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

% *Date of Decision : July 20, 2009*

+ **CRL.APPEAL NO.217/2006**

JAHANGIR @ABRAHIM Appellant.
Through: Mr.K.P.Mavi, Advocate.

versus

STATE Respondent
Through: Mr.Pawan Sharma, APP.

CRL.APPEAL NO.814/2006

MOHD. FAROOQ @GAINDA Appellant.
Through: Mr.Bhupesh Narula, Advocate.

versus

STATE Respondent
Through: Mr.Pawan Sharma, APP.

CRL.APPEAL NO.341/2006

MOHD. KHOKHAN @ASLAM Appellant.
Through: Mr.K.P.Mavi, Advocate.

versus

STATE Respondent
Through: Mr.Pawan Sharma, APP.

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

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether judgment should be reported in Digest? Yes

PRADEEP NANRAJOG, J. (Oral)

1. As recorded in DD No.3A, Ex.PW-2/A, at 2:38 AM on 1.8.2003 (i.e. during the intervening night of 31.7.2003 and 1.8.2003) the duty officer PS Seemapuri noted the information that the police control room had informed him over the telephone about the police control room having received information that a boy named Moju had been shot at Lane No.3 near a park adjoining F-339, New Seemapuri.

2. Copy of the DD entry was handed over to SI C.M.Meena PW-9. Accompanied by Const.Subhash PW-8, SI C.M.Meena proceeded to the spot i.e. F-339, New Seemapuri and learnt that the injured had been removed to G.T.B.Hospital.

3. In the meanwhile, the injured Muzibur Rehman @ Moju had been removed to GTB Hospital by his father Sheikh Siadul PW-3 and was got admitted there at 2:56 AM i.e. in the middle of the night; the time and the date being recorded in the MLC Ex.PW-10/A.

4. Dr.Pradeep Narain Sahu was working as the Additional Chief Medical Officer of GTB Hospital and was on duty. He penned the MLC Ex.PW-10/A recording therein:-

"The Pt. is conscious, well oriented.

Pulse – 80/min.

BP – 140/80 mmHg."

5. Since the injured had been removed to the hospital and no eye-witness was present at the spot, in any case, none met SI C.M.Meena and Const.Subhash at the spot, the two police officers proceeded to G.T.B. Hospital and found the injured Muzibur admitted at the hospital. SI C.M.Meena recorded the statement Ex.PW-9/A of Muzibur and obtained his thumb impression at the point mark 'A' thereon. In the statement Ex.PW-9/A Muzibur stated that he was a resident of House No.F-339, New Seemapuri, Delhi and was aged 28 years. He stated that he was engaged in the trade of buying and selling junk and that today night, at around 2:15, he went outside his house to visit the public toilet and when he reached the public toilet, accused Jahangir (A-1), Farooq (A-2), Khokhan (A-3), one Jaleel (declared PO) and one more person whose name he did not know, but could recognize him if brought before him, accosted him, and all of a sudden accused Farooq and accused Khokhan caught his right hand. Jaleel caught his left hand and the person whose name he does not know exhorted that he i.e. Muzibur would today be taught the lesson of being a police informer and at that Jahangir, who had a country made pistol in his right hand, fired a shot in his stomach and all the accused fled.

6. SI C.M.Meena made the endorsement Ex.PW-9/B under the statement Ex.PW-9/A and forwarded the same through Const.Subhash PW-8 for an FIR to be registered.

7. As recorded in the endorsement Ex.PW-9/B, the statement Ex.PW-9/A and the endorsement Ex.PW-9/B was dispatched from the hospital at 4:00 AM on 1.8.2003.

8. ASI Sushil Kumar PW-2 who was then functioning as the duty officer at the police station, on receipt of the statement Ex.PW-9/A and the endorsement Ex.PW-9/B, registered an FIR Ex.PW-2/C at 4:25 AM. The time being as noted in the FIR.

9. Needless to state, the FIR was registered for the offence punishable under Section 307/341 IPC.

10. SI CM Meena returned from the hospital to the place where the crime was committed. Const.Subhash also returned to the spot, but after getting the FIR registered.

