

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

Judgment Reserved on: April 28, 2016

% *Judgment Delivered on: May 06, 2016*

+ **CRL.A. 262/2016**

BADOL FARAZI

..... Appellant

Represented by: Mr.Pankaj Sinha, Ms.Nupur
Grover and Ms.Shalini Rana,
Advocates.

versus

THE STATE REPRESENTED BY:

GOVERNMENT OF NCT OF DELHI

..... Respondent

Represented by: Mr.Varun Goswami, APP for
the State with SI Ashish
Kumar, PS Amar Colony.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Convicted for offences punishable under Sections 392/397/302 IPC vide impugned judgment dated July 21, 2015 and sentenced for imprisonment for life for offence punishable under Section 302 IPC, rigorous imprisonment for a period of 10 years for offence punishable under Section 397 IPC and rigorous imprisonment for a period of 05 years for offence punishable under Section 392 IPC vide order dated August 22, 2015 Badol Farazi challenges the same inter alia on the ground that when the alleged offences were committed, he was not in India and thus he could not have committed the offences which fact was apparent from his passport which was duly seized. We may note that vide impugned judgment Sanjay Maiti has also been convicted for offence punishable under Section 411 IPC

for the reason gold chain of the deceased was recovered from his possession and sentenced to undergo simple imprisonment for a period of one year. There being no appeal from Sanjay Maiti, we are only concerned with the appeal of Badol Farazi.

2. Process of law was set into motion on receipt of DD No.4A at 9.05 AM on May 06, 2008 at PS Amar Colony through the PCR exhibited as Ex.PW-17/A informing that a lady was staying alone at C-13, Dayanand Colony and was not opening the door of the house. On receipt of Ex.PW-17/A, Inspector Manoj Kumar, PW-27 along with Constable Sanjay PW-16 reached the spot and found the dead body of a female lying on the floor which was identified to be that of Smt.Nirmal Madaan by her grandson Manav @ Sunny Madaan, PW-5. Statement of Manav Ex.PW-5/A was recorded by SI Ram Jeet Singh, PW-17 on which FIR was registered.

3. Manav stated that he was residing on the second floor of House No.C-13, Dayanand Colony, Lajpat Nagar-IV; on the first floor his paternal aunt Smt.Madhu Madaan was residing whereas his grandmother Smt.Nirmal Madaan aged about 71 years was residing on the ground floor. On that day i.e. May 06, 2008 when he was sleeping in his room, around 8.45 AM Mukesh s/o Krishan Nandan Singh, who used to work with his grandmother, came and stated that his grandmother had not opened the shop and thus called him downstairs. Manav and Mukesh went and knocked the door of his grandmother's floor however, nobody opened the door. They went to the rear where they found the door of rear portion open thus they made a call to the police. After the police reached, he jumped over the grill on the rear portion. Manav found his grandmother lying near the bed in a pool of blood. She had knife injuries on her hands and in her mouth broken portion

of the knife was stuck. One almirah was found open and belongings ransacked. Manav also stated that his grandmother had kept a boy namely Badal, aged around 20 years, slim body, wheatish complexion, 5.5 ft. in height, as domestic servant, who used to work in STD booth as well and used to sleep at the residence. Badal was missing from the house. Thus he suspected Badal for having committed the murder of his grandmother and robbing valuable articles. Besides the earth control, handle of knife lying at the spot along with the jeans pant and a belt lying in the backyard of the house purportedly belonging to Badal which had blood stains were seized.

4. Post-mortem was carried out on the body of the deceased Smt.Nirmala Madaan by Dr.Sukhdeep Singh, PW-10 who found a kitchen knife stuck in the mouth of the deceased and noted the following ante-mortem injuries:

“1. Incised wound 1.5 cm in length, cutting the lateral angle of the left upper lip.

2. Incised wound 2. cm in length, 1 cm invert to the lateral angle of upper lip, placed vertically bearing a knife blade into it upto a depth of 12 c.m, cutting the tongue into a wound 1.5 cm x 1 cm, placed 2 cm to the back of tip and 1 cm away from middle line from the left side through the tongue into submandiular fossa, staining of tissues is seen.

