

(2014) 09 DEL CK 0011**Delhi High Court****Case No:** Crl. A. 34 and 501/2014

Basheer Ansari

APPELLANT

Vs

State

RESPONDENT

Date of Decision: Sept. 23, 2014**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 313
- Penal Code, 1860 (IPC) - Section 396, 412

Hon'ble Judges: Pradeep Nandrajog, J; Mukta Gupta, J**Bench:** Division Bench**Advocate:** Rakhi Dubey, Anuj Pal and Ajit Sharma, Advocate for the Appellant; Lovkesh Sawhney, APP., Manoj Pant, Insp. and Kulbir, SI, Advocate for the Respondent**Judgement**

Pradeep Nandrajog, J.

Holding that two motives for the crime, firstly, to get rid of Sheikh Sattar so that the absconder co-accused Sheikh Zahir would not have to pay the rent which was outstanding to the deceased and secondly to commit dacoity, has been proved by the prosecution; further holding that appellants Rashidul Miyan and Basheer Ansari have been proved to be last seen along with absconder co-accused Sheikh Zahir and two other persons at the place where the deceased was found murdered with dacoity committed in the house; holding further that the mobile phone Ex.P-1 recovered from the personal search of appellant Basheer Ansari and the camera (also exhibited as Ex.P-1) and a SIM card Ex.P-3 got recovered by appellant Rashidul Miyan have been proved to be the ill-gotten gains of the dacoity, vide impugned decision dated October 24, 2013 the appellants have been convicted for the offence punishable u/s 396 IPC i.e. the offence of dacoity with murder. The two have been sentenced to undergo imprisonment for life and pay fine in sum of Rs. 25,000/- each, in default of payment of fine to undergo simple imprisonment for six months. For the offence punishable u/s 412 IPC (for retaining stolen property) the two have been sentenced to undergo RI for 10 years and pay fine in sum of Rs. 25,000/- each.

The order on sentence is dated October 30, 2013.

2. Learned counsel for the State submits that there is one more incriminating circumstance against the appellants; of the two refusing to participate in the TIP proceedings before Sh.J.P.Nahar, Metropolitan Magistrate, Delhi fixed for June 06, 2011.

3. Since out of the two motives for the crime i.e. a desire to get rid of the deceased so that he would not be compelled to pay the outstanding rent is alleged against absconder co-accused Sheikh Zahir, we would be pained profiling the relevant evidence on which the learned Trial Judge has laid the foundation for the appellant's being convicted :(i) evidence of last seen; (ii) the evidence regarding recovery of a mobile phone at the time of personal search of Basheer Ansari and the recovery of a SIM card and a camera pursuant to the disclosure statement of Rashidul Miyan and at his pointing out. We shall also be noting the evidence concerning refusal by the two to participate at a TIP proceedings.

4. A building, on a plot of land, as we were informed during argument and for which there is no evidence, ad-measuring about 30 sq.yards, was owned by the deceased Sheikh Sattar situated on Gali No. 1, Multani Mohalla, Gandhi Nagar, Delhi. The municipal number of the building is 991. A five storey building was constructed by Sheikh Sattar. The first two floors were used by him for commercial purposes and the top three were used for residence. Abdul Hassan Gazi PW-3 was his tenant on the top most floor. The floor beneath was under the tenancy of Sheikh Zahir, (absconder co-accused). