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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRIMINAL APPEAL NO. 1626/2014**

Date of decision: 13th March, 2015

DINGAL

..... Appellant

Through Ms. Saahila Lamba, Advocate.

versus

STATE

..... Respondent

Through Ms. Aashaa Tiwari, APP along with SI
Pushpendra, P.S. Kashmere Gate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

SANJIV KHANNA, J. (ORAL):

With the consent of the counsel, instead of taking up the bail application for consideration, we have taken up the appeal for hearing and disposal.

2. Dingal impugns and challenges his conviction under Section 302 of the Indian Penal Code, 1860 (IPC, for short) for having committed murder of Noor Mohammad @ Kalia on the intervening night between 31st December, 2011 and 1st January, 2012.

3. The impugned judgment dated 17th October, 2014 arises out of FIR No. 1/2012, Police Station Kashmere Gate. The impugned judgment acquitted the other two co-accused, namely, Farid @ Mota and Sushil

Kumar @ Sushil Dass. State has not preferred any appeal against their acquittal.

4. By order on sentence dated 18th October, 2014, the appellant-Dingal has been sentenced to undergo imprisonment for life and to pay a fine of Rs.10,000/- and in default of payment of fine to undergo Simple Imprisonment for three months.

5. There is ample evidence to show that Noor Mohammad had died a homicidal death as a result of cut throat injury. Dr. S. Lal (PW-1) had conducted post-mortem on his dead body and has deposed that on external examination two ante mortem injuries were found. First injury was an incised wound of size 2 x 0.5 cm into bone, deep over temple area and the second injury was multiple incised wound merged into each other to form a wound of size 14 x 2 cm. into trachea over middle of neck. The wound had cut the underline muscles, vessels and trachea and was horizontally placed. As per the medical opinion, death was due to haemorrhagic shock because of cut throat injury, sufficient in the ordinary course of nature to cause death. Post-mortem report is marked Exhibit PW-1/A. Dr. S. Lal (PW-1) has further deposed that on 12th January, 2012 a sealed parcel containing the said weapon of offence i.e. the knife was sent to him and the same was examined. He opined that the injury in question was possible with the knife produced for his examination. As per the case of the prosecution, the knife was recovered pursuant to the disclosure statement, Exhibit PW-

14/C, made by Sushil Kumar, one of the assailants mentioned in the FIR, marked Exhibit PW-7/B. The said Sushil Kumar has been acquitted by the trial court. The discovery of the knife is not attributed to a disclosure statement of the appellant-Dingal.

6. The core issue and question, which arises for consideration, is whether the appellant-Dingal is the actual perpetrator, who had committed the said offence. In the absence of any direct evidence, the trial court has in its impugned judgment convicted the appellant-Dingal, by placing reliance on circumstantial evidence. The alleged eye witnesses i.e. Gulshan (PW-5), wife of the deceased and Saira (PW-3), mother-in-law of the deceased have turned hostile. The circumstantial evidence relied upon in the trial court judgment primarily consists of the factum that the appellant-Dingal was found at the spot with blood stained clothes at about 10.30 A.M. on 1st January, 2012; the deposition of Sher Khan (PW-12) that he had informed the police and the deposition of Amjad Malik (PW-4) regarding purchase of *kafan* and other material by the appellant-Dingal.

7. Sher Khan (PW-12) in his deposition has stated that on 1st January, 2012 at about 10.15/10.30 A.M. he saw a crowd gathered in front of jhuggi of Saira (PW-3). He went there and saw the dead body of Noor Mohammad @ Kalia lying on the bed and his clothes and the bedding were soaked in blood. Saira (PW-3) and her children were weeping. He had then called the police. The police team had arrived at the spot and had

interrogated Saira (PW-3) and Gulshan (PW-5). Sher Khan (PW-12) in his deposition has not implicated the appellant-Dingal, as the possible perpetrator. In any case, he was not an eye witness.

8. Amjad Malik (PW-4) had identified the appellant-Dingal and deposed that appellant-Dingal had come to his shop for purchasing *kafan*/white piece of cloth and other articles. At that time, appellant-Dingal had stated that he was a Hindu, but wanted the said articles. He had paid him Rs.1,250/-. Subsequently, PW-4 Amjad Malik saw the appellant-Dingal in police custody and identified him.

