

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

% *Judgment Reserved on: 05th May, 2010*
Judgment Pronounced on: 13th May, 2010

+ **CRL.APPEAL No.346/2008**

SHOKEEN & ANR. Appellants
Through: Mr.K.B.Andley, Sr. Advocate with
Mr.M.L.Yadav, Advocate

versus

STATE Respondent
Through: Mr.M.N.Dudeja, 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?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

1. The above captioned appeal has been filed by the appellants Shokeen and Noor Mohd. @ Hafiz challenging their conviction for the offences punishable under Sections 302/392/411 IPC vide impugned judgment and order dated 1.4.2008. Vide the same judgment, co-accused Sanjay, Furkan, Abdul Majid and Anwar have been convicted for the offence punishable under Section 411 IPC and co-accused

Atta-Ur-Rehman has been acquitted of the charges framed against him.

2. Probably for the reason Sanjay, Furkan, Abdul Majid and Anwar were convicted for the offence punishable under Section 411 IPC and for which offence they have been sentenced to undergo rigorous imprisonment for a period of three years and by the time sentence was pronounced they had already undergone the sentence in excess of what was imposed upon them, they have not preferred any Appeal challenging their conviction. Thus, only Shokeen and Noor Mohd. are before us.

3. Briefly stated the case sought to be established by the prosecution is that one Paras Jain used to carry out Hawala operations in and around Delhi. He used to collect money from persons and deliver the same as per the understanding and obviously used to receive some commission. Many persons used to assist him or were associated with him of which his nephew Praveen Jain was one such person and accused Atta-Ur-Rehman was another. Sometime in the year 2004 accused Atta-Ur-Rehman got swayed by the greed for money and decided to rob the money collected by Praveen Jain to be given to Paras Jain as a part of the Hawala transactions. Accused Furkan, Abdul Majid, Anwar, Sanjay, Shokeen and

Noor Mohd. @ Hafiz joined him and together they entered into a conspiracy to rob the money collected by Praveen Jain from his house. As per their plan appellant Shokeen and Noor Mohd. were to enter the house of Praveen Jain with the excuse that they were to hand over Hawala money to him. Accused Anwar was to enter the house after a while pretending to be a rickshaw puller who brought Shokeen and Noor Mohd. to the place and demand his fare, while the others would remain outside the house in a car. The accused inside would commit the robbery and if need be to murder Praveen Jain to fulfil the object of their entry i.e. robbery and to give effect to their plan, on 14.8.2004 appellants Shokeen and Noor Mohd. @ Hafiz visited the house of Praveen Jain at Flat No.96A, DDA Flats, Jhilmil Colony, Delhi, but did not meet him as he was not there. They met Santok Chand Parakh PW-1 the father of Praveen Jain and Pawan Jain PW-2 the elder brother of Praveen Jain. They waited for Praveen Jain for sometime but when Praveen Jain did not arrive, they made a telephone call to someone whom they informed about the absence of Praveen Jain. After sometime a call was received at the house of Praveen Jain which was answered by Pawan Jain and the caller told him that he wanted to speak to one of the two persons present at the house. On the receiver being handed over to Noor Mohd. he i.e. Noor Mohd. spoke with the caller for a while

and thereafter handed over the receiver to Pawan Jain. The caller disclosed his name as Haji Kamal and gave the number 20070874 and asked Pawan Jain to tell Praveen Jain to call back at said number. Pawan Jain noted said number in his diary. On the directions of the caller, Shokeen and Noor Mohd. left the house. On 16.8.2004 at around 11:00 AM Shokeen and Noor Mohd. again visited the house of Praveen Jain and this time they met Praveen Jain. Santok Chand Parakh the father of Praveen Jain was also present at the house. During this time Mukesh Kumar Bhagat @ Guddu PW-8 also visited Praveen Jain and handed over to him Rs.2.25 lacs in cash and assisted Praveen in counting the cash in a room of the house. As per their plan, co-accused Anwar entered the house of Praveen Jain pretending to be a rickshaw puller and demanded his fare from Shokeen and Noor Mohd. which they paid. At around 12:15 PM Santok Chand Parakh left his house. When Santok Chand Parakh PW-1 returned to his house at around 1:30 PM he found Praveen lying on a double bed with his mouth gagged and his hands, legs and mouth tied with pieces of cloth and with blood smeared on his face and on the bed-sheet.

