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IN THE HIGH COURT OF DELHI AT NEW DELHI
Crl. Appeal No. 580/2009

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Reserved on: 8th August, 2012
Date of Decision: 22nd August, 2012

SHABBIR @ NEHA

....Petitioner

Through Mr. S.B. Dandapani, Advocate.

Versus

STATE GOVT. OF NCT OF DELHI

...Respondent

Through Mr. Sanjay Lao, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE S.P. GARG

SANJIV KHANNA, J.

Shabbir @ Neha impugns his conviction under Section 302 of the Indian Penal Code, 1860 ('IPC', for short) for murder of Atiq, vide judgment dated 19th February, 2009. By order of sentence dated 21st February, 2009 the appellant has been sentenced to Rigorous Imprisonment for life, to pay fine of Rs.5,000/- and, in default of payment of fine, to undergo further Simple Imprisonment for six months.

2. The case of the prosecution is that on the night intervening 26/27th April, 2004, the deceased Atiq and Babbu at about 10.30 PM had gone for a walk and had met two eunuchs at the gate of Woodland Park. Atiq went inside the park with the smaller eunuch and the taller eunuch followed them. Thereafter there was a quarrel. Babbu saw the quarrel

and called others. Atiq was stabbed. The two eunuchs were apprehended by the public and Atiq was taken to the hospital where he was declared brought dead. The names of the said two eunuchs were disclosed as Shabbir @ Neha, the appellant who has been convicted and Om Prakash @ Helan who has been acquitted.

3. Death of Atiq, by way of injury caused due to a sharp weapon like knife, stands proved and established by the MLC of Deen Dayal Upadhaya Hospital, Harinagar (Ex. BW13/A). As per the MLC, Atiq was brought to the casualty of the said hospital at 1.20 AM on 27th April, 2004. He was unconscious and not responding. His pulse and blood pressure were not palpable and recordable. He was declared brought dead. The MLC records CIW present over abdomen. The body was packed and sent to the mortuary for post-mortem. The post mortem report of Atiq Ex. PW13/B records that the deceased had one stab wound over mid part of left hypochondrium region just below last rib. It measured 1.8 cm x 1 cm and deep to peritoneal (sic. peritoneum). The edges were regular. The cause of death was due to hemorrhagic shock consequent upon rupture of spleen and abdomen followed by stab injury inflicted by sharp edged weapon (knife). Thus, the homicidal death of Atiq is established and proved by the said documents i.e. MLC and post-mortem report, PW13/A and PW13/B respectively.

4. The next question relates to involvement and whether the appellant had committed the said murder and had caused the stab injury. Babbu (PW7), in his testimony in court, had stated that he and Atiq had gone for a walk after meal at about 10.30 PM. Two eunuchs, in female clothes, were standing near the gate of Woodland Park. Atiq went to them stating 'let us have fun'. The two eunuchs demanded Rs.100/- but the amount was finally settled at Rs.80/-. The taller eunuch proposed that Atiq should take the shorter eunuch. Atiq and the shorter eunuch went inside the park. The taller eunuch followed them. PW7 remained outside the gate and did not go inside. Quarrel took place between Atiq and the eunuchs and they started grappling with each other. The shorter eunuch ran towards PW7, on which the said witness ran away and met Feroz Ahmed (PW2), Shahid (PW6) and Anis (PW4) at some distance. He told them about the quarrel. PW7 Babbu went to call other colleagues and when he returned, he saw that crowd had gathered at the gate of the park. The eunuchs had been apprehended by the public. Atiq had been stabbed and was taken to the hospital where he died. PW7 Babbu recognized the two eunuchs as Shabbir and Om Prakash. Shabbir being the present appellant and the taller eunuch.

5. PW-2 – Firoz Ahmed in his statement has stated that on 26th April, 2004, at about 10.30 PM, he along with Anis and Shahid were walking towards Woodland Park and they reached near taxi stand, when Babbu

came running to them. Babbu informed them that some persons were assaulting Atiq in Woodland Park, and on their way there, they stumbled across a tall person near the gate of Woodland Park. The said tall person was identified by the said witness as Shabbir. There were blood stains on his clothes. They could hear faint sounds of groaning coming from Atiq. PW-2 Feroz went into the park where he found Atiq crying. Atiq was lifted and brought to the gate of the park, where he told Anis that Shabbir had stabbed him with a knife. Feroz PW-2 and Chottey Master (sic. Chottey Miyan) took Atiq in a tempo to Aman Hospital, but on doctor's advise, Atiq was then taken to DDU hospital.

