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

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CRIMINAL APPEAL No.1609/2014

Date of decision: 16th December, 2015

SHAHDAB

..... Appellant

Through Ms. Sahila Lamba, Advocate.

versus

STATE

..... Respondent

Through Mr. Varun Goswami, APP with
Inspector Rajendra Prasad, SHO, PS-Aman
Vihar.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.K.GAUBA

SANJIV KHANNA, J. (ORAL)

Shahdab by the judgment under challenge dated 7th April, 2014 has been convicted under Section 302 of the Indian Penal Code, 1860 (IPC, for short) for having committed murder of Sameer, aged 9 years in the intervening night between 11th and 12th March, 2011. By order on sentence dated 8th May, 2014, appellant Shahdab stands sentenced to life imprisonment, fine of Rs.10,000/- and in default of payment of fine, to undergo Rigorous Imprisonment for six months. Section 428 of the Code

of Criminal Procedure, 1973 (Cr.P.C., for short), it is observed, would apply.

2. The aforesaid conviction arises out of FIR No.67/2011 recorded at police station Aman Vihar at 12.20 p.m. on 12th March, 2011. The FIR itself is a graphic and we would like to reproduce the English translation of the same in entirety:-

“Mohd. Moin Khan alias Ballu S/o. Sh. Bashir Khan, R/o. House of Pappu, A-Block, Bhagya Vihar, Near Chhath Puja Rani Khera, Delhi, Age- 35 years made his statement as under:

“I have been residing at the aforesaid address on rent along with my younger brother Hanif and my children Sameer and Sahil for about three years. I am a laborer. I hail from Mohalla Eman Jayi Jalal Nagar near Hafiz Mian Dargah, Shahjahanpur, UP. I was at home along with my elder brother Rahis and my children last night i.e. on 11.03.2011 at 9 O’Clock. Our acquaintance Shahdab had also come and all of us had dined together. My younger son Sahil had asked for bread to eat. I had declined the request and told him that he had eaten his dinner and would be served bread the next day. However, as he had persisted, I had sent my elder son Sameer Khan to get bread from Lucky’s shop located nearby. Shahdab also got up and followed him. We waited for Sameer for a long time but he did not return. When I went outside to search for him (Sameer), the shop had closed. I, thereafter, went to Shahdab’s workshop searching for Sameer, but I did not find Shahdab there. When I came back home, my brother Rahis told me that Shahdab had come in my absence and at that time his face and neck had blood stains while his knee and pants were soiled. When Rahis had enquired what had happened, he (Shahdab) got perturbed and had replied that he had a quarrel and went away making some excuse. We had searched for Sameer but could not trace him and we

could not locate Shahdab also. In the morning, when I inquired from the shopkeeper Lucky, he told me that at around 9 O'Clock in the night Sameer had come there with Shahdab and Shahdab had bought chips for Rupees five for Sameer and he had taken Sameer with him. For these reasons I suspected Shahdab and went to his workshop again where Shahdab was present but he was curt with us and when we asked him about the quarrel, he could not say anything with whom he had quarreled. When we told him that he would be confronted with Lucky, he caught our feet and started begging and sought apology and told us that he had killed Sameer in the night itself. He took us to the vacant plot in front of the ration shop where we saw dead body of my son Sameer. His pants had been pulled down and he was half naked. His face was smeared with blood and soil and a large amount of blood had spilled and his head was badly smashed. A crowd had assembled there and a few persons present started beating him (Shahdab) but some others from the neighbourhood saved him. My brother Hanif called the police. You have recorded my statement. I heard the same and it is correct.
Sd/-LTI of Moin Khan

Attested by
Insp. Naresh Malik
Dt. 12.03.2011"

3. The first information was communicated to Police Control Room at about 9.10 a.m. on 12th March, 2011 and got recorded in form No.1, Ex.P-X, to the effect that a dead body of a child, aged about 8-10 years, who was missing, was lying near Tyagi Property Dealers. At about 10.52 a.m. on the same date, the Police Control Room was informed by the police officer who had visited the spot, that dead body of one Sameer, son of Mohd. Moin Khan, aged 8 years with injuries on his head, possibly caused

by a stone, has been found. One Shahdab was the purported perpetrator. The beat constables at about 10 a.m. had taken Shahdab with them. Crime Team had been called to the spot.