4. How the prosecution claimed a break-through would be now noted by us with reference to the various documents/memos prepared from time to time.

5. Information pertaining to Praveen Jain being murdered was conveyed by Santok Chand Parakh to the Police Control Room from where it was transmitted to PS Vivek Vihar where DD No.16-A, Ex.PW-29/A was recorded. SI Randhir Singh PW-27 was entrusted with the investigation of the said DD and along with Ct.Vinod and Ct.Ombir Singh he reached Flat No.96-A, DDA Flats, Jhilmil Colony, Delhi. Inspector Kishan Lal PW-34 also reached the spot as he was also conveyed the information of Praveen Jain being murdered in his flat. He carried out the relevant investigation. At the first instance he promptly recorded the statement Ex.PW-1/B of Santok Chand Parakh wherein Santok Chand Parakh stated that two men who had visited their house on 14.08.2004 had come to the flat and one Guddu who used to frequently come to their flat had come to the flat in the morning. He left the flat at around 11:45 AM and when he returned to the flat he found his son murdered. Inspector Kishan Lal PW-34 made an endorsement beneath the said statement and sent the same for FIR to be registered at around 4:25 PM and completed the investigation at the spot by lifting the various blood stained exhibits and summoning the crime team which could lift no chance prints and hence the photographer took the photographs of the dead body. A pistol with some cartridges was recovered as entered in the memo Ex.PW-1/A, which we note has not assumed any incriminating

character for the reason the post-mortem of the deceased, as per post-mortem report Ex.PW-12/A, shows that death was due to asphyxia consequent upon pressure over nose and mouth. Certain injuries on the face were also noted.

6. Since in his statement, Santok Chand Parakh did not name the two persons in whose company he last left Praveen Jain nor could give their description, no break-through could be achieved until the next day i.e. 17.08.2004, when Pawan Jain PW-2, the brother of Praveen Jain returned to the flat and got recorded his statement before Insp.Kishan Lal PW-34 informing that his father told him that the two men who came on 14.08.2004 to meet Praveen Jain also visited Praveen Jain on 16.08.2004 and were the persons last seen with Praveen Jain before his death. Pawan informed in his statement that on 14.08.2004 the two men who had come to the flat made him speak to one Haji Kamal on a telephone who gave him a number 20070874 and requested him to tell Praveen Jain to call back at said number. Pawan further informed that he had noted the said number in a diary Ex.P-1, which he handed over to Inspector Kishan Lal who seized the same vide seizure memo Ex.PW-2/A.

7. The said telephone number gave further leads. Inspector Kishan Lal found that said number was that of a

Garuda Mobile Service provided by MTNL and contacting the relevant office of the service provider learnt that the subscriber of the number was one Rajesh Kumar PW-4. He contacted Rajesh Kumar who informed him that he had given the phone to his employee Naresh Kumar PW-6, who informed Inspector Kishan Lal that he had lost the instrument and for which he had lodged a complaint Ex.PW-32/A at PS Kashmere Gate.

8. It is apparent that Inspector Kishan Lal reached another dead end with the only leads which could possibly emerge being through the call details pertaining to said number. He obtained the call details on floppies Ex.PW-34/F-1 to Ex.PW-34/F-3 from the office of MTNL, Nehru Place. He took out the hard copy Ex.PW-34/G of the said call details. Inspector Kishan Lal noticed that most of the calls made to or from the said number on 14.08.2004 were from landline numbers installed in the area of Kithore and Kila Parikshit Garh in the State of Uttar Pradesh. Since SI Atul Tyagi PW-30 had his roots in the area of Kithore, he was joined in the investigation. On perusing the call details, SI Atul Tyagi noted a number as that of his informer. He summoned the said informer who revealed that the number i.e. the No.20070874 was being used by accused Abdul Majid and accused Furkan, both

residents of village Radhna in the State of Uttar Pradesh but currently residing in a house in Shalimar Bagh in Delhi. The said secret informer led SI Atul Tyagi and Inspector Kishan Lal to a house in Shalimar Bagh, Delhi but it turned out that Abdul Majid and Furkan had already vacated the said house two days prior. He then took SI Atul Tyagi and Inspector Kishan Lal to village Radhna, where on 23.08.2004 accused Furkan, Abdul Majid and Anwar were arrested and at that time the instrument pertaining to the No.20070874 was recovered from the house, which happened to be that of accused Abdul Majid. Two cell phones operated on Nos.33332630 and 31219519 were recovered from the possession of accused Furkan. It was then noted that the call details Ex.PW-34/G pertaining to the number 20070874 had many calls inter se the said number and the telephone No.33332630.

