3000/- which had been got recovered by the accused.

11. It is relevant to state that no suggestion has been given to this witness that she is deposing falsely for an ulterior motive or that she has nailed the accused for some particular enmity or purpose; she was a most natural witness; being the wife of the deceased she would obviously have been in the house when her husband had left in the early morning hours with the accused. She is a credible and trustworthy witness.

12. Lal Chand PW-10 was a resident of CP-893, New Seelampur i.e. the house opposite to where the accused was living. He has deposed that on 22.8.1996 at about 11.00 AM to 11.30 AM he saw Anees standing in front of his house along with another companion. It was raining. He left with his four seater scooter and at that time he saw Anees and his companion going inside the house. Anees was a tenant in that house. When he i.e. PW-10 returned in the evening, he saw that the house was locked. It was rainy weather and the rain continued for the next 2-3 days. He noted some foul smell emanating from the house. He thought of reporting the matter to the police, at that time he saw the accused coming towards the house along with some police personnel. In his

presence the lock of the house was opened and on entering inside they saw a dead body lying in a gunny bag. He i.e. PW-10 identified the dead body as that of the person who was the companion of Anees on 22.8.1996. This witness was also subjected to a lengthy cross-examination. He has stated that the key of the lock of the room was with Anees. He stated that there is no other entry to the house except from the door, the lock of which had been opened in his presence. He denied the suggestion that he was a stock witness of the prosecution. He further stated that there is no case pending against him.

13. Testimony of this witness is also cogent and clear; he was admittedly a resident of the house which was opposite, from where the dead body was recovered. His presence on 22.8.1996 in front of his house and his having seen Anees and the deceased Mukesh together is established.

14. Accused was arrested on 27.8.1996. In his personal search one key was recovered. This is recorded in the memo Ex.PW-2/A dated 27.8.1996 and has been testified by PW-1 and PW-2. The disclosure statement of the accused Ex.PW-2/B was also recorded. In this disclosure statement the accused disclosed that he could get the dead body of the deceased, which he had tied in a bori, recovered, besides a sum of Rs.3000/- and a watch of the deceased. On the same day vide memo Ex.PW-1/D the dead body of deceased Mukesh Khan was recovered from House No.CPA94,
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Purana Ghurshal, New Seelampur. This document is attested by Lal Chand PW-10 and Chanda Bi PW-1. This dead body had been found lying locked in the aforestated premises. From the key recovered from the personal search of the accused the lock of this door had been opened to retrieve the dead body. PW-1 and PW-10 have categorically testified on oath about the aforestated recovery and nothing has been elicited in their cross-examination to shake their credibility. The lock of the door was taken into possession vide memo Ex.PW-1/F. This document is also attested by Lal Chand PW-10 and Chanda Bi PW-1.

15. It is obvious that what had happened is that on 27.8.1996 the investigating Officer had taken the personal search of the accused from where the key had been recovered. The same had been taken into possession and deposited in the Malkhana. Disclosure statement of the accused was thereafter recorded and pursuant thereto the dead body was retrieved from the aforestated premises after opening the lock of the door with the key which had been recovered from the personal search of the accused. This key had been called for by the Investigating Officer from the Malkhana. The Investigating Officer PW-14 on oath deposed that the key had been brought from the Malkhana to the spot by Const.Kewal Singh. PW-12 Const.Nawal Singh has also corroborated this version of PW-14 and testified that the key had been retrieved from the Malkhana and Investigating Officer had sent some constable to bring this key

from the Mohorer Malkhana. It is clear that the documents had not been prepared contemporaneously; the paper work had been done after this part of the investigation was over and that is why in Ex.PW-2/A (the personal search memo) at serial no.1 it has been recorded that one key of a lock has been recovered; in brackets, it has been clarified that this lock and key had been taken into possession vide separate memos. The separate seizure memo of the lock is Ex.PW-1/F. There is clearly no discrepancy in this document as has been argued by learned defence counsel.

16. To substantiate this finding we have summoned the case diaries of the Investigating Officer. They have been perused. The entry of 27.8.1996 shows that the personal search of the accused was conducted followed by recording of his disclosure statement wherein he had disclosed that he could get the dead body recovered from the house which had been locked, the key of which had been recovered from his personal search. Entry in the case diary had further recorded that after the seizure of the key from the accused it had been deposited in the Malkhana and thereafter retrieved from the Malkhana for opening the lock.

17. Section 172(2) of the Cr.P.C. clearly postulates that any Criminal Court may send for the police diary of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Such entries though not substantive or corroborative evidence cannot be used by or

against any other witness other than the police officer for the aforenoted limited purpose only. See Shamshul Kanwar v. State of U.P. AIR 1995 SC 1748

18. The accused had also got recovered a pant containing a sum of Rs.3000/- and a wrist watch which had been identified by Chanda Bi as belonging to her deceased husband. The ligature material found tied around the neck of the dead body was held by the Post Mortem Doctor as the weapon of offence i.e. sufficient to strangle the neck of the deceased. Defence of the accused is sham. His version as given in statement under Section 313 Cr.P.C. does not match the defence sought to be established through the testimony of DW-2 who has deposed that both he i.e. the accused and DW-2 had been lifted by the police on 25.8.1996 and forced to remain in police custody. In the version of accused in his examination under Section 313 Cr.P.C., he has stated that he alone was lifted by the police and falsely implicated in this case and the date as given by him is of 26.8.1996. This is also not the defence adopted by the accused in his line of cross-examination at the time when he cross-examined the witnesses of the prosecution. These contrary defences are unconvincing.

19. The motive has failed; the information volunteered in the version of Chanda Bi PW-1 qua the motive sought to be established was an improvement on her earlier version recorded

under Section 161 of the Cr.P.C. Non-proof of motive is, however, not fatal.

20. Net result is that all the circumstances in the chain of evidence point unerringly towards the guilt of the accused for having committed the murder of Mukesh Khan. Appeal is without any merit. It is dismissed. Appellant is reported to be on bail. His bail bond and surety bonds are cancelled. Appellant is directed to surrender forthwith to suffer the remaining sentence.

(INDERMEET KAUR)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

4th September, 2009
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