6. PW-4 Anis is the brother of Atiq. In his statement, he has stated that he along with Feroz went to Woodland Park. At the gate of the park they met Babbu who came running towards them from inside the park. He told them that two eunuchs were beating Atiq. Feroz PW-2 and Anis went inside the park. A tall eunuch collided against him. The tall eunuch was identified as Shabbir. He caught hold of the tall eunuch. Shahid was also there and helped in apprehending the eunuch. The clothes of Shabbir were stained with blood. Feroz (PW2) went inside the park and brought Atiq. Atiq told PW-4 Anis that the tall eunuch had stabbed him with a knife. In the meanwhile, other persons gathered and gave beatings to the appellant. Atiq was taken to the hospital and the appellant was handed over to the police.

7. PW-6 Shahid has similarly stated that he along with Feroz (PW2) and Anis (PW4) had gone towards the park on 26th April, 2004 at about 9.00 PM. At the gate of the park Babbu met them and told them about the quarrel. In the meanwhile a eunuch came from inside the park and collided with Anis. The said eunuch was identified as the appellant Shabbir. He was overpowered. Feroz (PW2) went inside the park and brought Atiq on his shoulder. Feroz (PW2) and Chottey then took Atiq to the hospital.

8. It is noticeable that the statements of Feroz PW-2, Anis PW-4, Shahid PW-6 and Babbu PW7 on important material aspects are identical and similar. The said witnesses clearly indicate that on 26th April, 2004 at night the deceased Atiq and Babbu (PW7) had gone towards Woodland Park. Babbu (PW7) came running and informed them that Atiq had been attacked in a quarrel. PW-2, PW-4 and PW-6 (Feroz, Anis and Shahid) came towards the park where they stumbled across the tall person, i.e. appellant Shabbir, who was caught. PW-2 Feroz went inside the park and brought Atiq out, who was injured having a stab wound. The appellant was apprehended at the spot itself.

9. PW-2 Feroz in his statement stated that Atiq told Anis (PW4) that Shabbir had stabbed him with a knife. PW-4 Anis in his statement had stated that Atiq told him that a tall eunuch, i.e. the appellant, had stabbed him with a knife. PW-6 Shahid has stated that Atiq had not told him

anything but when he was cross-examined by the counsel for the appellant - Shabbir, he admitted that the appellant Shabbir was overpowered and given beating. He further stated that they had given beatings to the appellant because Feroz (PW2) had told him that he had stabbed Atiq. Feroz PW-2 was also cross-examined by the learned Additional Public Prosecutor on certain aspects. However, what is clear from the statements of PW-2 Feroz and PW-4 Anis is that Atiq had told PW-4 Anis that he was stabbed by the appellant. The said statement made by Atiq would constitute dying declaration and has to be given due weightage.

10. A dying declaration is essentially a statement made by a person as to the cause of his death and as to the circumstances resulting in his death. Section 32 of the Evidence Act, 1872 (Evidence Act, for short) makes a dying declaration admissible in the Court of Law. The said Section is an exception to the hearsay rule. The principle incorporated in the Section is based upon the latin doctrine *nemo moriturus praesumitur mentire*, i.e., a man will not meet his maker with a lie in his mouth. The words of a dying man, as observed by Shakespeare, are “.....scarce, they are seldom spent in vain; they breathe the truth that breathe their words in pain”. Section 32 of the Evidence Act makes a departure from the English Law whether it is essential that the declarant must have been entertained a settled or hopeless expectation

of death, death being imminent or impending. In India, for a dying declaration to be admissible, it need not have been made in expectation of the immediate death (see *Sharad Birdhichand Sarda versus State of Maharashtra*, (1984) 4 SCC 116 and the decisions cited therein and *Kans Raj versus State of Punjab and Others*, (2000) 5 SCC 207).

11. That apart, we feel the principle of res gestae is equally applicable. The said principle gets statutory recognition and is admissible in Evidence Act under Section 6 thereof. The essence of principle of res gestae in evidence is that the facts though not in issue are so connected with the facts in issue of the same transaction that they become relevant. A statement made contemporaneously with the act or immediately after it and not after much interval of time assures sanctity to the statement made as there is no possibility of fabrication. Sarkar on Evidence (15th Edition Reprint 2004 at page 156, 157) has summarized the principle of res gestae as applicable to India as under:-

“The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue “as to form part of the same transaction” become relevant by itself. This rule is, roughly speaking an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement on fact admissible under Section 6 of the Evidence Act is on account of spontaneity and immediacy of such statement or fact in

relation to the fact in issue. But, it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae [Gentela Vijayavardan Rao v. State of A.P., 1996 SC 2791:1996 Cri LJ 4151, 4154].