4. DD entry No.14A Ex.PW2/A was recorded at police station Aman Vihar at 9.16 a.m. on information communicated by the Police Control Room regarding recovery of a dead body of a small child. The said DD entry was marked for verification to ASI Sajjan Singh and Constable Manjeet, who have deposed as PW10 and PW12, respectively. They have in seriatim stated that on visiting the spot, they had seen dead body of a child in a vacant plot in a pool of blood with head injuries. At that time, father of the deceased, his uncle and the accused, i.e. the present appellant Shahdab, along with others were present. They had then informed the SHO, and Inspector Naresh Malik along with police officers had reached the spot. At the said spot, blood stain earth, blood stained stone, one pair of *chappal* (slipper) and a pocket diary were lying. Inspector Naresh Malik had called the Crime Team with a photographer, who then reached the spot and had taken photographs. Mohd. Moin Khan, father of the deceased had produced Shahdab, who was taken into custody by Inspector Naresh Malik vide arrest memo Ex.PW10/B, which was signed by PW10 at point A.

5. Constable Manjeet (PW12) identified the clothes worn by Shahdab marked Ex.P-5 (colly.), other materials, like small stone pieces marked Ex.P-8 (colly.), a big stone Ex.P-9, earth control Ex.P-10, slipper Ex.P-11 and pocket diary Ex.P-12. In his cross-examination, ASI Sajjan Singh (PW10) clarified that the IO had arrived at about 10 a.m. and the Crime Team had reached the spot at about 10.15 a.m.

6. The Investigating Officer Inspector Naresh Malik's (PW19) deposition is in sync and he affirms that on reaching the spot, i.e. the vacant plot, he had seen dead body of a boy having deep wounds on his head and his face was smudged with blood and soil. The name of the deceased, it was learnt, was Sameer, son of Mohd. Moin Khan, aged 9 years. The dead body was semi nude and the pants worn by the deceased were withdrawn. Blood stained earth, slippers, pocket diary and other incriminating materials found at the spot were sealed and seized. PW19 had recorded statement of Mohd. Moin Khan marked Ex.PW1/A, endorsed the *Rukka* Ex.PW19/A, prepared the site plan marked Ex.19/B and had sent the dead body to the mortuary. FIR marked Ex.PW2/B was registered. He had arrested Shahdab vide arrest memo Ex.PW10/B signed by him at point D. The appellant Shahdab was examined at the Sanjay Gandhi Memorial

Hospital vide MLC Ex.PW8/A and Ex.PW19/C1. PW19 had also taken into possession the clothes worn by the appellant i.e. black T-shirt, vest, trouser, two under garments etc. On 13th March, 2011, he had prepared the inquest papers (Ex.PW19/D) and had made a request for conducting the post mortem. He had identified the clothes worn by the appellant, which were marked Ex.P-1, clothes worn by the deceased, which were marked Ex.P-5 (colly.) and other articles found at the spot.

7. Similar depositions have been made by SI Vishesh Kumar (PW5), Ct. Sanjiv Kumar (PW15), Ct. Madan Mohan (PW16) and HC Harpool Singh (PW17).

8. The arrest memo (Ex.PW10/B) records the time of arrest as 2.50 p.m. on 12th March, 2011, which is after the FIR was registered at about 12.20 hours. This delay in arrest would not, however, negate the fact that the appellant had been detained at the spot itself as is apparent from the PCR form marked Ex.P-X and the ocular testimony of ASI Sajjan Singh (PW10), Constable Manjeet Singh (PW12) and Inspector Naresh Malik (PW19). The Crime Team report Ex.PW5/A was recorded between 10.15 a.m. to 11.15 a.m. on 12th March, 2011 and was proved by SI Vishesh Kumar (PW5), the Crime Team Incharge, who has deposed that a PCR call

was received by him at about 9.40 a.m. and on visiting the spot, he had seen dead body of a child, aged about 9 years. On inspection, he found that the child had suffered head injuries and one big blood stained stone along with some small stones were lying at the spot. Blood stains could also be noticed on the wall and slippers of pink colour were lying near the dead body. A pocket diary was also found there.

