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

+ **CRL.A. 808/2008**

% Date of Order : February 11, 2009

SHUAIB & ANR. Appellant
Through Mr. Javed Hashmi, Adv.

versus

STATE Respondent
Through Mr. Pawan Sharma, APP

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE ARUNA SURESH

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

: **PRADEEP NANDRAJOG, J.** (Oral)

1. Vide impugned judgment dated 25.7.2008, appellants Shuaib and Shadab have been convicted for the offence of having murdered Shamim. Both of them have been convicted under Section 302/34 IPC.

2. Vide order of sentence dated 29.7.2008, both have been awarded the punishment to undergo imprisonment for

life and to pay fine in sum of Rs.5000/- each. In default of payment of fine they have been directed to undergo rigorous imprisonment for six months.

3. The evidence found to be incriminating against the appellants is two-fold.

4. Against appellant Shuaib the learned Trial Judge has accepted the testimony of Reshma PW-4, sister of the deceased, who claimed to be an eye witness to the incident. Against Shadab, the learned Trial Judge has held that there are two incriminating pieces of evidence; firstly the facts disclosed by Reshma and secondly the recovery of a scissor, being the alleged weapon of offence used to cause injuries on the body of Shamim, at the instance of Shadab pursuant to his disclosure statement.

5. In her testimony, Reshma deposed in Court that on 5.3.2005 at around 4.35 p.m. her youngest brother Bilal was playing marbles outside their house along with Imran who was residing in the neighbourhood. While playing marbles, Bilal quarreled with Imran. She separated both of them and got Bilal inside the house. Imran went to his house. After about five

minutes, her brother Shamim (deceased) 18 years was sent by her to bring vegetables. Shamim had hardly taken 5-6 steps outside the house when appellants came out of their house. Appellant Shadab caught hold of her brother and appellant Shuaib inflicted a wound on the chest of her brother with something. Her brother started bleeding. Sandeep PW-7 was present. She along with Sandeep took Shamim to Kamal Nursing Home where doctor bandaged her brother and told her to take him to some good hospital. Accompanied by Sandeep she took her brother Shamim to Mohan Nursing Home, from where they were referred to GTB Hospital. They remained at GTB Hospital for some time and took back the injured to Mohan Nursing Home where the doctor referred him to St.Stephen's Hospital, where he died the next day at 8.00 A.M upon which she informed the police that her brother was murdered by the appellants.

6. In cross-examination, Reshma accepted that the place of occurrence was a thickly populated area and that she did not tell anyone about the incident. She admitted that neither at Kamal Nursing Home nor at Mohan Nursing Home

she told that the appellants had inflicted injuries on her brother. She stated that she did not inform anybody of the appellants having caused injuries on her brother because the father and the brother of the appellants had threatened her.

7. Sandeep examined as PW-7 has not supported the case of the prosecution. He deposed that when he reached the house of the deceased he found Shamim lying on the ground and his sister Reshma was standing there. Reshma told him that Shamim has sustained injuries and that he accompanied Reshma to take Shamim to Kamal Nursing Home where first-aid was given to him. He accompanied Reshma to Mohan Nursing Home and from there to GTB Hospital. He further deposed that in his presence, Shamim had told the doctor at GTB Hospital that he had sustained injuries as a result of falling down from the stairs. We note that the FIR in question was registered pursuant to the statement made by Reshma before the police the next day. i.e. 6.3.2005, after Shamim died. We also note that said statement has been made by Reshma to the police after nearly 28 hours of the incident.

8. Post-mortem of Shamim was conducted by

Dr.K.K.Banerji PW-3, who noted that apart from two surgically sutured wounds, deceased had one more wound on his person which had cut through blood vessels. He recorded that due to surgical intervention it was not possible to give a definite opinion regarding the nature of the third wound.

9. After he gave the post-mortem report, Ex.PW-3/A, on 11.5.2005 he received an application Ex.PW-3/DA from the Investigating Officer seeking opinion whether the injury could be a result of a fall over metal garbage or was the result of an assault. He gave his opinion, Ex.PW-3/DB, to the effect that no definite opinion can be given in this regard as the wound on the body were surgically altered.

10. It is not in dispute that at Mohan Nursing Home where Shamim was taken on 5.3.2005, in the medical papers, Ex.DW-1/D1, it has been recorded: *"Alleged H/o fall from stairs"*.

11. It is also not in dispute that at GTB Hospital where Shamim was taken, as recorded in Ex.DW-1/DD, at 6.05 p.m. on 5.3.2005, the history of the injury has been recorded *"Alleged H/o fall from height"*.

