

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

% Date of Decision: 06.11.2009

+ **CRL.L.P. 62/2007 & CRL.M.A. 4042/2007**

STATE Petitioner
Through: Ms.Richa Kapoor, Advocate.

versus

NASEEM & ANR Respondents
Through: Mr.G.P.Thareja, 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?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J. (ORAL)

Crl.M.A. No.4042/2007 in Crl.L.P. No.62/2007

There is delay of 32 days in filing the appeal.

Noting the cumbersome procedure to be followed, i.e. seeking of the file at various levels, for the reasons stated in the application, we condone the delay in seeking leave to appeal. The application is allowed.

Crl.L.P. No.62/2007

1. The State seeks leave to appeal against the impugned judgment and order dated 27.11.2006 acquitting both accused of the offence for having murdered Tej Singh as also for destroying evidence. A-2 Altaf has been acquitted of the offence punishable under Section 25 of the Arms Act, 1959.

2. It is urged by learned counsel for State that the reasoning of the learned trial Judge in para 21 of the impugned decision, pertaining to the appreciation of the testimony of PW-15, is perverse. Second contention urged is that the learned trial Judge has misconstrued and misappreciated the testimonies of PW-1 and PW-4 whose testimonies clearly establish that the deceased was last seen in the company of the accused. Thus, the learned counsel urges that motive which has been established through the testimony of PW-15 as also the factum of deceased being last seen alive soon before his death in the company of the accused has been successfully established. Counsel urges that the twin element is sufficient to sustain the conviction of the accused.

3. The two accused were sent to trial on the case projected by the prosecution, being that, A-1 Naseem had taken a loan of Rs.2.3 Lakhs from the deceased. Rather than

repay the loan, he chose to do away with the deceased. A-2 lent a helping hand to A-1. Both accused were seen in the company of the deceased at Garhi Mode in the early hours of the night of 05.09.2002. At 11.00 PM the same night, Ct. Balesh PW-8, saw a body being thrown out of a car within the jurisdiction of Police Station Seelampur. The dead body was of the deceased Tej Singh.

4. To prove that Tej Singh had lent Rs.2.3 Lakhs to Naseem, PW-14 Hariday, father-in-law of the deceased was examined.

5. He deposed of having lent the money to his son-in-law, who in turn further lent the money to A-1.

6. Discussing the evidentiary worth of the testimony of PW-14, in para-20 of the impugned decision, the learned trial Judge has held as under:-

“20. Now reverting back to the chain of circumstances as narrated herein above, it is to be seen if the prosecution has been able to prove the same, after evaluating the evidence and the testimonies of the witnesses. PW14 who allegedly paid Rs.2,30,000/- to the deceased for paying it to the accused Naseem admitted in his examination in chief that the said accused was not known to him. Admittedly, this witness was the father in law of the deceased. In the cross examination he admitted that he did not knew as to since when the deceased was engaged in the money lending business nor he knew, to how many persons, the deceased had lent the money. He denied to have stated to the police that the deceased had demanded money from him to

pay to Naseem and was duly confronted with his previous statement. He further admitted that he had not told the fact of giving money to the deceased to any other member of his family. He further admitted that the deceased was better off financially than him and further admitted that he did not know that after taking money from him, whether the deceased gave the same to anyone or not. It has further come in his testimony that he himself was not having the money and he had taken the said amount from his mother in law who was never examined as a witness. Thus, the entire story regarding PW14 giving money to the deceased for the purpose of lending it to accused Naseem is shrouded in suspicion and no credence can be lent to the testimony of this witness.”

7. Indeed, the reasoning of the learned trial Judge pertaining to the evidentiary worth of the testimony of PW-4 cannot be classified as a perverse view.

8. We concur with the reasoning of the learned trial Judge noting that it is strange that the deceased who was financially better than Hariday would raise a loan from Hariday and in turn lend the sum to a third party. We may add that assuming that the deceased did not have sufficient cash; we see no reason why he could not have impressed upon his father-in-law to directly give the money on loan to A-1.

