

**Shamim Vs. State**

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**Court :** Delhi

**Decided On :** May-19-2014

**Judge :** Sanjiv Khanna

**Appellant :** Shamim

**Respondent :** State

**Judgement :**

\* IN THE HIGH COURT OF DELHI AT NEW DELHI + Crl. Appeal No.175/2011  
Reserved on:

6. h May, 2014 Date of Decision:

19. h May, 2014 % Shamim Through Mr. Singh Charak, Adv. ....Appellant Virender Pratap Versus State Through Respondent Mr. Rajat Katyal, APP. CORAM: HONBLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE G. P. MITTAL SANJIV KHANNA, J.

The appellant Shamim and one Anzar (who was subsequently declared juvenile), were prosecuted for murder of Ashraf in the intervening night between 24th - 25th August, 2007. The impugned judgment dated 19th October, 2010, convicts the appellant under Section 302 IPC as well as Section 392 read with Section 34 IPC for murder and robbery. By order on sentence dated 30th October, 2010, the appellant Shamim has been sentenced to rigorous imprisonment for life and fine of Rs.5000/- for the offence under Section 302 IPC, and in default to undergo

rigorous imprisonment for three months. Similarly, rigorous imprisonment for 6 years and fine of Rs.3000/- and in default rigorous imprisonment for two months, has been imposed for the offence under Section 392 read with Section 34 IPC. The sentences were/are to run concurrently.

2. The factual position that Ashraf had died during the intervening night of 24th - 25th August, 2007 and his dead body was found in the morning at premises No.2158-59, Farid Book Depot, MP Street, Delhi, where he was working as Chowkidar, stands established in view of the testimonies of Mobin Khan (PW2) the first informant, Mohd. Aziz (PW3) who had a tea shop near the place of occurrence and Nasir Khan (PW13) the owner/proprietor of Farid Book Depot. In addition to these three witnesses, we also have testimonies of SI Pradeep Meena (PW4), first police officer visiting the spot and the initial Investigating Officer; and Insp. Shri Kishan (PW19) who was SHO, Chandni Mahal - the second Investigating Officer. Post mortem on the body of Ashraf was conducted on 26th August, 2007 by Dr. Vijay Dhankar (PW1). The dead body had been identified, as deposed to by Mohd. Imtiaz (PW5) and Zial U Haq (PW6). As per the post mortem report, the deceased had following injuries:

1. A laceration 1 x 0.5 cm x muscle deep present over inner aspect of lower lip with surrounding contusion of 2 X1cm.

2. A laceration 1.5 x 0.5 cm. present over inner aspect of lower lip with surrounding contusion of 2 x 2 cm present 1 cm lateral to injury No.1 on the right side.

3. A contusion 3 x 2 cm. present over inner aspect of upper lip, frenulum was lacerated.

The death it was opined was due to asphyxia consequent upon ante mortem smothering. Post mortem report was marked Ex. PW1/A.

3. The main question and contention raised in the present appeal relates to involvement of the appellant Shamim in the said crime. It is a case based on circumstantial evidence as there was no eye-witness. Primarily, the prosecution

case is based upon evidence of last seen as deposed by Mohd. Aziz (PW3), the telephone call received by PW3 at about 1.30 PM on 25th August, 2007 from the appellant made from an STD booth at Sahibabad U.P., also proved by the call records marked Ex. PW12/A and the statement of the STD booth owner Dharmender (PW15); recovery of stolen goods in the form of Rs.3500/- and a mobile phone from the appellant Shamim and currency of Rs.2700/- and a watch belonging to Mobin Khan (PW2) from Anzar (juvenile) and lastly, but importantly, chance finger prints/palm prints lifted from the spot as deposed to by SI Hemant Mishra (PW11) and the CFSL report (Ex. PW16/A) by Chet Ram (PW16) to the effect that two chance prints were identical with the right palm portion of the appellant and one chance print was identical with left thumb impression of the appellant.

4. To avoid prolixity, we will be referring to the arguments and contentions raised by the appellant while dealing with the evidence itself on the aforesaid aspects.

