

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

% Judgment delivered on 25.07.2011

+ CRL.A. 865/2009

RASHID ... Appellant

- versus -

STATE ... Respondent

Advocates who appeared in this case:

For the Appellant : Mr P. N. Bhan
For the Respondent : Ms Richa Kapur

AND

+ CRL.A. 814/2009

NASIR ... Appellant

- versus -

STATE ... Respondent

Advocates who appeared in this case:

For the Appellant : Mr R. M. Tufail with Mr Anwar A. Khan, Mr Farooq
Chaudhary and Mr Vishal Sehijpal
For the Respondent : Ms Richa Kapur

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED
HON'BLE MS. JUSTICE VEENA BIRBAL

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

BADAR DURREZ AHMED

1. These appeals are directed against the common judgment passed by the learned Additional Sessions Judge, Delhi in Sessions Case No. 67/2009 on 25.09.2009. The case arose out of FIR No. 368/2005 registered under Sections 302/120B/34 IPC and Sections 25 and 27 of the Arms Act, 1959 at police station Bhajanpura on 03.09.2005. By virtue of the impugned judgment, the appellants Nasir and Rashid in these two appeals were found guilty of committing the offence punishable under Section 302/120B IPC and the appellant Rashid was additionally convicted for the offence punishable under Section 302/120B/34 IPC read with Sections 25 and 27 of the Arms Act, 1959. The appellants were also aggrieved by the order on sentence passed by the learned Additional Sessions Judge, Delhi on 30.09.2009, whereby the appellant Nasir was sentenced to a term of imprisonment for life and to also pay a fine of ₹ 5,000/- and in default thereof, to further undergo simple imprisonment

for six months in respect of the offence punishable under Sections 302/120B IPC. The appellant Rashid was similarly sentenced to a term of imprisonment for life and was also directed to pay a fine of ₹ 5,000/- in default of which, he was to undergo simple imprisonment for six months in respect of the offence punishable under Section 302/120B/34 IPC. The appellant Rashid was further sentenced to undergo rigorous imprisonment for three years and also to pay a fine of ₹ 3,000/- and in default of such payment, he was to further undergo simple imprisonment for three months for the offence punishable under Sections 25 and 27 of the Arms Act, 1959. The benefit of Section 428 Cr. P.C was given to the appellants.

2. The prosecution's case is that on 02.09.2005 an information had been received by DD No. 25-A through lady constable Babita that a man was lying dead in main Gali No. 1, Noor-E-Elahi Colony. On receipt of the said information, Sub-Inspector Beghraj, Head Constable Jagbir Singh and Constable Bhim Singh reached the spot. Inspector Ombir Singh with driver Kiran Pal and Constable Digamber are also stated to have arrived at the spot. There they found a red motorcycle of the make Hero Honda Splendor bearing registration No. DL-7SL-7186 in front of house No. 95.

They also found blood at the spot and a *chappal* of the left foot lying there. They noticed an empty cartridge lying at some distance. On their arrival at the spot, the police party learnt that the injured had been taken to GTB hospital by a PCR van. Head Constable Jagbir Singh was directed to guard the spot and Inspector Ombir Singh along with other police officials reached at GTB hospital in a government vehicle and obtained the MLC bearing No. B-3262/05 of an unknown person wherein it was stated that the patient was brought dead with an alleged history of a gunshot wound.

3. The prosecution's case further is that at GTB hospital, one Smt. Hasiba met the police party and she identified the deceased as her husband. Her statement was allegedly recorded wherein she stated that shortly after 10 pm on 02.09.2005, her husband had received a call on his mobile and on receiving the said call, he immediately left the house on his motorcycle bearing No. DL-7SL-7186. When her husband (Mazhar Hussain) did not return, she made enquiries from her brother-in-law Azhar Hussain, who apparently told her that near Gali No. 1, Noor-E-Elahi Colony, one rider of a red motorcycle has been shot. Thereafter, she along with her brother-in-law (Azhar Hussain) reached the spot and saw the said

motorcycle bearing No. DL-7SL-7186 and a *chappal* of the left foot belonging to her husband lying there. She also came to learn that her husband had already been taken to GTB Hospital and on reaching there she came to know that her husband Mazhar Hussain had died due to receiving gunshot injuries.

4. In view of the statement given by Smt. Hasiba, investigation into the murder of Mazhar Hussain was set in motion. The Crime Team was called and the photographs were also taken of the spot. The empty cartridge, the *chappal* of the left foot, blood as well as controlled earth lying at the spot, were seized vide separate seizure memos.