3. Incised wound 0.5 cm x 1 cm below the inner end of eye-brow, incised wound is superficial.

4. Incised wound on the upper abdomen placed horizontally 1.5 x 3 cm located 13.5 cm above the umbilicus, the wound passes downward and backward into the abdominal cavity, cutting superficial tissues peritoneum and the medial and lower surface of liver. There is a cut wound 0.8 x 0.5 cm. In the abdominal cavity, there is about

500 to 700 ml of clotted blood.

5. Incised wound on the left abdomen placed horizontally 4 cm away from the mid line and 4 cm below the injury No.4 of size 1.8 x 0.1 cm, wound passes backward into abdominal cavity cutting superficial tissues, peritoneum passing through the anterior and posterior wall of stomach. Cut in anterior wall 2.5 x 0.5 cm and posterior wall being 1 x 5 c.m. Semi solid straw coloured food material seen coming out of the stomach.

6. Incised wound left abdomen placed horizontally 9 cm away from the mid line of size 1.5 x 0.3 cm.

7. Incised wound on left abdomen placed horizontally 13 cm away from the mid line of size 1.5 X 0.3 cm.

8. Incised wound on left lateral side of abdomen placed horizontally 16 cm away from the mid line of size 1 x 0.8 cm.

9. Incised wound obliquely placed with inner and directed downward 17 cm to the left of mid line and 6.5 cm above from injury No.8 of size 1.5 x 0.3 cm.

10. Incised wound obliquely placed on left lateral side of abdomen 21 cm away from the mid line of size 1.5 x 0.2 cm.

10. Incised wound located 2.5 cm above the umbilicus placed horizontally 3.5 cm away from the mid line.

11. Incised wound placed horizontally in line with injury No.11, 7.5 cm away from the mid line to the left. The wound cut superficial tissues and passes backward into the abdominal cavity.

12. Incised wound obliquely placed on left lateral side of abdomen 14.5 cm away from the mid line of size 2. X 0.5

cm.

13. Incised wound placed obliquely over the posterior medial aspect of left arm 11 cm above the elbow of size 2 x 0.5 cm.

14. Incised wound placed postero-laterally over left arm 8 cm above the elbow of size 5 x 1 cm x 6 cm deep laterally and upwards.

15. Incised wound 7 x 2 cm, bone deep placed obliquely over the back of left elbow.

16. Incised wound 1.5 x 0.4 cm obliquely placed over the front of left forearm on its medial aspect, 13 cm below the elbow.

17. Incised wound 4.5 x 0.5 cm x 5 cm deep placed 16 cm below the elbow, directed upwards on medial aspect of the left forearm.

18. Incised wound 2.5 cm x 0.3 cm placed obliquely over the dorsum of right ring finger.

19. Incised wound 1.5 x 0.3 cm obliquely placed on the medial end of left thigh, 12 cm above the knee.

20. Incised wound 3.5 cm x 0.6 cm placed obliquely on the left thigh, 5.5 cm above the knee.

21. Incised wound 1.5 cm x 0.2 cm over the lateral aspect of left thigh, 2 cm above the knee.”

5. Dr.Sukhdeep Singh, PW-10 opined the cause of death to be due to haemorrhagic shock as a result of multiple stab injuries. All injuries were ante-mortem in nature and collectively sufficient to cause death in the

ordinary course of nature. He also gave a subsequent opinion that the injuries mentioned in the post-mortem report were possible by the knives Ex.Nos.1 and Ex.No.3, that is, knife blade. Ex.No.2 the handle of the knife was possibly part of Ex.No.3 the blade of the knife. Before the Court he identified the knife Ex.No.1 and Ex.Nos.2 and 3 the handle and the blade of the second knife respectively.

