

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

Judgment reserved on: November 03, 2009
Judgment delivered on : November 10, 2009

+ **CRIMINAL APPEAL NO.416/2009**

FURKAN @ YUSUF

..... Appellant

Through: Mr.R.N. Mittal, Sr. Advocate
with Mr.D.K. Singh, Advocate.

Versus

THE STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Pawan Sharma, APP

WITH

+ **CRIMINAL APPEAL NO.497/2009**

MASOOD AHMED

..... Appellant

Through: Mr. Anupam S. Sharma,
Advocate.

Versus

STATE OF DELHI

..... Respondent

Through: Mr. Pawan Sharma, APP

WITH

+ **CRIMINAL APPEAL NO.653/2009**

DINESH

..... Appellant

Through: Ms.Charu Verma, Amicus.

Versus

STATE (N.C.T.) OF DELHI

..... Respondent

Through: Mr. Pawan Sharma, APP

AND

+ **CRIMINAL APPEAL NO.660/2009**

SHAHID

..... Appellant

Through: Ms.Purnima Sethi, Amicus.

Versus

STATE (N.C.T.) OF DELHI

..... Respondent

Through: Mr. Pawan Sharma, APP

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE AJIT BHARIHOKE

1. Whether 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 Digest ?

AJIT BHARIHOKE, J.

1. Above appeals are directed against the common judgment of conviction dated 20.04.2009 in Sessions Case No.225/08, FIR No.51/08, Police Station Adarsh Nagar vide which appellant Furkan has been convicted for offences punishable under Section 302 read with Section 34 IPC and section 27 of the Arms Act, whereas other three appellants have been convicted for the offence punishable under Section 302 read Section 34 IPC, and the consequent order on sentence dated 28.04.2009.
2. Briefly put, case of the prosecution is that on the intervening night of 14th and 15th February, 2002, one Harsha S/o Ramo informed

Police Station Adarsh Nagar on telephone that his son Sanjay @ Lade has been murdered by Dinesh, Shahid, Masood Ahmed and Yusuf. The information was recorded as DD No.22A and copy of DD report was entrusted to SI Naresh Kumar Bhatia for necessary action. SI, Naresh Kumar Bhatia along with Constable Ravinder left for the spot of occurrence. There he found the dead body of Sanjay lying on the bank of *Nala* with some portion of the body within the water. There were injuries on the throat as well as other parts of the dead body and blood was lying at the spot. He met the complainant Harsha-PW7 and recorded his statement.

3. That Harsha in his statement Ex.PW7/A disclosed that on the intervening night of 14th and 15th February, 2002 at about 12:15 a.m., he was informed by Chowkidar Prem Bahadur that the appellants Dinesh, Shahid, Masood Ahmed and Furkan @ Yusuf were quarrelling with his son Sanjay @ Lade (deceased) and Yusuf was having a knife in his hand. Chowkidar also told the complainant that when he tried to save Sanjay, the appellants threatened him and asked him to go away and that the appellants were taking his son towards the '*khatta*' (garbage dump). On this information, the complainant immediately rushed towards the '*khatta*' and searched for his son. When he could not find his son there, he proceeded towards 'Shah Alam Bandh' and on reaching near the 'Bandh', he saw that the appellants had already grounded his son Sanjay @ Lade. Appellants Dinesh and Shahid were holding him from his arms and hair and appellant Masood Ahmed was

holding his legs while appellant Furkan @ Yusuf was stabbing him with a knife on his face and neck and while beating him, appellants were also dragging the deceased towards the *Nala*. PW7 Harsha further stated that before he could reach at the spot, the appellants managed to drag his son into the *Nala* and when he raised alarm, all the appellants ran away. On reaching the spot, the complainant found his son Sanjay already dead. SI Naresh Kumar Bhatia sent the aforesaid statement of the complainant along with his endorsement to the Police Station for registration of the case and on the basis of the said statement, FIR under Section 302 IPC read with Section 34 IPC was registered and the investigation was taken over by the SHO, Inspector O.P. Meena.