12. It is also not in dispute that when Shamim was taken to St.Stephen's Hospital on 5.3.2005 at 11.50 p.m. while recording the history of the injury it was recorded: "*H/o Fall on metal garbage at 5.00 p.m. today*".

13. We note that the said history is recorded in the MLC prepared at St.Stephen's Hospital, being Ex.PW-15/A.

14. Believing the testimony of Reshma and holding that she would be perplexed when her brother was injured and medical evidence shows that she was taking her brother from hospital to hospital, the learned Trial Judge has held that the delay in informing the police that the appellants had assaulted her brother is explainable, and hence there is no fatal delay in registration of the FIR.

15. With respect to the conduct of Reshma in not informing anybody that the appellants had inflicted the injuries on her brother, learned Trial Judge has believed her statement that she was under a threat. Discrepancies pointed out in her deposition have been brushed aside by the learned Trial Judge holding that she was speaking from memory when she deposed in Court and that her mental condition at the relevant

point of time i.e. when her brother was injured on 5.3.2005 was such that she could reasonably be expected to be shaken and shattered.

16. Medical history recorded at Mohan Nursing Home, GTB Hospital and St.Stephen's Hospital has been brushed aside with a finding in para 20 of the impugned decision that the same do not reveal that the deceased had himself given the said history.

17. We are pained at the manner in which the learned Trial Judge has analysed the evidence. It appears that the Court was determined, somehow or the other, to convict the appellants.

18. The learned Trial Judge has ignored the fact that as per Reshma, her brother was injured by appellants at around 4.35 p.m. Sandeep, a friend of her brother was present and both of them immediately rushed Shamim to Kamal Nursing Home and there from took him to Mohan Nursing Home.

19. There is no record before this Court, indeed none was before the learned Trial Judge, pertaining to what happened at Kamal Nursing Home. But Ex.DW1/D1 shows that

the injured was given medical aid at Mohan Nursing Home on 5.3.2005. The injured, as deposed to by Reshma, was taken to GTB Hospital and we find that he was given medical treatment there at 6.05 p.m. evidenced by DW-1/DD.

20. Where was the occasion of any family member of the appellants accosting Reshma and threatening her not to disclose what had actually happened. Besides, Sandeep PW-7, was all throughout besides her. He does not say that anybody contacted Reshma.

21. The learned Trial Judge has ignored the fact that there is no evidence to show that any third person ever came into contact with Reshma.

22. The Trial Judge has glossed over the categorical statement of Sandeep, to the effect, that at St.Stephen's Hospital, in his presence, the injured himself gave the statement as to how the injury was sustained by him.

23. It is important to note that in three contemporaneous medical records at three hospitals, the history of the injury has been consistently recorded as a result of fall from a height.

24. Now, a doctor can record the history of an injury either as told by the injured himself or by the person accompanying the injured i.e. the person who has got the injured admitted at the hospital.

25. There is no evidence that any family members of the appellants were present in either of the three hospitals where the injured was first taken i.e. Kamal Nursing Home, Mohan Nursing Home or the GTB Hospital. There is some evidence that Naved, PW-11, a brother of the accused had reached St.Stephen's Hospital.

26. Be that is it may, the fact of matter remains that contemporaneous medical records at three different hospitals shows that the three doctors concerned had recorded the history of the injury as a result of a fall. Needless to state, the doctors did not conceive of the same out of their imagination. They must have written the same as told by the injured or by Reshma. As noted above, Sandeep has categorically stated that the history of the injury at St.Stephen's Hospital was disclosed by the injured himself.

27. Thus the testimony of Reshma PW-4 stands totally

discredited with respect to the independent medical record.

28. It is not of no significance that the doctor who conducted the post-mortem could not give a definite opinion whether injury was a result of a fall or could possibly be the result of being stabbed with a knife.

29. Under the circumstances the recovery of the alleged weapon of offence i.e. scissors, pursuant to the disclosure statement of appellant Shadab is of no consequence. More so, for the reason, the injury on the person of the deceased is on the abdomen and the shirt of the deceased admittedly does not have any cut mark as per the CFSL report Ex.C-1. It is important to note that the shirt of the deceased and the scissor was sent to the CFSL for an opinion whether the cut on the shirt could be the result of the scissor piercing through the shirt before entering the abdominal cavity of the deceased. The report records that the shirt is not even cut.

30. Thus, the probable cause of the injury was a result of a fall.

31. The appeal is allowed. Impugned judgment and

order dated 25.7.2008 convicting the appellants is set aside.
Order dated 29.7.2008 imposing the sentence is also set aside.
The appellants are acquitted of the charge of murdering the
deceased. If not required in any other case the appellants are
directed to be set free forthwith.

32. DASTI.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

FEBRUARY 11, 2009
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