6. Learned counsel for the appellant contends that the appellant has been falsely implicated for the reason the appellant was not even in India on the date of alleged incident i.e. May 06, 2008. The appellant visited India for the first time in July, 2008 on the strength of passport issued on July 02, 2008. The test identification parade of the appellant was not got conducted and thus dock identification for the first time in the Court is meaningless. Even the witnesses have stated that the police brought Badol to their house and that Manav had visited the police station to see the accused persons after the arrest. The identity of the appellant to be the same person, that is, Badal who served as servant to the deceased has not been established. The chain of circumstances does not connect the appellant with the offence alleged. The inquest report prepared immediately after the incident does not mention that any gold chain of the deceased was missing rather silver ring and artificial earring were recovered from the dead body. No credence can be placed on the testimony of Bagappa PW-11 who alleged that the appellant replaced him as a servant of the deceased, as Bagappa was demanding increase in his salary which was not accepted by the deceased. The testimony of Tenzin Thinley PW-13 is contradictory and unreliable. Further Tenzin Thinley admits that the room was dark from inside and thus he could not have seen the appellant with the deceased at the night of May 05, 2008.

The statement of Aman Anand, PW-15 is vague and cannot be relied upon. Nobody has proved the handwriting on the servant verification form. The servant verification form has not been proved to be in the handwriting of the deceased and does not connect the appellant with the offence committed as present is a case where nobody identifies Badol Farazi to be the same person who was employed by the deceased and was known by the name Badal. The signature of the appellant on the servant verification form was taken by the police after he was arrested which fact is deposed by Manoj Kumar PW-27. Further the specimen signatures were taken in the absence of a Magistrate which is impermissible in law as held by Full Bench of this Court in the decision reported as 191 (2012) DLT 225, Sapan Halder & Anr. vs. State. Further no finger prints were lifted from the spot which could have established the case against the appellant. There is no recovery of weapon of offence at the time of arrest of the appellant. Thus the appellant be acquitted.

7. Learned APP for the State contends that appellant has been named in the FIR. He was seen by Tenzin Thinley PW-13 and Bagappa PW-11 who have identified him and thus there was no need of a Test Identification Parade. This was not a case of fleeting glimpse by the witnesses. The plea of alibi that Badol entered India in July 2008 is required to be rejected and this Court will take judicial notice of the fact that Indo-Bangladesh border is a porous border permitting infiltration unabated. The passport was got made by the appellant only as a defence and strangely though in the passport there is an emigration check at Bangladesh check post, there is no corresponding endorsement of immigration at the Indian customs while he crossed over the border. The FIR notes that the house had been ransacked and thus only

when search was made it was found that gold chain of the deceased was missing. The ring on the finger of the deceased being of silver and the ear ring being artificial would have obviously not tempted the appellant to rob the same. The servant verification form which noted the name of Badal was recovered near the dead body which was sufficient proof that the deceased had employed the appellant as a servant and she was in the process of getting his verification done. The complainant had accompanied the Police officers when pursuant to the disclosure, Badol got recovered the knife from the park on July 16, 2008. There is no discrepancy in the testimony of the witnesses in relation to the recovery of one of the weapons of offence i.e. Ex.No.1.

8. Before proceeding with the arguments advanced, it would be relevant to note the testimony of the three star witnesses of the prosecution i.e. Manav @ sunny PW-5, Bagappa PW-11 and Tenzin Thinley PW-13.

9. Manav deposed in sync with his statement on the basis of which FIR was registered. He also deposed that immediately after the registration of FIR, along with a Constable he went to the Old Delhi Railway Station to search for Badal however he could not find him there and so he returned home. He deposed about the seizures made from the spot and Jeans pant of light blue colour recovered from the backyard of the house which was blood-stained. The servant verification form was recovered from near the dead body however in relation to the knife seized by the Police from the park near Garhi, he deposed that he was not present when the said knife was recovered. He also identified the gold chain of his grand-mother recovered from Sanjay Maiti which he had identified in a Test Identification Parade. In his cross-examination, nothing could be elicited except that he deposed

that his grand-mother used to sleep late and keep the light of the room off while sleeping.