5. For quite some time, the Investigating Officer had no inkling about the case, despite several steps taken by him during the course of the investigation. Suddenly, on 21.10.2005, an extra-judicial confession was alleged to have been made by the appellant Nasir to Azhar Hussain, who is the brother of the deceased Mazhar Hussain. The said Azhar Hussain, on 21.10.2005 itself, allegedly told the police that the appellant Nasir had made an extra-judicial confession, when he was returning after offering

namaz, that having been fed up, he had got Mazhar Hussain murdered by paying a *supari* (contract killing) of ₹ 1 lac. On the basis of the purported extra-judicial confession made by the appellant Nasir to Azhar Hussain (brother of the deceased Mazhar Hussain), the appellant Nasir was arrested and interrogated. He is alleged to have made a disclosure statement in which the name of the appellant Rashid cropped up. Thereafter, the appellant Rashid was arrested on 22.10.2005 and he apparently made a disclosure statement, wherein he is alleged to have stated that he had thrown the country-made *katta* (pistol) in a *nallah* (drain) near Brahmpuri *puliya* (bridge) and that he could get the same recovered. It is in his disclosure statement that the name of one Javed also cropped up.

6. It is the case of the prosecution that the appellant Rashid got recovered a sum of ₹ 25,000/- from a box kept in his house bearing No. 62, Gali No.3, Jaffarabad, New Seelam Pur. It is further the case of the prosecution that at the instance of the appellant Rashid, a country-made *katta* of .315 bore with one used cartridge inside it and another live cartridge were recovered from his house. The sketches of the *katta* as well as the used cartridge and the live cartridge were prepared. It is alleged that

the *katta* was recovered from the house of Rashid on the basis of a disclosure made by him in his supplementary disclosure statement Exhibit PW6/G wherein he had stated that he could get the *katta* recovered.

7. The exhibits, which included the cotton swabs, blood controlled earth, the *katta*, the empty cartridge and the live cartridge, were sent to the Forensic Science Laboratory, Rohini for the opinion of the experts. Statements of various witnesses were recorded and after completion of the investigation, the *challan* under Section 302/120B IPC read with Sections 25 and 27 of the Arms Act was filed in the court of the learned Metropolitan Magistrate, who, in turn, committed the case to the Court of Sessions. Three separate charges were framed by the learned Additional Sessions Judge, Karkardooma Courts, Delhi on 26.03.2007. Insofar as the first charge is concerned, the appellant Rashid was charged as follows:-

“That on 23.10.05 from your house bearing House No. 62, Gali No. 3, Jafrabad, New Seelampur, Delhi you got recovered one countrymade pistol with one empty cartridge which you had used the same while committing the offence punishable under Section 302/34 IPC and thereby committed offence punishable under Sections 27/25/54/59 of Arms Act and within my cognizance.

The second charge was also against the appellant Rashid and was as under:-

“That on 02.09.2005 you alongwith your co accused Javed (not arrested) in furtherance of your common intentions committed murder of Mazhar Hussain by firing a shot at him and thereby committed an offence punishable under Section 302/34 IPC and within cognizance of this court.”

The third charge was against both the appellants Nasir and Rashid and was as follows:-

“That before 02.09.2005 you both alongwith your associate Javed (not arrested) agreed to do an illegal act, wit, to murder Mazhar Hussain and that you — accused Rashid with your associate Javed (not arrested) did the said act in pursuance of the said agreement after taking payment of Rs one lac with your associate Javed (not arrested) murdered him and thereby committed an offence punishable under Section 120 B read with Section 302 IPC and within my cognizance.”

Both the accused pleaded not guilty and consequently, the matter went to trial, which culminated in the impugned judgment and order on sentence. The prosecution had examined 24 witnesses and the defence also examined one witness. The statement of the appellants had also been recorded under Section 313 Cr. P.C.