9. Photographs marked Ex.PW3/A1 to Ex.PW3/A18 and negatives of the same marked Ex.PW3/B1 to Ex.PW3/B18 were taken by Ct. Hanish Kumar (PW3).

10. Post mortem report (Ex.PW7/A) opines that the cause of death was cranio cerebral damage and asphyxia consequent upon blunt force impact to the head and neck. The said injuries were ante mortem and sufficient to cause death in the ordinary course of nature. Dr. Manoj Dhingra, who had conducted the post mortem along with Dr. Deepak Sharma, is the co-author of the report Ex.PW7/A. Dr. Manoj Dhingra had appeared and deposed as PW7 and has reiterated his observations. The injuries in the opinion of Dr. Manoj Dhingra (PW7) were caused by blunt force impact on the head and neck. The aforesaid facts, prove and establish beyond doubt that the deceased was inflicted injuries causing cranio cerebral damage and had

suffered asphyxia causing his death. This is a case of homicidal death amounting to murder under Section 300 IPC.

11. In his cross-examination, Dr. Manoj Dhingra (PW7) had accepted that no abnormality was noticed over the genital organ of the deceased and no injury was noticed around anus. We record and notice that the appellant has been acquitted from the charge under Section 377 IPC. However, the MLC of Shahdab Ex.PW8/A and Ex.PW19/C1 records as under:-

“Abrasion with scab formation (0.1 cm × 0.1 cm) over corona glands (of superior aspect) of penis.”

12. The State or victim has not preferred any appeal against the said acquittal. The said MLC also records bruises on both sides of face, but these as noticed below, could be on account of beating given to the appellant.

13. On the question of involvement of the appellant and the manner in which the appellant was apprehended, we would like to rely upon the testimonies of Mohd. Moin Khan @ Ballu (PW1), the father; Rahis Khan (PW14) and Hanif (PW11), two brothers of PW1; and Sumit Sharma @ Lucky (PW18), the shop owner.

14. Mohd. Moin Khan (PW1) has deposed that at about 10 p.m. on 11th

March, 2011, he, Rahis (PW14) and Shahdab had taken meals and drinks. PW1's younger son, Sahil wanted to eat bread and on his insistence, he had sent his elder son, Sameer to fetch bread from Lucky's shop. The appellant, present there, had followed Sameer. Since, Sameer did not return, Mohd. Moin Khan (PW1) in his search, had proceeded to Lucky's shop which he found had closed. PW1 had thereafter searched for Sameer in the nearby area and then at the factory of Shahdab, who was also missing and on inquiry it was learnt that Shahdab had not returned. Thereupon, PW1 returned to his residence and came to know from Rahis (PW14) that in his absence, Shahdab had come there and Rahis had noticed mud stains on his knees and legs and blood on his face and had questioned Shahdab about it. Shahdab had proclaimed that he had got involved in a grapple. Rahis had then queried Shahdab, about the grapple, upon which Shahdab had left making an excuse. Mohd. Moin Khan (PW1) and others had searched for Sameer at night, but neither Sameer nor Shahdab could be traced. In the morning, at about 5 a.m., Lucky opened his shop. They had then made inquiries from Lucky, who affirmed that Sameer had come to his shop with Shahdab, and had purchased a packet of chips. Shahdab had taken Sameer with him in his lap. Lucky had stated that he did not notice

