

R-33&34

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

% Date of Decision :19th January, 2010

+ **Crl. A. No. 732/2004**

MOHAMMAD AHMAD & ORS. Appellants
Through: Mr.S.K.Duggal, Advocate
versus
STATE Respondent
Through: Ms.Richa Kapoor, APP

Crl. A. No. 801/2004

ANSAR Appellant
Through: Mr.Zafar Sadique, Advocate
versus
STATE Respondent
Through: Ms.Richa Kapoor, 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 Reporter or not? Yes
3. Whether the judgment should be reported in the Digest?Yes

PRADEEP NANDRAJOG, J. (Oral)

1. Four persons were charge-sheeted pertaining to the offence of having murdered Mohan Lal. One of them; namely Duleh Hassan absconded after he was granted interim bail and hence was declared a Proclaimed Offender. His trial was segregated. Trial continued against the other three accused;

namely Ansar, Mohd.Ahmed and Shakeel Ahmed.

2. The charge framed against the three is as under:-

“That on 01.01.1991 at about 7.30 P.M., at H.No.F-240, New Seemapuri in furtherance of your common intention, you all committed murder of Mohal Lal causing his death and thereby committed an offence punishable under Section 302/34 IPC and within my cognizance.”

3. It may be noted at the outset that no charge for the offence of conspiracy i.e. Section 120B IPC relating to the murder of Mohal Lal was framed against any accused.

4. Case of the prosecution was that accused Shakeel Ahmed owed Rs.80,000/- to Mohan Lal and having no intention to return the said money, entered into a conspiracy with the other three co-accused who murdered Mohan Lal. As per the prosecution, giving effect to the conspiracy, at 7.30 P.M. on 01.01.1991, when it was dark, Ansar drove the white colour Maruti Van bearing Registration No.DNC-2696 belonging to Sibte Hasnain PW-15 to the house of Mohan Lal and parked the same on the street outside the house. Mohd. Ahmed, who was armed with a pistol, and Duleh Hassan who was armed with a knife, went inside the house of Mohan Lal and Mohd.Ahmed fired a shot at Mohan Lal. Duleh Hassan threw the knife at the spot. The two ran out and sat in the van. Ansar drove away the

van. At the same time, Rajni PW-1, the wife of the deceased was standing on the roof of the house and saw Ansar driving the van to outside her house. She saw Mohd. Ahmed and Duleh Hassan entering the ground floor of her house and running away. Nuruddin PW-2 was at the place where the crime took place i.e. the house of Mohan Lal, from a portion whereof Mohan Lal was carrying business, using the same as a shop, he saw Mohd.Ahmed and Duleh Hassan commit the crime.

5. Vide impugned judgment and order dated 23.08.2004 the learned trial judge has convicted Ansar, Mohd.Ahmed and Shakeel Ahmed of the offence they were charged of. The three have been sentenced to undergo imprisonment for life.

6. In returning the finding of guilt against the Shakeel Ahmed, the learned trial Judge has held that two pieces of incriminating evidence have surfaced against him. The first is the proof of the fact that he owed Rs.80,000/- to the deceased; and hence had a motive. The second is that after Ansar was arrested on 06.01.1991, he made a confessional statement disclosing the conspiracy and the fact that Mohd.Ahmed and Duleh Hassan were still in the house of Shakeel Ahmed and that when the Investigating Officer went to the house of

Shakeel Ahmed, he arrested Mohd.Ahmed and Duleh Hassan along with Shakeel Ahmed from the house of Shakeel Ahmed. In other words, the presence of co-accused Mohd.Ahmed and Duleh Hassan from the house of Shakeel Ahmed has been used as incriminating evidence against Shakeel Ahmed.

7. Incriminating evidence held established against Ansar is his being identified in court as the driver of the white Maruti Van in which the assailants came to the house of the deceased; the dock identification being by Rajini PW-1, the wife of the deceased.

8. Incriminating evidence held established against Mohd.Ahmed is his being identified as the one who fired upon the deceased by Nuruddin PW-2 and he being the person who were seen by Rajni entering the house accompanied by Duleh Hassan. The second incriminating evidence against him is that pursuant to his disclosure statement Ex.PW-1/A, he led the police to a vacant plot of land in Pappu Colony and pointed out a spot which he dug and hidden beneath the earth, got recovered a pistol Ex.P-1 and a fired cartridge Ex.P-2, which were seized by the Investigating Officer as per seizure memo Ex.PW-1/C; the sketch of the pistol and the fired cartridge being Ex.PW-1/B; the pistol and the fired cartridge recovered were proved to be complimentary i.e. the cartridge was proved

to be fired from the pistol in question. A bullet recovered from the dead body of the deceased was opined to be fired from the pistol Ex.P-1. The report of the Ballistic Expert being Ex.PW-17/F.