8. Mr P. N. Bhan, the learned counsel appearing on behalf of the appellant Rashid submitted that the entire case against Rashid as also Nasir is built upon the so-called extra-judicial confession made by Naisr before Azhar Hussain. He submitted that Azhar Hussain is the brother of the deceased Mazhar Hussain. The appellant Nasir is the son-in-law of the deceased Mazhar Hussain and is the maternal uncle (mama) of the appellant Rashid. He submitted that Javed is a fictitious character which, according to him, is the figment of imagination of the prosecution. The learned counsel submitted, as mentioned above, that the investigation into the murder of Mazhar Hussain had reached a dead end and the Investigating Officer had no idea whatsoever as to who was behind the said murder. Then, suddenly, on 21.10.2005, after about 50 days, the police allegedly made a breakthrough in the sense that PW2 Azhar Hussain reported to them that the appellant Nasir had made an extra-judicial confession to him that he had got his father-in-law killed by paying a sum of ₹ 1 lac. The learned counsel submitted that this assertion on the part of the prosecution has fallen to the ground because PW2 Azhar Hussain denied that the appellant Nasir had made an extra-judicial confession before him on 21.10.2005. As a result, PW2 Azhar Hussain

was declared as hostile and upon cross-examination by the learned Additional Public Prosecutor, he denied the suggestion that he had stated to the police on 21.10.2005 that when he was coming after offering *namaz*, Nasir, son of Nisar Khan, resident of B-8, New Seelampur, Near Jama Masjid Delhi had informed him that after having become fed up, he had got Mazhar Hussain murdered by paying a *supari* of ₹ 1 lac. He also denied the suggestion that he had been won over by the accused persons and that he was deposing falsely in order to save them.

9. In view of the fact that PW2 Azhar Hussain has not supported the prosecution case of extra-judicial confession, it was argued by Mr Bhan that the entire edifice of the case against the appellants Rashid as well as Nasir had been built upon the so-called extra-judicial confession and now that the foundation itself had been knocked aside, the case against the appellants could not stand. The learned counsel, upon going through the deposition of PW1 Hasiba, who was the wife of the deceased Mazhar Hussain, pointed out that she had deposed that her husband had received a phone call and then soon thereafter he left the house on his motorcycle and shortly thereafter came the news that he had been shot dead. The learned

counsel submitted that no inquiries have been made by the police with regard to who made the phone call. The call details of the mobile phone of the deceased Mazhar Hussain have also not been produced in evidence by the prosecution.

10. The learned counsel also submitted that there are serious contradictions between the testimonies of PW6 Inspector V. S. Punia and PW23 Ombir Singh, who was the Investigating Officer in this case. As per PW6 Inspector V. S. Punia, the cash amount of ₹ 25,000/- was allegedly recovered at the instance of the appellant Rashid from the first floor of his house, whereas according to PW3 Inspector Ombir Singh, the currency notes were recovered from the ground floor of the house. Again, PW6 Inspector V. S. Punia stated that the *katta* and the live cartridge as well as the empty cartridge inside the *katta* were recovered from the ground floor of the house of the appellant Rashid. PW23 Inspector Ombir, on the other hand stated that the *desi katta* and the live cartridge as well as the used cartridge inside the *katta* were recovered from the first floor of the said house.

11. It was further pointed out by Mr Bhan that the place of occurrence is also not free from doubt. He submitted that, first of all, there is no place of incident mentioned in the charges framed against the appellants. Secondly, some witnesses stated that the place of occurrence was at Noor-E-Elahi chowk, whereas PW7 Sub-Inspector Rakesh Kumar (who was in-charge of the Crime Team) gave the place of occurrence as house No. 62, Gali No. 3, Jaffarabad, New Seelampur, which happens to be the house of the appellant Rashid. PW11 Sub-Inspector Mukesh Kumar Jain gave the place of occurrence as Noor-E-Elahi near D-94, Bhajanpura, whereas PW12 Head Constable Jagbir Singh gave the place of occurrence as the main Gali No. 1, Noor-E-Elahi, Bhajanpura, Delhi. Mr Bhan submitted that it is not to suggest that Mazhar Hussain had not been murdered near about Noor-E-Elahi chowk but, these differences in the accounts with regard to the place of occurrence in the testimonies of the several prosecution witnesses only go to show that the witnesses are not credible.

12. Mr Bhan also submitted that at the time of post mortem examination by PW18 Dr S. Lal, it was noted that the body of Mazhar Hussain had two firearm injuries, one was in the front of the chest in the midline over the

sternum with tattooing and blackening and the other was on the left temporal area. Both the bullets were recovered from the body and the opinion of the doctor was that both injuries were sufficient to cause death. According to Mr Bhan, the said doctor (PW18 Dr S. Lal) had not remarked anywhere with regard to any deformity in either of the two bullets recovered by him from the body of Mazhar Hussain. However, PW20 Puneet Puri, who is the ballistic expert, has stated that he had received one bullet which was intact (EB-1) and one deformed bullet (EB-2). Thus, according to Mr Bhan, this creates a great deal of suspicion as to whether the bullets recovered from the body of Mazhar Hussain were the same bullets which were sent to the ballistic expert for his opinion. In any event, Mr Bhan submitted that PW20 Puneet Puri could not give any opinion with regard to the bullets EB-1 and EB-2 having been fired from the alleged weapon (*katta* Exhibit P-2). He submitted that in the only opinion of PW20 Puneet Puri is that the empty cartridge allegedly found from the spot and the empty cartridge allegedly found inside the *katta* were fired from the very *katta* which had been allegedly recovered at the instance of the appellant Rashid.

