

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

% *Judgment Reserved on: 14<sup>th</sup> September, 2009*  
*Judgment Delivered on: 16<sup>th</sup> September, 2009*

+ **CRL.A.792/2007**

SURESH KUMAR @ SAIJU ..... Appellant  
Through : Mr.Bhupesh Narula,  
Advocate.  
versus

THE STATE (GOVT. OF NCT OF DELHI) ..... Respondent  
Through : Ms.Richa Kapoor, APP.

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

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

**INDERMEET KAUR, J.**

1. On 22.9.2004 at 10.35 AM D.D.No.31B Ex.PW-10/A was recorded in Police Station Jahangir Puri to the effect that a lady and a child has been attacked at House No.G-245, Jahangir Puri and the assailants have fled away. This DD was handed over to ASI Ram Kishan PW-16 who along with Head Constable Rishi Prakash reached the spot. Inspector Ram Chander PW-23 also reached there. The incident had occurred on the 3<sup>rd</sup> floor of House No.G-245, Jahangir Puri. The victims of the offence were Sumita who had

succumbed to her injuries and her son Azad @ Samanto @ Pappu; the injured child had already been removed to Babu Jag Jeevan Ram Hospital. The dead body of the lady was lying on the floor in a bloody condition and her mouth had been gagged with her own saree, broken teeth, broken bangles, a blood stained ball pen and a brick were lying nearby. A blood stained shirt, lungi and shawl were also found lying. The crime team was summoned; crime team in-charge SI Subhash Chand PW-4 directed Const.Sushil PW-17 to take photographs of the scene i.e. PW-17/1-7; negatives of which are Ex. PW-17/8-15. Dead body was sent to the mortuary.

2. PW-23 reached the hospital to find out the whereabouts of the injured child. Statement Ex.PW-1/A of the child i.e. of Azad @ Samanto @ Pappu PW-1 was recorded by the Investigating Officer after he was declared fit by the doctor. In this statement it was revealed that PW-1 was residing with his mother Sumita and his step-father Maiju at Jahangir Puri since the last month. His natural father Ashok Samanto lived in their native village Balsara; his mother had abandoned her husband and was now living with Maiju. On 21.9.2004 his step-father Maiju and his younger brother Saiju were drinking liquor in the presence of his mother in the house; he i.e. PW-1 had gone to sleep. At about 1.00 AM on hearing the cries of his mother he woke up and saw his father Maiju sitting on his mother's chest and he was hitting her with a brick; his chacha i.e.

Saiju was trying to gag his mother by stuffing a cloth in her mouth; on seeing this scene PW-1 started screaming for help; his step-father hit him with a brick; Saiju pressed his neck and pulled his legs as a result of which PW-1 lost his consciousness; in the morning after he regained consciousness; he saw his mother lying next to him, soaked in blood. PW-1 narrated this version to Asha PW-2 the daughter of his landlord but because of the injuries which he had himself sustained he could not speak very coherently; at the time of incident he i.e. PW-1, his mother Sumita, his step-father and his chacha i.e. the brother of his step-father were the only persons present in the house. With the assistance of his landlord he was taken to the hospital. His step-father and brother of his step-father are responsible for killing his mother and causing injury to him; action be taken against them.

3. This was the first version of PW-1 and was recorded as early as 4.00PM on 22.9.2004 and which had formed the basis of the rukka. Endorsement Ex.PW-23/A had been made on this statement pursuant to which the FIR has been registered under Sections 302/307/34 of the IPC.

4. From the spot, the blood stained clothes i.e. the lungi, shawl, a mosquito net and a blood stained brick were seized, sealed and taken into possession vide memos Ex.PW-16/C to Ex.PW-16/E. Site plan Ex.PW-23/B was also prepared. Inquest papers Ex.PW-7/B to

Ex.PW-7/D were also prepared. Statements of Asha PW-2 and Ram Gulam PW-3 i.e. PW-3 being the landlord of the premises and PW-2 being his daughter were recorded. PW-2 was the first person to whom the child victim had disclosed about the incident; it was with the assistance of PW-3 that PW-1 had been removed to the hospital. Version of PW-3 is also to the effect that three days prior to the incident i.e. three days before 21.9.2004 Saiju, the younger brother of Maiju and brother in law of the deceased Sumita had come to stay in their house.

5. Post mortem on the deceased was conducted by Dr. B.N. Acharya PW-7 who had opined death due to asphyxia consequent to gagging and closure of the external air passes by a saree and hand i.e. by a manual smothering. Time since death was reported to be five and half days i.e. relating back to the intervening night of 21-22.9.2004.