4. That Inspector, O.P. Meena reached at the spot. On inspection of the dead body, he found injuries on the throat and other parts of the body and some blood was lying near the spot. Crime team also reached at the spot for inspecting the scene of crime and prepared its report Ex.PW6/A. The police photographer took photographs of scene of crime from various angles. Site plan Ex.PW7/V was prepared with the assistance of PW7 Harsha. The Investigating Officer lifted the blood stained earth and the control earth from the spot of occurrence and seized both the samples after converting them into separate sealed packets. Inquest was conducted and the dead body was sent for post mortem examination. The Investigating Officer also collected the post mortem report Ex.PW4/A.

5. During investigation, all the four appellants were arrested. On interrogation, they made disclosure statements. Pursuant to said disclosures, blood stained pants of Furkan, Dinesh and Masood Ahmed were recovered at the instance of respective appellants. Shahid also made a disclosure wherein he stated that he had burnt the pant which he was wearing at the time of occurrence. On 16.02.2002, Furkan was again interrogated. He made a disclosure statement and pursuant to that, he got the weapon of offence i.e. knife Ex.P-1 recovered from the mud inside the 'Nala' near the spot of occurrence. The knife was taken into possession after preparing its sketch and converted into a sealed pulanda.

6. All the incriminating articles seized during investigation were sent to CFSL for serological examination and the report was collected. On completion of investigation, charge sheet against the appellants was filed.

7. Appellant Furkan was charged for offences punishable under Section 302 read with Section 34 IPC and 27 Arms Act, whereas the other three appellants were charged under Section 302 IPC read with Section 34 IPC.

8. In order to bring home the guilt of the appellants, prosecution examined 15 witnesses including PW7 Harsha, who has given an eye witness account of the occurrence.

9. The defence of the appellants is that they are innocent and they have been falsely implicated. Accused Masood Ahmed took the plea that the deceased had purchased one old fridge from Masood Ahmed for Rs.3500/- on 22.04.2004. The fridge developed some complaint, so the deceased brought it for repairs. However, later on Sanjay @ Lade wanted to get the fridge sold and it was resold for Rs.2200/-. After a few days, PW7 Harsha visited the shop of appellant Masood Ahmed and complained that he had pushed the deceased Sanjay into bad habits like gambling and left the shop after extending threat to Masood Ahmed.

10. On conclusion of trial, the learned trial Judge relied upon the eye witness account of PW7 Harsha coupled with the recovery of incriminating articles i.e. the weapon of offence knife Ex.P-1 at the instance of Furkan @ Yusuf and the blood stained pants of appellants Furkan, Dinesh and Masood Ahmed at their instance and found the appellants guilty of offences punishable under Sections 302/34 IPC and convicted them on the aforesaid account. Appellant Furkan was also convicted under Section 27 of the Arms Act.

11. Learned Shri R.N. Mittal, Sr. Advocate for the appellant Furkan @ Yusuf, Shri Anupam S. Sharma, advocate for the appellant Masood Ahmed, Ms.Charu Verma, amicus curiae for the appellant Dinesh and Ms.Purnima Sethi, amicus curiae for the appellant Shahid have assailed the impugned judgment on the following grounds:

- (i) That the investigation of the case is unfair since the very beginning and that the FIR in this case was ante timed and recorded at a highly belated stage after due deliberations to falsely implicate the appellants on suspicion.
- (ii) That the prosecution case is mainly based upon the eye witness account of Harsha PW7, which is not reliable because of the various infirmities.
- (iii) That the evidence of recovery of the incriminating articles i.e. blood stained pants at the instance of Furkan @ Yusuf, Dinesh, Masood Ahmed and Shahid and the knife Ex.P-1 at the instance of accused Furkan @ Yusuf is doubtful.

12. It is the case of prosecution that the police machinery was set into motion by DD No.22A recorded on the receipt of the telephonic information given by PW7 Harsha S/o Ramo that his son Sanjay @ Lade has been killed by the appellants Dinesh, Shahid, Masood Ahmed and Yusuf @ Furkan on the roadside of 'Shah Alam Bandh'. Though DD No.22A has not been proved by the prosecution, yet it can be seen in favour of the defence. If we go by the DD report, the information was conveyed by PW7 Harsha on telephone, whereas Harsha in his cross-examination is categorical that he did not inform the police on the telephone about the murder of his son by the appellants. Instead, at one stage, in his cross-examination he stated that nearby jhuggi persons had telephoned the police and on a later stage, he claimed to

