

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

% *Date of Decision: 4th November, 2009*

+ **CRL.APPEAL No.238/2005**

MOHD. KHALID & ANR. Appellants
Through: Ms.Rakhi Nigam, Adv. for appellant No.1.
Mr.R.M.Tufail, Adv. for appellant No.2.

versus

STATE (NCT OF DELHI) Respondent
Through: Ms.Richa Kapoor, A.P.P.

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)

1. Appellants Mohd.Khalid and Shahnawaj have filed the present appeal challenging the judgment and order dated 25.02.2005 passed by the learned Trial Judge convicting both for the offence punishable under Section 302/34 IPC; and separately convicting Mohd.Khalid for the offence punishable under Section 27 of the Arms Act. For the offence of murder the appellants have been sentenced to undergo imprisonment for life. For the offence under the Arms Act Mohd.Khalid has been sentenced to undergo rigorous imprisonment for three years.

2. In so doing, the learned Trial Judge believed the ocular version of Farhan Khan PW-1 and Amna Begum PW-4 to be true. It may be noted that Farhan Khan is the minor son of the deceased and Amna Begum is the wife of the deceased. The reasoning noted by the trial Judge for the conviction of the appellants reads as under:-

“As such I do not find any deficiency in the statements of PW-1 Farhan Khan and PW-4 Amna Begum. Their presence on the spot soon after the incident has been duly corroborated by PW-3 Shehbaz who is a nearby resident and whose statement has gone unchallenged. This is further corroborated by MLC Ex.PW-9/A as it was she who had removed deceased to hospital. Both witnesses deposed that Md. Khalid fired a shot at Sadruddin and thereafter, ran away in a waiting car driven by accused Shanawaj. The fact that deceased died on account of gun shot injury is corroborated by PW-9 Dr. Sushila Gambhir as well as PW-7 Dr. Komal Singh who conducted post-mortem on the dead body. Injury was sufficient to cause death in ordinary course of nature. Weapon of offence, country-made pistol Ex.P5 along with empty cartridge Ex.P6 was recovered at the instance of accused Md.Khalid on 25.9.00.”

3. At the hearing of the appeal, learned counsel for appellant Mohd.Khalid has made the following submissions:-

(a) That the presence of PW-1 and PW-4, at the spot at the time of occurrence was doubtful and hence their claim of being eye-witnesses was false.

(b) That the post-mortem report Ex.PW-7/A of the deceased records two injuries on the person of the deceased. Counsel urges that this contradicts the testimonies of PW-1 and PW-4

wherein they deposed that appellant Mohd.Khalid fired a single shot at the deceased. It is urged that there is discrepancy in the medical and the ocular evidence.

(c) With reference to photographs Ex.PW-4/DA, Ex.PW-4/DB and Ex.PW-4/DC, which depict PW-4 with the appellant Mohd.Khalid and the admission of PW-4 during cross-examination that she was the lady in the photograph and Mohd.Khalid was the male, counsel urged that it was a case of a relationship gone sour and hence the motive of PW-4 to falsely implicate Mohd.Khalid.

(d) Lastly, PW-1 and PW-4 being the son and the wife of the deceased were interested witnesses and were not reliable. That since all the independent witnesses; namely Hanif PW-2, Shehbaz PW-3 and Feroz PW-14 have not supported the case of the prosecution, it would not be safe to convict Mohd.Khalid relying solely on the testimonies of PW-1 and PW-4.

4. Counsel for appellant Shahnawaj has made the following submissions:-

(a) That the presence of PW-1 and PW-4 at the spot at the time of the incident was doubtful.

(b) Since Amna Begum PW-4 was inimical towards Mohd.Khalid, Shahnawaj being a cousin of Mohd.Khalid was also being falsely implicated by PW-4.

(c) That as per the site plan Ex.PW-21/A, the car bearing No.DL-3CE-4104 wherein appellant Shahnawaj was sitting, when PW-4 and PW-1 claim having seen him, had its rear towards PW-4 and PW-1. In said circumstance, it was impossible for PW-4 and PW-1 to have seen Shahnawaj sitting in the car, much less to identify him in the Court.

(d) That the prosecution has not produced any proof that the car bearing No.DL-3CE-4104 involved in the commission of the offence was owned by Shahnawaj.

(e) That no site plan was prepared from where the car in question was recovered and hence the claim of the car being abandoned was false.

(f) Shahid, cited as a witness outside whose shop the deceased was fired at, was a material witness and the prosecution deliberately managed to not serve summons upon him and ultimately dropped him as a witness. It is urged that non-examination of Shahid has seriously prejudiced the defence.

