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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 17th September, 2012

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CRL.A. 709/2009

MOHD. SHAHABUDDIN

..... Appellant

Through Mr. Ajay Verma, Advocate.

versus

STATE (GNCT) OF DELHI

..... Respondent

Through Ms. Richa Kapoor, Additional Public
Prosecutor.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE S.P.GARG

SANJIV KHANNA, J. (ORAL)

By the impugned judgment dated 16th February, 2009, the appellant Mohd. Shahabuddin has been convicted under Section 302 Indian Penal Code, 1860 (IPC) for murder of Ashok. He has been sentenced to life imprisonment and fine of Rs.5,000/-. In default of payment of fine, he has to undergo rigorous imprisonment for six months. The appellant has also been convicted under Section 201 IPC and sentenced to rigorous imprisonment of four years and fine of Rs.2,000/-. In default of payment of fine, he has to undergo rigorous imprisonment for three months.

2. Ashok, the deceased was carrying on business of manufacturing school bags, at premises No.210/211, Gokalpuri, Delhi, in partnership with Ram Sahai, his brother-in-law. In the night intervening 14 and 15th May, 2005, Ashok was murdered on the ground floor of the said factory, where he was sleeping. Dead body of Ashok was found at about 9.30 A.M. by his daughter Pinki, then aged about 10 years. The body had several injury marks and was bleeding from different parts.

3. Autopsy of Ashok's dead body was done and as per Dr. S. Lal (PW-3), the deceased had 14 ante mortem injuries. He opined that the cause of death was haemorrhagic shock due to multiple ante mortem stab wounds over the neck, chest and abdomen. Injuries Nos.1, 3, 4, 11, 12 and 14 were caused by single pointed sharp edged weapon and injuries Nos.2, 5, 6, 7, 8, 9, 10 and 13 were caused by pointed tip of double sharp edge weapon. The post mortem report was exhibited as PW3/A. Thus, homicidal death of the deceased stands proved and established beyond doubt.

4. The core issue, which is argued before us, pertains to the involvement of the appellant Mohd. Shahabuddin and whether he is responsible for causing the said injuries. The appellant does not dispute and deny the fact that he, along with Rajinder and Sanjay, had slept in the factory premises. He is also not denying the fact that the deceased Ashok was present in the factory on the ground floor. The

appellant had appeared as a defence witness (DW-1) and in his statement has stated that in the night intervening 14th and 15th May, 2005, Ashok was writing accounts of payments made to workers. He had cleared dues of other workers by 10 P.M. Ashok was wearing a jeans pant and a checkered shirt. DW-1 had remained in the room up to 10.30 P.M. and had, thereafter, left the room to go to bed. He had gone to sleep by 11 P.M. and did not wake up throughout that night. Next day, he woke up at about 8 A.M. and went to the bathroom. They use to go 'Sauchalaya' for defecation. After defecation, he had gone to take tea and returned at about 10.30 A.M. A crowd had already collected there and police was also present. He was interrogated and taken to the police station. Other workers were also taken to the police station.

5. Sanjay Kumar had appeared as PW-14 and had stated that he was present in the factory along with Rajender. They along with Ashok and the appellant-Mohd. Shahabuddin were watching television, after completing their duty. While watching television, an altercation took place between the appellant and Ashok. The appellant was asking for Rs.1,000/- from Ashok, but Ashok had agreed to give him only Rs.100/-. The deceased refused to give money and therefore the appellant abused him. He (Sanjay Kumar) and Rajender intervened in the altercation and thereafter they went to sleep in the next room. Next

morning at about 8 A.M., he heard cries of Pinki, daughter of Ashok and woke up. He claimed that the appellant was not present at that time. However, he admitted that along with other workers, he was taken to the police station for interrogation.

6. Rajender Kumar had appeared as PW-10 and his examination-in-chief was concluded on 31st July, 2007. His cross-examination was deferred at the request of the Amicus Curiae. Thereafter, he was not produced for cross-examination as he had expired. Therefore, evidence of PW-10 cannot be taken on record, as requirement of Section 33 of the Evidence Act, that the accused should have been granted opportunity to cross-examine the witness, is not satisfied.