have no knowledge as to who informed the police about the occurrence. Thus, it remains unexplained on record as to how and in what manner the police came to know about the incident which prompted Inspector Naresh Kumar Bhatia to visit the spot of occurrence. Coming to the question of the FIR being ante timed, Constable Kishori Lal- PW9 is stated to have delivered the copies of the FIR (special report) to the senior police officer and the area magistrate. Ex.PW14/DA is DD No.2A dated 15.02.2002, Police Station Adarsh Nagar, which records the arrival of Constable Kishori Lal at the Police Station. Constable Kishori Lal-PW9 in his cross-examination has stated that he started from the Police Station to deliver the copy of the FIR at 4:35 a.m. and delivered it at the residence of Metropolitan Magistrate, Sarita Vihar after about one hour. This implies that the copy of FIR was delivered at the residence of concerned Metropolitan Magistrate somewhere around 5:30 a.m. This version of PW9 Constable Kishori Lal is belied by the endorsement of the second link magistrate on the copy of FIR Ex.PW1/A to the effect that it was received by him at 3:15 p.m. This circumstance, surely, creates a doubt about the timing of recording of the FIR as also the time of recording of DD No.2A dated 15.02.2002 about the arrival of Constable Kishori Lal-PW9 after the delivery of the FIR at the residence of Metropolitan Magistrate. Learned counsels for the appellants have further pointed that admittedly as per prosecution, the incident took place at about 12:15 a.m. in the night. DD report pertaining to information about the

occurrence was recorded at the Police Station at 1:05 a.m. The statement of PW7 Harsha, according to the prosecution, was recorded by PW13 SI Naresh Kumar Bhatia at 12:15 a.m., Rukka was sent to the Police Station at 3:30 a.m. and the FIR was recorded at 3:50 a.m. The Investigating Officer, O.P. Meena-PW14 has stated in his cross-examination on behalf of the accused Masood Ahmed that Ravinder Kumar returned back to the spot of occurrence with the copy of FIR at 4:30 a.m. Admittedly, the crime team also reached at the spot of occurrence at 4:30 a.m. and remained there till 5:30 a.m., and during said period PW7 Harsha was also present at the spot. Inspector, O.P. Meena in his cross-examination stated that he had briefed the crime team about all the facts of the case. It is also the case of the prosecution that crime team prepared its report Ex.PW6/A. Perusal of crime team report Ex.PW6/A shows that it is prepared on a printed performa having various columns for specific inputs. It transpires from the report Ex.PW6/A that in the column of FIR Number of the case, crime team has mentioned DD No.22A dated 15.02.2002 under Section 302 IPC. Non-mentioning of FIR Number in the aforesaid column particularly when, as per the case of prosecution, before the departure of the crime team, the copy of FIR had reached the spot of occurrence raises a strong doubt that by the time the crime team report Ex.PW6/A was prepared, formal FIR was not registered at the Police Station. It is also noted that in the column of date and time of offence, though the date is mentioned as 15.02.2002, but the time is mentioned as

unknown. This circumstance compounds the doubts further and not only this when in DD No.22A, it was clearly mentioned that Sanjay @ Lada has been killed by the appellants in the details of the case mentioned in Ex.PW6/A, the name and identity of the deceased initially recorded unknown, but after deleting the word unknown, it was written as Sanjay @ Lada. In view of above evidence, learned counsels appearing on behalf of the appellants have urged us to infer that in this case, manipulation has been done by the police regarding the contents of the FIR and the time of the FIR. Learned counsel for the State, on the other hand, has stated that perusal of the FIR Ex.PW1/A shows that it is mentioned in the body of FIR that copy of the FIR was being forwarded to the Investigating Officer and crime team and photographer were also referred to the spot of occurrence. From this, he has urged us to infer that this circumstance itself rules out the possibility of ante timing of the FIR.

13. On careful consideration of the submissions made on behalf of the respective parties, we are not convinced with the submission of learned counsel for the State. Recording of the FIR was in the hands of the officials of the Police Station. A possibility cannot be ruled out that without recording the FIR, the crime team might have been asked to reach at the spot and the FIR as well as DD No.22A were recorded at a later stage. This doubt is further compounded by the fact that though case of the prosecution is that DD No.22A was recorded on the

information given by Harsha-PW7, this fact is not supported by PW7 who was categorical in his testimony that he did not inform the police about the occurrence.

