

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

% *Judgment Reserved On: 18th January, 2010*
Judgment Delivered On: 21st January, 2010

+ **CRL.APPEAL NO.896/2002**

MOHD. NASEEM Appellant
Through: Mr.Mukesh Jain, Advocate

Versus

STATE Respondent
Through: Ms.Richa Kapoor, Advocate

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.

1. Believing that Meena (the deceased) made three dying declarations, the first to her daughter Shameena PW-2, the second to the doctor on duty at the hospital where she was brought in an injured condition and the third to ASI Ateeq Ahmed, in which she disclosed that the appellant who was her

step son had shot her, as also the testimony of Salma Bano PW-4, who claimed to be an eye witness, the learned Trial Judge has returned a finding of guilt against the appellant.

2. As per the prosecution the deceased was the second wife of Mohd.Raees and the appellant was her step son. One Mohd.Anees and Mohd.Raees (both proclaimed offenders), had caught Meena and on Mohd.Raees exhorting, the appellant fired with a pistol and all accused fled. Since Mohd.Anees and Mohd.Raees were declared proclaimed offenders, the instant trial relates only to the appellant.

3. The date of the incident is 26.9.1999. The time is 6:30 PM. The place of the occurrence is in dispute. As per the prosecution Meena was shot on the street at Faatak Baan Wala, Chitli Kabar. Learned counsel for the appellant points out that as per the testimony of Mohd.Nafees PW-5 the place of the crime could not be Faatak Baan Wala but 8 to 10 shops away.

4. It may be noted at the outset that the relevance of this controversy would be whether at all Salma Bano PW-4 was present with the deceased when the deceased was shot.

5. The police got information of the crime when DD No.20-A was recorded at the local police station at 7:08 PM on 26.9.1999 when Meena was brought in an injured condition to

LNJP Hospital. ASI Ateeq Ahmed PW-10 accompanied by Const.Manoj went to LNJP Hospital where Meena was found admitted in the casualty. Her MLC Ex.PW-3/A records that Nafees (PW-5) had brought her to the hospital. The time of arrival noted is 7:00 PM.

6. The MLC is in the handwriting of Dr.Allimuddin the Additional Chief Medical Officer of the hospital. It also records the name of Dr.Prem Kumar PW-3 who was the then Chief Medical Officer of LNJP Hospital. It stands recorded in the MLC that the history of the injury has been told by the patient herself that her step son Naseem i.e. the appellant had shot her about 10 minutes ago in Chitli Qaber area. It is recorded in the MLC that the patient was conscious and oriented. The pulse recorded is 76 beats per minute. BP recorded is 110/80 mm Hg. There is an endorsement on the MLC by some doctor, noting the time 10:00 PM and certifying the patient is fit for statement.

7. As per ASI Ateeq Ahmed when he reached the hospital he found Salma Bano PW-4 whose statement Ex.PW-4/A was recorded by him and after making an endorsement Ex.PW-4/B he forwarded the same for FIR to be registered. As recorded in the endorsement Ex.PW-4/B the tehrir was dispatched from

the hospital at 8:40 PM. Thereafter, in the casualty he recorded the statement Ex.PW-10/C of Meena.

8. In the statements of Salma Bano and Meena, both have disclosed that the husband of Meena i.e. Mohd.Raees and one Mohd.Anees caught Meena and appellant shot at her with a pistol and thereafter all fled. As per Meena the motive for the crime was a dispute between she and her husband pertaining to property and hence the desire of her husband and her step son to kill her.

9. It is apparent that the case of the prosecution would hinge upon the testimony of ASI Ateeq Ahmed, Salma Bano, Mohd.Nafees, Shameena and the doctor who prepared the MLC of Meena. But, before noting their testimony, it may be noted that it is not in dispute; a fact conceded by learned counsel for the appellant and the State that there is evidence of a property dispute between the deceased and her husband. This dispute has been sought to be used to their advantage by both sides. Whereas, appellant claims that due to past enmity, the crime being committed by an unknown assailant, he has been falsely implicated; the prosecution urges to the contrary by stating that the foundation of the crime was the motive of Mohd.Raees to kill the deceased with whom he was having a property dispute and

appellant being the son of Mohd.Raees from his first wife, would be beneficiary thereof.

10. Three other important facts may be noted. The first is that Mohd.Nafees PW-5, the person whose name is recorded in the MLC Ex.PW-3/A, as the one who brought Meena to LNJP Hospital, while deposing as PW-5 has categorically deposed that a crowd gathered in the market attracted his attention and when he reached the crowd he saw a woman lying in an injured condition and he took the said woman in a rickshaw to the hospital and got her admitted there. He deposed that he was in his shop at that time which was 7 to 8 shops away from Faatak Baan Wala. That the crowd had gathered towards the other side of his shop, not the side towards Faatak Baan Wala but the other and the exact place where the crowd had gathered was 3 to 4 shops away from his shop.

