

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

% *Date of decision: July 30, 2014*

+ **CRL.A.444/2012**

SHABNAM

..... Appellant

Represented by: Mr. Kunal Aurora, Advocate for Ms.
Anu Narula, Advocate.

versus

STATE NCT OF DELHI

.... Respondent

Represented by: Mr. Lovkesh Sawhney, APP for the
State with Inspector Sanjeev Kumar,
PS Okhla Industrial Area.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA (ORAL)

1. Shabnam stands convicted for the offence of murdering her sister Zulekha on the strength of the testimony of PW-10 Kamaal, husband of the deceased and the recovery of the hammer at the instance of Shabnam. The learned Trial Court while holding Shabnam guilty of offence punishable under Section 302 IPC vide the impugned judgment dated December 23, 2011 has directed her to undergo imprisonment for life and a fine of ₹10,000/- in default of payment of fine to undergone rigorous imprisonment for two months vide order dated December 24, 2011.

2. Shorn of unnecessary details the prosecution case starts from DD No.35/A received at 12.17 on the intervening night of July 28-29, 2008 at PS Okhla Industrial Area reporting that the head of a woman has been

smashed . The deceased was shifted to the hospital by the PCR. Kamaal was present in the hospital and got his statement recorded vide Ex.PW-10/A wherein he stated that he was residing along with his wife and four children. About four months ago his sister-in-law Shabnam aged 18½ years came to live with them. He was working as a labourer in a factory. His sister-in-law had an evil eye on him and used to like him. On the night of July 28-29, 2008 all of them had slept after taking the dinner at 11.30. In the night, he heard some voice on which he and his younger son Shahid @ Lala got up. They saw Shabnam holding a hammer in her hand and his wife Zulekha was lying on the floor with blood oozing out from her head. They saw Shabnam attacking Zulekha forcefully by the hammer. He caught hold of Shabnam along with the hammer, gave a slap on her face and asked her as to why she was killing his wife, on which Shabnam stated that she was removing her sister from her way so that she could marry Kamaal. Later Zulekha died in the hospital which information was received vide DD No.42/A on July 29, 2008 at 5.15 AM and thus the case was converted to one under Section 302 IPC. The crime team and the photographer were called. The blood stained floor, blood samples etc. were seized. The bed spread on the floor, Sari, Pillow, bed sheet etc. were also seized. Shabnam was arrested on the pointing out of the complainant vide arrest memo Ex.PW-14/B. Pursuant to the disclosure statement of Shabnam recorded in the presence of Kamaal and HC Neetu the hammer used in the commission of crime was recovered. The post-mortem of the deceased was got conducted.

3. Shabnam questions the finding on the ground that the alleged weapon of offence was lying on the spot itself and thus there was no question of its recovery pursuant to her disclosure. The hammer has not been sent to the

post-mortem doctor for the opinion so as to connect the same with the injury caused. The version of Kamaal is improbable and full of contradictions. Kamaal is not an eye witness and has falsely implicated Shabnam. Kamaal had an evil eye on Shabnam and thus after murdering his wife he has implicated Shabnam in the present case.

4. On incriminating evidence being put to Shabnam as per the requirement of Section 313 Cr.PC she stated that the witnesses were interested witnesses and they have deposed falsely against her. To the question “Do you have to say anything else?” she answered:-

“Answer 27:- I am innocent. The deceased was my real elder sister and I used to love her a lot and I have no concern with her murder. However, I have been falsely implicated in this case.”

5. During the pendency of the present appeal this Court on December 10, 2012 while hearing arguments noted the MLC Ex.PW-6/A of Shabnam which is as under:

“The accused Shabnam, aged 18 years, female has been living in Delhi for past four months and working in a private sector. She is currently residing in Delhi with her sister’s family.

According to her sexual attempts and sexual assault was done by few people at work and some in village but she does not name any one in particular and also does not report about penetration. According to her last attempt was made two months back.

On examination there was no sign of external injury. On local examination hymen was found ruptured.”

6. This Court also looked into the mulakat record and found that Kamaal

had come to meet Shabnam in jail on August 26, 2008, October 07, 2008 and May 05, 2009. The DCP, South East District was directed to inquire into the issues. Inquiry was conducted wherein it appears that Shabnam refrained from making any statement against anyone and hence we are not proceeding any further on this aspect of the matter.

7. Before proceedings further it would be appropriate to note the injuries on the deceased and the opinion in the post-mortem report Ex.PW3/A:

“Lacerated wound present over right temporo-parietal region of scalp measuring 5 x 4 cm with brain matter exposed out from the wound.