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These declarations in order that they may be admissible as res gestae, should be contemporaneous or almost contemporaneous with the transaction in issue, i.e. the interval should not be such as to give time or opportunity for fabrication and they should not amount to a mere narrative of a past occurrence. "The declarations are admitted when they appear to have been made under the immediate influence of some principal transaction, relevant to the issue, and are so connected with it as to characterize or explain it. It should appear that they were made without premeditation or artifice, and without a view to the consequences; that they are the spontaneous utterances, the natural result of the act they characterize or elucidate" [Jones Ev Civil, s 344: see Noor Md v Imtiaz, A 1940 O 130]. "The declarations must be calculated to unfold the nature and quality of the facts which they are intended to explain; they must so harmonise with those facts as to form one transaction. There must be a transaction of which they are considered a part; they must be concomitant with the principal act, and so connect with it as to be regarded as the result and consequence of co-existing motives" [Jones, s 348 citing People v. Vernon, 35 Cal 49 and other American cases]. These accompanying facts and constituent incidents, which reveal the true nature of the fact in issue and disclose the motives of the parties or establish their connection with the fact under inquiry, are admitted as res gestae. The history

of the term res gestae was traced by PROF THAYER in 15 Am Law Review, 5, 81 (see Wig s 1767). ”

The said doctrine has been applied by the Supreme Court in several cases including *Sukhar versus State of U.P.*, (1999) 9 SCC 507 and *Gentela Vijayvardhan Rao versus State of A.P.*, (1996) 6 SCC 431.

12. The motive is also established by the statement of PW7 (Babbu).

13. The presence of the appellant at the spot and his detention and beating by the public is clearly established by the statement of Feroz PW-2, Anis PW-4, Shahid PW-6 and Babbu PW-7. We also have on record the MLC of the appellant Ex. PW-21/J dated 27th April, 2004 at 6.35 AM issued by the DDU Hospital. In the said MLC, it is recorded that the appellant was brought for medical examination as he was allegedly beaten by the public, comprising of around 20-25 persons, as told by the patient himself. He had multiple bruise and abrasions, as has been noted in the MLC. In his statement under Section 313 of the Code of Criminal Procedure 1973 (CrPC, for short), the appellant did not explain or state that his detention had taken place at a different location, time or place.

14. Learned amicus curiae appearing for the appellant has submitted that there is no clear evidence that the knife injury was caused by the appellant, and not by the second accused, who has been acquitted i.e.

Om Prakash @ Helen. He relied upon the statement of PW-7 Babbu, who in his cross-examination had stated that he had seen the knife in the hand of the shorter eunuch i.e. Om Prakash @ Helen. At this stage itself we may note that PW-7 (Babbu) was confronted with his statement Ex. PW7/DA, wherein he had stated that he had seen the knife in the hand of shorter eunuch. The aforesaid statement of Babbu PW-7 does not help the appellant in the present case in view of the dying declaration made by Atiq to Anis PW4 that the appellant had stabbed him with a knife. The said aspect has been admitted and accepted by PW-2 Feroz, and PW-4 Anis in clear and categorical terms. PW-6 Shahid in his cross-examination on behalf of the appellant had also stated that they had given beating to the appellant because PW 2 (Feroz) had told him that the appellant had stabbed Atiq. The trial court in the impugned decision has doubted the common intention of the other co-accused Om Prakash @ Helen and his involvement in the offence in spite of the statement of PW-7 Babbu, which has been referred to and quoted above. Presence of Om Prakash has not been mentioned by PW-2 Feroz, PW-4 Anis and PW-6 Shahid. PW-7 Babbu in his statement has mentioned that there were two eunuchs and during the quarrel both of them were grappling with Atiq. Thereafter, shorter eunuch ran after him and he ran out of the gate. The shorter eunuch was holding a knife in his hand. The said eunuch was not seen by Feroz PW2, Anis PW4 and Shahid PW6

immediately thereafter. They did not support the prosecution's case against Om Prakash. PW7 Babbu had not stated that there was blood on the knife in the hands of Om Prakash. Probably Om Prakash ran away. The contention/ plea therefore should be rejected.

15. PW-19 SI Udai Singh, the first police officer who reached the spot has stated that when he reached at Chawla Band, Titarpur, Najafgarh Road, several persons had collected and two eunuchs Shabbir @ Neha and Om Prakash @ Helan, were there. They had been caught by the public and given beating. He was told that both the eunuchs had assaulted Atiq with knife. But this is incorrect as Atiq had only suffered one knife stab. He had also stated that both the accused were sent to DDU Hospital for medical examination but MLC of Om Prakash @ Helen was not placed on record.

