

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

+ **CRIMINAL APPEAL NO. 199/2011**

% **Reserved on: 6<sup>th</sup> December, 2012**  
**Date of Decision: 24<sup>th</sup> January, 2013**

MOHD. MUSTAQ ..... Appellant  
Through Mr. Bhupesh Narula, Advocate.

Versus

THE STATE (NCT OF DELHI) ..... Respondent  
Through Mr. Sanjay Lao, APP for the State.

**CORAM:**  
**HON'BLE MR. JUSTICE SANJIV KHANNA**  
**HON'BLE MR. JUSTICE S.P.GARG**

**SANJIV KHANNA, J:**

Mohd. Mustaq, by this first appeal, challenges his conviction vide impugned judgment dated 20<sup>th</sup> October, 2010, for murder of Manju and pilfered valuables and cash, on 1<sup>st</sup> September, 2006, under Section 302 and 392 of the Indian Penal Code, 1860 (IPC, for short). By the order of sentence dated 27<sup>th</sup> October, 2010, the appellant has been sentenced to life imprisonment for the offence under Section 302/34 IPC and Rs.10,000/- as fine with stipulation that he will undergo Simple Imprisonment for six months in case of default in payment of fine, and Rigorous Imprisonment for ten years and fine of

Rs.7,000/- with the condition that in case of default of payment of fine shall undergo Simple Imprisonment of four months for the offence under Section 392/34 IPC.

2. At the outset, we may notice that two other accused, Mehtab and Habibullah, were chargesheeted but could not be arrested and brought to trial. They were declared as Proclaimed Offenders (PO).

3. We record that homicidal death of the deceased Manju, on 1<sup>st</sup> September, 2006, because of injuries caused between 8.30 A.M. to 11.30 A.M., on ground floor of D-1/20, Sita Puri, Part-I, New Delhi remains undisputed. Dr. Anil Shandil (PW-4), posted as Senior Resident, Department of Forensic Medicine, DDU Hospital, New Delhi, has proved the inflicted injuries on deceased's body, found after due examination conducted during the post mortem on 2<sup>nd</sup> September, 2006. The Post Mortem Report (Ex.PW-4/A) delineates following injuries:

**“External Injuries:**

1. Incised looking cut wound with well defined regular margins left side forehead 2 cm. below hair line and 3 c.m. from mid line of dimension 1.9 cm×0.2 cm with dried up blood clots along margins.
2. Incised cut wound over palmar aspect of left hand over proximal phalanx of middle finger, ring finger of size 1.2×0.2 cm and 1cm×0.2 cm with dried up blood clots along margins.
3. Multiple irregular shaped reddish abrasion 11cm from natal cleft 7cm from mid line and left side back varying in size from 0.3cm ×0.2 cm to 1.1m×0.2 cm in an area 10cm×7 cm.

**Head:** Brain matter pale.

**Neck:** Cut throat wound present over front and sides of neck with clean cut well defined regular margins 4cm left from mid line and 9 cm right from mid line and 4 cm from hyper extended chin, 3 cm from right angle of mandible 7.6 cm above jugular notch and 2.7 cm from mandible bone left side of dimension 13 cm × 5 cm in to tracheal deep with blood clots over the wound, chest both arms. The wound cutting through right side vessels of neck and anteriorly trachea with blood clots corresponding with clean cut well defined regular margins.

**Chest:** Heart empty, all coronaries patent, musculature and valves NAD.

**Abdomen:** All abdominal viscera pale.

**Opinion:** All the injuries were antemortem in nature and caused by sharp edged weapon. Time since death was approximately about 24 hours prior to post mortem. Cause of death was hemorrhage and shock resulting from injury to right side vessels of neck and injury to trachea cumulative effect of which was sufficient to cause death in ordinary course of nature.”

PW-4 further opined that the injuries could possibly have been inflicted using the produced knife (Exhibit P-1) or similar instrument.

