

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

% *Date of decision : March 15, 2016*

+ **CRL.A. 461/2000**

JAIBUN & ORS.

..... Appellant

Represented by: Mr.R.S.Rathi, Advocate with
Ms.Kusum, Advocate.

versus

STATE

..... Respondent

Represented by: Mr.Varun Goswami, APP with
Insp.Birender Singh PS
Shahdara.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. Jaibun Nisha and her husband Rahis have been convicted for offences punishable under Sections 120-B/364/302/201 IPC vide impugned judgment dated May 19, 2000, and have been directed to undergo imprisonment for life for offence punishable under Section 302 IPC, rigorous imprisonment for a period of two years for offences punishable under Sections 120-B and 201 IPC and rigorous imprisonment for a period of 5 years for offence punishable under Section 364 IPC vide the order on sentence dated May 30, 2000. The learned Trial Judge has based the conviction on the last seen evidence of Sher Mohd. PW-2, extra-judicial confession made by Rahis to Alimuddin PW-10, recovery of the weapon of offence and the conduct of the deceased and Jaibun.

2. Police machinery was set into motion on receipt of a missing report at 9.30 AM on October 17, 1997 recorded vide DD No.4A i.e. Ex.PW-4/A lodged by Yamin PW-4 informing that he was a mechanic by profession, his younger brother Tahseen aged 19 years was also repairing coolers and fans with him. On September 20, 1997 at 10.00 AM Tahseen left for the village Jilepura, District Bulendshahar, U.P. however he had neither reached the village nor returned back. Yamin described his brother Tahseen as 5 feet 5 inch height, wheetish complexion, black eyes, wearing a check shirt and navy blue colour pant. On October 20, 1997 Yamin again went to the Police Station and suspected kidnapping of his brother resulting in registration of FIR No.544/97 under Section 365 IPC.

3. On October 29, 1997 S.I. Ajay Kumar PW-14, the investigating officer went to village of Tahseen where he recorded the statement of Faiyaz Khan F/o Tahseen PW-5 and Alimuddin, uncle of Tahseen PW-10. It was revealed to him that the body of Tahseen had been recovered on October 28, 1997 and post-mortem had been conducted. Thus he collected the post-mortem report and seized the other documents.

4. The prosecution relies on the testimony of Sher Mohd. PW-2 to prove that Tahseen was last seen with Jaibun and Rahis. Sher Mohd. PW-2 deposed that on September 21, 1997 in the evening at about 8.00 PM he was present at the bus stand Bulandshehar along with his wife and children. He met Tahseen while getting down from the bus at the bus stand. Tahseen was accompanied by Jaibun as she also got down from the bus. Sher Mohd. further stated that when he was talking to Tahseen, Jaibun was standing at some distance and talking to her husband Rahis, who was also standing there. Thereafter Tahseen, Jaibun and Rahis boarded a rickshaw and went

away. He gave this information to the family after October 28, 1997 on receipt of the information that dead body of Tahseen had been recovered in a sugarcane field.

5. Even accepting the version of Sher Mohd., it is evident that he had seen Tahseen on September 21, 1997 at about 8.00 PM with Jaibun and Rahis. As per the post-mortem report Ex.PW-12/A though cause of death could not be ascertained due to the body being highly decomposed, however the time since death was opined to be about 10 days. The post-mortem having been conducted on October 29, 1997 at 3.30 PM, the possible date of death of Tahseen was around October 19, 1997. Sher Mohd. had seen Tahseen with Jaibun and Rahis on September 21, 1997 which cannot be treated as the last seen evidence due to the wide time gap between Sher Mohd. having seen Tahseen with Jaibun and Rahis and the date of death.

6. The prosecution also presses recovery of fawra, the weapon of offence at the instance of Rahis after his arrest, as an incriminating evidence against Rahis. Alimuddin PW-10 stated that on December 05, 1997 when he was present in his field, he saw Police party going to the jungle. Rahis was in Police custody, he took them to the well of Bashir near Arhar field of Bundu and pointed out to the place of occurrence. Rahis thereafter took the Police party to the sugarcane field of Sattoo. Rahis also led the Police party to his residence at village Jilepura and produced a fawra from underneath the cot. The handle of the fawra was wooden and the blade was of iron.

7. Despite fawra having been recovered at the instance of Rahis, the same is not connected with the offence committed for the reason the fawra was not found to be blood stained which tallied with that of the deceased, nor did the doctor opine that any injury on the body of the deceased was

possible by the said weapon nor did any witness see Rahis using the fawra on the deceased. Thus the recovery of weapon of offence sought to be used by the prosecution to prove the offence committed by Jaibun and Rahis is meaningless and is required to be discarded.