9. The deposition of Amjad Malik (PW-4), therefore, only shows and proves that the appellant-Dingal had purchased a *kafan* on 1st January, 2012 and had paid Rs.1,250/- for the same. We will subsequently be referring to the cross-examination of Amjad Malik (PW-4). At this stage however, we would like to first refer to the testimonies of Saira (PW-3) and Gulshan (PW-5).

10. As per the prosecution version, Noor Mohammad was murdered outside the jhuggi of Saira (PW-3) on the intervening night between 31st December, 2011 and 1st January, 2012. Saira (PW-3) in her court deposition has stated that she has six children, five from her first husband and one from her second husband. Her eldest daughter, Gulshan (PW-5), was living with the deceased Noor Mohammad for the last three years as his wife, but they did not have any children. Noor Mohammad had been

arrested once before and had undergone imprisonment for six months. During this period, his wife Gulshan had started cohabiting with the appellant-Dingal and had got pregnant. Noor Mohammad had come out of the jail on 3rd December, 2011. Saira (PW-3) deposed that other than the aforesaid facts, she did not know anything about the said case and how Noor Mohammad had died, as she had not seen anyone killing Noor Mohammad. She was cross-examined by the Additional Public Prosecutor. In her cross-examination, she accepted that Gulshan (PW-5), her daughter, had given birth to a male child of appellant-Dingal. She, however, denied having made any statement to the police, implicating that appellant-Dingal as the culprit, who had murdered Noor Mohammad. She also denied having implicated Sushil Kumar and Farid, who have been acquitted by the trial court. She, however, accepted that her daughter Gulshan used to treat appellant-Dingal as her husband, but asserted that they were not married.

11. Gulshan (PW-5) has stated that she was a beggar and the deceased Noor Mohammad was her husband. However, she did not have any issue from Noor Mohammad. She had started living with the appellant-Dingal, when Noor Mohammad was in jail and had conceived a child. She claimed ignorance as to the circumstances in which Noor Mohammad had died. She was cross-examined by the Additional Public Prosecutor, but she did not accept that the appellant-Dingal was the person who had inflicted the fatal injuries on the deceased. In her cross-examination by the Additional

Public Prosecutor, she accepted as correct that the deceased Noor Mohammad was a drug addict. However, she denied the suggestion given by the Additional Public Prosecutor that she was aware that Noor Mohammad had gone to jail in many cases. She also denied the suggestion that Noor Mohammad after coming out of jail on 3rd December, 2011 had asked her to abort the child of appellant-Dingal and this had led to an altercation between the deceased and the appellant- Dingal. She accepted as correct the suggestion of the Additional Public Prosecutor that on 1st January, 2012 at about 8 A.M. her mother, i.e., Saira (PW-3) came shouting that someone had killed Noor Mohammad. Thereupon, she went to the jhuggi near Nili Chatri Mandir and had seen the dead body of her husband Noor Mohammad. His throat had been slit. She also accepted as correct that the appellant-Dingal had stated that he would arrange for *kafan* and had brought the *kafan* and other material for burial of Noor Mohammad. During her cross examination by the Learned Additional Public Prosecutor, she voluntarily added that the appellant-Dingal was living with her and he had not asked for any money from her.

12. From the aforesaid cross-examination by the Additional Public Prosecutor, it appears that Gulshan (PW-5) had started living with appellant-Dingal and at about 8 A.M. on 1st January, 2012, Saira (PW-3) had come and informed them, i.e., PW-5 and the appellant, that someone had killed Noor Mohammad @ Kalia. Thereafter, Gulshan (PW-5) had

proceeded to the jhuggi near Nili Chatri Mandir. The suggestion to and deposition of Gulshan (PW-5) exposit that she and the appellant had not spent the night in the jhuggi with Saira (PW-3). At this stage, it would also be relevant to advert to the statement of the appellant-Dingal under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C., for short). Appellant-Dingal had stated as under:-

“Q. Why this case against you?