5. Mobin Khan (PW2) had stated that he was working in the printing press at Farid Book Depot, owned by Nasir Khan (PW13), since last 5-6 years. On 25th August, 2007 at 8.30 AM, he came to the book depot but found the door was locked from outside and Ashraf, the Chowkidar was not present. He waited for a hour thinking that Ashraf might have gone to take tea. Thereafter PW2 along with Shahid (who was not examined) broke the main lock with the help of a hammer and went inside. Ashraf was lying near a sofa motionless, with blood which had oozed from his mouth. They picked up Ashraf and put him on the sofa. Locks inside office were also broken. PW2 telephoned police at No.100. Police and then the owner Nasir Khan (PW13) arrived. Nasir Khan (PW13) on verification, noticed that Rs.6000/- were missing from the cupboard of a table along with one mobile phone. Mobin Khan (PW2) on checking his table, found his watch Timex with golden chain was missing. In the meanwhile, Mohd. Aziz (PW3), a tea vendor came there and revealed he had seen Shamim and Anzar (Juvenile) with Ashraf at 11.30 PM at night while they were roaming on the street. Appellant Shamim on enquiry had stated that one goods vehicle with goods would be coming and he was waiting for unloading the goods. Mohd. Aziz (PW3) has testified similarly about the interaction and conversation at 11.30 PM with appellant Shamim, Anzar (Juvenile) and the

deceased Ashraf. He has also deposed on the aspect of incriminating material which was found at the place of occurrence and seized.

6. Aforesaid factual position, substantially and on material aspects has been affirmed by Nasir Khan (PW13) who has stated that Ashraf used to work as chowkidar and on 25th August, 2007 at about 9.30 AM, he reached the office and found crowd there. Mobin Khan (PW2) then informed him that he had broken the lock and entered the office and found that Ashraf was lying motionless on the floor and blood had come out from his mouth and belongings were scattered. Mobin Khan (PW2) had then called the police. Nasir Khan (PW13) checked his office and found that Rs.6000/- were missing from the drawer of the table. One mobile phone and a wrist watch which belonged to Mobin Khan (PW2) were also found to be missing. PW13 stated that Shamim and Anzar (Juvenile) were employed by him at Farid Book Depot but they had worked only till May, 2007.

7. Learned counsel for the appellant had submitted that Shahid who had broken the lock along with PW2 was not examined. This is correct but we do not think that the statement of PW2 should be disbelieved or erased for the said reason. The version given by Mobin Khan (PW2) has been corroborated by Mohd. Aziz (PW3) and also by Nasir Khan (PW13). Duplication of evidence was not required. Testimony of Mobin Khan (PW2) on the aspect of breaking the lock etc. is trustworthy and reliable. In addition, we have documentary evidence in the form of PCR information (Ex. PW18/A) which records that at 9.54/9.56 AM on 25th August, 2007, one M.M. Khan from telephone No.23289786 had made a call regarding death of chowkidar and breaking of locks. The said form was proved by Const. Dharampal (PW18). Questioning the identity of Mobin Khan (PW2) whether he had informed the PCR, it was submitted that information was given to the police by M.M. Khan and not by Mobin Khan (PW2). The contention is clearly fallacious as Mobin Khan has signed his court deposition as M.M. Khan. Assertion by PW2 that he had made the complaint or informed the police remained unchallenged, when he was examined on oath. It is stated that prosecution has not proved or established identity of the subscriber of telephone No.23289786 and whether the said telephone was installed in Farid Book Depot. It is brought to our notice that prosecution had filed telephone bill in respect of telephone No.23247075 in the

name of Nasir Khan (PW13) marked Ex. PW13/C. The contention again is misconceived as telephone bill Ex. PW13/C was filed to show ownership and proprietorship of Nasir Khan (PW13) who was operating from 2158, M.P. Street, Darya Ganj. The issue in question was/is not, which phone was used to make the call to the police but whether Mobin Khan (PW2) had made the call as deposed by him. The aforesaid factum is clearly proved from the PCR Form (Ex. PW18/A) and testimony of Mobin Khan (PW2).

8. Referring to the PCR Form (Ex. PW18/A), it was submitted that there was delay in recording the DD entry No.9A (Ex. PW17/A) in Police Station, Chandni Mahal, which was recorded at 10.27 AM. The contention is devoid of merit as it is clear from PCR Form (Ex. PW18/A) that it took considerable time for the PCR to reach the spot due to heavy traffic and in fact the police officers had to walk and then confirmed that the information conveyed on telephone regarding the murder and breaking of locks was correct. This would have necessarily taken time. PCR Form also records that Addl. SHO, P.S. Darya Ganj had come to the site. As noticed above, the FIR in question was registered in P.S. Chandni Mahal as the offence was committed in the area under the said Police Station. This explains the so called or purported delay in recording information at P.S. Chandni Mahal (Ex. PW17/A) as intimation initially it is apparent was sent to police station, Darya Ganj. The so-called delay in the present case is not substantial or unexplained.