11. As deposed to by Const.Subhash PW-8, since it was raining in the night, no blood could be lifted from the spot i.e. the public toilet where the crime was committed. However, conducting proceedings at the spot pertaining to the investigation, SI C.M.Meena prepared the rough site plan Ex.PW-9/C with the assistance of the father of the deceased i.e. Sheikh Saidul PW-3, recording therein the spot where the deceased was shot; being at the entry of the public toilet at F-Block. Since PW-3 claimed to have witnessed the firing, the spot wherefrom he allegedly witnessed the firing was marked 'B'.

12. Since the names of A-1 to A-3 and Jaleel were known

to the police as per the statement of the deceased and that of his father, the police kept a look out for the accused A-1 to A-3 and Jaleel. A-1 Jahangir was the first one to be apprehended on 1.8.2003 itself. He was interrogated and his statement Ex.PW-5/A was recorded by SI C.M.Meena. The statement is a confessional statement and hence we eschew a detailed reference thereto, save and except such part of the statement which attracts Section 27 of the Evidence Act.

13. The said relevant part of the statement is: *"I fired a shot in the stomach of Moju from a country made pistol and thereafter all of us fled from the spot. The said country made pistol can be got recovered by me from beneath an almirah in the room taken on rent by me in Nandnagri."*

14. Jahangir thereafter led SI C.M.Meena to House No.B-3/105 Nand Nagri and led him to the first floor. At that time Const.Vinesh Kumar PW-5 and Const.Bachchu Singh PW-13 were accompanying SI C.M.Meena. As recorded in the seizure memo Ex.PW-5/C, Jahangir pointed out an iron almirah inside a room on the first floor of House No.B-3/105 Nand Nagri and from beneath the almirah took out a country made pistol which was seized vide seizure memo Ex.PW-5/C. SI C.M.Meena prepared the sketch Ex.PW-5/B of the revolver. A used cartridge was also seized on being produced from beneath the almirah by Jahangir, sketch whereof was also drawn on Ex.PW-5/B.

15. The injured Muzibur Rehman was given medical treatment at GTB Hospital. But, unfortunately he could not survive and died on 4.8.2003. Said information was passed on to the investigating officer who got registered the offence of murder in the FIR and proceeded to the hospital to seize the dead body. The body was sent for post-mortem to the mortuary of GTB Hospital, where Dr.S.K.Verma PW-16 conducted the post-mortem the next day i.e. 5.8.2003. He recorded in the post-mortem report Ex.PW-16/A that there existed a fire-arm entry wound, oval in shape, placed on right side hypochondrium. The exact spot was 3 cms to the right of midline and 1.5 cms below the right coastal margin. He noted: *Tattooing in an area of 13 x 12 cms around the entry wound.*

16. A bullet was found lodged in the para vertebral muscles which was removed by him.

17. He noted that the cause of death was shock due to septicemia following the solitary injury produced by the projectile of a fire-arm and was sufficient to cause death in ordinary course of nature.

18. After the post-mortem, the bullet along with the blood sample of the deceased on a piece of gauze was handed over by him to the investigating officer. By this time, since the offence had taken a higher degree, i.e. from attempt to murder to murder, further investigation was entrusted to the Additional SHO Bakshi Ram who seized the bullet and the gauze piece

containing the blood sample of the deceased as recorded in the seizure memo Ex.PW-9/F which was witnessed by SI C.M.Meena who signed at point mark 'A' on the seizure memo Ex.PW-9/F.

19. The bullet which was recovered from the body of the deceased as also the firearm which was recovered pursuant to the disclosure statement of Jahangir and upon Jahangir leading the police to the room wherefrom it was recovered, were sent for ballistic opinion. S.S.Baisoya, Junior Scientific Officer (Ballistic), CFSL, Chandigarh PW-17, conducted the ballistic test by test firing a standard bullet of size 8 mm for the reason the country made pistol sent to him was of bore 8 mm. He opined, vide report Ex.PW-17/A, that the bullet which was recovered from the body of the deceased was fired from the country made pistol. He so opined after examining and comparing the individual characteristic marks on the bullet recovered from the body of the deceased and test fired bullet. He also opined that the cartridge case recovered and sent to him for opinion was fired from the pistol in question for the reason individual characteristic marks matched those on the cartridge of the test fired bullet.

