

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

% *Judgment Reserved on: January 14, 2010*
Judgment Pronounced on: January 19, 2010

+ **CRL.APPEAL NO.713/2008**

MOHD.SHAHID ALAM Appellant
Through: Mr.A.J.Bhambani and Ms.Nisha
Bhambani, Advocates.

Versus

STATE Respondent
Through: Mr.M.N.Dudeja, A.P.P.

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. The appellant has been convicted for the offence of having murdered Abdul Wahid also known as Bade Miyan, as also for the offence of robbery. For the former offence he has been sentenced to undergo imprisonment for life and for the latter he has been sentenced to undergo imprisonment for five years and pay a fine in sum of Rs.5,000/-, in default of

payment of fine to undergo simple imprisonment for one month.

2. The learned Trial Judge has summarized the incriminating evidence against the appellant as under:-

"I am, thus, of the opinion that from the aforesaid evidence discussed above, the prosecution has established beyond doubt that on the intervening night of the incident i.e. 12/13.5.2003 accused Mohd.Shahid Alam @ Salim had committed murder of one Abdul Wahid @ Bade Miyan by inflicting injuries by a weight of 5 Kg denomination on his head which were found to be sufficient in ordinary course to cause death. The accused has, thus, committed an offence punishable under Section 302 IPC and is convicted accordingly.

PW-10 Mohammad Nasir, the son of the deceased had deposed that on the night preceding the incident, he had a discussion with his father at the shop about making the payments and he testified that he specifically told him that Asif son of Allah-Wallah had come asking for money on which his father had told him that he had brought money with him. He had also told him that he would make the payment the next day in the morning. He testified that his father had told him that his father had brought Rs.10,000/- with him. He further testified that he also told his father that there were some other money of the retail business lying there in the shop and the said money could be used to make payment. Thus, it is seen that there was a cash of Rs.10,000/- plus the retail sale cash lying in the said dairy when the witness left the shop at 9.30 PM when his father and the accused had remained in the shop. The said cash was found missing in the morning when this incident took place. The accused was also found missing from the time of incident. Subsequently, when the accused was arrested on 10.7.2003, he had got recovered the keys

of the said tijori lying in the dairy of the deceased. Hence, it can be said that it was the accused who had committed the theft of the said amount lying in the tijori at the dairy and had caused the death of Bade Miyan while so committing the theft. The accused has, thus, also committed an offence of robbery punishable under Section 392 IPC.”

3. It is thus apparent that the fate of the appellant has to be decided with reference to the testimony of Mohd.Nasir PW-10, the son of the deceased and the finding returned that the key of the Tijori (locker) in the shop of the deceased was recovered from the appellant. To put it in legal terms, the incriminating evidence against the appellant is of his being last seen in the company of the deceased at the shop in the night where the dead body of the deceased was detected the next day morning and the fact that the deceased and the appellant used to sleep in the shop as also the evidence of recovery of the key of the Tijori in the shop from the appellant. We may note that though not used as an incriminating circumstance against the appellant of absconding, evidence shows that the appellant was apprehended on 10.7.2003 i.e. after about 2 months of the crime.

4. Mohd.Nasir PW-10 deposed that he and his father Abdul Wahid were running Taj Dairy at Farashkhana and the

appellant was employed by them as a servant. Appellant used to supply milk to houses and used to clean utensils in the shop. After business hours, the appellant and his father used to sleep in the shop in the night. On 12.5.2003 in the morning Asif son of Allawallah, the man who used to supply milk to them came and requested for payment for the milk supplied. When his father came to the dairy in the evening he conveyed said fact to his father who told him that he had brought Rs.10,000/- and would make payment the next day morning. He told his father that cash was lying in the shop in respect of the sales effected during the day and said money would also be used for making payment to the milk man. He left the shop at about 9:30 PM and his father and the appellant remained in the shop. Next day morning at 6:30 AM he learnt about a quarrel between his father and someone at the shop. He reached there at about 7:30 AM and learnt that his father had been murdered. That after about one and a half month he received message that the police had some clue about the whereabouts of the appellant and that he should meet the police. He met the police and at Haus Qazi saw the appellant and pointed him out. He was apprehended and brought to the

police station where a key was recovered from his possession. The same was of the Tijori of the shop. He deposed that the key recovered from the appellant was Ex.P-8.

