

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

% Date of Decision : 15th April, 2010

+ **Crl.A.No.238/2008**

SABIR @ SABIR PAHALWAN Appellant
Through: Ms.Shradha Bhargava,
Advocate

versus

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

+ **Crl.A.No.495/2008**

MOHD.RIZWAN Appellant
Through: Ms.Charu Verma, Advocate

versus

STATE N.C.T. OF DELHI 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 Reporter or not?
3. Whether the judgment should be reported in the Digest?Yes

PRADEEP NANDRAJOG, J. (Oral)

1. Noting that the counsel engaged by appellants Mohd. Rizwan and Sabir were not appearing in the two appeals, which had reached for hearing on 07.04.2010, we had

directed court notice to be served upon the counsel of the two appellants. Process server has reported that Mr.Abdul Salam Advocate for Sabir has sold his chamber and the fresh address of the learned counsel is not available with the Tis Hazari Bar Association. As regards appellant Mohd.Rizwan, the process server has reported that the lawyers being five in number who have filed the appeal are no longer sitting at the space indicated as their work place in the Vakalatnama filed by said counsels.

2. Under the circumstances, we hereby appoint Ms.Charu Verma Advocate and Ms.Shradha Bhargava Advocate on the panel of Delhi High Court Legal Services Committee as Amicus Curiae to represent appellant Sabir and appellant Mohd.Rizwan respectively. We fix fee of learned counsel in sum of Rs.5,500/- each to be paid by the Delhi High Court Legal Services Committee.

3. With the assistance of learned Amicus Curiae and learned counsel for the State we have gone through the record.

4. With reference to the testimony of Dilshad @Bhura PW-1, believing him to be a credible eye-witness, vide impugned judgment and order dated 15.01.2008, the learned trial judge has convicted appellant Mohd.Rizwan for the

offence of having murdered Akbar in the early hours of the morning of 08.10.2003. Vide same judgment and order, appellant Mohd.Rizwan as also appellant Sabir have been convicted for the offence of causing disappearance of evidence of murder i.e. the offence punishable under Section 201/34 IPC.

5. That the dead body of Akbar was fished out from a Nala near Kabristan within the jurisdiction of P.S. Welcome at around early afternoon on 08.10.2003 is not in dispute.

6. With reference to the testimony of Dr.Gaurav Vinod Jain PW-21 and the post-mortem report Ex.PW-21/A, it is not disputed before us that the same establishes the fact that Akbar was strangled to death with a ligature material and was also assaulted with injuries caused on his chest and the skull.

7. The only question which arises for consideration in the instant appeal is, whether Dilshad PW-1 is a witness of credit and hence should be believed ?

8. Since this limited question arises for our consideration, it would be useless for us to note any other piece of evidence which has been led at the trial. Needless to state the said evidence simply relates to the preparation of the various memos and the involvement of the various police

officials at the different stages. Hardly any investigation was conducted, for the reason, the challan shows that the prosecution was solely relying upon the testimony of Dilshad PW-1 to sustain the charge.

9. As per Dilshad he knew the deceased Akbar, a bad character of the area. Rukhsana was married to Akbar but left him and was residing with Rizwan, not to the liking of Akbar. Akbar wanted Rizwan to leave Rukhsana so that she could return to him and on this, in the past, there used to be fights between Akbar and Rizwan. On many occasions Akbar had beaten Rizwan. On the day of incident i.e. 07.10.2003, claims Dilshad, at around 8:00 PM, while proceeding to his house he saw Akbar with a dark complexioned boy. Both were taking liquor. They started fighting. He separated them. The dusky coloured boy went away. He i.e. Dilshad bought half bottle of liquor and returned to the place where Akbar was sitting, which happened to be the Takhat of Sabir Pahalwan. All drank liquor. One Nazim came and took a peg and went away. Rizwan also brought four quarter bottles of liquor and gave one to Dilshad. A quarrel ensued between Rizwan and Akbar, who snatched a quarter bottle from the hand of Dilshad and drank it neat. Being totally drunk, Akbar went to sleep but before that told Rizwan to return his wife to him. At about