20. A-2 Farooq was arrested on 8.9.2003. A-3 Khokhan was arrested on 29.10.2003. A-4 Halim was arrested on 10.11.2003. Jaleel could not be arrested and was declared a proclaimed offender.

21. Save and except making confessional statements

admitting their involvement in the crime, which statements are wholly inadmissible in evidence, we note that nothing was recovered from the police pursuant to the confessional statements made by A-2, A-3 and A-4.

22. According to the police, the motive, which needless to state, has traces thereof in the statement Ex.PW-9/A of Muzibur Rehman, is the vengeance against him of being a police informer.

23. To a reader of our present decision it would be apparent that the case of the prosecution hinged upon a motive i.e. revenge; recovery of a country made pistol pursuant to the disclosure statement of Jahangir followed by his leading the police to a room and from beneath an almirah within the room getting recovered the same; the FSL report connecting the said firearm as the weapon of offence with reference to the bullet which was recovered from the body of the deceased during post-mortem; and lastly, the statement Ex.PW-9/A of the deceased and the deposition of his father. Needless to state, law treats said statement of the deceased as a dying declaration.

24. At the trial, Sheikh Saidul PW-3 deposed that on 1.8.2003 he was sleeping in his house and got up to go to the urinal and he heard a noise of his son Muzibur Rehman. He went towards him and saw all the four accused as also their accomplice Jaleel. He recognized them as he knew them

before. Jahangir fired at his son. When he reached near his son and enquired from him, his son told him that Jahangir had fired at him. He deposed that the accused had enmity with his son as they suspected that his son was a police informer. After firing, all the accused and their accomplice i.e. the 5th person ran away. He removed his son to GTB Hospital and got him admitted. Police reached there and recorded the statement of his son.

25. Sheikh Saidul was cross-examined by counsel for all the accused. On being cross-examined by counsel for A-2 and A-3 he stated that his son was fully conscious when he was admitted at the hospital and was in a fit state to make a statement. On being cross-examined by counsel for A-1 and A-4 he stated that the statement of his son was recorded by police after about one hour of his son being admitted at the hospital.

26. SI C.M.Meena deposed that after he was handed over DD No.3-A, accompanied by Const.Subhash he went to the spot where the crime was committed and therefrom to G.T.B. Hospital and found Muzibur Rehman admitted at the hospital and being fit for making a statement, he recorded the statement Ex.PW-9/A of Muzibur. He deposed that he made an endorsement Ex.PW-9/B thereunder and got the FIR registered. He deposed that he apprehended Jahangir, who upon interrogation, made the statement Ex.PW-5/A in which he

disclosed that after shooting the deceased he had hidden the country made pistol beneath an almirah in the room taken on rent by him in Nand Nagri and that thereafter he led him to the room and from beneath the almirah produced the country made pistol and a used cartridge which were seized vide memo Ex.PW-5/C.

27. Const.Vinesh Kumar PW-5 and Const.Bachchu Singh PW-13 deposed that they were present when Jahangir got recovered the country made pistol and the used cartridge and that they had witnessed the seizure memo Ex.PW-5/C.

28. The MLC Ex.PW-10/A of the deceased which was prepared by Dr.Pradeep Narain Sahu was proved by Dr.Sanjy Kohli PW-10 since Dr.Pradeep Narain Sahu had left the hospital and Dr.Sanjy Kohli was familiar with the writing of Dr.Pradeep Narain Sahu as he had worked with him.

29. Dr.S.K.Verma PW-16 proved the post-mortem report Ex.PW-16/A. S.S.Baisoya, Junior Scientific Officer (Ballistic) CFSL Chandigarh, PW-17, proved the ballistic report Ex.PW-17/B.