9. Mobin Khan (PW2) and Nasir Khan (PW13) had deposed about missing articles i.e. Rs.6000/- in cash, a mobile phone and the watch belonging to Mobin Khan (PW2). On the said aspect and on recovery, learned counsel for the appellant has raised the following submissions. (i) There was delay in forwarding the FIR which was received by the concerned Metropolitan Magistrate on 26th August, 2007 in the morning. (ii) The crime team report (Ex. PW11/A) does not refer to the stolen money, watch or mobile phone. Against column No.7 i.e. property stolen, it was noted paper, cheque books etc.

were stolen. The said crime team had remained at the spot from 10.30 AM to 1.30 PM and thus, till 1.30 PM Nasir Khan (PW13) had not noticed that money or mobile phone was missing. Rukka was recorded and sent to the police station at

1.40 PM and thereafter FIR was recorded at 1.50 PM as per DD Entry No.10A dated 25th August, 2007 marked Ex. PW17/B, at Police Station, Chandni Mahal. Thus, it is submitted that recoveries are debatable, if not clearly planted and/or FIR was anti-timed. (iii) The total amount seized from Shamim and Anzar (juvenile) was Rs.6,200/- and not Rs.6000/-; mobile phone call records of the mobile phone No.9911903596 allegedly seized from Anzar (Juvenile) were not placed on record and the wife of Nasir Khan (PW13) who had purportedly purchased the said phone was not cited and produced as a witness. It is also alleged that the personal search memo (Ex. PW19/C) refers to cash of Rs.2200/- seized from black colour purse and 20 photographs with one negative and not Rs.3500/- or the mobile phone. Further Dharmender (PW15), the STD booth owner at Sahibabad had not signed the seizure memos.

10. We have considered the said contentions but find them devoid of merit. Personal search memo (Ex. PW19/C) refers to articles belonging to the appellant Shamim found at the time of arrest. The case property i.e. Rs.3500/- recovered in cash and the mobile phone were recorded separately in the seizure memo (Ex. PW8/B), as deposed to and proved by SI Ram Niwas (PW8), Insp. Shri Kishan (PW19) and Mobin Khan (PW2). It was a matter of convenience but preparation of a separate seizure memo cannot be a ground to dismiss and disregard the seizure. Recovery memos, arrest memo and personal search memo (Ex PW8/B) have been signed by Mobin Khan (PW2) and it was not required that Dharmender (PW15) should have also signed the said memos. Further Dharmender (PW15) and Insp. Shri Kishan (PW19) have deposed that Dharmender was not involved in the search to locate the appellant and his testimony was only to the effect that he was operating an STD booth near the main market, Rail Road, Sahibabad, Ghaziabad (U.P.). SI Ram Niwas (PW8) version that Dharmender (PW15) had joined and was present when appellant Shamim was arrested is incorrect. This is a minor discrepancy. We shall be referring to PW15s statement subsequently while dealing with the contention of the appellant that Dharmender (PW15) did not recognize the appellant. It is correct that the crime team report (Ex. PW11/A) does not mention and refer to theft or stolen property in form of Indian rupees, watch or mobile phone, but this fact was mentioned in the rukka and the FIR. The word etc. is used against column No.7 of the crime team report which refers to stolen

property, indicates that the list was incomplete and full details were to be ascertained. CrI.A. 175/2011 marked Ex. PW10/1 to PW10/20 indicate that the office had been ransacked and cheque books, papers etc. were taken out/scattered. It could have taken time for Nasir Khan (PW13) to ascertain and know what had been stolen. It is obvious that the intention was to commit larceny and steal valuables, which is clear from the photographs. Moreover, this factum cannot be read in isolation and while we take notice of the said discrepancy, there are number of reasons why we feel that the prosecution has been able to prove and establish involvement of the appellant beyond doubt. The amount seized from appellant Shamim was Rs.3,500/- and from Anzar (juvenile) Rs.2,700/- and the total amount certainly exceeds Rs.6,000/-, the amount stolen as deposed by Nasir Khan (PW13). However, it would not be correct to disregard and disbelieve the recovery of Rs.3,500/- from the appellant Shamim for the said reason. It is submitted on behalf of the State that the amount stated by Nasir Khan (PW13) may have been an estimate or the total amount seized would have included personal money belonging to appellant Shamim or Anzar (juvenile). The two possibilities do explain this difference of Rs.200/-.

11. Mobin Khan (PW2) had deposed that on 25.8.2007, he along with police officers including SI Ram Niwas (PW8) had gone to Sahibabad, U.P. and at about 2.30 PM, they had reached Railway Road near Sahibabad Railway Station, where they saw the appellant Shamim and Anzar (juvenile). Both of them were detained and recoveries were made. Accordingly, the seizure memos were prepared and they were brought to Delhi. PW2 also deposed about presence of Mohd. Aziz (PW3) at Farid Book Depot.