13. It was also submitted by Mr Bhan that no finger prints were taken from the alleged weapon of offence and that there were serious doubts with regard to the recovery of the empty cartridge from the alleged place of occurrence and the recovery of the empty cartridge as well as the live cartridge allegedly at the instance of the appellant Rashid. He also submitted that Javed was a fictitious person, who had been created by the prosecution. There were no details of Javed provided by the prosecution – no address, no parentage and no connection with to anybody. Thus, according to Mr Bhan, the entire case of the prosecution was not supported by any evidence and, therefore, the appellant Rashid as also Nasir were entitled to be acquitted.

14. Mr R. M. Tufail, the learned counsel appearing on behalf of the appellant Nasir, adopted the arguments of Mr Bhan and submitted that the whole case is full of doubts. He submitted that, in any event, even as per the prosecution, it was a case of circumstantial evidence. That being the position, the existence of motive would be a very important factor. But, no motive has been established by the prosecution and the so-called story of magic (jaadu-tona) being practiced by Mazhar Hussain on his son-in-

law Nasir is too far-fetched and without any basis whatsoever. The prosecution has not brought out any evidence to suggest any acrimony between the appellant Nasir and his father-in-law Mazhar Hussain. Thus, according to Mr Tufail, in the clear absence of motive, the trial court ought not to have convicted the appellants and, therefore, the appeals ought to be allowed.

15. Ms Richa Kapur, the learned counsel appearing on behalf of the State, submitted that although the appellant Nasir had made an extra-judicial confession before PW2 Azhar Hussain, the latter has resiled from his statement made to the police on 21.10.2005. She submitted, however, that even if the extra-judicial confession is kept aside, there is enough circumstantial evidence which points towards the guilt of the appellants. She submitted that the recovery of the empty cartridge (Exhibit P-4) (EC-1) is clearly established and the same was seized as per seizure memo Exhibit PW12/A much before the arrest of the appellant Rashid and the recovery of the *katta*. The empty cartridge finds mention in the *ruqqa* as well as can be seen in the photographs Exhibit PW4/F and Exhibit PW4/G. It also finds mention in the brief facts (Exhibit PW23/D) dated 03.09.2005

prepared during the inquest proceedings. She submitted that another important circumstance was the recovery of the *katta* at the instance of the appellant Rashid. She submitted that although no place has been specifically mentioned by the appellant Rashid in his alleged second disclosure statement, but he had stated that he could get the same recovered and the fact that he did point out is in itself admissible. She also submitted that the empty cartridge in the *katta* matched with the empty cartridge found at the spot and in the opinion of the ballistic expert Puneet Puri, both the cartridges had been fired from the *katta* Exhibit P-2, as per the report of the ballistic expert Exhibit PW20/A. She submitted that the recoveries in themselves were sufficient to establish the prosecution case and placed reliance on the decision of the Supreme Court in the case of **Rameshbhai Mohanbhai Koli v. State of Gujarat : JT 2010 (11) SC 605.** She further submitted that the existence of a motive is not at all essential when there are other circumstances which unerringly point out towards the guilt of the accused. She also submitted that the call records of the appellant Nasir's mobile phone (9810254326) and the appellant Rashid's mobile phone (9810234935) had been produced in evidence as Exhibit PW22/A-1 to A-21 and Exhibit PW22/B-1 to B-8 respectively and the

same had been proved by PW22 R. K. Singh, who was working with Bharti Airtel. According to her, this shows that there were phone conversations between the appellants Nasir and Rashid on 01.09.2005 and 02.09.2005. According to her, this is an important aspect to show that there was a conspiracy between the appellants.

16. We have gone through the evidence on record and have considered the arguments advanced by the counsel for the parties. We agree with the submission made by the learned counsel for the appellants that the entire edifice of the prosecution case has been built upon the foundation of the extra-judicial confession which was allegedly made by the appellant Nasir to PW2 Azhar Hussain. We also find that PW2 Azhar Hussain has denied this fact before Court during his deposition and it is for this reason that he was declared to be hostile. On cross-examination by the learned Additional Public Prosecutor, PW2 Azhar Hussain has clearly denied the suggestion that such a confession was made by the appellant Nasir to him on 21.10.2005 and that he had made a statement to this effect before the police on 21.10.2005.