30. ASI Shahid Khan PW-14 deposed that on 28.1.2003 he was posted at PS Seema Puri and on said day Muzibur Rehman @ Moju, a resident of Seema Puri had informed him that some persons were planning to commit dacoity at Taneja Petrol Pump and were in the DDA Park. On receipt of said information he formed a raiding party in which Muzibur joined.

Five persons had gathered. Four were apprehended. One managed to escape. A-1 Jahangir was one of them from whose possession a 12 bore loaded country made pistol was recovered and that FIR No.28/03 under Sections 399/402 IPC read with Section 25 of the Arms Act was registered.

31. Vide impugned judgment and order dated 10.3.2006 the learned Trial Judge has acquitted A-4 Mohd.Halim holding that the version of PW-3, the father of the deceased, that he saw the assailants could not be believed because everything happened in a flash of moment and that in all probability the names of the accused were disclosed to him by his injured son. Since in the statement Ex.PW-9/A made by the deceased he had not named Halim and had simply stated that there was one more person with the named accused, the learned Trial Judge held that there was insufficient evidence against Halim wherefrom his involvement could be established. Holding that the statement Ex.PW-9/A of the deceased inspired confidence and was proved through the testimonies of his father PW-3, SI C.M.Meena PW-9 and Const.Subhash PW-8, the learned Trial Judge has held that the involvement of the appellants i.e. A-1 to A-3 in the crime was established therefrom. Further incriminating evidence found and relied upon against Jahangir A-1 is the recovery of the country made pistol pursuant to his disclosure statement which was established to be the weapon of offence as per the ballistic report Ex.PW-17/A. Conduct of A-

2 and A-3 of absconding was also found to be incriminating evidence against them.

32. The first and the foremost question to be addressed in the appeal, as was indeed urged, by learned counsel for the appellants is whether it stands established that the statement Ex.PW-9/A was made by the deceased when he was conscious. Needless to state, as held in the decision reported as JT 2001 (9) SC 282 Patel Hiralal Joitaram Vs. State of Gujarat, the said statement has to be treated as a dying declaration since the maker thereof died four days after making the statement and the statement pertains to the cause of his death.

33. It is true that there is no formal certificate issued by any doctor certifying that the deceased was fit for making a statement. But, as noted in para 4 above, on the MLC Ex.PW-10/A, Dr.Pradeep Narain Sahu has recorded that the patient is conscious and well-oriented. Not only that. The doctor has recorded on the MLC that the pulse of the patient was 80 per minute and his blood pressure was 140/80. The pulse and the blood pressure of the injured as recorded on the MLC is good evidence wherefrom it can be safely inferred that the condition of the deceased had not deteriorated and on the contrary, notwithstanding the injury, the body of the deceased, then injured, was fairly stable. Besides, not only SI C.M.Meena has deposed that Muzibur was fit for statement and thus he recorded his statement at the hospital, PW-3, the father of the

deceased has also so deposed and so has Const.Subhash PW-8.

34. We note that the testimony of PW-8 in this respect has gone totally unchallenged. Even the testimony of PW-3, the father of the deceased, on this respect has gone virtually unchallenged.

35. We thus hold that the evidence on record establishes that the deceased was fully conscious and the statement Ex.PW-9/A is the last dying declaration of the deceased.

36. The post-mortem report of the deceased shows that the skin around the wound where the bullet had entered the body of the deceased had tattooing. This means that the shot was fired from a contact range. The dying declaration Ex.PW-9/A of the deceased also establishes that the shot was fired from contact range. Thus, the post-mortem report corroborates the statement of the deceased in one material respect being the shot fired from a contact range. This lends further assurance to the fact that the deceased consciously stated as was recorded in his dying declaration and that the same is not a concoction by SI C.M.Meena for on the day of the injury SI C.M.Meena did not have with him the post-mortem report for the obvious reason Muzibur was injured and had not died by then.

37. The testimony of PW-14 clearly establishes the motive for the crime; motive being the fact that the deceased

had given an information to the police on 28.1.2003 about a dacoity being planned by A-1 Jahangir which led to Jahangir being apprehended and thus nurturing revenge against the deceased.