6. PW-1 had suffered grievous injuries and he continued to remain in the hospital till 8.10.2004; he was discharged from the hospital vide discharge slip Ex.PW-23/C. His MLC Ex.PW-18./A and X- ray report Ex.PW-20/A had noted fracture of the middle phalynx of left index finger and other abrasions. His statement Ex.PW-1/B under Section 164 Cr.P.C. was recorded on 18.11.2004 by Sh. Vinod Yadav PW-22 who before recording his statement had satisfied himself that the child was fit to give rational answers to the

questions put to him and certificate to the said effect has been penned by him in his writing from point X to X on Ex.PW-1/B.

7. Both the accused persons were absconding. On 14.10.2004 village Nangla Tara, P.S. Jahanganj, Farukhabad, U.P., the house of the accused was raided but the accused persons were not found there. On the same day, a secret information was received that the accused Saiju @ Suresh Kumar had gone to Delhi and would be returning by Kalindi Express. PW-23 along with H.C.Rajinder Singh PW-19, Const.Kanwar Pal, Const.Naresh Kumar PW-11 reached the railway station; on the pointing out of PW-1 accused Suresh was arrested vide memo Ex.PW-11/B; his personal search Ex. PW-11/A was conducted. He was interrogated and his disclosure statement Ex.PW-19/A was recorded. Co-accused Maiju continued to abscond and since he could not be arrested he was declared a proclaimed offender.

8. The accused had raised a defence of alibi through the testimony of two defence witnesses, namely Babu Ram DW-1 and Nek Ram DW-2 to substantiate his submission that on 21.9.2004 he was not present at the place of incident but he had gone to attend the cremation of one Vidyawati at Aliganj, U.P. This defence has been rejected by the Court below.

9. Trial Judge had relied upon the testimony of the eye-witness i.e. Azad @ Samanto @ Pappu PW-1 to nail the accused; besides,

the trial Court had held that the testimony of Asha PW-2 had corroborated the version set up by PW-1; she was the first person to whom the victim child had related the incident being the daughter of his landlord who had come to his room in the morning hours. The trial Judge had also placed reliance on the version of Ram Gulam PW-3 landlord of the house to hold that version of PW-3 had substantiated that Suresh @ Saiju was present in the house and had come to live there three days prior to the incident. These pieces of evidence had been co-joined with one another by the trial Judge to sustain the conviction of the accused under Section 302 of the IPC; for the offence under Section 307 of the IPC, besides the testimony of the aforementioned witnesses; medical record i.e. the MLC of PW-1 Ex. PW-18/A and his X-ray report Ex.PW-20/A had established that the child had suffered grievous injuries; this evidence has been used to sustain the conviction of the accused under Section 307 of the IPC.

10. On behalf of the accused, it has been argued that the judgment of the trial Court is infirm and it has ignored the discrepancies which have appeared in the version of PW-1, the child witness who was admittedly not more than eleven years of age at the time of incident; attention has been drawn to his cross-examination wherein he had admitted that at the time of quarrel at 1.00AM the person residing on the ground floor had come up; his

name is not known but he was a 'Behari'. It is argued that there is no explanation as to who this person was and why he has not been examined; there is also no explanation as to why the statement of PW-1 under section 164 of the Cr. P.C. had been recorded after two months of the incident i.e. on 18.11.2004 which throws doubt on its veracity. Version of PW-1 has become suspect. It is argued that the trial Court had summarily rejected the defence of the accused without appreciating the version of DW-1 and DW-2 in their correct perspective; attention has been drawn to the photographs which has been exhibited in their testimony; it is argued that the defence witnesses are entitled to the same weightage as that of the prosecution witnesses. Version of prosecution is not credible; accused Saiju is admittedly the brother-in-law of the deceased; the husband has managed to escape and the present appellant has been falsely roped in.

11. We have heard the learned counsel for the parties and have perused the record.

12. The version of the prosecution is hinged largely on the testimony of PW-1; he is a child witness and was aged about eleven years when he had come into witness box. It was his statement Ex.PW-1/A which had formed the basis of the rukka; the incident had occurred in the intervening night of 21-22.9.2004 at about 1.00 AM in the morning; child victim had himself sustained grievous

injuries and had become unconscious; he had been removed to the hospital on the following day by PW-3 at about 10.00 AM. The child had been given medical aid; after he was declared fit for statement at 3.00 PM his statement was recorded by Dr.Ashfaq at 4:00 PM by the Investigating Officer PW-23 which is evidenced from the noting in the MLC Ex.PW-18/A and proved by Dr.Seema PW-18 who had identified the handwriting and singnatures of Dr.Ashfaq.