anything thereafter as he was busy. Mohd. Moin Khan (PW1) after this conversation with Lucky, suspected Shahdab and went straight to his factory and rang the door bell. After some delay, a lady opened the door. Shahdab came out subsequently. On being queried about Sameer, Shahdab claimed that he had left Sameer after purchasing chips. Shahdab, however, was incoherent and on being repeatedly questioned by Mohd. Moin Khan (PW1) and Rahis (PW14) gave ambiguous and unsatisfactory answers. On PW1 persistence that his son would never go with a stranger, and on being confronted that Lucky had affirmed having seen Sameer with him, Shahdab broke down, wept and confessed that he had killed Sameer. In the meanwhile, PW1's brother Hanif also reached there. Shahdab took them to a vacant plot and pointed towards Sameer's dead body. Blood and mud were found on the face of Sameer. Blood could also be seen nearby. One big stone was lying there. Mohd. Moin Khan (PW1) became nervous and hysterical on seeing his son Sameer. Shahdab was apprehended by Hanif and others and was beaten up. A call was made to the police, who arrived and took Shahdab in their custody. Police had recorded his statement Ex.PW1/A and the FIR in question marked Ex.PW2/B was registered.

15. There is nothing to dent or doubt the core and material testimony of

Mohd. Moin Khan (PW1), who has stuck to his originally narrated stand and version. There is a minor variation, between the statement (Ex.PW1/A) and the court deposition, on whether Shahdab was physically confronted with Lucky and had then confessed or Shahdab had confessed earlier when he was orally confronted with the version given by Lucky. This variation is insignificant and reflects lapse in recollection, for Shahdab was certainly physically confronted by Lucky, as accepted by Lucky in his court disposition as PW18. PW1 has explained that the dead body of Sameer was lying at a distance of 200-300 yards from his house and at a distance of 60-70 yards from the nearest house. It is noticed by us, from the photographs, that the body was not visible from the road, and the vacant plot in question had a boundary wall. Thus, Mohd. Moin Khan (PW1) has affirmed that at about 5 a.m. on 12th March, 2011, after he had spoken to Lucky, it became apparent that Shahdab was with Sameer and after making purchases, the two had left together. PW1 had then proceeded to the house of Shahdab, at about 5.30 a.m. At about 7.00-7.30 a.m., dead body of Sameer was found. The police had arrived at the spot much later at about 10 a.m. Thus Shahdab had confessed and accepted his guilt, much earlier and before the police came to the spot.

16. PW1 had purportedly identified the diary Ex.P-12, which was found lying at the spot, claiming that the same belonged to Shahdab. However, we would not like to place reliance on this assertion, as the said statement was made on 24th January, 2013 when the witness was recalled for further examination.

17. The core and main version given by PW1 gets substantial support and affirmation from the in seriatim testimony of Rahis (PW14), Hanif (PW11) and Lucky (PW18). PW14 affirms that he, Mohd. Moin Khan (PW1) and Shahdab were present in the house of PW1 and his nephews, Sameer and Sahil were also there. Shahdab and PW1 had taken dinner and drinks. Sahil had insisted on having bread after dinner, and thereupon PW1 had asked Sameer to fetch bread from the nearby shop of Lucky. Shahdab had followed Sameer. Sameer did not return and Mohd. Moin Khan (PW1) had gone out to search for him. During PW1's absence, Shahdab had returned to the *jhuggi* and Rahis (PW14) had inquired about Sameer from him. PW14 had noticed blood on the face of Shahdab and mud stains on the knee portion of his pants. Shahdab had then proclaimed that he got involved in a grapple and had left. They had searched for Sameer at night, but neither Sameer nor Shahdab could be found. In the morning, when

Lucky (PW18) opened his shop, his brother Mohd. Moin Khan had spoken to him. He had learnt that Mohd. Moin Khan (PW1) and Hanif, had interacted with Shahdab and had made pertinent queries about Sameer. Subsequently on learning facts, he had gone to the spot where the dead body of Sameer was lying. Police was called and photographs were taken and exhibits/evidence were collected. Rahis (PW14) identified the clothes worn by Sameer as Ex.P-1 and Ex.P-2 and the clothes worn by the appellant Shahdab were marked Ex.P-3 and Ex.P4. PW14 has accepted that the shop of Lucky was at about a minute's walking distance from the house of PW1. PW1 had gone in search of Sameer after about half an hour, and Shahdab had returned to PW1's residence 10-15 minutes after PW1 had left in search of Sameer. PW14 had not gone with PW1 in the morning and had reached the spot at about 8.30-9.00 p.m. PW14 has accepted that Shahdab had not confessed anything in his presence, but this would make any difference, for PW14 was not present with PW1 in the morning when he had interacted with the appellant and had then proceeded to the vacant plot. PW14 had interacted with the appellant subsequently.

