

Aslam @ Guddu Vs. State

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Court : Delhi

Decided On : Apr-20-2015

Judge : Sanjiv Khanna

Appellant : Aslam @ Guddu

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRIMINAL APPEAL No.517/1998 Reserved on:

6. h February, 2015 Date of Decision:

20. h April, 2015 % ASLAM @ GUDDU Through Appellant Mr. Ravi Tikania, Advocate. versus STATE Through Respondent Mr. Varun Goswami, APP. CORAM: HON'BLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE VIBHU BAKHRU SANJIV KHANNA, J: Aslam, in this appeal, challenges his conviction under Section 302 of the Indian Penal Code, 1860 (IPC, for short) as the perpetrator who had shot Samiullah at about 4 A.M. on 24th August, 1994 by the impugned judgment dated 11th November, 1997.

2. By the impugned order on sentence dated 12th November, 1997, the appellant has been sentenced to undergo imprisonment for life and pay a fine of Rs.2,000/- under Section 302 IPC, and in default of payment of fine, he has to further undergo rigorous imprisonment for two months. The appellant has also been

sentenced to rigorous imprisonment of two years and a fine of Rs.1,000/- under Section 27 of the Arms Act, 1959. In default of payment of fine, he has to undergo rigorous imprisonment for one month. The sentences are to run concurrently.

3. The impugned judgment dated 11th November, 1997 primarily relies upon the dock identification of the appellant by the eye witnesses Shahjahan (PW-1) and Rehana (PW-2), wife and daughter of the deceased, respectively. In addition, the second primary evidence relied upon by the prosecution is recovery of the fire arm on the basis of the purported disclosure statement (Ex. PW-13/A) made by the appellant and the CFSL report (Ex.PW-19/A), which opines that the fired bullet recovered from the place of occurrence was fired from the pistol recovered (Ex. PW-13/1).

4. The contention raised on behalf of the appellant is that the dock identification of the appellant Aslam by Shahjahan (PW-1) and Rehana (PW-2) is unreliable and unworthy of credence. On the question of fire arm, it is alleged that the pistol (Ex. PW-13/1) was planted and the CFSL report (Ex.PW-19/A) should not be relied upon, for the seals were tampered.

5. Shahjahan (PW-1), wife of the deceased has testified that on 24th August, 1994, while sleeping beside her husband on the same takhat, she heard a loud noise of a blast (dhamaka) and woke up. Blood was oozing from the shoulder and lower portion of ribs of Samiullah. She raised alarm and persons from neighbourhood assembled. Her husband was taken to the hospital, where he died. She made a statement Ex.PW-1/A, which became subject matter of the FIR. However, it is noticeable that in Ex.PW-1/A, PW-1 had not implicated and named the appellant Aslam. She did not name anyone but had given a description of the perpetrator. The translation of Ex.PW-1/A reads as under:

I reside at the aforesaid address alongwith my family members, and have 7 children including two sons and five daughters. The age of my two sons is 15 years and 12 years respectively. The age of my eldest daughter is 20 years and she is married. The age of other daughters is 18, 16, 10 and 8 years respectively. My husband namely used to undertake/perform the job of paints etc. Yesterday i.e. on 23rd/8/94, he had returned from the work at about 9 P.M.. After taking meal he

had slept in the room on the wooden plank (Takhat). I had also slept on the same wooden plank (Takhat) beside by husband. My husband was sleeping having his face towards the Jangla (from grill), whereas my face was towards the other direction. At about 4.00 A.M. in the morning, I heard a sound like cracker. As soon as I opened my eyes and saw, I again heard another sound. Thereupon, I saw towards my husband and found that blood was oozing out from his right shoulder and chest. When I had heard the first sound, I saw towards the Jangal (from grill) and had found one young boy (man) of medium built having long hair and wearing cream coloured shirt who ran out towards the culvert (pulia) of the Idgah after firing two bullet shots which struck on my husband. I can identify him if he appears before me. Thereupon, I raised an alarm. On hearing the sound of the bullet shots and the alarm raised by me, the people of my neighbourhood woke up. Yusuf and some other persons from the locality (Mohalla) came at my house and took my husband to the hospital. Now I have come to know that my husband has expired at the G.T.B. (Guru Teg Bahadur) Hospital. Legal action may be taken. I have heard the statement and the same is correct.