10. Bagappa PW-11 deposed that on April 01, 2008 he started working as a helper in the STD shop of Mrs. Nirmal Madaan at Lajpat Nagar. On April 27, 2008 he requested Mrs.Madaan to increase his salary which she refused and thus he quit the job. Mrs.Madaan told him that she would talk to him after an hour after attending a Satsang. In the meantime Badol came to the STD shop for some employment. Bagappa told Badol that Mrs.Madaan would come after one hour and when Mrs.Nirmal Madaan came back, he told her about Badol. Mrs. Nirmal Madaan employed Badol as the servant. Thereafter on the same day he left the job. Bagappa correctly identified Badol in the Court as the person who had been employed by the deceased. Initially Bagappa was not cross-examined however on an application filed under Section 311 Cr.P.C. by the appellant, Bagappa was recalled for cross-examination. However, nothing material could be elicited in cross-examination. He reiterated that he left the job because he was not paid sufficiently and that Mataji had offered a salary of ₹1000/- per month which was not sufficient for him. He reiterated that he had seen Badol in the STD booth for the first time. On a Court question, Bagappa reiterated that Badal Singh Sain appointed by Mrs.Nirmal Madaan was the same person standing in the dock.

11. Tenzin Thinley PW-13 was running a restaurant in Majnu Ka Teela and was a tenant at C-13, Dayanand Colony on the second floor. He deposed that on the night of May 05, 2008 at about 11.00 PM he was watching TV. Since water was overflowing in front of the window from the overhead tank, he went downstairs and found the main entrance gate of the

house of Nirmal Dadi closed. So he called out the deceased to get the gate opened. He peeped inside her room from the window and found Badol along with one more person. Badol told him not to worry and he will manage the overflowing of water. Feeling assured, he went upstairs in his room. On the next morning i.e. May 06, 2008 when he got up at 9.00 AM he found a large number of Police personnel inside the house and when he went downstairs he came to know that Dadi Ma had been murdered. On September 01, 2008 he was called by the Police to the Patiala House Court for the purpose of identifying the accused, where he identified Badol. In cross-examination he clarified that he did not notice the time when water was overflowing however it was around 11.00 PM as he was watching TV in his room and his elder brother was sleeping in the other room. He deposed that Manav also used to reside on the same floor. He stated that he was not aware of the exact time when the deceased used to sleep and also whether she used to switch off the light when she slept. In cross-examination he further stated that it was dark inside the room of the deceased when he spoke to Badol about the water overflowing. A suggestion was given to him by counsel for Sanjay Maiti that Sanjay Maiti was not the same person whom he had seen on that night, in the room of the deceased to which he stated that he had a doubt however no such suggestion was given on behalf of Badol.

12. During the course of investigation the Police moved an application for TIP of Sanjay Maiti however he refused Test Identification Parade. In view of the evidence of Tenzin PW-13 who expressed his doubt on the identification of Sanjay, he was acquitted for offence punishable under Section 302 IPC. As far as Badol is concerned the witnesses clarified that Badal Singh Sain was the same person i.e. Badol Farazi who was present in

the Court. Badal was named in the FIR. Having been employed with the deceased on April 27, 2008, both Manav and Tenzin had sufficient opportunities to see him till May 05, 2008 as he was doing household chores of the deceased at her house and office i.e. STD booth on the ground floor of the house C-13, Dayanand Colony. Further Bagappa had a discussion with Badol and the two waited for Mrs. Nirmal Maddan to return from Satsang on April 27, 2008, whereafter Bagappa left the job. This was not a case where the witnesses had a fleeting glimpse of Badal. Thus, no Test Identification Parade was warranted when the witnesses knew the accused very well and had named him in the FIR. The Division Bench of this Court in the decision reported as 107 (2003) DLT 385 State Vs. Mohd.Afzal & Ors. authored by one of us Pradeep Nandrajog, J. noting the various decisions of the Supreme Court on the point of identification of the accused as per Section 9 of the Evidence Act culled out the various principles and held:

“304. The facts which establish the identify of an accused person are relevant facts as per Section 9 of the Evidence Act. Substantive evidence of a witness is the statement made by him in the Court. No doubt, there are judgments holding that evidence of identification of an accused person at the trial for the first time is inherently of a weak character and to carry the strength of conviction, the evidence should show as to how and under what circumstances the witness was identifying a particular accused. However, the judgments have to be read and understood in the peculiar facts of those cases. We may note a few. In the judgment reported as 1970 (2) SCC 128, Budhsen v. State of U.P., it was held :—

“The purpose of a prior test identification, therefore, seems to be to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of

the accused who are strangers to them, in the form of earlier identification proceeding. There may, however, be exceptions to this general rule, when for example, the Court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration.”