A. It is a false case. Gulshan had been residing with me. As informed by her, her husband Noor Mohd. @ Kalia was in J/C in some case, who had been released one month prior to the date of incident but he had never met me during that period nor he had met Gulshan in my presence. In the morning of 01.01.2012, while I just got up from the sleep under the Monkey bridge opposite to Hanuman Mandir, Gulshan was also with me. We were informed by Saira mother of Gulshan that Noor Mohd. @ Kalia had been murdered by someone. I told Gulshan to call at 100 number but since she was not having any mobile with her, I informed Sher Khan who in turn informed to Police but subsequently, myself, Gulshan and parents of Gulshan were taken to Police. All others except me were let off and I was falsely implicated in this case.”

13. Appellant-Dingal has, therefore, claimed that Gulshan (PW-5) was residing with him. In the morning of 1st January, 2012 he had got up from sleep under the Monkey Bridge, opposite to Hanuman Mandir. Gulshan (PW-5) was with him at that time. Saira (PW-3) had come there and informed them that Noor Mohammad had been murdered by someone. Though it is true that the appellant-Dingal had categorically denied that he

had purchased the *kafan* and other articles from Amjad Malik (PW-4), this fact alone cannot be treated as a highly incriminating one, sufficient to warrant a conviction. Though we accept the prosecution version that the appellants-Dingal had purchased the *kafan* and other materials for cremating the dead body of Noor Mohammad, this fact in our view is hardly sufficient to implicate the accused and show his involvement in the offence under consideration. From the deposition of Gulshan (PW-5), it is apparent that the appellants-Dingal had subsequently come to the spot where the dead body of Noor Mohammad had been found. It is apparent that appellants-Dingal had not absconded. His presence at the spot in the morning when police reached stands proved and is undisputed.

14. Amjad Malik (PW-4) in his cross-examination on behalf of the accused, i.e., appellants-Dingal, Sushil Kumar and Farid, had claimed that the appellant had come to his shop at about 5.30 A.M. for purchasing the articles on 1st/2nd January, 2012. Learned counsel appearing for the State submits that the appellant must have visited the shop of Amjad Malik (PW-4) in the morning of 1st January, 2012 at 5.30 A.M. The aforesaid deposition, it is submitted, would indicate that the appellants-Dingal had wrongly deposed that he came to know about the death of Noor Mohammad at 8 A.M. on 1st January, 2012. We have considered the said contention of the prosecution, but we do not think that the statement of Amjad Malik (PW-4) in the cross-examination should be accorded undue

importance or be treated as a reliable assertion. Time was not mentioned by Amjad Malik (PW-4) in his statement under Section 161 Cr.P.C. Amjad Malik (PW-4) was himself not certain in his cross-examination, whether the appellant-Dingal had visited his shop on 1st or 2nd January, 2012. It being a cold winter morning, it is quite plausible that the appellant-Dingal may have visited the shop in the morning hours but after 8 A.M..

15. The appellant-Dingal was medically examined by Dr. Prashant Kumar (PW-2) on 1st January, 2012, at about 10.40 P.M. On local examination, he did not find any fresh external injury. His MLC was marked Exhibit PW-2/A.

16. In the impugned judgment, it is recorded that as per FSL report Exhibit PW-9/N, the clothes of appellant-Dingal were found to be blood stained and matched with the blood group of the deceased. The clothes of appellant-Dingal were found to be blood stained, but the blood group could not be ascertained. Presence of blood stains on the clothes of appellant-Dingal can be explained because appellant-Dingal was certainly present in the morning at the spot and had seen the dead body of Noor Mohammad. Blood was oozing and had spilled all over.

17. In view of the aforesaid discussion, we do not think there is any substantial and incriminating circumstantial evidence, which if read in entirety and cumulatively, would show and establish that the appellant-

Dingal was the perpetrator of the said offence and no other person would have committed the same. The appellant-Dingal is accordingly entitled to benefit of doubt and to succeed in this appeal. His conviction by the trial court for having committed the murder of Noor Mohammad is accordingly set aside.

18. The appeal is allowed. The appellant-Dingal will be released forthwith, unless he is required to be detained in any other case in accordance with law. Trial court record will be sent back.

(SANJIV KHANNA)
JUDGE

(ASHUTOSH KUMAR)
JUDGE

MARCH 13, 2015
VKR