9. It is not being disputed in appeals by learned counsel for the appellants that Mohan Lal was residing and was also having a shop at premises No. F-240, New Seemapuri and that he was murdered when he was sitting in his shop. Thus we need not note the evidence of the police officers and the relatable seizure memos pertaining to blood sample, blood stained concrete, control earth concrete and other exhibits lifted by the investigation team which reached soon after the crime was committed at 7.30 P.M. on 01.01.1991 at the spot. We also need not note the evidence led pertaining to the crime being committed at the spot as also evidence pertaining to the various exhibits which were seized and deposited in the Malkhana from time to time. We would be noting such evidence as would impinged on what has been found to be incriminating against the three accused.

10. Inspector B.S.Palta PW-17, then working as SHO PS Seemapuri, the Police Station within the territorial jurisdiction whereof the crime was committed, received an information at about 8.15 P.M. on 01.01.1991 that a person has been shot at

New Seemapuri and had been removed to GTB Hospital. He reached the spot left behind a Constable to preserve the same and reached the hospital where he met ASI V.P.Singh who had already obtained a copy of DD No.13A Ex.PW-17/A, as per which information of the crime was registered at the Police Station. Inspector B.S.Palta collected the MLC Ex.PW-14/A of Mohan Lal, as per which the patient had been brought dead and was having a gun shot injury.

11. The dead body was seized and sent to the mortuary of LNJP Hospital where Dr.L.T.Ramani PW-5 conducted the post mortem on 02.01.1991 and retrieved a bullet from the dead body, which bullet along with blood sample of the deceased were handed over to Constable Sunil Kumar, who in turn, handed over the same to the Investigation Officer as recorded in the Memo Ex.PW-7/A.

12. The Investigation Officer recorded the statement of Rajni and Nuruddin under Section 161 Cr.P.C. on the next day of the crime. It would be necessary for us to note that Rajni told the Investigation Officer that from the roof of her house she saw two persons came in a white coloured Maruti Van bearing registration No.DNC-2696 entering her house. She could recognize them if they were brought before her. In the statement she gave the features of the said two persons.

Being relevant qua appellant Ansar, we may note that in her said statement she has nowhere stated that she saw the face of the driver or the fact that there was a third person driving the white Maruti Van in which two persons came to her house. She disclosed said fact in her supplementary statement recorded after Ansar was arrested.

13. Nuruddin stated in his statement to the Investigation Officer that two persons, whom he could recognize if brought before him, entered the shop which was in the house of the deceased. One of them was armed with knife and the other with pistol. The man with the pistol fired a shot at Mohan Lal and both the accused ran away. Thus, the only clue which the police had was that the assailants had come in a white Maruti Van bearing registration No.DNC 2696; i.e. the number disclosed in the statement of Rajni.

14. It is obvious that the said Van had to be traced. On 06.01.1991, information was received that the said Van had been spotted. In the meanwhile, on inquiry the Investigation Officer learnt that the Van in question was owned by Sibte Hasnain PW-15.

15. The Van was spotted on 06.01.1991 outside Kamdhenu Restaurant, Dilshad Garden. The Investigation Officer, who took along with him Nuruddin, found the Van still

parked outside the Restaurant. Ansar was arrested. The vehicle was seized vide memo Ex.PW-2/E. Ansar made a confessional statement Ex.PW-10/B informing about the conspiracy and the fact that Mohd.Ahmed and Duleh Hassan were in the house of Shakeel Ahmed. He took them to Pappu Colony, Shahibabad. From the house of Shakeel Ahmed, he i.e. Shakeel Ahmed as also Mohd.Ahmed and Duleh Hassan were arrested the same day i.e. on 06.01.1991.

16. We may note that the aforesaid facts of apprehension of Ansar and the three other co-accused as also the disclosure-cum-confessional statement of Ansar have been proved through the testimony of Nuruddin PW-2 and Inspector B.S.Palta PW-17.

17. Mohd.Ahmed, on being interrogated by Inspector B.S.Palta made a disclosure statement Ex.PW-1/A informing that the pistol used by him in committing the crime can be got recovered by him. He lead the Investigation Officer who was accompanied by Rajini to a vacant plot in Pappu Colony and dug out from a spot, which he pointed out, and retrieved the pistol Ex.P-1 and used cartridge Ex.P-2 which was seized as per memo Ex.PW-1/C. Sketch thereto Ex.PW-1/B was drawn by the IO at the spot itself.

18. We note that the disclosure statement and the

recoveries pertaining thereto have been proved through the testimony of Rajni PW-1 and the Investigation Officer PW-17.

