

\* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRIMINAL APPEAL No.380/2013

MOHD ANEES AND ANR ..... Appellants

STATE ..... Respondent

**CORAM:**  
**HON'BLE MR. JUSTICE SANJIV KHANNA**  
**HON'BLE MR. JUSTICE R.K.GAUBA**

1. By judgment dated 07.12.2012, the appellants - Mohd. Anees and Mohd. Rahees - were held guilty by the Additional Sessions Judge for offences under Section 302 read with Section 34 of Indian Penal Code, 1860 ("IPC") and under Section 174A IPC on the charge that both of them, in furtherance of their common intention with Mohd. Nasim son of Mohd. Rahees, had committed the murder of Meena wife of Mohd. Rahees on 26.09.1999 at about 6:30 PM opposite House No.1347, Fataq Banwala, Chitli Cover, Delhi and thereafter had intentionally absconded to be declared proclaimed offenders. By order dated 10.12.2012, the learned trial court awarded imprisonment for life with fine of ₹2,000/-

each for offence under Section 302/34 IPC and imprisonment for two years with fine of ₹1,000/- each for offence under Section 174A IPC. It was further directed that in the event of fine not being paid, the appellants would undergo simple imprisonment for fifteen days and seven days respectively. Benefit of Section 428 of the Code of Criminal Procedure, 1973 (“Cr.P.C.”) was accorded.

2. For reasons set out hereinafter, we refrain from tracing here the entire set of background facts or evidence on basis of which the appellants were brought to trial. Suffice it note here that the alleged accomplice Mohd. Nasim son of Mohd. Rahees was arrested soon after the occurrence (which is the subject matter of the prosecution case) and was brought to trial in the court of Additional Sessions Judge in sessions case No. 11/2000. The report under Section 173 Cr.P.C which had been submitted at that stage indicated that the appellants herein had absconded and, thus, had to be declared proclaimed offenders, after recourse to the procedure envisaged, *inter alia*, in Sections 82 and 83 Cr.P.C. The trial against Mohd. Nasim concluded with the judgment dated 01.10.2002 holding him guilty and convicting him for the offence punishable under Section 302/34 IPC by order dated 03.10.2002. The learned trial court in that case awarded imprisonment for life with fine of ₹5,000/- against the said convict Mohd. Nasim. Mohd. Nasim challenged the said judgment and order on sentence by criminal appeal No. 896/2002. The said criminal appeal, however, was dismissed by a Division Bench of this Court by judgment dated 21.01.2010.

3. It may be mentioned here that the evidence adduced by the prosecution in the trial against Mohd. Nasim included reliance on the statement of Salma Bano examined (in that case as PW-4) on 10.11.2000 followed by her cross-examination on 13.03.2001. A perusal of the statement of Salma Bano (PW-4) in the case against Mohd. Nasim (since convicted) would reveal that she was presented as an eye-witness to the occurrence, her deposition there also making reference to certain role attributed to the two appellants before this Court.

4. After the appellants had been arrested, a supplementary charge-sheet was submitted on 17.08.2009. This led to their trial in the Court of Additional Sessions Judge in sessions case No.79/2010. After formal charge had been framed on 21.10.2009 for the offence under Section 302/34 IPC, on the request of the prosecution an additional charge was framed for offence under Section 174A IPC on 08.10.2010 thereby bringing in an amendment of the charges.

5. During the trial against the appellants, at the instance of the prosecution, Salma Bano was summoned again for her statement. She appeared and was examined partly as PW-2 on 22.04.2010. The record shows that her statement could not be continued on that day since she was indisposed. She appeared again before the learned Additional Sessions Judge on 08.02.2011. The deposition recorded on the said date begins with the following :

*“(Ld. Addl. PP prays that the prosecution will adopt the examination-in-chief of this witness already recorded on 10.11.2000 in this case as PW4, during the trial against the accused Naseem). Heard. Allowed.”*

6. We may note here that the appellants were represented in the Court by a counsel engaged by them for their defence at the time of deposition of Salma Bano (PW-2) being thus recorded on 08.02.2011, she also being cross-examined by the said counsel on the subsequent date (03.03.2011). Noticeably, against the above backdrop, the public prosecutor did not call upon the witness Salma Bano (PW-2) to narrate the sequence of events of the date of the alleged incident. He restricted his examination to questioning of the witness only to confirm her ability to identify the appellants as the persons who, as co-participants, had aided and abetted convict Mohd. Nasim in the incident.

7. The learned counsel for the appellants has argued that the above is a procedure unknown to law and we agree with his submissions to this effect. He drew our attention to the following paragraph (at page 15) of the impugned judgment :-

*“After going through the evidence of PW2 and her statement Ex.PW4/A on the basis of which the FIR was registered, the evidence of PW2 can be relied upon to the facts that on 26.9.99 at about 6.30 p.m. she had gone along with deceased at Banwala fatah, Chitli Qabar and at that place, the deceased has received firearm injuries. This reliable testimony of PW2 corroborates the dying declaration Ex.PW4/A.”*

8. Salma Bano was a witness, who was still available to the prosecution. She, thus, cannot be covered by any stretch of reasoning in the category of a witness who could not be found or was incapable of giving evidence or whose presence could not be procured without unreasonable delay or expense within the meaning of the provisions contained in Section 33 of the Indian Evidence Act, 1872 or Section 299

Cr.P.C. The law requires, per Section 273 Cr.P.C., that the evidence is taken in the course of a trial in the presence of the accused. The evidence of Salma Bano (PW-2), to the extent it was intended to narrate the role of the appellants as the co-participants in the crime, required to be elicited by questioning her afresh in the trial against the appellants. The adoption of the transcript of her testimony in the earlier trial against Mohd. Anees was neither permissible nor proper. The observations in the impugned judgment quoted earlier show that the statement of Salma Bano in the previous trial weighed on the mind of the trial court. The short-circuiting of the procedure in aforesaid manner, thus, prejudiced the appellants, thereby vitiating the result and consequently cannot be approved.

9. The learned counsel for the State fairly conceded the above legal position but submitted that the statement of Salma Bano as PW-4 in the previous trial would still be available to both sides as “previous statement” for it to be appropriately used in accordance with the rules of evidence. The counsel for the appellants agreed with these submission and we find the same moratorium.

10. For the foregoing reasons, we set aside the impugned judgment and order on sentence and remand the prosecution case for further proceedings against the appellants in accordance with law. The case shall be placed before the learned Sessions Judge (West District) on 11.01.2016 when it shall be allocated by her within her discretion to the court of competent jurisdiction. The appellants shall appear accordingly. The sessions court to which the case is allocated in terms of these directions will recall Salma Bano and allow her to be examined by the

prosecution afresh and thereafter proceed further in accordance with law. The case shall be decided afresh without being influenced by the view taken, or observations made, in the judgment dated 07.12.2012.

11. The criminal appeal is disposed of in the above terms.

**(R.K.GAUBA)**  
**JUDGE**

**(SANJIV KHANNA)**  
**JUDGE**

**DECEMBER 09, 2015**  
**VLD**