16. Learned counsel for the appellant submitted that Feroz PW-2, Anis PW-4 and Shahid PW-6 were declared hostile and were cross-examined by learned Additional Public Prosecutor and therefore, their testimonies were debatable and doubtful. The Id. Counsel submitted that the benefit of doubt should be given to the appellant accused. We considered the said contention but do not find any merit in the said contention. The testimony of Feroz PW-2, Anis PW-4 and Shahid PW-6 which have been reproduced above, are

truthful and they have not over stated the case. We have not taken into account the exaggerations and over statements in their statements under Section 161, which they refused to accept and admit even when cross-examined by the learned Additional Public Prosecutor. PW-2 Feroz refused to accept that he had seen the eunuchs assaulting Atiq in the park and when they tried to run away they were overpowered. In the cross-examination by the counsel for the appellant, Feroz PW-2 had reiterated that Atiq had told Anis PW4 at the gate of the park that he had been stabbed by the tall eunuch i.e. the appellant.

17. Similarly, PW-4 Anis was cross-examined by the Additional Public Prosecutor. He denied that he had stated to the police that Babbu had told him that two eunuchs were beating Atiq because he had not given money to them after having intercourse with them. He had also denied that he had seen two eunuchs beating Atiq and they tried to run but were overpowered.

18. PW-6 Shahid, in the cross-examination by the Additional Public Prosecutor, stated that Babbu did not tell why the quarrel had taken place and he had not stated to the police that the quarrel had taken place because Atiq had not paid the eunuchs. He did not state that he had seen two eunuchs beating Atiq nor had he stated to the police that on seeing them, the two eunuchs tried to run away and they overpowered both the

eunuchs. The witnesses, it is apparent, were embarrassed, hesitant and did not want to state that Atiq had sexual intercourse with any eunuch.

19. In fact, if we read the statements of Feroz PW-2, Anis PW-4 and Shahid PW-6, who were together and had reached the spot immediately after the occurrence, they are identical on all material aspects. They have denied the suggestions given by the Additional Public Prosecutor that they have gone inside the park and that they had seen the eunuchs beating Atiq on the pavement. Statement of these witnesses cannot be ignored only on the ground that they were cross-examined by Additional Public Prosecutor after being declared hostile on certain aspects that may be relevant as far as accused Om Prakash is concerned but as far as the appellant herein is concerned, they are speaking in unison and together in the same voice and are against the appellant as the person responsible and who had cause the injury resulting in the death of Atiq.

20. Learned counsel for the appellant submitted that the knife as per the police was recovered on the basis of disclosure statement next day in the morning i.e. 27th April, 2004. Our attention is drawn to the testimony of PW19 SI Udai Singh and PW21 Ram chander who was also the SHO, Khajoori Khas and the Investigating Officer. PW21, Insp. Ram Chander has stated that both the accused persons had taken them to the spot and at the instance of Shabbir, the knife was recovered. Earlier Shabbir had made disclosure statement Ex. PW19/F. PW-19 had stated

that after disclosure statement PW19/F was made by Shabbir, the knife was recovered. Shabbir has disclosed that he had thrown the weapon of offence i.e. knife in a 'kyari' inside the park near western side of Woodland Park. In the cross-examination he admitted that knife was lying in the open space below a tree. The pointing memo (Ex. PW19/J) was prepared on the recovery of the knife. He had also admitted that they stayed at the spot for about one and a half hour. Arrest of the appellant was effected on 28th April, 2004.

21. PW-21 Inspector Ram Chander, on the recovery of knife in the cross-examination had stated that the knife was found hidden in the hedge along the path which existed in the middle of the park but no site plan was prepared. He has further stated that Om Prakash had made disclosure statement at about 9.00 AM in the police station. However, in spite of disclosure statement of Shabbir, which PW-21 had stated that he had recorded in his own hand writing in police station, he claimed to have reached the spot at 9.00 AM.

22. It is apparent that the story propounded and set up by the PW-19 and PW-21, with regard to the disclosure statement and recovery of knife, is incorrect and wrong. The alleged story of discovery of knife hidden somewhere is improbable. This is also clear when we examine the testimony of PW2 (Feroz) who, when cross-examined by the Additional Public Prosecutor, had stated that the knife was not recovered

on the pointing of the accused. He voluntarily stated that the knife was lying at the place of occurrence and it was picked up by them and handed over to the police. However, even if we completely discard the disclosure statement and recovery of knife pursuant thereto, there is ample evidence and material to uphold the conviction of the appellant.