9. It is settled law that if the view taken by a trial Judge with respect to an appreciation of fact is a reasonable and probable view, merely because another view can be taken would be no ground for the Court in appeal to overrule the said

finding.

10. To prove the factum of Rs.2.3 Lakhs being loaned by the deceased to A-1 and there being an altercation between A-1 and the deceased with respect to the return of the loan, Manoj Kumar PW-15, was examined who deposed that on 04.09.2002 the deceased had demanded Rs.2.7 Lakhs from A-1 and with respect thereto there was some exchange of words between the two.

11. Finding returned by the learned trial Judge pertaining to the evidentiary worth of the testimony of PW-15 is in para 21 of the impugned decision, which reads as under:-

“21. PW15 who deposed that an altercation took place between the accused Naseem and deceased on 4.9.02 when he called the accused to the shop of the deceased is also doubtful. It is a constant case of the prosecution that the deceased had lent Rs.2,30,000/- to the accused Naseem, however, this witness deposed that the deceased demanded money amounting to Rs. 2,70,000/- which was lent by him to the said accused on loan. In the cross-examination he deposed that the deceased had demanded the interest of Rs. 2,70,000/- from Naseem. He further denied any knowledge as to when the said amount was given to the accused by the deceased and further denied that the deceased had shown any written record regarding the said transaction. Thus, this witness is not sure whether the deceased demanded the principle amount or the interest amount and as even stated the demanded amount contrary to the prosecution case. Hence not much reliance can be placed on his testimony.”

12. Having perused the testimony of PW-15, we concur with the submission made by learned counsel for the petitioner that a meaningful reading of the testimony would show that the deceased was demanding the original loan together with interest thereon. This explains the variance in the sum of Rs.2.3 Lakhs, stated to be the loan and Rs.2.7 Lakhs, deposed to by PW-15, being sought to be returned by A-1 to the deceased.

13. It is apparent that the learned trial Judge has got confused on the issue and has returned a wrong finding with respect to the evidentiary worth of the testimony of PW-15.

14. What is the effect thereof would be discussed by us a little later.

15. The star witness of the prosecution was Ram Dass PW-5, brother of the deceased, who admittedly had lodged a missing person's complaint at the Police Post Garhi on 06.09.2002 at around 9.30AM.

16. With respect to the testimony of PW-5 who deposed in Court that on 05.09.2002, the deceased came to his shop and on enquiry told him that he was coming from a *Chaupal* and that he was going to collect money from A-1, so stating he left for receiving the money from A-1. Before leaving his shop,

the deceased spoke over the phone with A-1. Since his brother did not return, he searched for him in the night and next day lodged a complaint with the Police Post Garhi of his brother's missing. The learned trial Judge noted, and in our opinion correctly, that the testimony of PW-5 did not inspire any confidence for the reason no such facts were disclosed by him in the missing persons complaint lodged by him.

17. It is normal human conduct to inform the police, if the maker of the complaint has knowledge, that the person missing was last seen in the company of a person.

18. No such thing being stated by PW-5 in the missing person's complaint, the view taken by the learned trial Judge that PW-5 is an untrustworthy witness is correct.

19. The learned trial Judge has referred to the testimony of PW-5 in paras-24 to 26 of the impugned decision.

20. Ignoring the reasoning of the learned trial Judge pertaining to the knowledge of PW-5 that his brother lent Rs.2.3 Lakhs to A-1, we find no infirmity in the reasoning of the learned trial Judge pertaining to the testimony of PW-5.