11. It may be highlighted by us that neither the prosecution nor the defence has got highlighted through the testimony of Nafees as to where was the exact spot wherefrom he picked up Meena from the street.

12. The second important fact to be noted is that neither the rough site plan prepared by ASI Ateeq Ahmed nor the site

plan to scale lists the spot wherefrom Salma Bano PW-4 witnessed the incident.

13. The third is that the weapon of offence was not recovered.

14. We note the testimony of Salma Bano, Shameena, ASI Ateeq Ahmed and Dr.Prem.

15. Shameena PW-2, deposed that on 26.10.1999 (the date appears to be a typographic error and should read 26.9.1999) she was going with her friend Jeba to Chitli Qaber Bazaar and saw her mother Meena in a rickshaw with her foster sister Salma Bano. Salma Bano was weeping and her mother Meena was in the lap of Salma Bano. On inquiry, her mother told her that she was shot. She hired another rickshaw and followed her mother and Salma Bano to the hospital where her mother told her that Mohd.Raees and Anees had caught her and the appellant had fired at her.

16. Dr.Prem PW-3, deposed that on 26.9.1999 he was working as a CMO in the casualty of LNJP Hospital. Dr.Allimuddin was the Additional CMO. Both were present in the casualty at 7:00 PM. Meena wife of Mohd.Raees was admitted in the casualty. Under his i.e. Dr.Prem's supervision, Dr.Allimuddin prepared the MLC Ex.PW-3/A of Meena after

Meena was examined by him i.e. Dr.Prem and Dr.Allimuddin. He deposed that the history recorded in the MLC was as disclosed by the patient herself. On being cross examined he stated that he did not remember whether any police officer approached him about the patient.

17. Suffice would it be to note that Dr.Prem PW-3 was not cross examined with reference to the contents of MLC Ex.PW-3/A. He has not been cross examined with reference to his testimony that the history recorded in the MLC was as disclosed by the patient herself. It has not been put to him that Meena was not conscious and that her pulse and BP as also the factum of her consciousness was incorrectly recorded in the MLC Ex.PW-3/A.

18. Salma Bano PW-4 deposed that on 26.9.1999 she went to meet her foster sister Meena who lived in Vijay Mohalla. Meena requested her to accompany her to Chitli Qaber where she had to meet her husband Mohd.Raees. Proceeding on foot they reached Baan Wala Faatak, Chitli Qaber at 6:30 PM. All of a sudden Mohd.Raees and Anees who were present at the spot caught Meena and Mohd.Raees exhorted 'Naseem Maar Goli Aaj Saare Mukadame Ki Jad Khatam Kar Dein'. Thereupon the appellant fired with a country made pistol on the chest of

Meena. All accused ran away. She started shouting and weeping. Somebody removed Meena to the hospital. She followed Meena in a separate rickshaw. Her statement Ex.PW-4/A was recorded by a police officer in the hospital.

19. We have noted hereinabove the testimony of Mohd.Nafees PW-5 in para 10 above.

20. ASI Ateeq Ahmed PW-10, deposed that on receipt of DD No.20A he left the police station at about 7:08 PM in the company of Const.Manoj. At LNJP Hospital he met Salma Bano whose statement Ex.PW-4/A was recorded by him and that after making the endorsement Ex.PW-10/B thereon he sent the same for FIR to be registered. He recorded the statement Ex.PW-10/C of Salma Bano. Returning to the spot he prepared the rough site plan Ex.PW-10/D and that thereafter he entrusted the investigation to Insp.Suresh Dabas on 28.9.1999 since Meena expired on said date and the offence of murder was added in the FIR which hithertofores was recorded for the offence of attempt to murder.

21. What needs to be considered by us is whether Shameena PW-2 has deposed truthfully. Whether Salma Bano was present with the deceased? Whether Dr.Prem is the recipient of dying declaration from the deceased? Whether ASI

Ateeq Ahmed is also the recipient of the dying declaration of the deceased? What is the effect of the rough site plan Ex.PW-10/D and the site plan to scale, not recording the spot wherefrom blood of the deceased was lifted as also the effect of the two plans not showing where deceased and Salma Bano were positioned when the deceased was shot.

