

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

% *Date of Decision: 20th January, 2010*

+ **CRL.APPEAL NO. 463/2002**

JAMSHED Appellant
Through: Mr.Bhupesh Narula, Advocate.

Versus

STATE Respondent
Through: Mr.M.N.Dudeja, APP

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? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J.(Oral)

1. Noting that none had been appearing for the appellant; further noting that Sh.K.D.Kalia, Advocate who had filed the appeal did not appear on three consecutive dates when instant appeal was called for hearing i.e. on 6th, 7th and 8th January 2010, vide order dated 11.01.2010 we had directed Production Warrants to be issued to the Superintendent Central

Jail Tihar, with a direction that the appellant should be produced in Court on 18.01.2010.

2. On 18.01.2010, an order was passed recording that as per the Superintendent Central Jail Tihar, the appellant had been transferred to Rampur Jail on 11.02.2002 and thereafter he was transferred to the District Jail at Bareilly on 11.06.2002.

3. There being a difficulty in securing the presence of the appellant and noting that his lawyer had not been appearing, vide order dated 18.01.2010 we had appointed Mr. Bhupesh Narula, Advocate who is on the panel of Delhi High Court Legal Services Committee, as an Amicus Curie to argue the appeal. Paper book was supplied to Sh. Bhupesh Narula, Advocate in Court itself and the appeal was retained on Board; to be taken up as and when Mr. Bhupesh Narula, Advocate informed the Court that he was prepared to argue the appeal. We are happy to note that learned counsel Sh. Bhupesh Narula has fully prepared himself and has mentioned the matter to us today; stating that he is prepared to argue the appeal.

4. Accordingly, we have proceeded to hear arguments in the appeal and having concluded the hearing, we are proceeding to dictate our opinion.

5. Vide impugned judgment and order dated 04.06.2002, the appellant has been convicted for the offence punishable under Section 392/397/302/34 IPC and for the offence punishable under Section 27(1) of the Arms Act.

6. Vide order on sentence dated 06.06.2002, for the offence of murder the appellant has been sentenced to undergo imprisonment for life. For the offence punishable under Section 392 read with Section 397 IPC he has been sentenced to undergo imprisonment for 7 years; same sentence has been imposed upon him pertaining to the offence punishable under Section 27(1) of the Arms Act.

7. It may be noted at the outset that there were three suspects pertaining to the crime which was committed at 2:20 PM on 09.07.1996, when 2 persons shot at Gagan S/o Ram Mohan Rai and snatched a bag containing Rs.5 lacs which was withdrawn by Gagan from the bank and fled on a motor-cycle which was stationed nearby on which the third accused was sitting. One of the three persons never being apprehended, appellant and Faheem being apprehended were sent for trial but Faheem absconded mid-trial and thus the trial continued only against the appellant.

8. In returning a verdict of guilt against the appellant, the learned Trial Judge has held that the testimony of Ram Mohan Rai PW-1 and Sher Singh PW-3 inspires confidence and since said two persons had identified the appellant as one out of two boys who fired at the deceased and had fled on a motor-cycle along with a third person after snatching the bag from the hand of the deceased containing Rs.5 lacs, the same was good evidence wherefrom the guilt of the appellant could be inferred. The learned Trial Judge has referred to the recovery of Rs.40,000/- at the instance of the appellant as being duly proved. But, we do not find that the learned Trial Judge has or has not used said evidence. We note that after discussing the controversy pertaining to the recovery in para 25 of the impugned decision, the learned Trial Judge has suddenly closed the discussion by recording that the present case is based on the evidence of the eye-witnesses and the recovery would be only a corroborative piece of evidence.

9. It may be noted at the outset that no weapon of offence was recovered. Before proceeding with the analysis of the evidence we may note that recoveries are not corroborative piece of evidence. Recoveries pursuant to disclosure statement

are independent evidence and if linked to the crime are treated as pieces of incriminating evidence. This means that the said evidence has to be used in conjunction with other incriminating evidence held established and then see whether the chain is complete or whether the cumulative weight of the incriminating circumstances or evidence reaches a level of proof wherefrom any ordinary person would draw a conclusion that a particular fact has been proved.