13. The version as given by PW-1 in this rukka is clear and cogent; this version had been corroborated in his second version Ex. PW-1/B which has been recorded under Section 164 of the Cr. P.C. on 18.11.2004. The submission of learned defence counsel about non-explanation of the recording of this version as late as 18.11.2004 is answered in the testimony of PW-22. The learned Metropolitan Magistrate PW-22 who had recorded this statement has on oath deposed that on 7.10.2004 an application had been moved before him by the Investigating Officer with a prayer to record the statement of Azad @ Samanto @ Pappu; the application has been directed to be put up on 8.10.2004 on which date Investigating Officer had sought extension of time and the matter was then adjourned to 23.10.2004, 27.10.2004, 25.11.2004 and finally on 18.11.2004 the statement Ex.PW-1/B was recorded by PW-22. This witness has not been cross-examined. PW-23 the Investigating Officer has also not been cross-examined on this

aspect. The discharge slip of PW-1 shows that he was discharged on 8.10.2004. These facts clearly explain as to why this version of PW-1 was recorded on 18.11.2004.

14. PW-1 has also been fully consistent and fully coherent on oath. He had been put a preliminary round of questions to test his rationality before he was permitted to enter the witness box. He was examined without oath. He has in graphic detail recited the incident; he has deposed that he along with his mother Sumita were staying with his step-father Maiju at Mandi; thereafter they shifted to Jahangir Puri; he had come to Delhi with his mother from Bengal with Maiju who is from U.P.; they were living in the house of Asha and Ram Gulam; a few days before the incident Suresh @ Saiju also joined them. On the day of the incident i.e. on 21.9.2004 at 10.00 PM Maiju and Saiju were drinking liquor in the presence of his mother; he i.e. PW-1 had finished his dinner and was lying on the floor; at about 1.00AM he heard cries of his mother; he woke up and saw that she was lying on the floor; his father Maiju was sitting on her chest and hitting her on her face with a brick; Saiju was holding his mother's hand and was stuffing a red coloured cloth into her mouth; he was also assaulting his mother; clothes of his mother had been removed and Saiju himself was also unclad; he was outraging the chastity of his mother; PW-1 raised alarm; upon this his father Maiju struck him i.e. PW-1 with a brick on his face; his two upper

teeth broke and he sustained injuries on his nose, lower lip, left temple as also on his right index finger; his chacha Saiju pressed his throat and pulled his legs; he became unconscious; he regained consciousness in the morning when he was woken up by Asha daughter of his landlord who had come after feeding the pigeons. He i.e. PW-1 related the incident to Asha. His mother was lying next to him and was soaked in blood. Asha informed her father i.e. Ram Gulam PW-3 who removed him to the hospital.

15. In his cross-examination PW-1 has stuck to his version; although he had been subjected to a lengthy four page cross-examination, he had not steered from his initial stand. He has admitted that he had gone to sleep by 10.00 PM and was woken up by the cries of his mother; he has stated that when the quarrel took place at 1.00 AM the person residing below his floor had come up; he was a 'Behari' but he does not know his name.

16. Testimony of a witness has to be read in its entirety and stray sentences here and there cannot be picked up to discredit an otherwise fully reliable version; this discrepancy as has been pointed out by learned defence counsel is too minor to otherwise dent the version of PW-1; when an incident is narrated by the same person on different occasions, some differences in the mode of narration are bound to arise and such of these differences which do not militate against the trustworthiness of the narration, unless the

variations can be held to be so abnormal and unnatural and which would not occur if the witness would have really witnessed what he/she was narrating.

17. In Suresh vs. State AIR 1981 SC 1122 the Supreme Court while dealing with the testimony of a child witness had held that children do tend to mix up what they see with what they like to imagine to have seen; besides, a little tutoring is inevitable in their case in order to lend coherence and consistency to their dis-jointed thoughts which tend to stray. In our view testimony of PW-1 is fully reliable.

18. PW-1 had related this incident to PW-2 who has corroborated this version of PW-1. She has deposed that on 22.9.2004 at 8.45 AM she had gone to the third floor to wake up her brother who was sleeping on the terrace; while she was there she called out the name of PW-1; there was no response; on opening the door she saw that the mother of Pappu was lying on one side and Pappu was also lying face down in an injured condition, blood was spattered around; Pappu, PW-1 was woken up by her; he narrated the incident which had taken place on the previous night i.e. about his mother being attacked by his step-father and chacha. PW-2 related this incident to her father. In her cross-examination this version has been reiterated.