38. We note that two police officers have deposed to the facts pertaining to the recovery of the country made pistol pursuant to the disclosure statement made by Jahangir out of whom Const.Vinesh Kumar PW-5 did not turn up on the date he was to be cross examined. We ignore his testimony. But the testimony of SI C.M.Meena and Const.Bachchu Singh establishes the recovery of the country made pistol pursuant to the disclosure statement of Jahangir. The said country made pistol is indeed the weapon of offence. Thus, said evidence is further incriminating evidence against A-1 Jahangir and further corroborates the truth disclosed in the statement Ex.PW-9/A that Jahangir had fired the shot.

39. The submission made by learned counsel for the appellants that the Punjab Police Rules requires a dying declaration to be recorded before a Magistrate of the area and this not being done renders the statement Ex.PW-9/A as tainted evidence has not impressed us for the reason no doubt it would be desirable to have a dying declaration, whenever possible, be recorded by a Magistrate because said fact would lend credibility to the dying declaration. But, in a case of the kind before us, where there is unimpeachable evidence of a high

quality, leaving no scope for doubt in a judicial mind, non recording of a dying declaration before a Magistrate would be of not much relevance. After all, rules of procedure are a step in aid to do substantive justice.

40. The last submission made that the deceased died due to septicemia and not as a direct result of being shot and hence the offence is not one of murder needs to be noted and rejected in light of the observations in the decision in Patel Hiralal's case (supra). In said case the victim was set on fire after some corrosive liquid was poured on her. She lived on for quite a few days and died due to septicemia. In para 35 to 38 of the report, it was opined as under:-

“35. Section 299 IPC defines ‘culpable homicide’ as “whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act, to cause death, commits the offence of culpable homicide.”

36. Explanation 2 to Section 299 has a material bearing on the said contention and hence that is extracted below:

“Explanation 2 – Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.”

37. Section 300 IPC carves out two segments, one is culpable homicide amounting to murder and the second segment consists of culpable homicide not amounting to murder. Four clauses enumerated in the section are enveloped in the first segment. What is set apart for the

second segment is compendiously described as “except in the cases hereinafter excepted” from out of the first segment. For the purpose of this case we deem it necessary to quote only the second clause in Section 300 IPC.

“2ndly – If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused.”

38. In the present case, appellant did not even make an effort to bring the case within any of the four exceptions enumerated in Section 300. Hence the only question to be answered is whether he did the act with the intention of causing such bodily injury as he knew “to be likely to cause death of the deceased.” It is inconceivable that appellant would not have known that setting a human being ablaze after soaking her clothes with inflammable liquid would cause her death as the type of burns resulting therefrom would at least be “likely” to cause her death (if not they are sufficient in the ordinary course of nature to cause her death). The fact that she died only after a fortnight of sustaining those burn injuries, cannot evacuate the act out of the contours of the “2ndly” clause of Section 300 IPC. There was a little abatement of the ferocity of the flames which engulfed her as she, in the instinctive human thirst of getting extricated from the gobbling tentacles of the fire, succeeded in tracing out of a water-flow. Such a reflex action performed by her had mitigated the conflagration of the flames but did not save her from the fatality of the calamity. Hence, the interval of fourteen days between the attack and her death is not a cause for mitigation of the offence perpetuated by the offender. We are, therefore, not impressed by the alternative argument advanced by the learned senior counsel for the appellant.”

41. He, who shoots with a bullet in the stomach of a person, can be attributed knowledge of doing an imminently dangerous act which attracts Section 300 fourthly. Those who act in concert are vicariously liable because of Section 34 IPC.

42. We find no merits in the appeals.

43. The appeals are dismissed.

44. Appellant Mohd.Farooq @ Gaimda is already in judicial custody. The appellants Mohd.Khokhan @ Aslam and Jahangir @ Ibrahim are on bail. Their bail bonds and surety bonds are cancelled and they are directed to surrender and suffer the remaining sentence.

PRADEEP NANDRAJOG, J.

INDERMEET KAUR, J.

JULY 20, 2009
dk/mm