10. Vide DD No.10A dated 09.07.1996 recorded at PS Anand Parbat at 2:20 PM, information was recorded that a firing had taken place opposite Kamal Hotel, Anand Parbat area. ASI Vasu Dev PW-20 accompanied by Ct.Uday Vir PW-5 left for the spot and saw blood lying in front of Gali No.5, Than Singh Nagar, and a live cartridge at some distance. He learnt that the injured was removed to Jeevan hospital and thus he proceeded to said hospital where he found Ganga S/o Ram Mohan Rai admitted in the hospital having firearm injury and unfit to make a statement. Accordingly, ASI Vasu Dev obtained the MLC Ex.PW-14/A of Gagan. In the hospital he met Ram Mohan Rai PW-1, the father of Gagan, whose statement Ex.PW-1/A was recorded by him and after making endorsement Ex.PW-20/B, he sent

Ct.Uday Vir for FIR to be registered. Crime team was also summoned at the spot. He returned to the spot where a photographer Sanjay from Wimpy Studio was called who took photographs of the site. Live cartridge lying at the spot was lifted. With the help of cotton blood was lifted. Blood stained street portion was lifted. Control earth was lifted. The same were recorded in the recovery memo Ex.PW-5/A. Site plan Ex.PW-20/C was prepared with the marginal notes pertaining to the spot wherefrom various exhibits were recovered and thereafter the same were sent to the Malkhana for safe deposit.

11. Gagan could not survive in spite of medical aid and died on 22.07.1996 which information was recorded vide DD No. 15 Ex.PW-19/A. Further investigation was handed over to Insp.Satya Prakash who prepared the inquest papers and sent the dead body of the deceased to the mortuary of the Civil Hospital Delhi, where Dr.L.T.Ramani PW-16 conducted the post-mortem and prepared the report Ex.PW-16/B noting therein the surgical and firearm wounds. Two firearm entry wounds and an exit wound were noted. The two entry wounds were in the chest region.

12. The only clue available with the police was the

description of two boys who had fired at the deceased, with reference to their probable age, height and colour of the skin, for the reason in the statement Ex.PW-1/A, Ram Mohan Rai had informed that on the day of the incident, he and his son had withdrawn Rs.5 lacs from a bank and were returning to their factory in Anand Parbat and at around 2:10 PM had reached Gali No.5, Rohtak Road. They parked their car DL 7C 3494 at that spot and proceeded on foot towards their factory. His son was having a raxine bag containing the money, when all of a sudden two young men aged 25 years - 26 years, one of whom was approximately 5' 7" tall and the other was 5' 5" tall intercepted his son. The boy who was 5' 7" tall was wearing a pant and a black coloured shirt and was having a country made pistol in his hand. He was wheatish in complexion. The other boy whose height was 5' 5" was also wheatish in complexion and was wearing a brown coloured shirt. Even he was armed with a country made pistol. Both fired at his son and snatched the bag. They sat behind a Yamaha motor-cycle which was parked nearby on which a third boy was already sitting and all fled away.

13. It is obvious that the clues available with the police

were meager. Break through was arrived when Faheem was apprehended on 13.8.1996 by ASI Vasu Dev PW-20, who as usual, i.e. as always deposed by the police, while deposing in Court, stated that he did so on secret information received.

14. Personal search memo Ex.PW-8/A of Faheem records nothing of substance recovered. He made a disclosure statement Ex.PW-8/B admitting to the crime and informed how the loot was distributed amongst the friends. As claimed by ASI Vasu Dev he led the police to his house and got recovered Rs.1,500/- which was seized vide memo Ex.PW-8/C. As claimed by ASI Vasu Dev, Faheem led him to Ashoka Export in Tamur Nagar Delhi from where appellant was apprehended on 17.8.1996. He made a disclosure statement Ex.PW-15/E, as claimed by ASI Vasu Dev. He thereafter led the police to the house of one Javed (DW-2) being House No.108, Gali No.5, Ambedkar Basti, Mauj Pur and produced a suit case from under a thakat from which suit case Rs.40,000/- in the nomination of Rs.100/- were recovered and said recovery was reflected in the memo Ex.PW-15/B.

15. To complete the record of the narratives, it may be noted that after Faheem was arrested TIP proceedings were

fixed for 16.8.1996 and as recorded in the memo Ex.PW-10/B of the proceedings by Mr.Vinod Kumar, MM Delhi (PW-10), Faheem refused to participate in the proceedings alleging that his face was shown to the witness. Similarly, after appellant was arrested, TIP proceedings were fixed for 26.8.1996. Appellant refused to participate alleging that he was shown to the witness. The record of the proceedings dated 26.8.1996 was prepared by Vinod Kumar PW-10 being Ex.PW-10/D.