22. Before commencing further journey towards our destination i.e. what is the truth, it may be noted that as per the post-mortem report of the deceased, she was shot with a firearm in the chest and the internal damage caused by the projectile resulted in her death.

23. The MLC Ex.PW-3/A of Meena (the deceased) shows that she was brought to the hospital by Mohd.Nafees who is none else other than PW-5. As per Mohd.Nafees he removed the injured lady to the hospital and none accompanied the two in the rickshaw. Even Salma Bano PW-4 states that she followed the rickshaw in which Meena was removed to the hospital by hiring another rickshaw. Thus, it is apparent that Shameena PW-2 is not speaking the truth for the reason she could not have seen her mother in an injured condition on the lap of Meena in a cycle rickshaw and her mother could have told her nothing in the manner deposed by Shameena. Thus, the

learned Trial Judge ought not to have relied upon the testimony of Shameena who has volunteered something to the police which she had not even seen or heard.

24. From the contents of the MLC Ex.PW-3/A of Meena and the deposition of Dr.Prem PW-3, it is apparent that the history recorded in the MLC pertaining to the injury on Meena was told by Meena herself when Dr.Prem and Dr.Alimuddin examined Meena. That Meena was conscious when she was admitted to the hospital has been stated as a matter of fact by Dr.Prem who has not even been examined on said aspect. Besides, the MLC corroborates the consciousness of Meena. This corroboration is to be found where it is recorded in the MLC that the heart beat of Meena was 76 beats per minute and her BP was 110/80 mm Hg. The pulse and the BP are that of a normal person. This further strengthens the fact that Meena was conscious and oriented when brought to the hospital.

25. The teherir Ex.PW-4/B prepared by ASI Ateeq Ahmed shows that the same was dispatched from the hospital at 8:40 PM and ASI Ateeq Ahmed has not been questioned on said issue. The statement Ex.PW-4/A of Salma Bano precedes the teherir. Both Salma Bano and ASI Ateeq Ahmed have said that the statement Ex.PW-4/A was recorded at the LNJP Hospital.

Nothing has been shown to us which discredits said fact. It is thus apparent that Salma Bano had met ASI Ateeq Ahmed at the hospital when he reached there.

26. No suggestion has been given to Salma Bano that she reached the hospital after receiving information of Meena being shot. Salma Bano has deposed that she started crying and became nervous when Meena was shot and that someone from the crowd removed Meena to the hospital and in a separate rickshaw she followed Meena to the hospital. It is no doubt true that Mohd.Nafees PW-5 has not stated that he saw Salma Bano at the spot when he removed Meena to the hospital, but, from said fact alone it cannot be said that Salma Bano is deposing falsely.

27. How a person reacts in a given situation and what catches the eye of a person in a given situation may vary from person to person. In a crowded market place a shot is fired through a firearm and a pedestrian on the street falls down. the noise of the shot attracts the attention of persons in the street who instinctively turn towards the spot wherefrom the sound of the firearm was heard. The first glimpse of some catches the sight of somebody running. The eyes of these persons would tend to follow the movement of the person fleeing and when

questioned about the features of the said person and the clothes worn by him, these persons would give good description of the person whom they saw fleeing. Simultaneously, the eye of some persons catches the sight of a person falling. These onlookers tend to look on to the said person and when questioned would give a good description of what happened to the person who was shot. Yet again, some persons react to the aid of the victim by attempting to flag down a motor vehicle or a rickshaw and thus these persons would be least expected to depose about who was running away and in what manner the victim fell. Further, each one of them would not notice the presence of the other. It may be kept in mind that single shots are fired in the flash of the moment and the assailants flee in the wink of the eye. It just depends upon the eye of the viewer as to what segment of the event is noticed.

28. Salma Bano's residential address informs this Court that she comes from a humble socio-economic background. That she is an illiterate person is to be found in the fact that after she deposed in Court she affixed the right thumb impression on her testimony and did not append her signatures thereto. Her instinctive reactions on seeing a crime being committed and her narratives thereof in a Court of Law where

the atmosphere is fairly intimidating to a witness have to be tested with reference to her being a poor, illiterate lady of humble origin.

29. Her claims of crying for help when her foster sister was shot, is not unnatural. Women tend to become hysterical when faced with adverse situations. Thus, Mohd.Nafees removing Meena to the hospital and Salma Bano following in a separate rickshaw is an event which is possible and thus the testimony of Salma Bano cannot be thrown in the dustbin on a hypothesis as projected by learned counsel for the appellant.

30. We see no reason why Salma Bano would be telling a lie. It is no doubt true that her foster sister i.e. the deceased was having a property dispute with Mohd.Raees, but it is against human nature to let go a person who murders one's near and dear one just to wreck vengeance on somebody whom one may not like.