9. Accused Abdul Majid, Furkan and Anwar made disclosure statements Ex.PW-30/H, Ex.PW-30/G and Ex.PW-20/E confessing to the conspiracy and the crime and informed that four other persons namely Atta-Ur-Rehman, Shokeen, Noor Mohd. @ Hafiz and Sanjay were their partners and that they had shared the booty of the crime i.e. Hawala money looted from the deceased Praveen Jain. Said accused were then apprehended and their disclosure statements recorded as

per which they admitted to the crime and save and except Atta-Ur-Rehman the others volunteered to get the booty recovered as in their share.

10. No money was got recovered by Atta-Ur-Rehman. Abdul Majid got recovered Rs.12,000/- in cash, accused Furkan got recovered Rs.16,000/- in cash, accused Noor Mohd. got recovered Rs.32,000/- in cash, accused Shokeen got recovered Rs.20,000/- in cash and accused Sanjay got recovered Rs.20,000/- in cash. Accused Anwar informed that he had deposited Rs.35,000/- in the bank in an account maintained in the name of his wife, which fact was found to be true.

11. As per the prosecution Santok Chand Parakh and Pawan Jain had identified Shokeen and Noor Mohd. as the two persons who had visited the flat of the deceased on 14.8.2004 and Santok Chand Parakh additionally identified the said two as the one who visited the flat on 16.8.2004. Thus, qua appellants Shokeen and Noor Mohd. the evidence would be of last seen in the company of the deceased and additionally the money got recovered by them. Qua accused Abdul Majid the evidence would be the recovery of the Garuda Mobile phone having subscriber No.20070874 as also the mobile No.33332630 with proof of inter se calls exchanged between said numbers from 15.8.2004 onwards as also proof of a

telephone call made from the landline number in the flat of the deceased and a return call to the said landline number on 14.8.2004. Further evidence incriminating against Abdul Majid would be the recovery of cash at his instance. Against Furkan and Sanjay incriminating evidence would be the cash got recovered by them. Incriminating evidence qua Anwar would be proof of Rs.35,000/- deposited with the bank in the account of his wife. Needless to state it had to be proved that the said money was the fruit of the crime.

12. It is apparent that the fate of the seven accused was hinging upon two distinct sets of evidence.

13. Regretfully, the prosecution did not comply with the mandate of Section 65-B of the Evidence Act inasmuch as the call record details Ex.PW-34/F1 to Ex.PW-34/F3 as also the hard copy thereof Ex.PW-34/G were simply tendered when Inspector Kishan Lal deposed as PW-34 and additionally for the reason the floppies of the call record details nor the hard copy was supplied to the accused. Thus, the learned Trial Judge, and in our opinion correctly returned the finding that said evidence was inadmissible as it was not properly proved. The result was that the inter linkage of calls inter se the various telephones as surfaced during investigation could not be proved. The only evidence of certain handsets pertaining to

some numbers, without link evidence of the call details was rendered denuded of its lethal punch and hence the failure of proof of charge of conspiracy.

14. The proof of conspiracy having failed, it is apparent that only those who went to the house to rob the deceased and in the process murdered him could be held liable for their acts. Of course, it had to be considered whether there was proof that the looted money was distributed as claimed by the prosecution and whether it was received by the accused who got various amounts recovered from their person or from the bank account of the wife had knowledge that they were the recipients of stolen property.

15. The latter need not be discussed by us for the reason, as noted above, the accused who have been convicted for the offence punishable under Section 411 IPC have not preferred any appeals.