16. Sher Singh PW-3 has a factory in the same area where Ram Mohan Rai and his son had a factory. He claimed to have witnessed the shooting. Thus, the prosecution had two eye witnesses; namely Ram Mohan Rai PW-1 and Sher Singh PW-3.

17. The other evidence against the appellant which was sought to be led at the trial was the recovery of Rs.40,000/- pursuant to his disclosure statement as recorded in the seizure memo hereinabove referred to.

18. Ram Mohan Rai appeared as PW-1 and deposed that on 9.7.1996 he and his son Gagan Mohan had returned to their factory at Anand Parbat from the bank in their car No.DL 7C 3494. The time was around 2:20 PM. They had withdrawn

Rs.5 lacs from the bank. The car was parked on the side of their factory 17-78, Gali No.5, Than Singh Nagar, Anand Parbat. His son took out the bag containing the money. When he had just taken out the bag firing started from the front and back. His son fell down because of the bullet injuries. Two boys snatched the bag and ran away. On a motor-cycle which was stationed at a distance of about 100 yards one person was sitting. The two boys who had fired the shots and had snatched the bag ran towards the motor-cycle. All 3 fled away. One boy who had fired was wearing a black coloured printed shirt. Other was wearing jeans and a coloured shirt. He tried to chase the two boys but because of swelling on his leg could not do so. He raised an alarm but nobody came to their rescue. He informed the police. His son was removed to the hospital by one Sher Singh who was standing there. He also went to the hospital where his statement Ex.PW-1/A was recorded. He accompanied the police to the spot where the live cartridge was taken into possession vide memo Ex.PW-1/B. Blood, blood stained earth was collected from the spot as entered in the memo Ex.PW-5/A. His son expired in Jeevan Hospital on 22.7.1996. He identified the dead body of his son

in the mortuary. He was called to Tihar Jail on 16.8.1996 for TIP of Faheem who refused to participate in the TIP Proceedings. He was not called for any TIP on 26.8.1996. He had seen accused Jamshed i.e. the appellant on the date of the incident and subsequently when he appeared in Court on different dates. For unexplainable reasons the witness was declared hostile and was cross-examined by the learned Additional Public Prosecutor. On being cross examined he admitted that it was correct that on 15.10.1996 while he was sitting outside the Court with Sher Singh two persons in police custody were brought to the Court of the Magistrate and he identified one out of the two being Jamshed.

19. On being cross-examined by the accused i.e. the appellant he stated that he cannot tell as to who was wearing the jeans at the time of the occurrence i.e. whether it was Jamshed or Faheem. He also stated that he could not say whether Jamshed fired from the front or from the back.

20. Sher Singh PW-3 deposed that he was working in factory No.17-73 and 78, Gali No.5, Than Singh Nagar. On 9.7.1996 he came out of the factory after lunch and saw Ram Mohan Rai coming along with his son Gagan Mohan and the

two parked their car. Gagan took out a bag from his car and put it on his shoulder. He heard noise of two shots akin to busting of crackers. Gagan Mohan fell down. Two boys snatched his bag while running away a cartridge fell from the hand of one boy. Ram Mohan Rai chased those boys who ran towards a motor-cycle. He removed the injured in a TSR to Jeevan Hospital. The accused i.e. the appellant present in Court was the person who had fired the shot on the back of Gagan Mohan.

21. On being cross-examined by a learned counsel for the appellant he admitted that he did not mention the description of the two boys who had seen in his statement it was recorded by the police.

22. The appellant who was the only person to face the trial since one of the three accused could never be apprehended and the second i.e. Faheem absconded mid-trial, led defence evidence by examining Mr.R.S.Tripathi DW-1 working as a senior supervisor in the Central Telegraphic Office Eastern Courts who stated that the Department preserves originals of telegrams for 3 months and thus could not produce the original record pertaining to the copy of the

telegram Ex.DW-1/A but admitted that the said copy bears the seal of the Telegraph Office Eastern Courts, New Delhi.