3. The deceased Manju, wife of Devki Nandan (PW-1), was residing at RZ D-120, Sitapuri, New Delhi, as proved from the statement of PW-1. He has averred that, on 1<sup>st</sup> September, 2006 after 11.30 A.M., he rushed home and discovered that Manju's dead body was lying, with the aforesaid injuries inflicted on the body. Lady Head Constable Sunita (PW-8), the duty officer in Police Station, Dabri on 1<sup>st</sup> September, 2006 between 8 A.M. to 4 P.M, has proved that she recorded DD No. 17A (Exhibit PW-8/A), at about 11.48 A.M. On the same day at about 2.15 P.M., FIR No. 848/2006 (Exhibit PW-8/B) was

recorded, on the basis of rukka sent by SI Maharaj Singh (PW-27) through Constable Sunil. SI Maharaj Singh (PW-27) has deposed similarly. Thus, it can be conclusively held that Manju was stabbed to death, on 1<sup>st</sup> Sept. 2006, before 11.30 A.M. She was last seen alive on 1<sup>st</sup> Sept, 2006 morning at 8.30 A.M., according to PW-1's statement.

4. The basic dispute pertains to the alleged involvement of the appellant, in the said crime and whether the prosecution has established case against the appellant beyond reasonable doubt. The prosecution case, on the involvement of the appellant, largely rests upon the statement of Devki Nandan (PW-1) husband of the deceased, Laxmi Kant Srivastava (PW-7), SI Maharaj Singh (PW-27) and Inspector Dharamvir Singh (PW-28).

5. It is an undisputed position that the appellant's name is not mentioned in the FIR, which was recorded on the basis of PW-1 Devki Nandan's statement. PW-1, in his statement (Exhibit PW-27/A (rukka)) has stated that, on 1<sup>st</sup> September, 2006, at 8.30 A.M., he had left home for his shop and by that time his children had already left for their school. At about 11.30 A.M., a neighbour came to his shop and asked him to immediately reach his residence as an incident had occurred there. On reaching the house, he found that his wife Manju was lying in the kitchen, smeared in blood, and injury marks were visible on her

body. A knife was lying near the corpse, the belongings were scattered and the almirah was left open. He has averred that Rs.10,000-15,000/- and 100-125 grams of gold jewellery had been looted by the assailants. The property, in question, was two floored construction on 40 square yards plot and had two rooms on the first floor. PW-1 had rented one room to Ayesha and her two daughters and the second room to two boys, who had approached him just the evening before the incident. One of the boys had given his name as Mohd. Rustam but PW-1 did not remember the second boy's name. He had identified Mohd. Rustam to be between 20-22 years old and the second boy to be around 24-25 years old. Ayesha and her two daughters generally left the property by 9.00-9.30 A.M. but, according to him, when he left in the morning for the shop, the two boys were still present in the room, upstairs. PW-1 has, in his statement, suspected involvement of those two boys, who had rented his room, in the commission of the said offence.

6. As per the court testimony of PW-1, his supplementary statement (Exhibit PW-1/DA) was recorded on 1<sup>st</sup> September, 2006 wherein he had mentioned that Mohd. Rustam had given his telephone number as 9213444549 but had informed that the said phone was out of order, at the time. He has further stated that the second person was about 30-35 years old, fair in complexion and about 5.8 feet in height

but of strong built. However, Dharamvir Singh (PW-28) Investigating Officer, in his examination-in-chief, has stated that, on 3<sup>rd</sup> September, 2006, the complainant Devki Nandan (PW-1) had disclosed to him that, at the time of letting out of the room, the two boys had given the telephone No. 9213444549 as their contact number. Thus, there is a contradiction regarding the date on which PW-1 had disclosed regarding Telephone No. 9213444549 and the date on which supplementary statement (Exhibit PW-1/DA) was recorded. The police file does state that Devki Nandan had given a supplementary statement under Section 161 Cr.P.C., on 1<sup>st</sup> September, 2006 but does not record the telephone number or the age of the second accused, whose name was unknown. Similarly, the police file for 2<sup>nd</sup> September, 2006 does not mention that any efforts were made to locate details of the subscriber of the telephone number 9213444549 and ascertain or locate the place of usage, and neither were the call details/cell tower details obtained. The case diary for 2<sup>nd</sup> and 3<sup>rd</sup> September, 2006 similarly does not refer to the said number or consequent inquiries which would have followed. The case diary for 3<sup>rd</sup> September, 2006 refers to local inquiries and the inclination that the accused might be working in an export factory stands recorded. Inquiries from the beat constable etc. were indicated. It is only on 4<sup>th</sup> September, 2006, in the case diary No. 4, that inquiry about telephone