17. The next important aspect of the case is that prosecution has not been able to establish any motive on the part of the appellants to have Mazhar Hussain murdered. Nothing has been brought on record to suggest any animosity or enmity between the appellant Nasir and his father-in-law Mazhar Husain. We agree with the submission made by the learned counsel for the appellants that the suggestion that Nasir was fed up with his father-in-law employing magic (*jaadu tona*) against him is too farfetched and is purely in the realm of imagination. No concrete evidence has been brought out by the prosecution to even suggest that there was a motive for the appellant Nasir to have his father-in-law Mazhar Hussain killed. Obviously, when Nasir did not have a motive, there was no question of him having taken out a *supari* for Rs 1 lakh for having his father-in-law Mazhar Hussain killed. Consequently, the appellant Rashid also did not have any motive to kill Mazhar Hussain.

18. Another interesting aspect of this case is the existence or, shall we say, non-existence of the third accused Javed. Usually, while recording disclosure statements, all the details are given by the persons whose statements are recorded by the police. But, in this case, we find that only

the name of Javed has cropped up. There is no description of him. His address has not been given. His parentage has also not been disclosed. Where he came from is unknown. What he did is unknown. In these circumstances, we cannot but agree with the submission made by the learned counsel for the appellants that Javed is a fictitious character and does not exist in reality.

19. We have also seen that the bullets recovered from the dead body of Mazhar Hussain did not match the alleged weapon of offence, namely, the *katta* (Exhibit P-2). Thus, there is no link between the bullet and the weapon of offence.

20. This leaves us with the alleged recovery of the empty shell from the scene of crime. There is a discrepancy as to where the empty shell was actually recovered from. According to PW-12 [Head Constable Jagbir Singh], the same was recovered near Baba Polyclinic, whereas, according to PW-17 [Sub-Inspector Beghraj], the empty cartridge was lying at a distance of 4 feet from the motorcycle and, if one were to see the site plan, Baba Polyclinic is at a great distance from the motorcycle. Secondly,

there is doubt with regard to the recoveries at the instance of the appellant Rashid. We have already indicated while recording the submissions of the learned counsel for the appellant that there are contradictions between PW-6 [Inspector V.S. Punia] and PW-23 [Inspector Ombir Singh] with regard to the place of recovery of the cash of Rs 25,000/- and the *katta* and live cartridge as well as the fired cartridge from the house of the appellant Rashid.

21. We also find it difficult to believe that the appellant Rashid would have kept the *katta* with a fired cartridge inside it for over 50 days in his house, particularly when he was in close contact with the victim's family and would, in all the circumstances, have been aware of the progress of the investigation. We may reiterate that Rashid is the nephew of Nasir who, in turn, was the son-in-law of deceased Mazhar Hussain. Both Rashid and Nasir must have been in contact with the family members of the deceased Mazhar Hussain and, therefore, it would be highly unnatural on the part of Rashid to have retained a murder weapon in his house with the empty fired shell in it.

22. With regard to the call records pertaining to the appellants Nasir and Rashid, there is nothing unusual or abnormal about the calls and phone conversations between the two, whether it be on 01.09.2005 or 02.09.2005 or on any other date because they are closely related. Nasir is the maternal uncle of Rashid and it is natural for them to be speaking to each other even on a day-to-day basis. From such conversations alone, it cannot be inferred that they were entering into a conspiracy to kill Mazhar Hussain.

23. Consequently, we find that in this case, the prosecution has not been able to prove or establish any motive. They have also not been able to prove or establish any conspiracy between the appellants. The third accused Javed has remained a fictional character and has not surfaced. There is no evidence of any money having exchanged hands and the mere alleged recovery of Rs 25,000/- from the house of Rashid is of no consequence. The bullets found from the body of the deceased Mazhar Hussain have not matched with the empty cartridges or the alleged weapon of offence [*katta* (Exhibit P-2)]. The recoveries of the empty cartridges and the *katta* are also not free from doubt.

24. For all these reasons, we are of the clear view that the prosecution has not been able to bring home its case against the appellants. The impugned judgment and / or order on sentence are set aside and the appellants are acquitted of all charges.

25. The appellants be set at liberty forthwith. The appeals are allowed.

BADAR DURREZ AHMED, J

VEENA BIRBAL, J

JULY 25, 2011

SR/dutt