(g) Lastly, that the only role alleged against Shahnawaj was that he drove the car in which Mohd.Khalid escaped from the spot; this does not amount to participation in the murder. In absence of any participation in the actual offence, it cannot be said that Shahnawaj shared an intention to murder the deceased with appellant Mohd.Khalid and hence his conviction with the aid of Section 34 IPC pertaining to the death of the husband of Amna Begum PW-4 cannot be sustained.

5. Before dealing with the arguments set forth by the counsel for the appellants, we broadly note the case of the prosecution.

6. The case of the prosecution is that at about 7.30 PM on 20.09.2000, Farhan Khan PW-1 accompanied his father Sadruddin (deceased) to a General Provisional Store situated near their house i.e. F-232, Inder Enclave, Phase-II, Sultanpuri, Delhi. Appellant Mohd.Khalid also reached at said shop and started abusing Sadruddin, on which Farhan Khan PW-1 rushed back to inform his mother Amna Begum PW-4. Amna Begum immediately accompanied Farhan Khan PW-1 back to the General Provisional Store and when they were at some distance from said shop, they saw appellant Mohd.Khalid fire a shot at Sadruddin. At that time, a white coloured car was parked at a distance of 4/5 paces from where Mohd.Khalid was standing and appellant Shahnawaj was sitting on the driver's seat. After firing at Sadruddin, Mohd.Khalid sat in said car and both the appellants fled away. Sadruddin fell on the spot; Amna Begum caught him and as a result her clothes got stained with blood. She took her husband to Sanjay Gandhi Hospital, however, Sadruddin expired on the way.

7. Process of law was set in motion when at 8.10 PM somebody informed PS Sultanpuri about the incident, where DD No.70-B Mark-A was recorded and a copy thereof was entrusted

to SI Ajay Solanki PW-19 for investigation. SI Ajay Solanki PW-19 accompanied by Const.Subhash PW-15 went to the spot and on learning that the injured had been taken to Sanjay Gandhi Hospital, went to said hospital. At the hospital, they learnt that Sadruddin was declared brought dead; he collected his MLC Ex.PW-9/A which records that the patient was brought to the hospital by his wife Amna. SI Ajay Solanki PW-19 met Amna Begum in the hospital and recorded her statement Ex.PW-4/A. He made an endorsement Ex.PW8/A under said statement and noting therein the brief facts of the case sent it for registration of an FIR at 11.20 PM. It may be noted that in her statement, Amna Begum has inculpated both appellants and has narrated facts which have formed the case of the prosecution and have been noted by us in the preceding para.

8. After registration of FIR, investigation was transferred to Insp.Ranbir Singh PW-29 who filled the inquest papers and sent the dead body for post-mortem. Dr. Komal Singh PW-7 conducted the post-mortem and prepared her report Ex.PW-7/A. She noted two injuries on the person of the deceased being:-

“1. One gun shot injury, oval in shape present at epigastric area and it was 15 cm from the right nipple and 10 cm from the left nipple.

Rough sketch drawn. It is 4 cm X 3 cm. A black ring was present at its right border and 3 mm on left border. Omental fat was exuding out of it.

2. There was another oval wound 8 mm X 6 mm in size having irregular margins present at the fourth

lumber vertebra level. On the right lateral side it was 10 cm from the midline, margins were everted."

9. Dr. Komal Singh opined that the death was due to firearm injury to vital organs of the body. She outlined the track of the bullet in the body, which reads as under:-

"It entered at the epigasteric area (N0.1). After that it went to the anterior surface of the right of the liver and then it went to the omental fact lacerating the small intestine reaching to at L 4 (No.2). From there it was exuded out."

10. Insp.Ranbir Singh seized the blood stained salwar, kurta and dupatta of Amna Begum as recorded in memo Ex.PW-4/F. Said clothes along with other articles seized during the investigation were sent for forensic examination and as per FSL report Ex.PZ-1, blood of human origin was detected on the salwar, kurta and dupatta of Amna Begum; however, the blood group could not be determined.

11. During the course of the investigation, Insp.Ranbir Singh learnt that on 6.3.2000 Amna Begum had lodged an FIR being FIR No.222/2000 Ex.PW-13/A for the offence punishable under section 354/506 IPC against appellant Mohd. Khalid. The FIR records that on 2.3.2000 when husband of Amna Begum was not present in the house, Mohd.Khalid entered her house and misbehaved with her. Insp.Ranbir Singh also learnt that on 4.5.2000, due to the mutual differences and quarrels between Mohd. Khalid and Amna Begum PW-4, HC Dewan Singh PW-20 had issued a Kalandra Ex.PW-17/A under section 107/150 Cr.P.C.

against both Mohd.Khalid and Amna Begum for maintenance of piece.