On internal examination on opening the scalp a depressed fracture was present over the right parietal bone of skull measuring 4 x 4 cm. The comminuted fracture of skull was present involving right parietal bone in the region of 6 x 4 cm laceration of brain matter was present on right parietal region of size 4 x 3 x 2 cm. Sub-dural haematoma of size 6 x 4 x .5 cm was present over right parieto-occipital region of brain. Linear fracture of 5 cm was present at the base of skull on the right side in middle cranial fossa. Rest findings were within normal limits except the both lungs showing congestion and edema.

After conducting the post-mortem, the dead body was handed over along with the post-mortem report no.439/08, police inquest papers etc. Also blood in gauze piece and vaginal swab was preserved and handed over to concerned police official.

OPINION-*The cause of death in this case was due to cranio-cerebral damage as a result of blunt force impact to the head. Injury no.1 was antemortem in nature and sufficient to cause death in ordinary course of events.*

8. We note that the learned Trial Court while convicting Shabnam failed

to notice some very material aspects. Relying upon the testimony of Kamaal and PW-4 Mohd.Ilyas it failed to notice the true import of the testimony of Mohd.Ilyas. Mohd.Ilyas has deposed that he was residing in the neighbourhood of Kamaal and deposed that he knew Mohd.Israil and his brother-in-law Kamaal. Shabnam was the sister-in-law of Kamaal and had been residing in the Jhuggi for the last six-seven months prior to the incident. On the night of July 28-29, 2008 he was present at his Jhuggi. At about 12 night or 1.00 AM Shabnam came out of the Jhuggi saying “*Mar diya Mar Diya*”. He caught hold of Shabnam and asked what happened and who she had killed on which she stated that she killed her sister Zulekha by hammer. He immediately took her to the Jhuggi of Kamaal where he saw Zulekha lying on the floor and blood was oozing out of her head. Kamaal wanted to remove Zulekha to the hospital but there was no vehicle so he went to the nearby PCO and made a PCR call. The PCR van took Zulekha to the hospital. This witness further stated that when he caught hold of Shabnam she was crying “*Murder Ho Gaya Murder Ho Gaya Aur Yeh Mere Ko He Mar Dalega*”. This witness further stated that when Shabnam was running away from the spot, he asked Shabnam as to whether she had killed on which she stated no, when he asked Kamaal he also stated no. Words used by Mohd.Ilyas are “*Maine Isse (accused) Pucha Kya Tune Ise Mara, Isne Kaha Nahi Maine Isse Nahi Mara, Maine Kamaal Se Pucha To Kamaal Ne Kaha ke Isne He Mara, Hamne Kammal Se Kaha Ke Tum Isko Hospital Le Jao Aur Maine Iske Ristedaro Ko Bulake Isko (Accused) Unke Hawale Kardiya Aur Kaha Ke Isko Hifazat Se Rakho*”. In cross-examination by the learned APP he reiterated that while Shabnam was running she stated “*murder ho gaya or mere ko bhi maar dalega*”.

9. This conduct of running away of Shabnam has been treated by the learned Trial Court as one of absconson however, the learned Trial Court failed to apply the principle of res-gestae wherein statements contemporaneous to the fact in issue are relevant. Even as per the prosecution case at that stage Shabnam's sister was found bleeding with an injury on her head and the expression of words used by Shabnam "*ab mere ko bhi maar dalega*" are material. They are not incriminating against her but show that she had an apprehension of being killed by someone at that time. Shabnam ran out not to abscond but to save her life.

10. It is well settled that even where the accused gives a spontaneous explanation right at the moment when the crime is committed the explanation becomes res gestae within the meaning of Section 6 of the Evidence Act. The rule of res gestae is that the acts, declarations and incidents which constitute or accompany and explain the fact of transaction in issue are admissible. But if separated from the fact by an interval which though however slight allows of fabrication, it cannot be treated as substantially contemporaneous with the fact. The essence of doctrine of res gestae in evidence is that the facts which though not in issue are so connected with the fact in issue as to form part of the same transaction and thereby become relevant like fact in issue. In (1996) 6 SCC 241 Gentela Vijayavardhan Rao & Anr. Vs. State of A.P. the Supreme Court held-

"15. The principle or 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 fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes 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 or fact

admissible under Section 6 of the Evidence Act is on account of the 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 atleast 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. In R. v. Lillyman (1896) 2 QB 167 a statement made by a raped woman after the ravishment was held to be not part of the res gestae on account of some interval of time lapsing between making the statement and the act of rape. Privy Council while considering the extent upto which this rule of res gestae can be allowed as an exemption to the inhibition against near say evidence, has observed in Teper v. R. (1952) 2 All E.R. 447, thus :

“The rule that in a criminal trial hearsay evidence is admissible if it forms part of the res gestae is based on the propositions that the human utterance is both a fact and a means of communication and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of the truth. It is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement.”