14. It was further submitted on behalf of the appellants that perusal of the arrest memos of the respective appellants Ex.PW7/F, Ex.PW7/G, Ex.PW7/H and Ex.PW7/I would show that in all the arrest memos, the time of arrest has been changed by overwriting, which indicates that some manipulation has been done by the police during investigation. Learned counsel for the State in order to refute this argument has urged us to peruse the case diaries and from the case diaries, he has pointed out that in the carbon copies available in the case diary, there is no interpolation or overwriting about the time of arrest in the arrest memos. From this he has urged us to infer that this overwriting has been done deliberately in the court record by someone to help the appellants. Indeed, on perusal of the carbon copies of the arrest memos available in the case diary, we find in those arrest memos there is no overwriting about the time of arrest, but we notice that the carbon impression regarding the time mentioned in the memos is different than the carbon impression of the particulars filled in other columns of the arrest memos. This circumstance leads to an inference that the column for time of arrest was left unfilled when the arrest memos Ex.PW7/F to Ex.PW7/I were prepared and the time was later on mentioned by making use of another carbon paper. Even otherwise, if

we ignore this factor, then also a possibility cannot be ruled that the overwriting was done by the Investigating Officer subsequently at the time of preparation of charge sheet and filing said documents in the court along with the charge sheet. Thus, in our considered view, the fairness of the investigation definitely is suspect and a possibility cannot be ruled out that the FIR in this case has been ante timed and prepared after due deliberations.

15. It was next submitted on behalf of the appellants that the case of the prosecution rests mainly on the testimony of Harsha-PW7, the father of the deceased. It was submitted on behalf of the appellants that the presence of PW7 Harsha at the time of occurrence is highly doubtful and a possibility cannot be ruled out that he has been subsequently introduced as a witness to implicate the appellants merely on the basis of suspicion. In support of this contention, it was submitted that as per version of PW7 Harsha, he was told by Chowkidar Prem Bahadur on the night intervening 14-15.02.2002 at about 12:15 a.m. that the appellants, one of whom was having a knife in his hand, were quarreling with his son Sanjay @ Lade (deceased) and taking him towards '*kuda khatta*'. This prompted the complainant Harsha to proceed towards '*khatta*' and when he did not find his son there, he went towards 'Shah Alam Bandh', where he witnessed the incident of stabbing of his son by the appellants. In the cross-examination, Harsha-PW7 has stated that it took him about 25 minutes to reach

there. If the version of PW7 Harsha is to be believed, then by implication, it means that the appellants waited for about half an hour, since the quarrel ensued to stab the deceased Sanjay @ Lade as if they were waiting for PW7 to reach at the spot and witness the occurrence, which is highly improbable. Further PW7 Harsha in his cross-examination has admitted that there was no electricity at the '*kuda khatta*' or near the spot of occurrence. Therefore, it is also highly improbable that the witness could have seen the appellants stabbing the deceased. On perusal of the complaint statement of PW7 Harsha Ex.PW7/A, it transpires that when the complainant reached near the spot he saw that his son was lying on the ground and he was held by appellants Shahid, Dinesh and Masood Ahmed from his hair, arms and legs respectively and appellant Yusuf @ Furkan was stabbing him on his face and neck while the deceased was being dragged towards the *Nala*. One wonders as to how the appellants could have managed to drag the deceased on the ground towards Nala and simultaneously managed to keep on stabbing him with the knife. It is further pointed out that PW7 Harsha also stated in his cross-examination that he did not hold or touch his son to find out whether or not he was dead or alive, which conduct on the part of the father is highly unnatural. PW7 tried to explain his aforesaid conduct by stating in his cross-examination that he did not touch his son, as he was already dead and he concluded this as most portion of his neck was cut and one eye had been removed from the socket and this he saw by burning two

matchsticks. Above explanation of PW7 for such unnatural conduct is not acceptable. It is inconceivable that a father on seeing his son in injured condition would not try to feel his pulse or heartbeat to ensure if he was alive in order to take him for treatment to save his life.