12. The appellants were put to trial. Prosecution examined 29 witnesses. Eschewing reference to the testimonies of the formal and procedural witnesses, we note only the testimonies of the relevant witnesses in respect whereof submissions have been urged in the appeal.

13. Farhan Khan PW-1 deposed that on 20.9.2000 he accompanied his father Sadruddin to a General Provisional Store. Appellant Mohd.Khalid also reached there and started abusing his father Sadruddin. He went and informed his mother about the same and when his mother and he were at a short distance from the General Provisional Store, he saw appellant Mohd.Khalid fire a gun shot at his father. Appellant Mohd.Khalid thereafter sat in a white coloured car, parked at an arm's length from the place of occurrence, driven by appellant Shahnawaj and the two fled away.

14. On being cross-examined by the counsel for accused Shahnawaj, Farhan Khan PW-1 stated that the car was parked at a distance of 3 or 4 yards from the place of occurrence. The rear portion of the car was facing towards him. There were only two houses between his house and the General Provisional Store in front of which the incident took place.

15. Amna Begum PW-4 deposed that she was a resident of house bearing Municipal No.F-232, Inder Enclave, Phase-II, Sultanpuri, Delhi. The deceased Sadruddin was her husband. Appellant Mohd.Khalid was residing in her neighbourhood for 1½- 2 years prior to the incident. Appellant Shahnawaj was a relative of Mohd.Khalid and often used to visit him. About a year prior to the incident, when she was alone in the house, appellant Mohd.Khalid had entered her house and molested her for which, she had lodged an FIR Ex.PW-13/A. On the day of the incident i.e. 20.09.2000 at about 7 or 7.30 PM her husband Sadruddin and son Farhan Khan PW-1 went to a nearby General Provisional Store. Within five minutes of their leaving, her son returned and informed her about a quarrel between her husband and appellant Mohd.Khalid. She immediately rushed towards the spot and when she was at a short distance from the spot, she saw appellant Mohd.Khalid abuse her husband and thereafter fire a shot at him. At that time a maruti car was parked close to the spot and appellant Shahnawaj was sitting on the driver seat. After firing at her husband, Mohd.Khalid sat in the car and the two appellants fled away.

16. On being cross-examined she admitted that the photographs Ex.PW-4/DA, Ex. PW-4/DB and Ex.PW-4/DC depict her with appellant Mohd.Khalid.

17. Shehbaz PW-3 deposed that the deceased Sadruddin alongiwth his family resided in his neighbourhood. At around 7.30/7.45 PM on 20.09.2000 he heard a sound of explosion and immediately rushed out of his house. He saw that deceased Sadruddin was lying in a pool of blood on the road in front of the shop of Shahid and his wife Amna Begum and son were present besides Sadruddin and were weeping. He along with Amna Begum removed Sadruddin to Sanjay Gandhi Hospital in a TSR.

18. It may be noted that Shehbaz did not claim to have seen the appellant sped away in any car and to that extent did not support the case of the prosecution.

19. SI Ajay Solanki PW-19 deposed having recorded the statement Ex.PW-4/A of Amna Begum at the hospital.

20. It may be noted at the outset that PW-3 has not been subjected to any cross-examination and thus his testimony that when he came out of his house on hearing the sound of a fire cracker, he saw Amna Begum and Farhan Khan near the body of the deceased has gone unchallenged. Thus, the plea of both counsel for both appellants that presence of Amna Begum and Farhan Khan as claimed by them is doubtful has to be repelled because PW-3, an independent person has deposed of the two being present, which testimony has gone unchallenged. It may additionally be noted that whereas Amna Begum and Farhan Khan claim to be present at the spot before the shot was fired,

PW-3 came out of his house on hearing the sound of the gun shot (sound of a cracker as deposed to by him) and thus PW-3 not having seen the commission of the crime, is a truthful deposition by him. What is relevant is that PW-3 saw the mother and child near the body of the deceased, meaning thereby that the two were present at the spot before PW-3 arrived at the spot.

21. The MLC Ex.PW-9/A of the deceased records that the deceased has been brought to the hospital by Amna Begum. Testimony of SI Ajay Solanki PW-19 establishes presence of Amna Begum in the hospital. The seizure memo Ex.PW-4/F evidences that SI Ajay Solanki took possession of the blood stained salwar, kurta and dupatta of Amna Begum, who admittedly was not injured and the only explanation of her clothes being stained with blood is her act of removing her husband in a TSR to the hospital i.e. her being present at the spot as claimed by her.