18. Hanif's (PW11) deposition is relevant on the aspect of confrontation with Shahdab. PW11 has testified that at about 10 p.m., he learnt from his

brother (PW1) that Sameer was missing and had also learnt from Rahis that Shahdab, who was earlier present in the house, had returned and there was blood on his face. At night, they had searched for Sameer, in vain. In the morning, they had proceeded to the shop of Lucky, and learnt that Shahdab had Sameer in his lap when they came to his shop and had purchased a packet of chips. The two had left together. They had then gone to the house of Shahdab and had inquired about Sameer. Shahdab became perplexed, when questioned about the purported grapple on the previous night. He was then confronted with the fact that Rahis had seen him with blood stains on his face. He could not give proper replies and faltered. Shahdab was confronted with Lucky's version and told that they would confront him with Lucky. On this, Shahdab apologized and confessed that he had murdered Sameer in the vacant plot situated in front of the *kiryana* shop. Shahdab had led them to the plot in which the dead body of Sameer was lying in a pool of blood. Sameer's pant was withdrawn upto knees. Crowd had gathered and Shahdab was beaten up. He was rescued by the neighbours. Someone called the police, who arrived and took the dead body of Sameer to the hospital. Hanif (PW11) identified the recoveries made at the spot including the clothes worn by Sameer marked Ex.P-5

(colly.), blood stained earth Ex.P-6, blood stained piece of wall Ex.P-7, blood stained three small stone pieces Ex.P-8 (colly.) and one big stone Ex.P-9.

19. In his cross-examination, PW11 asserted that the witness had met Lucky in his shop next day at about 10-11 a.m. and at that time Mohd. Moin Khan (PW1) was not with him, but other relatives were with him. He has accepted that he had gone to the house of Shahdab at about 5.30 a.m. on 12th March, 2011 and they had knocked at the door and only after about an hour someone had opened the door. These facts, however, had not been told by him to the Investigating Officer. The statement made by PW11 that he had met Lucky at his shop “next day” at about 10.00-11.00 a.m., would be incorrect and unacceptable as the police was first intimated about the occurrence at 9:10 a.m. when the recording was made at the police control room. The answer reflects hazy recollection and that PW11 had got confused or the answer was possibly to a different question. PW11’s categorical deposition is that he had gone to the house of Shahdab at about 5.30 a.m. and they had visited the shop of Lucky earlier in the morning and not after a gap of about 4-5 hours. Reference to the meeting with 10-11 a.m. on the next day, apparently would be in reference to another meeting

between PW11 and Lucky on the next day i.e. 13th March, 2011. The question put possibly was whether the witness had met Lucky after the day of occurrence i.e. 12th March, 2011.

20. Sumit @ Lucky (PW18) is equally assertive in his statement and has affirmed that the appellant had visited his shop with Sameer on 11th March, 2011 and had purchased a packet of chips for Rs.5/- and a *gutka*. Shahdab was drunk at that time. Thereafter, the two had left together towards main road *mandir* side. He had closed his shop and proceeded to his house. PW18 affirms Mohd. Moin Khan (PW1) early morning visit at 5:30 a.m. PW1 was then disturbed and had inquired about his son, who was missing since the previous night. PW18 has narrated that he had seen Sameer with Shahdab. Subsequently, he had heard commotion and noise, as dead body of Sameer was found lying in a vacant plot. The pant of Sameer was withdrawn. Several persons were present. The appellant was also there and was beaten up. However, others had saved him. Police came to the spot. PW18 identified the T-shirt and pant worn by the appellant as Ex.PW8/P-1 (colly.).