(Emphasis ours).

305. *In the judgment reported as 1992 (3) SCR 480, State of Maharashtra v. Sukhdeo Singh, it was observed :*

“Test identification parade, if held promptly and after taking the necessary precautions to ensure its credibility, would lend the required assurance which the Court ordinarily seeks to act on it. In the absence of such test identification parade, it would be extremely risky to place implicit reliance on identification made for the first time in Court after a long lapse of time and that too of persons who had changed their appearance. We, therefore, think that the learned Trial Judge was perfectly justified in looking for corroboration.”

306. *The aforesaid observations show that law on Test Identification Parade is not a cast iron straight jacket legal proposition admitting of no exceptions. Requirement of Test Identification Parade emanates from the rule of prudence to generally look for corroboration as to the identity of the accused who is a stranger to the witness. As held in the judgment reported as 2003 (5) Scale 152, Malkhan Singh v.State of M.P., this rule of prudence is subject to exceptions, when for example, the Court is impressed by a particular witness on whose testimony, it can safely rely. After all, the identification parade belongs to the stage of investigation and there are no provisions in the Code of Criminal Procedure which make it mandatory for the Investigating Agency to conduct a test identification parade, nor is there any provision which confers right upon the accused to claim one. We may note that a test identification parade does*

not constitute a substantive evidence and they are governed by Section 162 Cr.P.C.

307. In Malkhan Singh's case (supra), the Hon'ble Supreme Court cited with approval its earlier observations in an unreported judgment of Hon'ble Supreme Court in Criminal Appeal No. 92/56, Prakash Chand Sogani v. The State of Rajasthan and it was held :

“It seems to us that it has been clearly laid down by this Court, in Parkash Chand Sogani v. The State of Rajasthan (supra), that the absence of test identification in all cases is not fatal and if the accused person is well-known by sight it would be waste of time to put him up for identification. Of course if prosecution fails to hold an identification on the plea that witnesses already knew the accused well and it transpires in the course of the trial that the Witnesses did not know the accused previously, prosecution would run the risk of losing its case.”

308. It, therefore, flows that test identification parade is a rule of prudence and prior identification of the accused by the witnesses re-assures the Court that his evidence of identification carries conviction. It would be required where accused is not known to the witness. Distinction has been drawn in law where a witness identifies an accused whom he had sufficient time to see in contra-distinction to a fleeting glimpse of the accused. Further, if the evidence of the witness otherwise inspires confidence, absence of a prior test identification parade, would be no ground to reject or disbelieve the testimony of the witness, more particularly in the case where the witness is a member of the public and no motive is attributed to him for falsely implicating the accused person.”

13. We now come to the verification form recovered from near the dead body. We note the version of Manav PW-5 in the examination-in-chief in this regard who deposed:

“Servant verification form filled in by accused Badal were also seized by the Police from under the bed of my grandmother and the same were shown to me by the Police and the same were seized vide seizure memo Ex.PW-5/D bearing my signatures at point A.”

14. From the statement as recorded above the only fact proved is that a servant verification form was seized by the Police from under the bed of his grand-mother vide seizure memo Ex.PW-5/D which seizure memo bore his signature at point ‘A’. However the lacuna left by the prosecution has been filled in by the defence while cross-examining this witness and we note the relevant portion of the cross-examination of Manav as under:

“The servant verification form of accused Badal was found next day i.e. 07.05.2008 when the dead body had been found. I had seen that servant verification form. I do not remember whether the said form was signed or not. My grandmother used to tell us that she was ‘Prabhakar’ but I do not know from where she did this. My grandmother could write Punjabi. She fully knew Hindi and could also understand some English. I can identify the Hindi handwriting of my grandmother. The servant verification form of accused Badal is completely filled (except signatures) in the handwriting of my grandmother. I cannot say whether it is the same form which was seized or not. I also cannot say whether it is the same form which was shown to me on the next day as I had not read that form minutely.”