12. This brings us to the testimony of Mohd. Aziz (PW3) and what happened on 25th August, 2007 before 1.30 PM and afterwards leading to the arrest of the appellant. deposed on four important aspects. Mohd. Aziz (PW3) had Firstly, he had seen the deceased with the appellant and Anzar (juvenile) in the intervening night on 24th - 25th August, 2007 at about 11.30 PM when he was going to close his tea shop. Secondly, he has stated that both Shamim and Anzar (Juvenile) were earlier employees of Farid Book Depot (3-4 months prior to the occurrence) and used to have tea from his shop. Thirdly, on 25th August, 2007 when he came

to his tea shop he came to know that Ashraf has been murdered by someone in Farid Book Depot and cash was missing. Fourthly, at about 1.35 PM, while police was present, Mohd. Aziz (PW3) had received a call on his mobile No.9999082886 from the appellant, Shamim who asked him what was going on in Farid Book Depot and informed him that he and Anzar (Juvenile) were going to Bihar and would come back after Ramzan. He had activated the speaker on his mobile phone and conversation was heard by the police officers including the SHO. On a leading question being put by Additional Public Prosecution, Mohd. Aziz (PW3) stated that the call was made from 911203278498.

13. Insp. Shri Kishan (PW19) had deposed on similar lines about the presence of Mohd. Aziz (PW3) and getting a phone call from the appellant Shamim on his mobile phone and thereafter they had gone to STD Booth of Dharmender (PW15) and consequently on identification of Mobin Khan (PW2), the appellant Shamim and Anzar (Juvenile) were arrested at Station Road. Dharmender (PW15) had deposed that he was running an STD booth in the main market at railway road, Sahibabad, Ghaziabad, UP and two boys aged 20-25 years had called/talked to a Delhi number from his booth. After the said call, Delhi Police had spoken to him and he gave his address to them. PW15 accepted that due to lapse of time he could not identify the appellant and Anzar (juvenile) in court, which is normal and can be accepted as PW15s statement in the court was recorded on 28th July, 2008. The factual position that the call was made from STD booth of Dharmender (PW15) i.e. from telephone No.911203278498 is proved from the call records of mobile number of Mohd. Aziz (PW3). Jyotish Moharana (PW12) had proved the call details of mobile No.9999082886 as well as application form of Azizuddin which were marked PW12/A and PW12/B, respectively. Ex. PW12/A, the call record show that a call was made from STD booth, Sahibabad of Dharmender (PW15) to Mobin Khan (PW2) on 25th August, 2007 at 1.29 PM which was for about 40 seconds and thereafter another call was made from the same booth to Mobin Khan (PW2) for one second. There were subsequent calls from the telephone of Mobin Khan (PW2) to the STD booth thereafter at 1.36 PM, 1.46 PM, 1.54 PM and 2.00 PM which corroborate with the version of Dharmender (PW15) that he subsequently received telephone calls from Delhi Police regarding his address. PW15 was not involved and associated in the arrest of the appellant

Shamim and therefore had not signed the arrest memo, seizure memo etc. but this does not mean that PW15s testimony is false and incorrect.

14. The mobile team report (Ex. PW11/A) records lifting of 7 chance prints from different locations from the property. This was affirmed by SI Hemant Mishra (PW11) who was incharge of the mobile team and had lifted the chance prints. As per the finger print report Ex. PW16/A to C, the said chance prints were sent by the Central District Crime Investigating Team on 25th August, 2007. Chet Ram (PW16) had independently received letter of Finger Print Bureau Diary No.852/CW/FPB dated 16th November, 2007 enclosing therewith specimen finger and palm prints of the appellant Shamim and Anzar (Juvenile). On comparing the chance prints with the specimen prints, he opined that the chance prints Q4 and Q7 were identical inter se and further identical with specimen right palm portion marked S1 of palm impression of Shamim and chance print Q6 was identical with specimen left thumb impression marked S3 of Shamim. This report was proved by Chet Ram (PW16).