5. Noting the fact that learned counsel for the appellant has not disputed that in the early hours of the morning of 13.5.2003, on receipt of information about the crime the police reached the shop No.1327, Farashkhana wherefrom PW-10 and his father were operating Taj Dairy and recovered the dead body of the deceased with fresh blood oozing out evidencing fresh injuries, meaning thereby, the deceased was murdered just before dawn, thus, we are not noting the testimony of all such persons who have deposed to blood sample and blood stained quilt, pillow and sheet etc. recovered from the spot except to note that as per the report of the serologist human blood of the same group as that of the deceased was detected thereon. The place where the crime was committed is thus not in dispute, being the shop where, as per the claim of PW-10, the appellant and his father slept in the night of 12th May, 2003.

6. Having perused the cross examination of Mohd.Nasir PW-10, it has to be noted that the appellant has

not challenged the testimony of Mohd.Nasir when he deposed that the appellant was employed as a servant by Mohd.Nasir and his father at Taj Dairy and that his father and Mohd.Nasir used to sleep in the said premises after business hours and that on 12th May, 2003 when he left the dairy at 9:30 PM his father and the appellant were seen by him in the dairy.

7. When examined under Section 313 Cr.P.C. the appellant stated: *'I used to work with Nasir. I was employed by him who was running a dairy. The deceased also used to sit in the same dairy. I had worked for about three months with Nasir. I used to take milk from the dairy and supply to the houses of customers and bring back the money and hand over to Nasir. The payment received from one of the customers was not entered by Nasir in his notebook maintained by him. Nasir accused me of having kept the money and he beat me and threw me out of the job. On my asking for payment of my salary, he stated that he would give me the same later on. I went to Punjab to earn money. There I worked in an oil mill. When I returned after two months I went to Nasir dairy and asked for my salary dues. At that time, Nasir took me to the police station and falsely implicated me in this case. I used to*

sleep at the dairy of the said Nasir. Sometimes Nasir and sometimes his father used to sleep there.'

8. It stares us in our eyes that while cross examining Mohd.Nasir no such defence was put up. Not even a suggestion has been given to Mohd.Nasir that the appellant was working as an employee in the dairy for only 3 months and his services were terminated and that he returned after 2 months to claim his dues and was falsely implicated.

9. From the testimony of Mohd.Nasir, who has not been challenged on the fact of the appellant being in employment and seen by him at the dairy at 9:30 PM on 12.5.2003 and the fact that he deposed that as per practice, his father and the appellant used to sleep in the dairy after business hours, the inevitable conclusion is that the prosecution has successfully established that the appellant and the deceased were in the company of each other at 9:30 PM in the dairy and the two slept in the dairy. This was the place where the deceased was murdered and body recovered at around 6:30 AM in the morning of 13.5.2003.

10. On the issue of the recovery of the key of the Tijori, as per the testimony of Mohd.Nasir the same was recovered

from him when he was arrested. But, according to the investigating officer the same was recovered pursuant to the disclosure statement Ex.PW-10/A of the appellant and upon appellant leading them to property No.1761-64, Lal Kuan wherefrom he picked up a shirt from the pocket of which a bunch of 3 keys Ex.P-8 were recovered.

11. There is some discrepancy in respect of the recovery of the bunch of keys Ex.P-8. There is a further problem. The disclosure statement of the appellant wherein it is stated by him that one out of the 3 keys is that of the Tijori is inadmissible in evidence. The prosecution had to lead evidence to link the key with the Tijori. No witness of the prosecution has said that the key was operated on the Tijori and that the Tijori could be locked and unlocked with the key. Further problem is that while deposing in Court, Mohd.Nasir PW-10 has not stated that one out of the 3 keys i.e. Ex.P-8 was the key of the locker. He has simply deposed that when brought to the police station after he was arrested the appellant produced the key of the Tijori. Identification during investigation relates to Section 162 Cr.P.C. and is not

evidence. Evidence is what is spoken in Court and pertaining to identification would relate to Section 9 of the Evidence Act.