22. A ticklish question, qua appellant Shahnawaj arises for our consideration. The question arises on account of the fact that if Amna Begum and her son, whose presence at the spot stands established by means of independent evidence of unimpeachable character, why should the two let go the actual assailant and falsely implicate the accused.

23. Qua appellant Mohd.Khalid, there is no doubt of what he did as deposed to by Amna Begum and Farhan Khan. He was seen on the street and picked up a quarrel with the deceased and shot him in the chest. As deposed to by the mother and son, Mohd.Khalid was at a distance of an arm's length from the car stated to be driven by Shahnawaj. After firing the shot, Mohd.Khalid sat in the car which was driven away.

24. Could Amna Begum and Farhan Khan see the driver of the car? The answer has to be found in the site plan Ex.PW-21/A which shows that Amna Begum and her son were standing on the road at point marked 'D' in the site plan. The place where the car was stationed is at point marked 'A'. The distance between the two points is about 10 metres. The point 'D' is on the extreme left of the road. Drawing a straight line from point 'D' to the driver's seat in the car, it is apparent that the same would form an angle of about 15° .

25. A driver seated on the driver seat in a Maruti car, if viewed by a person who is at the back of the car at a distance of 10 metres forming an angle of 15° from the spot where a person is standing vis-a-vis the driver's seat in the car would get no more other than a glimpse of the top of the head of the driver. Under no circumstances can the face of the driver be seen by the said person. Neither Amna Begum nor Farhan Khan have

stated that the driver of the car was looking back. From the fact that Amna Begum had a relationship more than platonic with Mohd.Khalid evidenced by the photographs Ex.PW-4/DA to Ex.PW-4/DC it can be reasonably inferred that Amna Begum was aware of the names of some of the friends of Mohd.Khalid and was probably aware that the car in question belonged to Shahnawaj and for said reason she stated that Shahnawaj was the driver of the car. Her son parroted her.

26. In view of the positions shown in the site plan Ex.PW-21/A and as discussed above, it has to be held that under no circumstances could Amna Begum and her son have seen the face of the driver who was driving the car and for said reason appellant Shahnawaj has to be given the benefit of doubt.

27. Thus, we need not discuss other submissions urged by learned counsel for Shahnawaj.

28. Pertaining to appellant Mohd.Khalid, evidence shows that he did become close to Amna Begum but fell foul with her evidenced by the fact that Amna Begum had lodged an FIR Ex.PW-13/A against him. The kalandra Ex.PW-17/A shows quarrels between Mohd.Khalid and Amna Begum. It is thus apparent that Mohd.Khalid had a motive; the motive being to do away with the husband of Amna Begum and thereafter regain her love.

29. Turning to the submissions urged by learned counsel for Mohd.Khalid that presence of PW-1 and PW-4 at the spot is doubtful, for the reasons noted herein above, we reject the plea. Pertaining to the second submission that the witnesses have deposed of only one shot being fired and the post-mortem report showing two injuries, suffice would it be to state that the second firearm injury is an exit wound. The post-mortem report of the deceased evidences, that he received only one firearm injury.

30. The third submission of the sour relationship between Amna Begum and Mohd.Khalid has been dealt by us in the preceding paragraphs and the motive which emerges there from. The plea that PW-1 and PW-4 were interested witnesses is neither here nor there for the reason merely because they were related to the deceased would not make them interested witnesses. We see no reason why PW-1 and PW-4 would let go the real culprit and falsely implicate Mohd.Khalid to satisfy the hatred of Amna Begum towards Mohd.Khalid, with whom, at some time in the past she had more than a platonic relationship.

31. The appeal, insofar it relates to appellant No.2 Shahnawaj is allowed. His conviction for the offence of murder of Sadruddin is set aside and he is acquitted of the charge framed against him.

32. The appeal, insofar it relates to appellant No.1 Mohd.Khalid is dismissed.

33. Appellant Shahnawaj is on bail. The bail bond and surety bond furnished by appellant Shahnawaj are discharged.

34. Since appellant Mohd.Khalid is still in jail, copy of this order be sent to the Superintendent, Central Jail, Tihar to be made available to appellant Mohd.Khalid.

**(PRADEEP NANDRAJOG)
JUDGE**

**(SURESH KAIT)
JUDGE**

November 04, 2009
Dharmender