19. The bullet recovered from the dead body of the deceased as also the pistol Ex.P-1 and the used cartridge Ex.P-2 were sent to the Ballistic Expert whose report is Ex.PW-17/F, with reference to test fire bullet and cartridge, opined with the cartridge Ex.P-2, has been fired from the pistol Ex.P-1 and that the bullet recovered from the dead body of the deceased has also been fired from the pistol Ex.P-1.

20. Sibte Hasnain PW-15 deposed in court that he was the owner of the Maruti Van bearing No.DNC-2696 and that Ansar was his driver and that on 31.12.1990 at the request of Ansar he had allowed him to take the Van because Ansar told him that he had to attend a marriage and had to take 'Baraaties' to the venue.

21. Rajni PW-1 deposed that on the day when the crime was committed she was at the roof of her house. At 7.30 P.M. a white Maruti Van came and parked near the office of DDA which was opposite her house. Accused Duleh Hassan and Mohd.Ahmed got out from the Van. Ansar kept sitting behind steering wheel of the van. Duleh Hassan and Mohd.Ahmed went inside her house. She heard a shot being fired. She ran to the ground floor and saw the said two accused running

towards the Van and speeding away towards the Van. She deposed about the recoveries effected in her presence when Mohd.Ansar led the police to Pappu Colony. She deposed that the pistol Ex.P-1 and the cartridge Ex.P-2 were the one which were recovered pursuant to accused Mohd.Ahmed taking the police to the spot at Pappu Colony.

22. We may note that Rajini was cross-examined on the issue whether there was any light outside her house. She stated that lights were coming from the various houses on to the street where the Maruti Van was parked. We may note that Rajini has not been cross-examined with reference to her statements recorded by the Investigation Officer.

23. Nuruddin PW-2 deposed that he was in the shop of the deceased on 01.01.1991 at 7.00 P.M. when Mohd.Ahmed and Duleh Hassan came to the shop. One of them fired at the deceased and thereafter both the assailants fled.

24. It is urged by learned counsel for the Ansar that the only person who has identified Ansar is Rajni PW-1, as per whom Ansar kept sitting in the white Maruti Van behind the wheel. Counsel urges that Ansar not being subjected to any TIP, dock identification for the first time when Rajini deposed in court has to be taken with a pinch of salt. Learned counsel further points out that in Rajni's statement recorded by the

Investigation Officer, on the day when the crime was committed, she nowhere states that she saw any driver on the driver's seat in the Van. Counsel points out that only after the accused were arrested a supplementary statement of Rajini was recorded, as per which she claimed to have seen the face of the third person sitting in the Van.

25. Pertaining to appellant Ansar, we note that the only incriminating evidence against him is that he has been identified in court by Rajini as the driver of the Van in which the two assailants were brought to her house.

26. Whereas, Rajini claims that the place where the Van was parked was well lit, we find that Nuruddin on being cross-examined admitted that there was complete darkness outside.

27. We note that the rough site plan Ex.PW-17/C and the site plan to scale Ex.PW-16/A do not know the existence of any street light near the spot where the Van was parked.

28. In our decision dated 11th January, 2010 deciding Crl.Appeal No.989/2002 titled Furkan Vs. State, on the issue of dock identification for the first time by an eye witness we had discussed the law, which was noted as under:-

"15. It is settled law that substantive evidence in a criminal trial is the evidence in Court and pertaining to identification of an accused, the substantive evidence is the evidence of identification in Court. Under Section 9 of the

Evidence Act, facts which establish the identity of the accused are relevant under Section 9 of the Evidence Act.

16. Test Identification pertains to the domain of investigation. There is no provision in the law which obliges the investigating agency to hold Test Identification Proceedings or confers any right upon the accused to claim a Test Identification. Test Identification Proceedings do not constitute substantive evidence and are essentially governed by Section 162 of the Code of Criminal Procedure.

17. The genesis of Test Identification of accused during investigation has its route in human psychology. As opined by Professor Borchard in his Article 'Convicting the Innocent' referred to in para 9 of the decision reported as 1988 SC 345 Hari Nath & Anr. Vs. State of UP, the emotional balance of the victim or eye-witness is so disturbed by his extra-ordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. Into the identification enter other motives not necessarily stimulated originally by the accused personally the desire to require a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another. Thus, doubts are resolved against the accused.

17. In Halsbury's laws of England there exists a passage being para 363, Vol. II, 6th Edition which is worth recalling. It reads as under:-

"It is undesirable that witnesses should be asked to identify a defendant for the first time in the dock at his trial; and as a general practice it is preferable that he should have been placed previously on a parade with other persons, so that potential witness can be asked to pick him out."