15. Thus in cross-examination Manav identified the hand-writing of his grand-mother on the servant verification form except the signature. Manav in his cross-examination did not support with regard to the servant verification form being the same form which was seized from near the dead body by the Police vide seizure memo Ex.PW-5/D, though he identified the same in his examination-in-chief. This portion of the testimony of Manav in

his examination-in-chief is corroborated by Inspector Manoj Kumar PW-27 and SI Ranjeet Singh PW-17, who have both identified their signatures on the seizure memo Ex.PW-5/D.

16. As regards the plea that it being dark Tenzin could not have identified appellant to be in the room of the deceased, we note that there are a number of ways to identify a person especially those who live in the same house i.e. height, features etc. Manav in his cross-examination has clarified that the deceased used to sleep around 12O'clock. Moreover, when Tenzin saw Badol with one more person in the room of the deceased, he did not notice whether the deceased was asleep or awaken. As per the post-mortem report which was conducted on May 07, 2008 at 2.45 PM, time since death was one and a half day. Thus murder of the deceased was committed somewhere on the mid-night of May 05-06, 2008. Thus, around the time of murder of the deceased, Badol was found in her room by Tenzin.

17. One of the weapons of offence i.e. the knife Ex.No.1 which has been opined by the doctor to have possibly caused the injuries was recovered at the instance of Badol and seized vide Ex.PW-5/H by Inspector S.P.Gupta PW-19 and SI K.P.Sah PW-23. The knife was found to be blood stained. The only cross-examination of the witnesses on this point is that no fingerprints were lifted from the knife so recovered. Thus even if Manav stated that he did not accompany at the time of recovery of the knife, from the testimony of these two witnesses i.e. Insp.S.P.Gupta PW-19 and SI K.P.Sah PW-23 coupled with the FSL report which shows that the knife had blood stains of human origin and the opinion of the post-mortem doctor that injuries were possible by the said weapon of offence, we hold the recovery of the knife Ex.No.1 at the instance of Badol to be incriminating against

him.

18. The jeans pant recovered from the backyard of the house and seized immediately after the dead body was found belonged to Badol as per Manav and was found to contain blood stains of human blood with 'A' group which tallied with that of the deceased.

19. This brings us to the most important defence of the appellant that the appellant was not present in India at the time when the offence was committed and he came to India only on July 08, 2008 after a Bangladesh passport was issued to him on July 02, 2008 thus leading to an inference that on May 5 & 6, 2008 he was not in India. We may note that though this passport was recovered from the appellant pursuant to his personal search conducted after the arrest and seized, however as far as genuineness of this document is concerned, no defence witness was examined by the appellant. Noting that an accused is not required to prove his defence beyond reasonable doubt and even if he is able to probabalize his defence, he is entitled to a benefit of doubt, we take judicial notice of the fact that Indo-Bangladesh border is a porous border wherein it is easy for people to immigrate or emigrate and in the present case though there is an emigration endorsement of the Bangladesh check post there is no endorsement of the Indian check-post thereby leading to an inference that after getting an endorsement made at the Bangladesh check post, the appellant surreptitiously entered India and this document was got created only to set up a plea of alibi.

20. At the instance of Badol, Sanjay Maiti was arrested pursuant to whose disclosure statement, gold chain of the deceased was recovered. The said gold chain was duly identified by Manav in the Test Identification Parade

carried out by Shri Satish Kumar, learned Metropolitan Magistrate PW-25 who has not been cross-examined and thus the veracity of TIP proceedings conducted by him has gone unchallenged.

21. On the basis of aforesaid discussion it can be safely held that the prosecution has proved its case beyond reasonable doubt against the appellant. Consequently, the impugned judgment of conviction and order on sentence are upheld. Appeal is dismissed.

22. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

23. TCR be returned.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

MAY 06, 2016
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