23. Javed Khan DW-2, the person from whose house the prosecution claims appellant having got recovered Rs.40,000/- from a suit case deposed that the appellant was picked up from his house by the police on 12.8.1996 and that he had sent a telegram to various authorities on 14.8.1996 and that copy thereof was Ex.DW-1/A. The telegram informs that the appellant was illegally picked up by the police.

24. On being cross examined Javed Khan explained the delay in sending the telegram on 14.8.1996 with respect to his claim that the appellant was picked up by the police on 12.8.1996 by stating that he was searching for the appellant and since he could not find him up to 14.8.1996 he sent the telegram in question.

25. Learned Trial Judge has discussed the evidentiary worth of the testimony of the defence evidence in para 28 of the impugned decision by holding as under:-

“28. As regards the alleged arrest of accused on 12.8.96, it is worth-noting that DW-1 Javed Khan deposes that he did not send the telegram on 12.8.96. He sent the telegram on 14.8.96. He explained that he was searching the accused and when he did not find him upto 14.8.96 he sent the

telegram. It is worth-noting that if DW-2 Javed Khan had really known that the accused Jamshed had been taken away by the police on 12.8.96, there was no question of his searching the accused Jamshed upto 14.8.96. Accordingly, the defence version that the accused was arrested on 12.8.96 is not believable.”

26. Challenging the findings returned by the learned Trial Judge, learned counsel for the appellant urges that the testimony of Ram Mohan Rai PW-1 and Sher Singh PW-3 pertaining to the identification of the appellant as one out of the two boys who fired at the deceased and snatched the bag containing Rs.5 lacs is not trustworthy for the reason Ram Mohan Rai could have had no more than a fleeting glimpse of the persons who had committed the crime and thus dock identification for the first time in Court by Ram Mohan Rai is suspect. Qua Sher Singh PW-2, reiterating the same submission counsel additionally points out that Sher Singh has admitted being in partnership with Ram Mohan Rai. Counsel states that there is no evidence of Sher Singh being present at the spot. Counsel terminates the submission by urging that Sher Singh is a planted witness.

27. Attacking the recovery attributed to the appellant, learned counsel for the appellant urges that everything has

been cooked up by the police. Our attention has been drawn to the contents of Faheem's disclosure statement Ex.PW-8/B recorded on 13.8.1996 and the disclosure statement Ex.PW-5/E of the appellant recorded on 17.8.1996. It has been shown that the confessional parts thereof are verbatim copy of each other. Counsel urges that it is just not possible that two accused, on two separate dates, would use identical words while disclosing about their involvement in a crime. Taking the challenge a little further, with reference to the testimony of ASI Basudev PW-2, learned counsel points out that as per the said police officer the appellant had produced a key and thereafter opened the brief-case containing Rs.40,000/- which was recovered as entered in the memo Ex.PW-15/D. Drawing our attention to the personal search memo Ex.PW-15/A pertaining to the appellant after he was arrested, learned counsel points out that no key has been shown as recovered therein. Counsel wonders as to wherefrom appellant produced the key when he led the investigating officer to Javed's house being House No.108, Gali No.5, Ambedkar Nagar, Mauj Pur. To put it in a nutshell, learned counsel urges that the recovery of Rs.40,000/- at the instance of the appellant is tainted and

hence said evidence has to be ignored as incriminating evidence against the appellant. Learned counsel further points out that PW-1 had not identified the currency notes which were recovered, as the ones which he had withdrawn from the bank in the company of his son.

28. We deal with the testimony of Ram Mohan Rai PW-1 and that of Sher Singh PW-3 for the reason both of them claim to have seen the appellant shoot at the deceased and thereafter along with the other co-accused snatch the bag from the hand of the deceased and flee. For if, we are satisfied with the fact that the two identifying the appellant in Court inspires confidence, it may become irrelevant to discuss any further.

29. It may be noted that the police filed an application during investigation for test identification of the appellant and the learned Metropolitan Magistrate notified a date being 26.8.1996 on which date the appellant was produced but he refused to participate in the test identification proceedings stating that he was shown to the witness. There is no evidence on record that after he was apprehended the appellant was shown to any witness till 26.8.1996. That PW-1

while deposing in Court has stated that he never went to the Court for TIP proceedings on 26.8.1996 appears to be a memory lapse for the reason the written memorandum pertaining to the TIP proceedings conducted by Vinod Kumar MM Delhi PW-10 i.e. the proceedings Ex.PW-10/D prove that TIP proceedings held in which the witness was present but the accused refused to participate in the TIP proceedings. Thus, having frustrated the TIP proceedings the appellant cannot gain any benefit by urging that his dock identification for the first time in Court does not inspire confidence.