number 9818444549 gets reflected for the first time. The details of this number, the name of the subscriber and other details including ID etc. were collected. It also came into notice that the said number had been issued by Raj Telecom. This factum was also admitted and accepted by Inspector Dharamvir Singh (PW-28), in his statement in chief, wherein he proved the details (marked Exhibit PW-23/A to PW-23/C) collected from Tata Indicom office through the Nodal Officer. The said telephone number was issued in the name of Laxmikant Srivastava s/o Satya Prakash, resident of Soothna Barsola, District Lakhimpur-Khiri, U.P. On the same day Samyuddin, who was running a fabrication unit at D-504, Sita Puri, Dabri, was interrogated. He disclosed that the said number belonged to one worker Mehtab and led them to his residence, at Chankaya Place near Madina Masjid, where landlady Sayada Khatum met them. She revealed that Mehtab had not been seen, at this residence, since 1<sup>st</sup> September, 2006. Samyuddin took them to the shop of Mukesh (PW-3), STD Booth operator, who confirmed that the said number belonged to one Mehtab. As noticed above, Mehtab has not been arrested and has been declared PO in the present case.

7. Thereafter, on 7<sup>th</sup> September, 2006, PW-28 along with the police staff went to village Soothna Barsola, Police Station Tikonja, District Lakhimpur-Khiri, U.P. and interrogated Lakshmikant Srivastava, on

whose name the telephone number was obtained. They also interrogated Istkhar @ Raju, cousin brother of Mehtab. Lakshmikant Srivastava revealed the friendship amongst Mehtab, Habibullah, (both proclaimed offenders) and the present appellant Mustaq. Samayuddin affirmed that, on 30<sup>th</sup> August, 2006, he had seen Habibullah and Mustaq at Mehtab's residence.

8. Before we examine the testimony of Lakshmikant Srivastava (PW-7), we would like to refer to the statement of Mukesh (PW-3) and Vinay Jain (PW-5). Mukesh (PW-3) has stated that one person Mehtab, who was working in Samyuddin's factory and resided near the masjid on rent, used to come with his brother Raju to purchase goods regularly. Vinay Jain (PW-5) has stated that he had issued the Tata Mobile Phone No. 9213444549 in subscriber Lakshmikant Srivastava's name, on 24<sup>th</sup> March, 2006. However, he did not remember whether two boys Mehtab and Raju had accompanied Lakshmikant Srivastava, at the said time. He was declared hostile and cross-examined by the public prosecutor but denied that he knew Mehtab and Raju, prior to 24<sup>th</sup> March, 2006. He has averred that local address Sitapuri was written by the person who had come to purchase the SIM card and, therefore, in the entry, in his diary (Exhibit PW-5/A), the local address mentioned was D-104, Sitapuri, New Delhi. This was the address of Mehtab.

9. Lakshmikant Srivastava (PW-7), in his testimony, has agreed that he purchased the mobile No. 9213444549 for Mehtab (PO) on the basis of his ID proof. He knew Mehtab because they belonged to the same village and when PW-7 had come to Delhi, in April, 2006 to meet his sister, he had visited Mehtab in Uttam Nagar. At that time, it had been two years since Mehtab had not visited his family, in the village and they had requested him to meet Mehtab. He stayed at Mehtab's residence where he had seen Mustaq and Habibullah (PO). He had visited Mustaq's residence, in Gurgaon, with Mehtab. He had informed the police that the number, in question, was being used by Mehtab but was purchased with his name as subscriber, when he had come to Delhi. The police interrogated and brought him to Delhi to assist the investigation. They went to Mehtab's house but it was locked. He was further interrogated and he suggested that Mehtab could be with the appellant Mustaq. Thereafter, PW-7 took the police to Mustaq's residence at Subzi Mandi, Kapashera where the appellant was interrogated and, thereafter, arrested. From the house of Mustaq, a shirt was recovered. PW-7 has stated that the police had come to his village on 7-8<sup>th</sup> September, 2006. Police diary of 8<sup>th</sup> September, 2006 reveals that they had gone to Lakshmikant Srivastava's village and interrogated him. In his examination-in-chief, PW-7 has indicated that "after" (i.e. he had stated the facts regarding accused Mustaq) he was

then set free. Thus, he had been detained by the police till the appellant was interrogated and detained. (The disclosure statement and recovery of the clothes, which the appellant Mustaq had worn, at the time of occurrence shall be examined separately).