6. On the basis of the aforesaid statement, an endorsement was made and the FIR No.234/1994 was registered after recording DD entry No.20A at 6.20 A.M. on 24th August, 1994. A reading of the statement Ex.PW-1/A makes it evident that PW-1 did not know the assailant. The assailant was not identified and named. However, she had seen the appellant from Jangla (iron grill). He was a young boy of medium built having long hair and was wearing a cream colour shirt. The said boy ran towards culvert (pulia) of the Idgah road after firing two shots at PW-1s husband. Ex. PW-1/A creates grave doubt about identification of the appellant Aslam by Shahjahan (PW-1) in the court, inter alia, stating that she had often seen the appellant Aslam in the Karkhana opposite their house. PW-1 identified and named the appellant Aslam and stated that he was also known as Guddu. In her cross-examination, PW-1 testified that she had seen the appellant last time 4-5 days prior to the date of occurrence and that she knew the appellant because he was working in a factory in front of her house and used to be called by the said name. She accepted that the police had come to her residence at about 5 A.M. on 24th August, 1994 and claimed that she was nervous. The police continued to visit her house for the next three days. She asserted that no one had informed her

about the name of the assailant and she knew the appellant herself. She had told the name of the assailant for the first time to the police in her statement recorded on 25th August, 1994. She denied the suggestion that she had not given the name of the assailant to the police. She was confronted with her statement Ex.PW-1/A and Ex.PW-5/B, where the name of the assailant was not mentioned. Noticeably, the deceased was taken to the hospital at 4.30 A.M. and thereafter, PW-1 came to know that her husband had expired. She came back to her residence at 5 A.M. and then her statement Ex. PW1A was recorded. The dock identification of the appellant Aslam in the said manner is thus highly unreliable and questionable. If PW-1 knew the appellant Aslam and recognized him, then her failure and ineptitude in naming the culprit whom she knew beforehand is puzzling and elusive. Ex. PW1A clearly reflects that PW-1 had not identified the culprit who had fired at about 4 A.M. on 24th August, 1994 and even thereafter till Ex. PW-1/A was recorded on 24 August, 1994 at 6 A.M.. This is the reason why she had given general description of physical attributes of the perpetrator rather than naming the perpetrator in her first statement to the police.

7. Rehana (PW-2), daughter of the deceased, has deposed on similar lines. In her examination-in-chief, she claimed that on 23rd August, 1994, she was sleeping in her house on the floor and at about 3.30/4.00 A.M., she heard a loud noise (dhamaka) and the appellant, who was also known as Guddu, was seen by her running through a Jangla. Her father was lying and blood was oozing from his right shoulder and abdomen below the ribs. She claimed that she had seen the appellant firing at her father. In her cross-examination, PW-2 accepted that when she woke up, the shot had already been fired. She accepted that she had not seen the appellant Aslam firing a shot at her father. PW-2 claimed that she only saw the appellant at a distance of 2-3 feet from the Jangla of her house, running towards the Idgah Road. Regarding the identity of the appellant Aslam, PW-2 has testified that the appellant had worked for about 6-7 months in a factory in front of their house and, therefore, she knew the appellant Aslam. The appellant was not on visiting terms with her family. Thus, PW-2 contradicted herself by first stating that she had seen the appellant Aslam firing a shot at her father and later on accepting that she did not see the appellant Aslam firing a shot at her father. However, she has claimed that the appellant was seen by her running away hastily.

8. The statement, Ex.PW-1/A made by Shahjahan (PW-1), soon after the occurrence, in which she failed to name appellant Aslam, is a facet which cannot be ignored and spurned. It is an important and relevant fact, which has a significant bearing and raises question marks on the ocular depositions of PWs-1 and 2. The appellant was arrested, as per the prosecution version, on 4th September, 1994 at about 2.45 p.m. as deposed to by Inspector Babu Singh (PW-21). In his cross-examination, PW-21 had claimed that on 30th August, 1994, he had visited Sambal and had met the local police as well the relatives of the appellant Aslam, but he did not mention this fact in the case diary. He also did not remember whether he had mentioned in the case diary that the appellant had run away after seeing him. Similarly, Ct. Jaddu Paswan, PW-6, in his cross-examination, accepted that the name of the assailant was not known at that time as Shahjahan (PW-1) had not told them the name of the assailant.

9. It may be noted that in the brief facts prepared by S.I. M.S. Beg (PW-17) marked Ex.PW17/E along with the request for conducting post mortem, it is recorded that the injured had expired on reaching GTB Hospital. On making inquiries, it had been revealed that the deceased Samiullah was sleeping in his room near the iron grill, when some unknown person shot two bullets at him. One bullet struck at the lower chest portion and the other bullet struck at the right shoulder of the deceased. Assailant had succeeded in running away from the spot. Statement of wife of the deceased i.e. Samiullah, who was sleeping with him on the same wooden plank (takht) was recorded.

10. S.I. M.S. Beg (PW-17) had deposed that subsequently, on the same day, Rehana (PW-2) had disclosed the name of the assailant. However, as noticed, it is apparent that the name and identity of the perpetrator was unknown and not revealed by the family members of the deceased.