19. The father of PW-2 Ram Gulam has been examined as PW-3. He had removed the injured PW-1 to the hospital at 10.00AM. On oath he has deposed that Maiju was his tenant; he was living there with his wife and son Pappu. Another person i.e. the devar of the deceased, either named Saiju or Maju had come to live with them two-three days prior to the incident. PW-3 had also informed the police. In his cross-examination, he has stated that his house is a three storeyed apartment and he is in occupation of the ground floor and the first floor, the top most floor was in occupation of Sumita. Nothing has been elicited in his cross-examination to dent his version. Version of PW-3 has established that the present appellant i.e. Suresh @ Saiju three days prior to 21.9.2004 had come to reside with his brother Maiju, the deceased Sumita and the injured child Azad @ Samanto @ Pappu.

20. We have noted the reasoning of the trial Judge while rejecting the plea of alibi which had been taken by the defence. It would be relevant to note that learned defence counsel has not cross-examined any of the witnesses of the prosecution on the defence now sought to be set up that on 21.9.2004 the accused Suresh @ Saiju was not present in the house i.e. at G-245, Jahangir Puri and had in fact gone to attend the cremation of Vidyawati; neither does this defence find any mention in the cross-examination of the witnesses of the prosecution and nor had it surfaced till the time the

statement of the accused was recorded under section 313 of the Cr. P.C.. In his statement under Section 313 of the Cr. P.C. the accused had stated that he has been falsely implicated and he has no relation with the deceased or the injured. Even up to this stage he had nowhere taken up the plea of alibi. This plea found mention for the first time when the statement of the witnesses of the defence were recorded i.e. of DW-1 and DW-2 on 26.3.2007. DW-1 and DW-2 have made parrot like recitations; they have exhibited five photographs Mark D-1 to D-5 of the scene of the cremation depicting the presence of the present appellant in one photograph i.e. Mark D-1. DW-1 had stated that on 21.9.2004 his mother was cremated at about 4.00 PM and accused Saiju who is the son-in-law of his brother had come to attend her cremation. In his cross-examination, he has admitted that his father had already expired and no photographs had been taken at the time of his cremation. He has admitted that the photographs proved in his version i.e. Mark D-1 to D-5 do not depict the date; the presence of accused Suresh has been noted in one photograph encircled at point 'A' in Mark D-1. He has admitted the colour of the flag on the 'Jahaj' depicted in mark D-2 is different from the colour of the flags depicted in the other photographs i.e. mark D1, D-3 to D-5; he has also admitted that the border of the photograph mark D-2 is in green colour whereas the border on the other photographs is in

white colour. DW-2 has deposed on the same line as DW-1. The deceased Vidyawati was his mother-in-law; in his cross-examination he has stated that at the time of cremation of his father-in-law no photographs had been taken; he has admitted that the border of the photograph Mark D-2 is in a different colour from the other photographs Mark D-1, D-3 to D-5 and the colours in the flags of the 'Jahaj' are also different in Mark D-2 as compared to Mark D-1, D-3 to D-5.

21. It is relevant to point out that the presence of the accused is noted in only one photograph Mark D-1. The face of the dead body has also been depicted in one photograph i.e. Mark D-2. Besides the fact that the plea of alibi has been taken at a much belated stage; even otherwise it has clearly been established that the photograph Mark D-2 which is the photograph of the dead body was taken on a different date as compared to the other photographs; not only is the border of this photograph different but the colour of the flags on the 'Jahaj' are also different; photographs at a cremation are also not taken in routine; the plea of alibi is clearly false and was rightly rejected by the trial Court.

22. Testimony of PW-18 Dr. Seema, Medical Officer of the BJRM Hospital has proved the MLC of Azad @ Samanto @ Pappu evidencing the injuries on his person as grievous. As per this MLC the victim was referred to the Surgery Ward, the Department of ENT

and also to the Orthopedic department. X- ray record of PW-1 had been proved by Dr.Shipra Rampal PW-20 Radiologist in the said hospital. She had given her detailed report Ex.PW-20/A which had evidenced a fracture of the middle phalynx of the left finger; the injuries sustained by PW-1 were grievous.

23. In our view the judgment of the trial Judge calls for no interference; the evidence, both ocular and documentary had been appreciated in the correct perspective. Conviction of the appellant under Section 302/34 of the IPC for having committed murder of Sumita and his second conviction under Section 307/34 of the IPC for having caused injury on the person of Azad @ Samanto @ Pappu which was an attempt to kill him, calls for no interference. Appeal is without any merit; it is dismissed. Appellant is on bail; his bail bond and surety bonds are cancelled. He shall surrender forthwith to suffer the remaining sentence.

**(INDERMEET KAUR)**  
**JUDGE**

**(PRADEEP NANDRAJOG)**  
**JUDGE**

16<sup>th</sup> September, 2009  
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