18. We need not catalogue the various decisions relating to Test Identification Proceedings for the reason we find that the law has been very succinctly penned in para 11 of the decision in Hari Nath's case (*supra*), which reads as under:-

"It is, no doubt, true that absence of corroboration by test identification may not assume any materiality if either the witness had known the accused earlier or where the reasons for gaining an enduring impress of the identity on the mind and memory of the witness are, otherwise, brought out."

29. The fact that Rajini never told the Investigation Officer at the first stage that she had seen the third person

driving the Van; the fact that Rajini for the first time spoke about the person driving the Van after Ansar was arrested; the fact that the site plan do not show street light outside the house of the deceased or near the place where the Van was stationed; the fact that Nurruddin has admitted that there was complete darkness outside; the fact that Ansar was not subjected to any TIP, leads us to give benefit of doubt to Ansar as being the person driving the Van, whom Rajini saw, as claimed by her.

30. We may note that notwithstanding the fact that Rajni has not been confronted with her statements recorded by the Investigating Officer but noting that the Investigating Officer has referred to the said fact, to reassure our judicial conscious we have noted the facts disclosed by Rajni in her statements recorded under Section 161 Cr.P.C.

31. Thus, Ansar would be entitled to an acquittal on being given the benefit of doubt.

32. Pertaining to appellant Mohd.Ahmed, we have on record his being identified in Court by Rajni and Nuruddin. It is true that after he was arrested, Mohd.Ahmed was not subjected to any TIP and that the two witnesses have identified him in Court for the first time. But, from the testimony of Nuruddin, it is apparent that he had sufficient

opportunity to see the face of Mohd.Ahmed. The testimony of Rajni does not bring out that even she had a sufficient opportunity to see Mohd.Ahmed. But the fact that Nuruddin got sufficient opportunity to see the face of Mohd.Ahmed, we are satisfied with the dock identification of Mohd.Ahmed by Nuruddin, who has been subjected to extensive cross-examination but has withstood the same.

33. Thus, against accused Mohd.Ahmed we have a direct eye witness account. We have further highly incriminating evidence against him in the form of the recovery of the pistol Ex.P-1 from him which has been linked to the bullet recovered from the dead body of the deceased. The linkage being through the ballistic report Ex.PW-17/F.

34. The twin evidence is sufficient to sustain the conviction of accused Mohd.Ahmed.

35. Against accused Shakeel Ahmed we note that there is no evidence of his participating in the commission of the crime.

36. Only evidence against him is that he owed Rs.80,000/- to the deceased, a fact proved through the testimony of Suresh Kumar PW-11 as also through a document Ex.PW-1/D which is an acknowledgment on a stamp paper by Shakeel Ahmed that he owed Rs.80,000/- to the deceased.

37. Before proceeding further in the matter, we express our displeasure at no charge being framed for the offence of conspiracy against the accused persons. It is apparent that the learned trial Judge has acted most negligently.

38. A perusal of the charge sheet shows that Shakeel Ahmed was listed as the architect of the conspiracy. Except for financing the crime, no role in the commission of the crime has been alleged against Shakeel Ahmed. Needless to state on the day when the crime was committed Shakeel Ahmed never came to the spot. He did not facilitate the commission of the crime either actively or as the one who facilitated the commission of the crime. We wonder as to how Shakeel Ahmed could at all be charged, much less convicted, for the offence punishable under Section 302/34 IPC.

39. Be that as it may, the only incriminating evidence against Shakeel Ahmed is his having a motive, proved through the fact that he owed some money to the deceased. The other evidence is that Mohd.Ahmed and Duleh Hassan were arrested from his house. But, this arrest is 6 days after the crime was committed.

40. In our opinion, the said two pieces of evidence fall short of proof of Shakeel Ahmed being involved in any conspiracy to murder the deceased.

41. The net result is that Crl.A.No.801/2004 filed by Ansar is allowed. Crl.A.No.732/2004 stands allowed vis-à-vis appellant No.2 Shakeel Ahmed. The said appeal is dismissed vis-à-vis appellant No.1 Mohd.Ahmed.

42. Appellant Ansar and appellant Shakeel Ahmed are acquitted of the charge framed against them.

43. The conviction of appellant Mohd.Ahmed is sustained.

44. All the accused are in jail.

45. Copy of this order be sent to the Superintendent Central Jail Tihar with a direction that if not required in custody in any other case, appellant Ansar and appellant Shakeel Ahmad be forthwith released from jail.

46. Copy of this order be supplied by the Superintendent Central Jail Tihar to appellant Mohd.Ahmed.

47. Registry would send 3 sets of the present decision to the Superintendent Central Jail, Tihar.

PRADEEP NANDRAJOG, J

SURESH KAIT, J

JANUARY 19, 2010
'nks/mm'