16. We are concerned only with the fate of appellant Shokeen and appellant Noor Mohd.

17. In sustaining their conviction for the offence of committing robbery and murdering the deceased and retaining part of the looted property i.e. the offences punishable under Section 392/302/411 IPC the learned Trial Judge has relied

upon the deduction made with reference to the testimony of Santok Chand Parakh PW-1 and Pawan Jain PW-2, the father and the brother respectively of the deceased. With reference to their testimony, the learned Trial Judge has held that it stands established that the appellants were the ones who were last seen in the company of the deceased at around 12:15 PM on 16.8.2004 and had fled before 1:30 PM when Santok Chand Parakh returned. Learned Trial Judge has found corroboration to the proof of the fact that the appellants had visited the flat of the deceased as claimed by Santok Chand Parakh through the truncated testimony of Mukesh Kumar Bhagat @ Guddu PW-8. The recoveries of Rs.32,000/- and Rs.20,000/- in cash by the appellants have been held to be proved with further finding that this was a part of the booty which was shared amongst the accused.

18. Santok Chand Parakh PW-1 deposed that at about 11:00 AM 2 persons visited his house on 14.8.2004 to meet his son Praveen who used to deal in Hawala transactions. The said 2 persons could not meet Praveen since he was not at the house. His elder son Pawan was present at the house and Pawan requested the said 2 persons to hand over to him the money they wanted to hand over to Praveen. The said 2 persons did not agree and left saying that they would come

back on 16.8.2004. On 16.8.2004 at about 11:00 AM the same 2 persons again visited his house and enquired about Praveen. Since Praveen had gone out somewhere, the 2 persons waited for sometime till Praveen returned. When Praveen returned, one Guddu who was also assisting Praveen in the Hawala transactions, also visited Praveen. Soon after, one more person, claiming to be a rickshaw puller entered the house demanding the rickshaw fare from the said two persons. One of the two paid the fare. Thereafter at about 12:15 PM after informing Praveen, he i.e. Santok Chand Parakh left the house for some work. When he returned to his house at about 1:30 PM he found the door of the house open and on entry he found the dead body of his son Praveen lying on a double bed with its mouth, hand, legs tied with pieces of cloth and an attachi case belonging to his brother-in-law Prakash was missing. He informed the police at the PCR No.100. Santok Chand Parakh stated that he could not identify the persons who had come to his house on 16.8.2004.

19. Pawan PW-2 deposed that on 14.8.2004 when he returned to his house at about 12:30 PM after making purchases he found 2 persons sitting in his house in the company of his father. He enquired from the said 2 persons the purpose of their visit, at which the said persons informed

him that they wanted to hand over some money to his younger brother Praveen. After waiting for some time for Praveen, the said 2 persons made a telephone call from the landline installed in his i.e. Pawan's house. They informed somebody over the telephone that Praveen was not in the house. After sometime a call was received on the telephone which was attended to by him, and the caller requested him i.e. Pawan to hand over the receiver to one of the two visitors. The caller disclosed his name as Haji Kamal. One of the two persons who looked like a Muslim spoke to the caller on the telephone and after a while handed over the receiver to him i.e. Pawan. The caller gave him a number i.e. 20070847 and told him to ask Praveen to call back on the said number. Thereafter the two visitors left. On the same day he informed his brother Praveen about the visit of the two men and gave him the telephone number. In the evening on returning home, Praveen told him that he had spoken on the number given by him and that the two visitors would again visit them day after tomorrow. On 16.8.2004 he was in Dehradun and on receiving information about the death of his brother he returned to Delhi at about 9:00 PM. His father told him that the two men who had visited their house on 14.8.2004 had again visited them on 16.8.2004 and murdered Praveen. He identified the appellants Shokeen

and Noor Mohd. as the two persons who had visited their house on 14.8.2004.

20. It may be noted here that the examination-in-chief of Pawan PW-2 took place on 11.5.2006. When the counsel for accused Noor Mohd. and Anwar cross-examined Pawan PW-2 on the same day, with regard to the identity of the appellants, Pawan PW-2 stuck to the version stated by him in his examination-in-chief to the effect that Shokeen and Noor Mohd. were the men who visited their house on 14.8.2004. The cross-examination of Pawan was deferred and on the next date which happened to be after more than one year i.e. 4.7.2007 Pawan resiled from what he stated during examination-in-chief and initial cross-examination by stating that Noor Mohd. and Shokeen did not visit their house on 14.8.2004 and claimed that his earlier version was at the instance of the police.