12. It is apparent that the learned public prosecutor has been extremely negligent while leading evidence. Even the investigating officer has been callous in not checking whether the key in question was that of the lock of the Tijori, a fact which he could easily have proved by deposing that he operated the lock of the Tijori with the key. To some extent one may say that even the learned Trial Judge has acted casually for the reason the Tijori Ex.P-9 seized from the place of the crime as recorded in the seizure memo Ex.PW-10/D was exhibited in Court and when the bunch of keys Ex.P-8 was exhibited, the learned Judge could have checked whether one out of the three keys pertained to the lock of the Tijori and if yes or no, the fact could be recorded in the order sheet.

13. Pertaining to the charge of robbery, there is a further problem. Mohd.Nasir has only deposed that his father told him that he had brought the money to pay to the milk man. Mohd.Nasir has not said that he saw his father put the money inside the Tijori. As per Mohd.Nasir his father told him of having money with him at 5:00 PM. There is a possibility

that whatever money was with the deceased was either spent or given to somebody. In any case, there is no positive evidence that Rs.10,000/- was put inside the Tijori by the deceased.

14. Thus, in respect of robbery, noting that if the appellant is found to be the assailant, the only motive could be robbery, but since we cannot return presumptive finding at a criminal trial which findings are based on strong suspicion, we hold that there is insufficient evidence to sustain the conviction for the offence of robbery.

15. A vital link evidence of the recovery of the key of the Tijori Ex.P-9 having been dented, we are left with the evidence of the appellant and the deceased being last seen in the company of each other at 9:30 PM on 12.5.2003 and the dead body being detected the next morning at around 6:30 AM and the evidence of the appellant absconding till he was arrested on 10.7.2003.

16. Whether the evidence of the accused being last seen in the company of the deceased and there being sufficient proximity of the time and place where the two were last seen as also proximity of time of last seen alive and the

death of the deceased without any further evidence is sufficient wherefrom, in a case of circumstantial evidence, the guilt of the accused can be inferred was a matter of debate in various decisions which were noted by a Co-ordinate Division Bench of this Court of which Bench, one of us; namely, Pradeep Nandrajog, J. was a Member of. The opinion of the Co-ordinate Division Bench dated 10th August, 2009 disposed of a batch of 4 appeals, lead appeal being Crl.A.No.362/2001 Arvind @ Chotu Vs. State.

17. With reference to the decisions reported as AIR 1955 SC 801 Deonandan Mishra Vs. The State of Bihar, 1993 SCC (Cri) 520 Anant Bhujangrao Kulkarni Vs. State of Maharashtra, (2000) 8 SCC 382 State of West Bengal Vs. Mir Mohammad Omar & Ors. (2002) 6 SCC 715 Mohibur Rahman & Anr. Vs. State of Assam, (2002) 8 SCC 45 Bodhraj @ Bodha & Ors. Vs. State of Jammu & Kashmir, (2003) 7 SCC 37 Babu S/o Raveendran Vs. Babu S/o Bahuleyan & Anr., 2003 (8) SCC 93 Amit @ Ammu Vs. State of Maharashtra, (2005) 3 SCC 114 State of U.P. Vs. Satish, AIR 2006 SC 1708 Deepak Chandrakant Pail Vs. State of Maharashtra, AIR 2006 SC 1712 State of U.P. Vs. Desh Raj, 2006 (3) SCALE 452 RAmreddy

Rajeshkhanna Reddy & Anr. Vs. State of Andhra Pradesh, 2006

(12) SCALE Vikramjit Singh @ Vicky Vs. State of Punjab, 2007

(3) SCALE 740 State of Goa Vs. Sanjay Thakran & Anr., 2008

(9) SCALE 319 Venkatesan Vs. State of Tamil Nadu and 2009

(3) SCALE 327 Vithal Eknath Adlinge Vs. State of Maharashtra.