11. Mohd. Mustkin (PW-13), in his cross-examination, accepted that he had met Shahjahan (PW-1) on 25th August, 1994 at about 6 A.M. and before talking to her, he did not know the name of the appellant. He had not tried to search for the culprit. He claimed that he had not met PW-1 on 24th August, 1994, though he and his father had reached the hospital at about 5.30/6.00 A.M. and many persons

from the neighbourhood were present.

12. It has emerged from the testimony of Shahjahan (PW-1) and Rehana (PW-2) that the mother of the appellant Aslam had come to PW-1s residence with a proposal of marriage between the appellant and Rehana (PW-2). The deceased had declined. This possibly was the reason and cause why PWs-1 and 2 suspected involvement of the appellant and then became the lead for the prosecution.

13. We are aware and conscious that failure to mention the name of appellant in the FIR is not fatal. However, in the distinctive circumstances of the present case, we feel that the identification of the appellant by Shahjahan (PW-1) and Rehana (PW-2) requires necessary corroboration before it is accepted. The doubt and debate about the culprit cannot therefore be safely decided by singularly relying upon the dock identification by PW-1and PW-2. Their identification requires corroboration and support.

14. This brings us to the second primary facet relied upon by the prosecution. Dr. A.K. Tyagi (PW-14) of G.T.B. Hospital had conducted the post-mortem examination on the body of the deceased Samiullah. He has deposed about the fire arm injury wound of 1.00 cm diameter as also the exit wound of 1.8 cm1.00 cm. The death, he opined, was due to shock as a result of haemorrhage caused by injuries to liver, lung, stomach and internal tissues. There were oval tattooing marks around the entry wound. PW-14 opined that the injuries found on the body were on account of one fire arm shot.

15. Constable Jaddu Paswan (PW-6) has deposed that a fire cartridge case (lead of the cartridge) was seized from near the Takht and sealed with the seal of MSB. Seizure memo Ex.PW-6/B was prepared. He identified the fired cartridge lead as Ex.P-1. The fired cartridge lead was identified after opening the sealed parcel bearing the seal of CFSL.

16. S.I. M.S. Beg (PW-17) has deposed that his team found one fired bullet at the spot, which was seized and sealed with the seal of MSB vide seizure memo Ex. PW6B. He had also affirmed that on 4th September, 1994, he along with Inspector

Babu Singh (PW-21) had arrested the appellant on an informer pointing him out. On the same day, the appellant was interrogated by Inspector Babu Singh (PW-21) in the presence of S.I. M.S. Beg (PW-17) and Mohd. Mustkin (PW13). The appellant had made a disclosure statement and thereafter taken them to House No.Z-1/109, Lakri Market, Welcome Colony. Appellant Aslam got recovered a country made pistol containing one fired cartridge case from an almirah. The same was seized and sealed with the seal of BS and taken into possession vide memo Ex.PW13/B. He identified the country made pistol as Ex.PW-13/1 and the cartridge case as Ex.PW-13/2. PW-17 accepted that after 24th August, 1994, he joined investigation only on 4 th September, 1994. As far as House No.109 is concerned, he had not verified the ownership and accepted that some ladies, who were pardanashin, were present on the first floor. He also accepted that many persons had gathered outside the house. The almirah from where the pistol and cartridge case were recovered was simply bolted and made of wood. He did not inspect the almirah.

17. Inspector Babu Singh (PW-21) has similarly deposed about the arrest of the appellant on 4th September, 1994 and the fact that Mohd. Mustkin (PW-13) was present with him. The appellant, thereafter, had made a disclosure statement Ex.PW-13/A leading to recovery of a country made pistol from an almirah in House No.Z-1/109, Lakri Market, Welcome Colony. The country made pistol had one cartridge case inside the barrel and the same was seized vide seizure memo Ex.PW-13/B. PW-21 identified the country made pistol and the cartridge case as Ex.PW-13/1 and Ex.PW-13/2, respectively. At the time of recovery, the occupants of the house including some pardanashin ladies were present, but they did not join investigation. He had also seen 3-4 sewing machines, but the workers ran away on seeing the police party. Later on, about 100 persons had gathered there.

18. Mohd. Mustkin (PW-13) has deposed about the arrest of the appellant on 4th September, 1994 from Lakri Market, Welcome Colony and his interrogation by the police. The appellant had stated that he could get a country made pistol recovered from a factory in Loha Mandi. The appellant had taken them to a house in Loha Mandi from where a country made pistol was taken out from an almirah. PW-13 identified the country made pistol and the cartridge case as Ex.PW-13/1 and

Ex.PW-13/2, respectively. He had stated that the two articles were seized and sealed with the seal of something like BS. PW-13 claimed that the almirah in question was made of steel, which was not locked but was only bolted. PW-17 had stated that the almirah was made of wood, but this discrepancy, we would hold is not material and significant. PW-13 did not see what was lying inside the almirah. 3-4 persons were present in the house, but he did not know their names. The police handed over the seal to him, which he returned to them after 3-4 days.