15. In view of the testimonies of Mobin Khan (PW2), Mohd. Aziz (PW3) and Nasir Khan (PW13), it has been established that the appellant Shamim had left the job and was not working at Farid Book Depot. Mohd. Aziz (PW3) stated that the appellant Shamim was not employed for last 3-4 months before the occurrence. In his crossexamination, PW3 affirmed that the appellant Shamim and Anzar (Juvenile) were not any more employees of Farid Book Depot. As per Nasir Khan (PW13), the appellant had stopped working since May, 2007. The prosecution had also relied upon the attendance register in support of the said position but learned counsel for the appellant submitted that the attendance register marked PW13/D appears to have been created and was not a genuine register maintained in normal course. We have examined the register and it is possible that the said register might have been created/filled up to justify the prosecution case and therefore, we are not relying on the said document, but this does not mean that we should disregard the testimonies of Mohd. Aziz (PW3) and Nasir Khan (PW13). In the statement of appellant Shamim, recorded under Section 313 Cr.P.C., he had answered question No.20 in negative as incorrect. The appellant had stated that when Ashraf died he was not in Delhi but had gone to Sahibabad after taking

leave. In his second statement recorded on 8th January, 2010 the appellant had stated that he was on leave for two days i.e. 24th and 25th August, 2007. His friends Raja Hussain and Mohd. Alam came to him in Sahibabad along with the police. They then informed him that Ashraf had died and the police wanted to question him. He was taken to P.S. Chandni Mahal and after interrogation was left but after one hour the appellant was again called back and made to sign blank papers and was involved in the present case. We have seen the cross-examination of Nasir Khan (PW13). It was not suggested to the said witness that appellant was still working with him i.e. Farid Book Depot. We have referred in detail to the testimony of Mohd. Aziz (PW3). No such suggestion was given to PW3 also.

16. Learned counsel for the appellant referred to site plans - scaled and unscaled marked Ex. PW9/A and PW19/D respectively and it was highlighted that the unscaled site plan does not mention or refer to broken handle (kundi). This is correct but we find that in the photograph (Ex. PW10/12), a broken handle is clearly visible and is seen. Further this is insignificant, when we look at the entire evidence.

17. The submission pointing out inconsistency between deposition of Mobin Khan (PW2) that there were 65-70 workers and that of Nasir Khan (PW13) that there were 15 workers is again inconsequential and irrelevant for the controversy in question i.e. whether the appellant was the perpetrator.

18. From the aforesaid discussion, following factual position has emerged and proved: (i) Dead body of Ashraf, Watchman/Chowkidar was found at about 9.00 AM on 25th August, 2007 by Mobin Khan (PW2) who had to break the lock to enter Farid Book Depot. (ii) Locks inside Farid Book Depot had been broken and the place had been ransacked. (iii) Ashraf had bled from mouth and had died due to asphyxia consequent to anti mortem smothering. (iv) Mobin Khan (PW2) has deposed that his watch was missing and the proprietor/owner of Farid Book Depot - Nasir Khan (PW13) has deposed that Rs.6000/- and a mobile phone was missing. (v) Mohd. Aziz (PW3) who had a tea shop near Farid Book Depot had seen the appellant Shamim, one Anzar (juvenile) and the deceased at 11.30 PM

on 24th August, 2007 when they were roaming in the street near Farid Book Depot. PW3 had conversation with Shamim regarding his presence. (vi) Mohd. Aziz (PW3) received a telephone call on 25th August, 2007 at about 1.30 PM, in the presence of Insp. Shri Kishan (PW19). The said call was made by the appellant Shamim from the STD booth of Dharmendra (PW15) at Sahibabad, Ghaziabad, UP, enquiring about what was going on at Farid Book Depot and informing him that he was going to Bihar. The said factum is proved from the call records of Mohd. Aziz (PW3) marked Ex. PW12/A. (vii) Thereupon Insp. Shri Kishan (PW19), SI Ram Niwas (PW8) and Mobin Khan (PW2) went to Sahibabad from where the call was made and spoke to Dharmendra (PW15) and after search, appellant Shamim along with Anzar (Juvenile) were arrested. On personal search, mobile phone and Rs.3500/- were recovered from appellant Shamim. (viii) Mohd. Aziz (PW3) and Nasir Khan (PW13) have deposed that appellant Shamim used to work in Farid Book Depot but had left services 3-4 months before/in May, 2007. They were not specifically cross-examined on their testimonies on the said factual assertion. (ix) 7 chance prints were lifted from the place of occurrence i.e. inside Farid Book Depot and 3 chance prints matched the palm prints/thumb print of the appellant Shamim as per FSL report (Ex. PW16/A - C).

19. In view of the aforesaid position, we uphold the conviction of the appellant Shamim by the Trial Court for the offence under Section 302 IPC as well as under Section 392 read with Section 34 IPC. The order of sentence is also maintained. The appeal is disposed of. (SANJIV KHANNA) JUDGE (G. P. MITTAL) JUDGE  
May 19th, 2014 kkb

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