it was opined that the presumption of a fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule of law of evidence and that a fact otherwise doubtful may be inferred from certain other proved facts. It was opined that when inferring the existence of a fact from some other set of proved facts, the Court exercises a process of reasoning and reaches a logical conclusion as the most probable position. It was noted that the legislative foundation to the said rule of inference could be located in Section 114 of the Evidence Act which empowers the Court to presume the existence of any fact which is likely to have happened. In this process, the Court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case. Another legal principle on which inferences can be founded is to be located in Section

106 of the Evidence Act which embodies the legal principle that where a fact is especially within the knowledge of any person, the burden of proving the fact is upon him.

18. In para 103 of the opinion of the Division Bench, the legal position relating to last seen evidence was summarized as under:-

“ We may summarize the legal position as under:-

(i) Last-seen is a specie of circumstantial evidence and the principles of law applicable to circumstantial evidence are fully applicable while deciding the guilt or otherwise of an accused where the last-seen theory has to be applied.

(ii) It is not necessary that in each and every case corroboration by further evidence is required.

(iii) The single circumstance of last-seen, if of a kind, where a rational mind is persuaded to reach an irresistible conclusion that either the accused should explain, how and in what circumstances the deceased suffered death, it would be permissible to sustain a conviction on the solitary circumstance of last-seen.

(iv) Proximity of time between the deceased being last seen in the company of the accused and the death of the deceased is important and if the time gap is so small that the possibility of a third person being the offender is reasonably ruled out, on the solitary circumstance of last-seen, a conviction can be sustained.

(v) Proximity of place i.e. the place where the deceased and the accused were last seen alive with the place where the dead body of the deceased was found is an important circumstance and even where the proximity of time of the deceased being last seen

with the accused and the dead body being found is broken, depending upon the attendant circumstances, it would be permissible to sustain a conviction on said evidence.

(vi) Circumstances relating to the time and the place have to be kept in mind and play a very important role in evaluation of the weightage to be given to the circumstance of proximity of time and proximity of place while applying the last-seen theory.

(vii) The relationship of the accused and the deceased, the place where they were last seen together and the time when they were last seen together are also important circumstances to be kept in mind while applying the last seen theory. For example, the relationship is that of husband and wife and the place of the crime is the matrimonial house and the time the husband and wife were last seen was the early hours of the night would require said three factors to be kept in mind while applying the last-seen theory.

The above circumstances are illustrative and not exhaustive. At the foundation of the last-seen theory, principles of probability and cause and connection, wherefrom a reasonable and a logical mind would unhesitatingly point the finger of guilt at the accused, whenever attracted, would make applicable the theory of last-seen evidence and standing alone would be sufficient to sustain a conviction."

19. In the instant case there is no evidence that somebody broke into the shop where the deceased and the appellant slept in the night. The fact that the appellant and the deceased used to sleep in the shop and when the shutter was down at 9:30 PM both of them were in the shop requires

an inference to be drawn that the appellant and the deceased slept in the shop. Thus, unless the appellant explains as to under what circumstances the deceased died the homicidal death, he must own the guilt for the reason up to the time when the crime was detected the next day morning at around 6-6:30 AM none could have intervened to cause injuries upon the deceased. The fact that the appellant absconded in the early hours of the morning on 13.5.2003 further indicates his guilty mind which can be inferred as a matter of fact from his conduct of absconding i.e. fleeing from justice. Another nail in the coffin of the appellant is the false answer/explanation given by him that he had left employment much earlier and was not in the shop in the night of 12.5.2003.

20. To bring the curtains down we conclude by partially allowing the appeal, setting aside the conviction of the appellant for the offence of robbery. We sustain the conviction and the sentence imposed upon the appellant pertaining to the charge of murder and the sentence imposed, noting that learned counsel for the appellant did not dispute that with reference to the post-mortem report of the deceased none could argue that it was a case of murder.

21. Since the appellant is still in jail we direct that a copy of this order and judgment be sent to the Superintendent Central Jail Tihar to be made available to the appellant.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

JANUARY 19, 2010
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