4:00 AM Dilshad saw a jeep and Rizwan near the jeep with a rope in his hand. He went near Akbar and wrapped the rope around Akbar's neck and strangled him. Dilshad claims to have woken up Akbar by shaking him but could not see any sign of life. Sabir also shook Akbar to see any sign of life. Thereupon Sabir told Rizwan that they should remove the dead body. They dragged the dead body of the Akbar to the corner of a park and dumped it there and fled. Dilshad claims that after seeing all this he went to his house and had a good sleep. He woke up at around 11:00 AM and went to the house of his maternal uncle Haseen (PW-8) and informed him of what he had seen in the twilight hours of the morning. At his uncle telling him to report the matter to the police somewhere after 3:00 PM, he got recorded his statement Ex.PW-1/A.

10. Haseen PW-8 has somewhat corroborated Dilshad, in that, Haseen has deposed that in the afternoon on 08.10.2003 he met Dilshad who was perplexed and told him that he had seen deceased Akbar being strangled to death by Mohd.Rizwan.

11. Since something turns on the post-mortem report of the deceased, we note that Dr.Gaurav Vinod Jain PW-21, the author of the post-mortem report Ex.PW-21/A has proved the report, as per which, as many as ten external injuries were

noted on the body of the deceased. On cross-examination Dr.Gaurav Vinod Jain admitted that injury number 1,3,7,8 & 9 could be possible with a blunt object having small surface area being used as a weapon of offence.

12. We further note that as per the post-mortem report, internal examination revealed the brain being congested and having patchy sub-arachnoid hemorrhage, the heart had myocardium congestion with petechial hemorrhage over surface.

13. With reference to the post-mortem report Ex.PW-21/A, it is apparent that either with fist or with a small blunt object, the deceased was hit on the scalp resulting in sub-arachnoid hemorrhage. It is apparent that the second membrane i.e. the archanoid mater enwombing the brain was damaged. It shows more than mild force being applied when somebody struck on the scalp. The injury on the heart shows forceful blow on the chest, resulting in extravasation of the arteries of the pericardium membrane.

14. It is in this connection, it assumes importance that the stated eye-witness i.e. Dilshad has not deposed a word which explains the aforesaid injuries on the person of the deceased.

15. We find abnormality in the conduct of Dilshad vis-à-

vis what he claims to have seen. He claims to have seen Akbar being strangled to death by Mohd.Rizwan. He claims to have seen the incident at 4:00 AM. His conduct of going to his house and have a full sleep till 11:00 AM then proceeding to the house of Haseen, is prima facie, un-natural conduct of a person who sees a crime being committed. That apart, as per Dilshad the drinking session was over at about 12 midnight i.e. the intervening night of 7-8.10.2003. As noted hereinabove, Dilshad claims that after he saw Rizwan strangulating to death Akbar he went to his house. Dilshad has not given any justification as to why he remained present at the spot till 4:00 AM when drinking session was over at 12 midnight.

16. In a nutshell, Dilshad having not explained through his ocular version the injuries which were found on the person of the dead body of the Akbar and his un-natural conduct and his giving no reasons as to why he remained at the spot after 12 midnight till 4:00 AM, in our opinion, would render it most unsafe to sustain the conviction of the appellants on the testimony of Dilshad unless we can find some corroboration.

17. We find none. None has been shown to us by learned counsel for the State. From the testimony of Dilshad, it is apparent that the deceased was a bad character. Anybody, even Dilshad could have committed the crime, and if the

criminal knew the animosity between Akbar and Mohd. Rizwan, it was very easy to raise the finger of accusation at Rizwan.

18. The appeals are allowed.

19. Appellant Mohd.Rizwan is acquitted of the charge of having murdered Akbar as also of the charge of concealing/destroying evidence of murder. Appellant Sabir is acquitted of the offence of having concealed/destroyed evidence of murder. Both appellants are acquitted of the charge framed against them.

20. Appellant Sabir is on bail. The bail bond and surety bond furnished by Sabir are discharged.

21. Appellant Rizwan is in jail. Copy of this order be sent to the Superintendent Central Jail, Tihar with direction that unless required in custody in some other matter, Rizwan would be set free forthwith.

PRADEEP NANDRAJOG, J

SURESH KAIT, J

APRIL 15, 2010
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