8. According to the prosecution case, the dead body was recovered after Rahis made an extra-judicial confession to Alimuddin. Alimuddin PW-10 in his testimony stated that on October 27, 1997 at about 9.30 PM while he was taking rest Rahis came to him and started weeping holding his feet and stated *“Chacha mujhe bacha lo, maine bahut bada juram kar diya hai, Maine apne chacha Jat Bhai ka katal kar diya hai”*. Alimuddin stated that he asked Rahis as to why he committed the offence on which Rahis replied *“Maine Apni Biwi ke chakkar main aisa kar diya hai”*. He further said *“Main pagal ho jaunga, mujhe Police ke hawale kar do”*. He further told Alimuddin *“Katal karne ke bad lash ko maine apni biwi ke sath milkar Sattoo W/o Vijay Singh ke ikh ke kaith mein bore mein bandh karke dal rakha hai”*.

9. On this information given by Rahis, Alimuddin asked him to leave his house fearing that his family members may not do something wrong to Rahis on hearing all this. Next day in the morning he gave this information to his brother Faiyaz Khan PW-5. After that he went to PS Bulandshehar, Nayi Mandi and informed the Police about the dead body of Tahseen in the fields. The Police recovered the dead body of Tahseen from the sugarcane field of Sattoo W/o Vijay. The sack was found in a torn condition. Sher Mohd. son of his elder brother identified the dead body which was taken to hospital for post-mortem. After the post-mortem was conducted the dead body was handed over to them and on October 29, 1997 the same was

buried. However Faiyaz Khan PW-5 does not support the version of Alimuddin to the extent of the information being given to him by Alimuddin or the recovery of the dead body of his son Tahseen.

10. Faiyaz Khan PW-5 deposed that his wife, daughter and both his sons Yamin and Tahseen were residing in Delhi for the last more than 8 years whereas he along with his son Yasin was engaged in farming at Bulandshehar. Yamin came to him from Delhi and enquired about Tahseen on which he informed that Tahseen had never come to the village. After some time he received one letter in which it was written that his son Tahseen had been killed by Jaibun and Rahis, from which letter he came to know about the murder of his son. He had kept the letter in the house, however later children tore the said letter. He also informed about the said letter to his elder brother Alimuddin. Then they made search of Tahseen's dead body. Faiyaz became ill, thus he left everything on his elder brother Alimuddin. Faiyaz did not know anything else except these facts. His brother Alimuddin came to know that dead body of Tahseen was lying in a field near village Poundry in a gunny bag. The dead body was of his son Tahseen which was found in the sugarcane field. The body was highly decomposed and smelling badly. This information was given to the local Police who came and conducted the inquest proceedings. After the post-mortem, the body was handed over to them and they performed the last rites.

11. It is thus apparent Faiyaz does not support Alimuddin to the extent that Alimuddin informed him about extra judicial confession made by Rahis. The fact that an extra judicial confession was made to Alimuddin by Rahis is also not reflected in the proceedings dated October 28, 1997 conducted by S.I. Bahauddin Safi, after the body was recovered in the sugarcane fields in

the noon time.

12. S.I. Bahauddin Safi posted at Police Station Bulandshehar appeared as PW-13 and deposed that on October 28, 1997 at about 4.30 PM one Alimuddin came to him and produced an application. On receipt of application he made DD entry No.19 in the general diary and thereafter along with Constable Pramod Kumar and Constable Shiv Karan reached the spot i.e. sugarcane field of Smt. Sattoo where they found a dead body in a jute bag which was partly covered by soil. The dead body was identified to be that of Tahseen by Alimuddin and his brother Faiyaz, besides Babu Khan, Rafiq and Afsar Ali. He exhibited the documents prepared vide Ex.PW-13/A to PW-13/E and sent the body for post-mortem. Ex.PW-13/G is the typed letter from Alimuddin to SSP Bulandshehar dated October 28, 1997 where he noted that his nephew Tahseen S/o Faiyaz was missing for which a missing report and FIR had been lodged at PS Shahdara, Delhi and during search they found Tanseen's body lying in the sugarcane field and thus they requested that the body be retrieved and post-mortem be conducted. In this letter there is no reference whatsoever of the extra judicial confession allegedly made by Rahis to Alimuddin. Thus the fact that Rahis made an extra judicial confession to Alimuddin is not corroborated by any other material fact and in the absence of any corroboration, Jaibun and Rahis cannot be convicted on this mere weak piece of evidence.

13. Consequently, the impugned judgment of conviction and order on sentence are set aside. Appeal is allowed. Bail bonds and surety bonds of Jaibun and Rahis are cancelled.

14. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.
15. TCR be returned.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

MARCH 15, 2016
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