21. Two other witnesses to prove last seen, being PW-1 and PW-4 were marshaled by the prosecution against the accused.

22. Discussing the evidentiary worth of the testimony of PW-1, finding returned by the learned trial Judge is in para 22 of the impugned decision which reads as under:-

"22. PW1 in his statement recorded under Section 161 Cr.P.C. simply stated that the deceased was his cousin and he had gone to take money from Naseem on 5.9.02 but did not returned in the night and next day he went alongwith PW5 to police station Seelampur on receiving a message regarding the recovery of a dead body and identified the dead body of Tej Singh. In his examination in chief he improved his entire testimony and came out with totally new facts. He deposed that on 5.9.02 at about 9/9.15 pm he was sitting at the chaupal of his village with the deceased and after sometime the deceased told him that he had to go to collect money from accused Naseem as he had received a phone call to this effect in the evening. He further deposed that the deceased told him that he would first go to his STD shop and then to the accused and went away between 9.15/9.30 pm. On the next day, at about 8 am, he came to know that the deceased had not returned and then he met PW5 who also informed him that Tej Singh had gone to collect money from Naseem but had not returned. He told PW5 about his meeting with the deceased on the previous night and then went to the house of accused Naseem but could not found him. He then searched for Tej Singh but could not found him and then reached his house where he met PW5 who told him that he had lodged missing report and in the meantime, one HC came from PP Garhi and informed about the recovery of a dead body at police station Seelampur. Thus, there is a marked improvement in his entire testimony. He was duly confronted with his previous statement recorded under Section 161 Cr.P.C during the cross examination. In his further cross examination he deposed that he alongwith PW5 and PW15 had gone to police station Seelampur alongwith one HC to identify the dead body, however, neither PW5 nor PW15 have deposed that PW15 had also accompanied them to police station Seelampur. This witness further deposed that they had gone to police station Seelampur in his

maruti Zen car whereas PW5 deposed that they had gone in their own vehicle which was a maruti 800 but could not tell the no. PW5 further clarified that the said car belonged to the son of his uncle but again improved saying that it belonged to the member of his family. Thus there is an inconsistency between the testimonies of these two witnesses even on this small issue. The amount of improvements made by this witness i.e PW1 makes him unworthy of credence and no reliance can be placed on his testimony. It may further be pointed out here that PW1 admitted that his family and that of the deceased were residing separately but this witness never stated to the police regarding his meeting with the deceased on the night of 5.9.02 at the chaupal as deposed by him. Thus how he came to know that the deceased was going to take money from the accused becomes suspicious. It is needless to say that he was the cousin of the deceased and is an interested witness and therefore, his testimony had to be closely scrutinized."

23. Discussing the evidentiary worth of the testimony of PW-4, the learned trial Judge has observed in para 23 as under:-

"23. PW4 Bharat Singh who had lastly seen the deceased in the company of accused in a car at Garhi moar had also improved his statement during his examination in chief. He never stated in his statement recorded under Section 161 Cr.P.C that on 5.9.02, he closed his shop at about 9.45 pm and reached at Garhi moar where he purchased a cigarette and at that time someone called him from a maruti 800 grey colour car and on reaching there he saw the deceased with both the accused sitting in the car wherein Tej Singh was sitting on the front seat, accused Naseem was on the driver seat and the other accused on the back seat. He was duly confronted with his previous statement. He further admitted that he never deposed to the police that accused Naseem was previously known to him. In his cross examination he further failed to recollect if he

stated to the police that the deceased told him that he was going to Okhla Mandi with accused Naseem to collect money. He was further confronted with his previous statement when he deposed that he told the police that he had seen Tej Singh and the accused sitting in a car at Garhi moar. The only fact which was mentioned in his statement under Section 161 Cr.P.C was that this witness told PW5 that on the previous night he had seen deceased Tej Singh with accused Naseem while sitting in a maruti car. No description of the car, its colour or no. was given by this witness. He had also not stated about the presence of other accused in the car to the police. The amount of improvements made by this witness in his testimony also makes him unreliable and unworthy of credence.”

24. We have perused the testimonies of both witnesses as also their statements recorded under Section 161 Cr.P.C. Indeed, there are material improvements with respect to their testimonies in Court and their statements under Section 161 Cr.P.C. as noted by the learned trial Judge.