21. Mukesh Kumar Bhagat @ Guddu PW-8 deposed that he was working for Paras Jain who was a resident of Bihar and used to collect money for Paras Jain and hand over the same to Praveen Jain who was also working for Paras Jain. On 16.8.2004 at about 11:00 AM he visited Praveen Jain at his house and at that time two men were sitting with Praveen Jain. He handed over Rs.2 lacs to Rs.2.25 lacs to Praveen Jain.

Thereafter he left. He claimed that he could not identify the two persons whom he had seen in the house of Praveen Jain on 16.8.2004.

22. Suffice would it be to state that Mukesh Kumar Bhagat only supports the prosecution that two persons had visited house of Praveen Jain at around 11:00 AM on 16.8.2004. Santok Chand Parakh could only support the case of the prosecution that two men were with his son in their house when he left at 12:15 PM and by the time he returned at 1:30 PM his son had been murdered and the said two persons were missing along with the attachi case of his brother-in-law. Some time qua the identity of the said two persons surfaces through the testimony of Pawan who initially identified the appellants as the two persons who had come to their house on 14.8.2004, but after more than a year, retracted from his testimony in examination-in-chief. Ignoring the retraction of Pawan and applying the principle of linear equation it may be concluded that the appellants were the person who had visited the house on 16.8.2004. The theory of the linear equation would be: *A and B are stated by X to have visited his house on date M as also on the date N but without X identifying with certainty who A and B are. Y identifies the two persons A and*

B as the ones who visited the house on the date M. Thus, it can be deduced that A and B had visited the house on date N.

23. Well, from the point of view of a theorem such a deduction is plain and logical, but in our opinion this approach is impermissible in law for the reason, the reason of the law may not always be logic but experience.

24. To sustain a conviction on percipient evidence the Court must have the quality of the percipient evidence of such sterling nature that except for the credibility of the witness, no other task has to be performed by the Court. It is for this reason percipient evidence is treated as better evidence than circumstantial evidence for the reason in percipient evidence also called direct evidence the only possible source of taint is to the credibility of the witness and once the credibility is established, the Court is required to do no more inferential job, for what the witness states has to be accepted. It is only in a circumstantial evidence that a two stage process is to be adopted. Firstly, to test the credit of the witness who deposes a fact and secondly to draw an inference from the said fact. It is apparent that in this process there would be two possible sources of taint: firstly to the credibility of the witness and secondly to the inference which the Court may draw.

25. Taking a cue from the aforesaid principle of law, it may be difficult to apply the kind of deductive logic, to which we have referred to in para 22 above. The reason is, not only the one stated by us in para 23 above but additionally that ordinarily law does not permit a deduction to be made from something which itself is the result of deduction, save and except in an exceptional case where the second deduction is the logical corollary of the first.

26. Where does the rule of experience of life in a situation of the instant kind take us to?

27. A doubt qua the claim of Santok Chand Parakh, being that, the two persons who had come to his house on 14.8.2004 revisited the house on 16.8.2004, in the absence of his being unable to identify the appellants as the said two persons. It is possible that Santok Chand Parakh may be in error in his claim as made.

28. So slender is the thread with which the prosecution wants its fabric to be stitched that it would be unsafe to stitch the fabric with the slender thread for the reason the fabric may either come unstitched or imperfectly stitched.

29. The Rule of Prudence has always been invoked by the Courts to look for some corroboration where the evidence

of the prosecution is found vacillating at some place and especially where the offence attracts the capital sentence. It is trite law that graver is the offence, stricter should be the standard of proof and higher in quality and probity the incriminating evidence led by the prosecution.

30. We are of the opinion that the appellants are entitled to the benefit of doubt and hence we allow the appeal and set aside the impugned judgment and order dated 1.4.2008. The appellants are acquitted of the charge framed against them.

31. Copy of this order is directed to be sent to the Superintendent Central Jail Tihar with a direction to set free the appellants if not required in custody in some other case.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

MAY 13, 2010
dk / mm