16. Further, according to PW7 Harsha, his son Ramesh also reached at the spot at about 6:00 a.m. Ramesh was examined as PW3. He stated in his examination-in-chief that he identified the dead body of his younger brother Sanjay in the mortuary of Jagjeewan Ram Hospital. In the cross-examination, he stated that he did not come to know about the manner in which his brother was killed till the time he identified the dead body. As per the testimony of PW14, Inspector O.P. Meena, the dead body was sent to mortuary at around 9:30 a.m. in the morning. This implies that PW3 Ramesh would have identified the dead body sometimes after 9:30 a.m. and till then he was not aware as to how his brother was killed. If Ramesh had reached at the spot at 6:00 a.m. in the morning, under the natural course of circumstances, PW7 Harsha was expected to tell him about the manner in which the appellants killed the deceased. The fact that PW3 Ramesh was not aware about the manner in which his brother Sanjay @ Lade was killed, raises a strong doubt that PW7 is not an eye witness to the occurrence.

17. In view of the aforesaid infirmities, learned counsels for the appellants have urged us to conclude that PW7 Harsha is not a reliable

witness and his presence at the spot at the time of occurrence is highly doubtful. On the other hand, learned counsel for the State has submitted that above said infirmities pointed out on behalf of the appellants are inconsequential and those cannot be made a reason to discredit the ocular testimony of PW7 Harsha. He has submitted that there is nothing on the record to suggest as to why PW7 Harsha would falsely implicate the appellants and let the real culprit who committed the murder of his son go scot free.

18. We have carefully considered the submissions made on behalf of the parties. In our considered view, the above referred infirmities pointed out in the testimony of PW7 Harsha makes his presence at the time of occurrence highly doubtful and we are of the considered view that it is not safe to rely upon the testimony of PW7 Harsha, particularly when the fairness of the investigation is also under cloud.

19. The third submission on behalf of the appellants is that once the testimony of Harsha is not found reliable and there is a doubt against the fairness of the investigation, no reliance can be placed upon the evidence pertaining to the recovery of incriminating articles at the instance of the appellants. They have also pointed out that as per the case of the prosecution, the deceased was stabbed while he was lying on the ground and was being dragged. Therefore, the injury being on the face and neck, the maximum blood of the deceased obviously

would have fallen on his sweater and the shirt. It is submitted on behalf of the appellants that perusal of the serological report Ex.PW12/A shows that on serological examination though human blood was found on the clothes of the deceased, but blood group 'O' could not be detected on his shirt, sweater and pair of shoes, whereas the pants recovered at the instance of appellants Dinesh, Masood Ahmed and Shahid which they were allegedly wearing at the time of incident and the knife Ex.P-1 which was recovered two days later from the *Nala* did test positive for human blood group 'O'. From the above evidence, the appellants have urged us to infer that some tampering with the pants and knife has been done to link those articles with the crime. We find force in the submission because it is highly improbable that the sweater and shirt of the deceased, which obviously would have been drenched with the blood of the deceased, did not give positive test for blood group 'O' for some reason, whereas the incriminating articles seized from the appellants, which purportedly had some blood stains, confirmed to have tested positive for human blood group 'O'. As per the case of prosecution, the knife Ex.P-1 which is said to be the weapon of offence was recovered two days after the incident from mud within the *Nala*. It is highly improbable that even after remaining in the mud and water in the *Nala*, the knife Ex.P-1 could have retained sufficient amount of blood stains so as to facilitate a proper serological examination. Otherwise also, in view of the discussion above, even the fairness of the investigation in this case is suspect. Therefore, the

prosecution cannot take much advantage from the evidence pertaining to recovery of incriminating articles at the instance of the appellants.

20. The result of above discussion is that the presence of so-called eye witness PW7 Harsha at the time of occurrence is doubtful. Even the fairness of investigation in this case is highly suspect. Thus, we do not find it safe to rely upon the prosecution evidence to uphold the conviction of the appellants. They are entitled to benefit of doubt.

21. The appeals are allowed accordingly. We set aside the impugned judgment of conviction of appellants as also the consequent order on sentence and acquit all the appellants of charge under Section 302 read with Section 34 IPC and also acquit the appellant Furkan under Section 27 of the Arms Act extending them benefit of doubt.

22. The appellants are in custody. They be released forthwith if they are not wanted in any other case.

23. Appeals are disposed of accordingly.

AJIT BHARIHOKE, J.

NOVEMBER 10, 2009
pst

SANJAY KISHAN KAUL, J.