10. This brings us to the crucial aspect regarding Devki Nandan (PW-1)'s evidence. The said witness had identified the appellant Mustaq, as the second boy, who had been taken as tenant, on 31<sup>st</sup> August, 2006. He has propelled that it was Mustaq who had come with Mohd. Rustam. As noted above, Mohd. Rustam's name is mentioned in the statement of PW-1, i.e., rukka (Exhibit PW-1/A) but the appellant's name is not to be found. We notice that the appellant had refused to participate in the Test Identification Parade (TIP). When this fact was put to the appellant, at the time when his statement under Section 313 Cr.P.C. was recorded, he has riposted "I was shown to the complainant by the police, in the police station, after making me bald due to which I refused to participate in the TIP". It may be relevant to note here that, in the said statement, the appellant Mustaq admitted that he was arrested on 10<sup>th</sup> September, 2006 by Inspector Dharamvir Singh (PW-27) from his residence- Quarter No. 8, Bihari Kachi Colony, close to a drain near Kapashera border. He has accepted that Lakshmikant Srivastava was present there, with the police team. He has even affirmed his arrest memo.

11. Ordinarily, the testimony, made in the court by a related witness, who has identified the culprit, is accepted i.e., in the present case, the allegation that the appellant was the second tenant. The fact that PW-1 is the deceased's husband by itself cannot be a ground to reject his deposition and appellant's identification, in the Court, by him. However, in the present case there are several considerations which insinuate that PW-1's statement and the identification, made by him in the court, is unreliable and not trustworthy. In the present case, the police had charge sheeted three persons; Habibullah, Mehtab and the appellant. Mehtab and Habibullah are both PO and, hence, have not been subjected to trial because they could not be arrested. Mohd. Mehtab's name is delineated in the FIR and stands affirmed by PW-1 who had disclosed this immediately after the occurrence, when the police visited the crime spot. PW-1 was unable to give the second name and, therefore, gave a general description of the second boy, in his first statement (Ex PW1/A) which is also reflected and recorded in the FIR. Therein he estimated the second boy's age to be between 24-25 years. The appellant herein is about 35 years of age and could not have been 24-25 years age at the time of incident. This is further fortified by the MLC (Ex. PW 11/A) , wherein his age is mentioned to be 35 years. It was submitted by the public prosecutor that, in the second statement under Section 161 Cr.P.C. recorded on 1<sup>st</sup> September,

2006, that is the date of occurrence itself, PW-1 had given the second boy's age to be between 30-35 years. We have already raked that the second statement of the PW-1 does not appear to have been recorded on 1<sup>st</sup> September, 2006 but is rather a subsequent recording probably on 3<sup>rd</sup> September, 2006. In the second statement, tenant's telephone number is disclosed but inquiries regarding the telephone number were initiated only on 4<sup>th</sup> September, 2006 and not before. In the arrest form of the appellant, available in the police file, his age is recorded to be 36 years with observations that he is of medium built and shallow complexion. Further, against the columns 'beard' and 'mustache' it is indicated to be black. In other words, the appellant had black beard and mustache, when he was arrested. It mentioned that the appellant had a mole on the neck. (Photocopy of the arrest form is directed to be kept on record and for identification is marked HC-1). This fact is not mentioned in the FIR or even in the second statement (Exhibit PW-1/DA). What is mentioned in the said statement is that the second person had a mole on his cheek. Now, it is not the prosecution case that the appellant had grown the beard or moustache, after 1<sup>st</sup> September, 2006 and hence the mole was not identifiable or he had done so to change his appearance. More importantly, after failed search for the two other absconding accused, the police were, fortuitously, led to their acquaintance Lakshmikant

Srivastava (PW-7) who was brought to Delhi by the police from his residence in Village Soothna Barsola, U.P., and entailed in the present case. PW-1 had claimed that 100-125 grams gold and Rs 10,000 were pilfered. No jewellery or cash was, however, recovered from the appellant's personal search or on the basis of his disclosure statement. The loot was of substantial value and it is not palatable that, if the appellant was involved in the robbery, he would be so ingenuous as to not be a beneficiary of the loot. The motive behind the crime is evidently and undeniably to steal money and valuables. Neither has the police investigation suggested that they suspected sale of gold, by the appellant to a third party. Additionally the chance finger prints lifted from the almirah are not attributed to the appellant.