31. That the investigation officer failed to pick up blood sample of the deceased from the street and even failed to lift blood stained concrete from the street is no doubt a lapse of the investigating officer. But, where there is unimpeachable evidence of good quality wherefrom the guilt of an accused can

be inferred, said lapses have to be ignored unless it is shown that a serious prejudice has been caused to the defence.

32. We are conscious of the fact that the exact spot where the crime was committed being determined would be a relevant fact while ascertaining the credibility of the testimony of Salma Bano and in this area of consideration it has to be kept in mind that as per Mohd.Nafees, his shop where he was sitting, when he heard noise of the crowd outside the street was 7 to 8 shops away from Faatak Baan Wala i.e. the place where Salma Bano claims her foster sister being shot. Further, Mohd.Nafees states that the crowd had gathered 3 – 2 shops away from his shop towards the other side and not towards Faatak Baan Wala.

33. What was urged by learned counsel for the appellant was that the crowd would expectedly be near where the injured was lying and this means that the injured was lying not at Faatak Baan Wala but about 10 to 11 shops away and this means that there is a serious infirmity in the testimony of Salma Bano.

34. As noted by us in para 11 above, neither the prosecution nor the defence has got highlighted when Mohd.Nafees was deposing in Court as to where was the situs of the exact spot wherefrom he picked up Meena from the street.

35. The inference required to be drawn as impressed upon us by learned counsel for the appellant presupposes a fact: that the crowd would gather just adjacent to the spot where the injured falls after being shot. It ignores that in a public street, where two persons catch hold of the victim and the third fires through a firearm, the instant reaction of the crowd on the street is to duck for cover lest due to further firing they may get injured. Now, what did the crowd know that only one shot would be fired? Obviously none knew what further action would be chartered by the accused. In this context it does not render doubtful the testimony of Salma Bano that her foster sister was shot when they reached Faatak Baan Wala. It is possible that the crowd retracted from the spot where the injured fell and hence Mohd.Nafees saw the crowd 3 – 4 shops away from his shop towards the side not towards Faatak Baan Wala.

36. Another thing is possible. Witnesses and in particular those who are illiterate tend to be laconic while stating a fact and disclose the same in broad terms and not with technical niceties. Walking on a street, when one is near a landmark spot on the street, and if something happens, one tends to remember the spot with reference to the landmark and

while disclosing the spot, a person with lower levels of literacy may not appropriately state that the spot was near the landmark and would state that the spot was at the landmark itself.

37. The controversy which was sought to be projected as assuming gigantic proportions, on a closer look, appears to be an attempt to make a mountain out of a mole hill.

38. It is settled law that while appreciating the evidence led by the prosecution it has to be first ascertained whether the prosecution has proved its case by looking at the broad probabilities of the case and thereafter to see and identify the embellishments and then determine whether the embellishments have dented the broad probabilities proved by the prosecution. There can hardly ever be a case where minor discrepancies or errors do not creep in, for the reason every human being has human failings and limitations and God has yet to create a perfect human being. On the contrary, where a fool proof case without any embellishment or variations is brought before a Court, that itself becomes a ground to suspect the credibility of the case brought before the Court by labeling the witnesses as parrots and hence not speaking through their

own tongue but being made to speak the words through remote control.

39. As noted above, the teherir was dispatched from the hospital at 8:40 PM on the statement of Salma Bano. The statement Ex.PW-10/C of the deceased has been recorded by ASI Ateeq Ahmed thereafter. We find an endorsement on the MLC Ex.PW-3/A of the deceased recording the time as 10:00 PM when the patient has been certified 'fit for statement'. Though ASI Ateeq Ahmed has not deposed of having obtained any certification from the doctor before he recorded the statement of Salma Bano and even Dr.Prem PW-3 has thrown no light thereon, it appears that the said certification was obtained before Meena's statement was recorded by ASI Ateeq Ahmed.

40. Even ignoring the said statement Ex.PW-10/C and the testimony of ASI Ateeq Ahmed, the testimony of Dr.Prem PW-3 and the MLC Ex.PW-3/A of the deceased conclusively proves the first dying declaration made by Meena to Dr.Prem and Dr.Alimuiddin. The said dying declaration coupled with the testimony of Salma Bano whom we hold to be a truthful eye-witness is sufficient to sustain the impugned judgment.

41. The appeal is dismissed.

42. Since the appellant is still in jail we direct that a copy of our decision be sent to the Superintendent, Central Jail, Tihar for being made available to the appellant.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

JANUARY 21, 2010
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