7. Mahavir Prasad, the other co-worker, had appeared as PW-7. He had stated that in the night of 14th May, 2005, he had left the factory premises at about 11 P.M., after finishing the work. At that time Ashok, Sanjay, Rajender and the appellant were present in the factory. Next day i.e. on 15th May, 2005, he came to the factory at about 9 A.M. and went to the first floor. Rajender and Sanjay were sleeping. The appellant was also sleeping in the adjacent room. Another labour Yusuf was working in the Varanda. At that time, he heard shrieks and cries of the daughter of Ashok. Thereafter, he along with Rajender, Sanjay, Yusuf and another labour, namely, Sukhbir went to the ground floor and found that Ashok was lying dead in a pool of blood. Pinki

informed Gangaram, nephew of the deceased Ashok. Gangaram came at the spot, along with one Subhash, and informed the police. PW-7 has stated that the appellant had already left the factory premises and was not present there. The appellant had taken advance money from the deceased Ashok and Ashok used to remind him that advance money would be deducted. There was exchange of hot words between them.

8. It is clear from PW-7's statement that the appellant was in the factory and was sleeping there till the dead body of Ashok was found. Appellant's presence in the said premises till 9.30 A.M. is, therefore, virtually accepted. The charge sheet also admits and records the said position. The appellant had appeared as DW-1 and stated that he was in the factory till about 8.30 A.M. Some contradictions or variation in the timing is possible, as witnesses were deposing after a considerable delay. However, what is clear and cannot be denied is that the appellant did not abscond and had remained in the factory till everybody woke up. When, Pinki (PW-8) had noticed the dead body, the appellant was present at that time in the factory. Thus, the appellant had not, as per the prosecution case, absconded at night immediately after committing the "Act".

9. The next question, which arises for consideration, is whether the appellant went missing thereafter and had absconded. As per the

appellant, he had come to the factory at about 10.30 A.M. As per the prosecution case, the appellant had come to the factory on his own at about 3.30 P.M. Even if we believe the prosecution version, it is clear that the police did not have to search for the appellant. He had come to the factory premises on his own at 3.30 P.M. It is also clear from the statement of PW-14 and PW-7 that the workers of the factory were rounded up and were taken to the police station for interrogation, at about 2.30 P.M. Thus, till 2.30 P.M. there was doubt and uncertainty.

10. This brings us to the evidence of Subhash, brother of the deceased, who had appeared as PW-5. He has stated that the deceased was carrying on business of school bags along with his brother-in-law Ram Sahai. 5-6 days prior to the incident, Ram Sahai had gone to his village. Ashok and other workers used to sleep in the factory. On 15th May, 2005, he was at his tea shop. At about 9.45 A.M. his nephew Gangram came and told him that Ashok was lying dead inside the factory room, in a pool of blood. He reached the factory and found that Ashok had suffered injuries and wounds on his body by a sharp edged weapon. He informed the police and his statement marked Ex.PW5/A was recorded.

11. The said statement Ex.PW-5/A of Subhash (PW-5) was recorded at about 12.15 P.M. on 15th May, 2005. We have examined the said statement wherein it is mentioned that the workers Rajender, Sanjay

and the appellant used to reside in the factory. However, it is not mentioned that the appellant was missing and was not traceable since morning. It is on the basis of this statement that FIR marked Ex. PW-4/B was registered in Police Station Welcome, at about 12.30 P.M. on 15th May, 2005. PW-5 in his cross-examination has admitted that there were about 10 workers in the factory and the police had been called at 10.30 A.M. and reached in 15-20 minutes. He has further stated that he had not mentioned that he suspected anyone.

12. The Rukka was recorded by SI Mukhtiar Singh, who was examined as PW-18. In his statement recorded in the Court, he has proved the Rukka Ex.PW-18/A. In fact, he was the first police officer to have reached the spot of occurrence. In his statement, he did not mention about the appellant's absence from the spot.

13. This brings us to the prosecution version regarding disclosure statement and recovery of a pair of scissors and the blood stained cloth i.e. the underwear, which the appellant was allegedly wearing at the time of arrest. Inspector Palvinder Singh Chahal (PW-25) is the Investigating Officer. In his view, the appellant was missing from the factory and had come back at about 3.30 P.M. on his own. Thereafter, the appellant had made a disclosure statement and confessed the crime. He has stated that a pair of scissors was recovered from the adjacent room where the dead body was lying at the instance of the appellant.

However, PW-25 stated that the pair of scissors had been washed. While investigating, he observed that the appellant was having a new packet of underwear. He has stated that blood stains were visible on the underwear, which the appellant was wearing. Thereafter, he made the appellant remove his underwear which was sealed and taken into possession vide memo Ex.PW 5/J.

14. The FSL report (Ex. PX and PY) states that human blood was found on the underwear and the blood group was 'B'. Blood group 'B' was also found on the bed sheet cutting and the Baniyan cutting of the deceased. However, what is surprisingly noticeable is that only the underwear of the appellant was seized. The clothes, which the appellant was wearing, were not seized. Blood stains would not have come on the underwear without there being blood on the upper clothes. It is not indicated whether the police had tried to search for the upper clothes of the appellant. The prosecution version that the appellant had gone and purchased a new underwear does not help them. A person generally has more than one set of undergarments, as these are required to be washed and changed regularly. It is not understandable why the appellant would still be wearing a blood stained underwear, a clear indication of his involvement if he had taken care to wash the ss.