19. Head Constable Udai Pal Singh (PW-16) has also stated that on 24th August, 1994, S.I. M.S. Beg had deposited two sealed parcels bearing seal of AKT and two sealed packets sealed with the seal of MSB. Subsequently, on 4th September, 1994, Inspector Babu Singh had deposited with him one sealed parcel bearing the seal of BS. He had accordingly made entries in Register No.19 at Sr. No.1233 on 24 th August, 1994 and at Sr. No.1242 on 4th September, 1994. On 7th November, 1994, he had sent three sealed parcels, one bearing the seal of MSB and two bearing the seals of AKT to CFSL, Chandigarh and accordingly had made entries in Register No.19 marked Ex.PW-16/A. The said register records that one match box sealed with the seal of MSB containing a bullet lead was sent to the Director, CFSL for examination.

20. The country made pistol was examined by PW-19, Dr. Asha Dheer, Assistant Director, Central Forensic Science Laboratory, Chandigarh. She has deposed that she had received two parcels sealed with the seal of BS from the Police Station Welcome, Delhi. One parcel was found to be containing a country made pistol and a fired 8 mm/.315 cartridge case, which was marked C/1 by her. In the second parcel, she found a fired 8 mm/.315 bullet, which was marked B/1 by her. Upon examination and comparison of the individual characteristic marks on crime and test cartridge cases and bullets under comparison microscope, she came to the conclusion that the fired crime cartridge case and the bullet had been fired through the country made pistol mark A and could not have been fired through any other fire arm. PW-19 identified the country made pistol as well as the cartridge case and proved her report marked Ex.PW19/A.

21. Dr. Ikramul Haque, Junior Scientific Officer, Biology, Chandigarh had deposed as PW-20. He has deposed that on 8th November, 1994, he had received four parcels. The first parcel was sealed with the seal of MSB. The second parcel had the seal of CFSL, Ballistic Division, Chandigarh. The third parcel had five seals of AKT and the fourth parcel had three seals of AKT. Parcel No.2, on opening, was found to be containing a copper bullet. On the said bullet, presence of blood could be confirmed, but the blood group could not be ascertained.

22. As noticed above, Dr. Asha Dheer, PW-19 has stated that she received two parcels bearing the seal of BS from police station Welcome, Delhi in FIR No.234/1994 for examination. In one parcel, there was a country made pistol and in the same parcel, there was one fired cartridge case. The second parcel had one fired bullet. The fired bullet as per the deposition of Constable Jaddu Paswan (PW-6) and SI M.S. Beg (PW-17) were found at the place of occurrence and had been sealed with the seal of MSB. This is also clear from the seizure memo Ex.PW-6/B. The said memo records that the bullet lead found at the spot was kept in a match box and converted into a parcel with the help of cloth and sealed with the seal of MSB. However, the seals mentioned by PW-19, Dr. Asha Dheer on the parcel containing the bullet was BS and not MSB. The seal BS was used at the time of seizure of the pistol and fired cartridge case on 4th September, 1994 as mentioned by Inspector Babu Singh (PW-21). This is also mentioned in the seizure memo Ex.PW-13/B. Mohd. Mustkin (PW13) had also stated that the pistol was seized on 4 th September, 1994 and was sealed with the seal of something like BS. The seal remained with him for about 2-3 days and thereafter it was returned. There is no explanation forthcoming as to how did the seal on the parcel of seized fired bullet change from MSBto BS. Thus, the deposition of PW-19, Dr. Asha Dheer creates grave doubt whether the bullet sent to her for examination was the actual bullet alleged to be found at the place of occurrence i.e. the house of the deceased. There is a distinct possibility of change of the said bullet. This effaces and nullifies the CFSL report, marked Ex. PW-19/A. It cannot be said that the fired bullet, recovered from the spot and sealed with the seal of MSB was sent for CFSL examination and subjected to test/examination, as the bullet examined was sealed with the seal of BS.

22. In view of the aforesaid discussion, we are inclined to hold that the alleged weapon of offence recovered has not been connected and linked with the bullet i.e. the lead found at the spot. There is a possibility of tampering and, therefore, the CFSL report Ex. PW-19/A cannot be relied upon. Therefore, we hold that the prosecution has not been able to prove its case beyond reasonable doubt that the appellant was the person who had committed the said offence.

23. Appeal is accordingly allowed and conviction and sentence of the appellant Aslam is set aside. Bail bond furnished by him will be treated as cancelled. Trial court records will be sent back. (SANJIV KHANNA) JUDGE (VIBHU BAKHRU) JUDGE APRIL 20th, 2015 NA/kkb

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