23. Learned counsel for the appellant submitted that there is discrepancy in the statements of PW-2 Feroz, PW-4 Anis and PW-6 Shahid, whether the clothes of the appellant accused were blood stained. It is also submitted that the statement of PW-6 Shahid does not support the case of the prosecution that the clothes of the appellant were blood stained. PW2 in his examination in chief had stated that there were blood stains on the clothes of the accused i.e. the appellant. In the cross-examination by the Additional Public Prosecutor, he had also stated that the accused was wearing Salwar and Jampath and they were taken into possession by the police. However, he admitted that he would not be able to identify the clothes which the accused were wearing. This was possible and not improbable as the statement of PW2 Feroz was being recorded after nearly one year in February, 2005. He was being truthful. PW-4, Anis also stated that the clothes of the appellant accused were stained with blood. However, in the cross-examination, he expressed ignorance and was confronted with a statement under Section 161 Ex. PW4/A, wherein it is not recorded or stated that the clothes of Shabbir were stained with

blood. PW-6 Shahid had stated in the cross-examination that he did not know if there were blood stains on the clothes of Shabbir. PW-7 Babbu when cross examined on behalf of the appellant – Shabbir, had stated that he had not seen blood on the clothes of the accused when he had returned to the spot. Feroz PW-2, Anis PW-4 and Shahid PW-6, have stated that they were extremely nervous and were taken aback and shocked by the incident which had taken place resulting in stabbing of Atiq. PW-6, Shahid stated that he did not know if there were blood stains on the clothes of the appellant. However, PW-2 was clear and categorical that there were blood stains on the clothes of Shabbir. PW-2 had further gone to describe clothes worn by the accused as Salwar and Jampath. The clothes worn by the appellant were seized by the police vide seizure memo Ex. PW19/J. These clothes were later on sent to CFSL for scientific analysis. The report submitted by CFSL dated 18th August, 2004, refers to packet Exhibit marked 4 which contained of one salwar and jampath. Both of them tested positive for the presence of blood. The said report has been marked as Ex. PW11/A. However, the blood group could not be ascertained conclusively. Knife (Ex. PW12/A) which was recovered was also sent for CFSL examination. The CFSL report dated 29th October 2004 states that the vest (baniyan) was examined and compared with the knife under stereomicroscope. It was observed that the Knife- Ex. Marked as '1' - could have caused the

cut which was present on the vest. The cut mark on the vest was sharp in nature and the edge of the knife was also sharp.

24. It is clear from the aforesaid that the examination of PW-2, PW-4, PW-6 and PW-7 are reliable and trustworthy. Testimony of PW-7 shows and discloses the motive or the cause of the violence i.e. that there was dispute with regard to payment. The appellant was working as a sex worker which is clear and also established from the clothes worn by the appellant which were seized and then sent for examination. PW-7 establishes that there was a fight and a quarrel. This is also confirmed by the testimonies of PW-2, PW-4 and PW-6 who reached the spot immediately after Atiq was stabbed. They in unison and in affirmative have stated that the appellant was trying to run away when he was caught. PW-2 has stated that the appellant's clothes were blood stained. PW-2 and PW-4 have stated that the Atiq had told PW-4 Anis that the appellant had stabbed him. PW-6 had also stated that he started beating the appellant as Feroz PW-2 had told him that the appellant had stabbed Atiq. The statement made by the deceased Atiq to PW-4 is dying declaration and is material and relevant. Principle of *res gestae* also apply. We may also note that Anis PW-4 was not cross-examined on the said aspect. The statement of PW2 that Atiq had told him that stab wound was given by the appellant, i.e. the tall eunuch remained,

unchallenged. The detention, and thereafter the arrest of the appellant at the spot itself, is also established.

25. Thus, the prosecution has been able to successfully establish chain of circumstances which clearly point and implicate the appellant and exclude anyone else from commission of offence. We may note that the presence of Om Prakash @ Helen has not been doubted by the learned trial court. Om Prakash has however, been given benefit on the ground that he did not share common intention with the appellant. In this regard, the statements made by PW-2, PW-4 and PW-6 can be referred to and relied upon.

26. In view of the aforesaid position, we do not find any merit in the present appeal and the conviction and the sentence awarded to the appellant is confirmed. The appeal is dismissed.

(SANJIV KHANNA)
JUDGE

(S. P. GARG)
JUDGE

August 22, 2012

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