15. It is clear, from the facts stated above, that in the present case there is no eye witness. The case of the prosecution is based upon

circumstantial evidence. The only evidence, which can be relied upon by the prosecution, is the blood stained underwear of the appellant. On the said aspect, we have already commented above and noticed that no blood stains could have been found on the underwear unless there were also blood stains on upper clothes of the appellant. The other evidence relied upon by the prosecution pertains to absence of the appellant from 9.30 A.M. to 3.30 P.M. on 15th May, 2005. What is admitted by the prosecution is that the appellant had spent the night in the factory and remained present there till 9.30 A.M. Thereafter, the appellant, as per the prosecution version, came back on his own, at 3.30 P.M. We do not think that in the present case, the said absence, even if accepted, can be categorized as a case of abscondence. Even as per the prosecution version, the appellant had remained at the spot after having committed murder of Ashok. He was found sleeping in the factory till 9.30 A.M. Anyone would have been shaken up after seeing or knowing what had happened. Absence for some time cannot be treated in the present case as abscondence, which deserves adverse inference and conclusion. We may note here that the appellant had appeared as DW-1 and had urged that he had come to the spot at about 10.30 A.M. itself. The statement of PW-5, which was recorded at about 12.15 P.M. on 15th May, 2005 does not mention about the absence of the appellant from the spot and the fact that he had absconded.

16. Regarding recovery of weapon of offence i.e. scissor, we may note that scissor is a cutting tool, which is normally used for cutting clothes, rexene, leather etc. The factory in question manufactured school bags. Therefore, presence of a pair of scissors in the said factory is normal and natural. Moreover, the pair of scissors was recovered from an open space in the adjacent room. As per Inspector Palvinder Singh Chahal, (PW-25), the pair of scissors had already been washed and there were no blood stains on it. On the contrary, the FSL report states that blood was found on the pair of scissors, but blood group could not be indicated. In this case we do not think that recovery of pair of the scissors, allegedly made pursuant to the disclosure statement of the appellant, is an incriminating fact proved and established under Section 27 of the Evidence Act. As stated above, it is a normal tool used for cutting and was found in the adjacent room where the dead body was lying. No weight should be attached to the alleged disclosure and recovery.

17. We record that the motive alleged by the prosecution is that there was a fight between the deceased and the appellant on payment of money. The appellant wanted Rs.1,000/- in payment but the deceased paid only Rs.100/-. It is difficult to accept and believe that for only Rs.900/- the appellant committed murder of Ashok. Moreover, the matter was said to have been pacified with intervention

soon. Others had left the spot. This indicates that the incident or quarrel had been resolved and there were no lingering hard feeling. A small dispute or difference on the question of amount between the appellant and the deceased cannot per se be regarded as a motive for the appellant to murder Ashok.

18. In a case of circumstantial evidence, the circumstances from which inference of guilt is sought to be drawn must be cogently and firmly established. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. Circumstances established should show a definite tendency unerringly pointing towards the guilt of the accused. Circumstantial evidence, in order to sustain conviction, must be complete and incapable of explanation other than guilt of the accused. Evidence should be inconsistent with his innocence (see *Chandmal vs. State of Rajasthan*, AIR 1976 SC 917 and *Padala Veera Reddy vs. State of Andhra Pradesh & Ors.* (3) 1989 Supp (2) SCC 706). We are conscious of the fact that meticulous perfection is not required and proof beyond reasonable doubt does not mean completely foolproof. We have to be realistic and not swayed by stray chances of innocence. But evidence established in this case, as elucidated above, do not show and meet the required and accepted parameters for conviction based on circumstantial evidence. The required parameter that the facts

cumulatively must show unerring tendency of guilt of the accused and that the accused within all human probability had committed the crime, is not satisfied.

19. Keeping in view the aforesaid facts, we do not think that the facts on record justify appellant's conviction. It cannot be said with certainty that the appellant was involved or had murdered Ashok. Therefore, the appellant is entitled to benefit of doubt. Conviction of the appellant by the impugned judgment dated 16th February, 2009 is set aside. The appellant will be released immediately, if he is not required to be detained in any other case.

Copy of this order will be sent to the Superintendent of Jail.

SANJIV KHANNA, J.

S.P.GARG, J.

SEPTEMBER 17, 2012
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