The correct legal position stated above needs no further elucidation.”

11. We would elucidate this fact further from the subsequent discussion. The prosecution case is based entirely on the testimony of Kamaal. Kamaal in his cross-examination has admitted that he did not see Shabnam hitting Zulekha by the hammer on the head. The incident took place at the night when Kamaal, his wife Zulekha, their four children and Shabnam were sleeping in the Jhuggi. Kamaal deposed before the Court that at about 11.45

he heard noise after his sleep of about 45 minutes. The noise was that of hitting but he thought the noise could be of TV or CD player. He saw in the Jhuggi that Shabnam was standing and that time she was not having her dupatta on her so he lowered his eyes. He saw hammer in her hand. When he further lowered his eyes he heard noise of hitting, then he apprehended Shabnam with a hammer. Thus according to him he had not seen the acts of Shabnam either in the first instance or even in the second. The inference to be drawn from the testimony of this witness is that Shabnam gave at least two injury blows to Zulekha one which he heard while sleeping thinking it to be noise of TV or CD Player and the second time when he had lowered his eyes as Shabnam was without dupatta. This is contrary to the post-mortem report as per which there is only one lacerated wound present over right temporo-parietal region of scalp measuring 5 x 4 cm with brain matter exposed out from the wound on the deceased.

12. In cross-examination Kamaal admitted that he had seen his wife in objectionable position with one Lallu and therefore he tried to make Zulekha understand that they should not visit their house. He further stated that though his wife ensured that they would not visit again but they still visited their house a number of times. He scolded his wife for this reason and thereafter he saw his wife in compromising position with a relative of Lallu. Thus two facts are clear from the testimony of this witness that Kamaal had not seen Shabnam hitting Zulekha and Kamaal also had a motive as he did not like his wife indulging with Lallu and the other relatives. As against this the prosecution has proved no motive to Shabnam for killing her sister.

13. The prosecution has also relied upon the statement of Master Shahid PW-2, the son of Kamaal and the deceased who according to Kamaal got up

with him on hearing the noise. He also states that when he woke up he saw Shabnam having hammer in her hand and her father had caught hold of Shabnam and was saying “*Tune Isko Kyo Mara*”. This version of Mohd.Shahid shows that immediately when Mohd.Shahid got up from his sleep he found both Shabnam and Kamaal standing with hammer in the hand of Shabnam and Kamaal holding her. Thus, only Shabnam and Kamaal would know who killed Zulekha. Had Shabnam killed Zulekha, she would have had no apprehension of her being killed immediately after the incident and her uttering the words “*Ke wo ab muje bhi maar dalega*” are thus very important.

14. The case of the prosecution is not based on any eye witness but only circumstantial evidence. The incident occurred in the wee hours of the night when only Kamaal, Shabnam and four children were there in the Jhuggi besides the deceased. This brings us to the most important piece of evidence in the form of photographs Ex.PW-7/1 to Ex.PW-7/5. A perusal of the photographs shows that the blood and the hammer were lying at the extreme corner of the room where obviously Zulekha was sleeping. Next to Zulekha would obviously be her husband sleeping. It is highly unnatural that Shabnam could reach the extreme corner of the room towards the wall without disturbing anybody. Hence, in our opinion the version of Kamaal having found Shabnam with the hammer in the hand is not plausible.

15. Further it is not the case of Kamaal that Shabnam took away the hammer with her. When crime team reached the spot the hammer was lying at the spot there and was seized vide Seizure Memo Ex.PW-20/D. The learned Trial Court grossly erred in using the recovery of hammer at the instance of Shabnam under Section 27 of the Evidence Act against her. The

hammer was lying on the spot and would have been seen by everybody including the police officer or Kamaal when the Zulekha was removed to the hospital. Thus the hammer already being available, it was not discovery of a fact pursuant to the disclosure of Shabnam. Further no opinion has been taken from the doctor that the hammer Ex.P1 could have caused the injury on the head of the deceased. No chance prints could be developed from the hammer which could have thrown some light as to who was Zulekha's assailant. Thus, the recovery of hammer at the instance of Shabnam has to be excluded from consideration as an incriminating evidence.

16. In the absence of recovery of weapon of offence linking Shabnam to the offence, no eye witness being there, conduct of Shabnam soon after the incident being contrary to her having assaulted her sister, apprehension of her death looming large on her, we are of the considered opinion that the Shabnam is entitled to the benefit of doubt. Consequently, the impugned judgment convicting Shabnam for offence under Section 302 IPC is set aside. The appellant is on bail. Her bail bond and the surety bond are discharged.

17. Trial Court record be sent back.

18. Copy of the judgment be sent to the Superintendent, Tihar Jail for record.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

JULY 30, 2014/vn