30. On the issue of appellant being identified in the Court by PW-1 and PW-3, it may be noted that PW-1 who is the father of the deceased has deposed that when he and his son got down from the car, the appellant and co-accused Faheem fired a shot each at his son who was hit and fell down. The accused came into body contact with his son, though not stated by him, can be inferred from the fact he has stated that both accused snatched the bag containing the money from the hand of his son. Meaning thereby, that PW-1 had more than a fleeting glimpse of the appellant. He has further deposed that after snatching the bag the appellant and the co-accused ran

and he attempted to chase them but gave up the chase as he had swelling on his leg. This means that PW-1 did not lose sight of the appellant till the appellant fled to the place where the motor-cycle was parked by the third associate i.e. it is apparent that PW-1 saw the appellant for at least a minute or so. The crime was committed at around 2:20 PM i.e. during bright day light. We are thus satisfied that PW-1 could have identified the appellant when he deposed in Court. Our inference is re-strengthened from the fact that in his statement made to the police soon after the crime he has given the features of the accused showing that he had a good opportunity to see the accused and their physical features were deeply etched in his memory.

31. On the issue of dock identification not being preceded by any TIP proceedings, in the decision reported as 1988 SC 345 *Hari Nath & Anr. Vs. State of UP*, it was observed that not conducting TIP proceedings is not fatal in every case. It was observed that where the evidence is brought on record that the accused not earlier known to the witness was seen by the witness for so long that an enduring impress of the identity on the mind and the memory of the witness got well etched,

dock identification, if inspiring confidence would be good evidence.

32. PW-1 has stated that Sher Singh removed his son to the hospital and this statement of his has not been challenged during cross examination. Thus, submission of learned counsel that there is no independent evidence of Sher Singh being present is not correct.

33. With reference to the deposition of Sher Singh, it is apparent that even Sher Singh had more than a fleeting glimpse of the appellant and merely because he was a business partner of PW-1 would not mean that he is an interested witness.

34. Being satisfied with the quality of evidence of the two eye witnesses who had indicted the appellant as having seen him fire at the deceased and along with the co-accused fled after snatching the bag containing the money from the hands of the deceased, it hardly matters if there is some blemish in the recovery of Rs.40,000/- pursuant to the disclosure statement of the appellant.

35. It is no doubt true that Faheem's disclosure statement and that of the appellant are near identically

worded. But the same assumes no importance in the instant case for the reason Rs.40,000/- have been got recovered by the appellant from the house of Javed who has been produced as a defence witness by the appellant but has not uttered a word in denial that the police never came to his house and much less recovered Rs.40,000/- from a suit case pulled out from under a thakat by the appellant. That ASI Vasu Dev has stated that the appellant produced the key of the suit case appears to be an inadvertent statement while deposing in Court for the reason the pointing out cum seizure memo Ex.PW-15/D nowhere records said fact. It is obvious that the suit case was not locked.

36. That the currency notes were not identified by any witness being the ones which were in the bag of the deceased is neither here nor there.

37. Qua the evidence led in defence, apart from the reasoning of the learned Trial Judge we wish to add that it is coming to the notice of this Court that criminals and gangsters have started understanding the nuances of criminal law and some of them have started taking preventive defensive measures. The nominal role of the appellant shows his

involvement in 8 other crimes committed in Delhi, Western Uttar Pradesh and the State of Uttrakhand. The offences relate to theft, robbery, dacoity and attempt to murder. It assumes importance that the co-accused Faheem was apprehended on 13.8.1996. The gangsters knew that Faheem being in the grip of the police would blurt out the names and the addresses of the other gangsters and thus took anticipatory preventive measures by sending a telegram on 14.8.1996 that the appellant had been picked up by the police. Had the appellant been actually picked up by the police on 12.8.1996 as claimed in the telegram we see no reason why a hue and cry was not created on 12.8.1996 or 13.8.1996.

38. We find no merit in the appeal which is dismissed.

**(PRADEEP NANDRAJOG)
JUDGE**

**(SURESH KAIT)
JUDGE**

**JANUARY 20, 2010
mr/mm/dk**