25. We see no reason to take a different view.

26. It is settled law that where there is evidence of planting, a very serious view has to be taken by the Court as the same shows connivance of the Investigating Officer and casts a doubt on the purity of the investigation.

27. Two pieces of incriminating evidence was sought to be produced by the prosecution. The same was the presence of blood in the car stated to be used in the crime, which car

was recovered from near the Bela Farms. The second was the lifting of fingerprints of accused Altaf from the glass of the car.

28. In para 33 of the impugned decision, the learned trial Judge has noted that when the chance prints were lifted from the car, accused Altaf was in the custody of the IO. The learned trial Judge has held that in that view of the matter, the possibility of the fingerprints being got planted cannot be ruled out.

29. Indeed, we see no reason why the Investigating Officer did not ensure that Altaf was put back in the police lock-up before he proceeded to lift, along with the forensic team, the chance fingerprints from the car.

30. The fact that Altaf was in the custody of the Investigating Officer certainly dents the lifting of the chance fingerprints of Altaf from the car in question.

31. Pertaining to the car having blood stains, the learned trial Judge, in para 34 of the impugned decision, has observed as under:-

“34. It is again the case of the prosecution that blood stains were found on the mat of the car. These blood stains were never observed by the IO at the time of seizing of the car in the parking nor they were reported or spotted by the members of the crime team but were only seen by the IO when the car was brought to the police station. PW-23 who remained with the IO during the entire investigation, in his cross examination

deposed that the IO was having bottle of blood sample with him when he went to Holy Family Hospital. The question as to what the IO was doing with the said sample bottle remains unanswered. The prosecution tried to cover up by arguing that it was an empty bottle which remains with the IO for collecting blood sample if any. I do not agree with this contention as blood stains are generally lifted with the help of a cloth/cotton gauze and the blood is not collected in a bottle from anywhere. Thus the possibility of the blood being planted on the car can also not be ruled out. Even otherwise the blood stains found on the car showed no reaction during the chemical examination and could not be linked to the deceased.”

32. Indeed, we find obnoxious that the Investigating Officer was moving around with a bottle of blood sample with him. The view taken by the learned trial Judge that there is every possibility of the Investigating Officer planting blood in the car cannot be ruled out. The learned trial Judge is perfectly correct in recording that blood samples are lifted on a cloth or on a cotton gauze and not in a bottle.

33. It is elementary knowledge that within minutes of oozing out of the body blood clots.

34. Samples thereof have to be lifted on a cloth or on a cotton ball.

35. Thus, the only incriminating evidence which can be possibly surfaced against the accused is with respect to the testimony of PW-15. But that would relate only to motive.

36. It has rightly been held in a number of decisions that motive is a weak piece of evidence, for the reason it is based on the principle of presumptive logic. By its inherent nature, presumptive logic is a weak logic.

37. At this stage learned counsel for the appellant submits that the recovery of *desi katta* from A-2 has been discounted by the learned trial Judge notwithstanding the fact that human blood of the same group as that of the deceased was detected on the *katta* which was recovered pursuant to the disclosure statement of A-2, for the reason no blood was detected on the gold chain which was recovered simultaneously.

38. The reasoning of the learned trial Judge is certainly not satisfactory. But we note that there being evidence of blood being planted in the car by the Investigating Officer, there is every possibility of the same thing happening with respect to the *desi katta*.

39. That apart there is no link evidence that the *desi katta* in question was the weapon of offence. No report of any Ballistic Expert has been proved at the trial with respect to any bullet or any cartridge.

40. We conclude by noting that the cause of death of the deceased was being shot with a firearm.

41. We see no reasons to grant leave to appeal to the State. The reasoning of the learned trial Judge is sound. Two areas where the reasoning could be corrected, effect of the correction thereof have been noted by us. It does not complete the chain wherefrom the guilt can be inferred.

42. The petition is dismissed.

**PRADEEP NANDRAJOG
(JUDGE)**

**SURESH KAIT
(JUDGE)**

**NOVEMBER 06, 2009
sb**