12. Learned Public Prosecutor submitted that PW-1's shirt, with sticker 'Vijay Tailor' on it, was recovered from the appellant Mustaq's possession and was later identified in the TIP by PW-1. The first statement (Ex. PW1/A) does not disclose that two shirts were missing, with the stolen goods, but this is, interestingly, mentioned in the second statement (Ex. PW1/DA). The fact that the shirt was stolen and, thereafter, recovered from the appellant, by itself and without recovery of the valuable items, would not justify accepting PW-1's stand.

13. The another corroborating fact, relied by the prosecution to advance their case, is the recovery of blood stained clothes, allegedly worn by the appellant at the time of commission of offence. These clothes were found on 11<sup>th</sup> September, 2006, i.e., after about ten days of the occurrence from bushes of a park in Sector-1, Dwarka. Ostensibly, the appellant had produced a shirt (Exhibit No. P-50), kept in the polythene bag. It is not copacetic and believable that the recovered shirt was kept intact, in polythene, even after many days of the occurrence. This position comes under suspicion when it is noticed that PW-7, who was the witness to the recovery, in his cross-examination has been unable to give any details as to how and in what manner the shirt was recovered. He has stated “it is correct that I did not (sic) go inside the park from where as accused Mustaq had produced the shirt in the polythene. The two police men had gone with Mustaq inside the park. I do not remember the name of the officials who had stayed outside. I cannot say whether IO had gone inside or not. I was so nervous at that time that I cannot say as to how much time was taken by the accused to take out the shirt from the bushes”.

14. As per the FIR (Ex. PW-8/B) and PW-1's deposition, Mehtab and one other tenant were the perpetrators of the crime. Prosecution has, however, chosen to prosecute against three- Mustaq, Habibullah and the appellant. Involvement of a third person is not proved or established. The

core issue is whether the second person/tenant was Habibullah, the proclaimed offender, or the appellant Mustaq. Habibullah is a proclaimed offender and has not been arrested, therefore, has not faced trial. PW-1, no doubt, has identified the appellant as the second tenant but we have doubts about the said identification, in the court, for various reasons stated above, including mismatching of physical features as mentioned in the FIR, 2<sup>nd</sup> statement (Exhibit PW1D/A) and in the arrest form. Further, as noticed, no recovery of stolen/looted articles has been made from the appellant though, as per the FIR (Ex.PW-8/B), 100-125 grams gold and Rs 10,000/- was swindled from the house. Further, the appellant did not abscond or run away whereas Habibullah and Mehtab have and are untraceable after the occurrence. Thus, there is a considerable possibility that Habibullah was the 2<sup>nd</sup> person/tenant and the appellant has been implicated because Habibullah has not been found. The prosecution has not been able to dispel this doubt. 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 and 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, does 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 and rule out possibility of involvement of a third person i.e. Habibullah, in this case, is not satisfied.

15. As observed in *Sharad Birdhichand Sarda v. State of Maharashtra* (1984) 4 SCC 116, the circumstantial evidence, in order to sustain a conviction, must be complete and incapable of any other explanation or hypothesis, other than the guilt of the accused. The following conditions must be fulfilled before a case against an accused can be said to be fully established on circumstantial evidence:

- (1) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established,
- (2) The facts so established should be consistent only with the

hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) The circumstances should be of a conclusive nature and tendency,

(4) They should exclude every possible hypothesis except the one to be proved, and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

16. In view of the aforesaid position, we are inclined to extend benefit of doubt to the appellant. He is accordingly acquitted and will be released immediately unless required to be detained in any other case in accordance with law. Appeal is accordingly disposed of.

-sd-  
(SANJIV KHANNA)  
JUDGE

-sd-  
( S.P. GARG)  
JUDGE

**JANUARY 24, 2013**  
**VKR/kkb**