21. Lucky (PW18) has not stated that Mohd. Moin Khan (PW1) and Hanif (PW11) had brought Shahdab to his shop or that the appellant

Shahdab had confessed the crime on being confronted by PW18. However, PW18 in his examination-in-chief has accepted that the appellant was seeking pardon from Mohd. Moin Khan (PW1) @ Ballu and other persons, who were present there. This deviation and divergence in the testimony of Lucky (PW18) and Mohd. Moin Khan (PW1), to our mind, is not of such nature as to destroy or negate the prosecution case or to reject their primary narration implicating the appellant. PW18 in his cross-examination has reiterated that he had seen the appellant Shahdab and Sameer together at night. The testimony of PW18 matches and is same as per the statement Ex.PW1/A, i.e. the first information.

22. The aforesaid testimonies would indicate that the following facts stands proved beyond a pale of doubt:-

- (i) Appellant Shahdab had dinner and drinks with Mohd. Moin Khan (PW1) in his *jhuggi*, where Rahis (PW14) was also present.
- (ii) On insistence of younger child Sahil, Mohd. Moin Khan (PW1) had asked his elder son Sameer to fetch bread from the nearby shop of Lucky (PW18).
- (iii) Shahdab had left the *jhuggi* immediately thereafter and followed Sameer.

(iv) Sameer did not return to his residence.

(v) Lucky (PW18) has deposed that Shahdab and Sameer had come together to his shop that night and at that time Sameer was in the lap of Shahdab. Shahdab had purchased a packet of chips and a *gutka* from his shop. Thereafter, both of them had left together.

(vi) This was the last time Sameer was seen alive by any witness or known person. Sameer went missing.

(vii) Mohd. Moin Khan (PW1) had searched for Sameer at night and had gone to the shop of Lucky (PW18), but the same was closed. PW1 had also gone to the residence/factory of Shahdab, but Shahdab could not be traced.

(viii) Rahis (PW14) has stated that Shahdab had returned during Mohd. Moin Khan's absence to the *jhuggi* at night and at that time PW14 had noticed blood on his face and mud on his pant. On being questioned, Shahdab had stated that he had a grapple with someone and had left thereafter.

(ix) Mohd. Moin Khan (PW1) spoke to Lucky (PW18) at about 5.00/5.30 a.m., and came to know that both Shahdab and Sameer had come to his shop and both of them had left together.

(x) Mohd. Moin Khan (PW1) proceeded straight to the house of

Shahdab at about 5.30 a.m. On pointed questioning, Shahdab was unable to answer and then confessed his guilt. Hanif (PW11) was with Mohd. Moin Khan (PW1) at that time.

(xi) Lucky (PW18) had heard Shahdab apologise.

(xii) Shahdab took them to the vacant plot, where the dead body of Sameer was found. Blood had spilled all over and the head of Sameer had been smashed.

(xiii) Police was informed and Shahdab was arrested from the vacant plot itself.

23. The FSL report marked Ex.PW19/H and J confirms presence of human blood on the pant worn by the appellant, but the blood group could not be ascertained.

24. We have looked at the photographs marked Ex. A-1 to A-18, which would show that body of Sameer was found inside and adjacent to the boundary wall. This shows the reason why the body of Sameer was not visible to the passersby and could not be found at night or in the early morning.

25. The aforesaid two factors noticed in paragraphs 23 and 24 above would corroborate the ocular testimonies of Mohd. Moin Khan (PW1),

Lucky (PW18) and uncles Rahis (PW14) and Hanif (PW11), which when read together would lead to only one conclusion that the appellant alone and no one else, who was guilty and has committed the offence charged.

26. Appellant Shahdab in his statement under Section 313 Cr.P.C. averred that he had been falsely implicated in the case. Most of the answers professed lack of knowledge, or complete denial claiming that the assertions were incorrect. Shahdab claimed that he had not taken Sameer with him anywhere and had not seen him on the date of the incident. The police had falsely implicated him to work out a blind murder case. He even professed having helped Sameer's parents in the search.

27. Appellant Shahdab has been, therefore, rightly convicted for murder of Sameer under Section 302 IPC. The order of sentence also does not require any interference.

28. For the aforesaid reasons, we do not find any merit in the present appeal. The same is dismissed.

SANJIV KHANNA, J.

DECEMBER 16, 2015/NA

R.K.GAUBA, J.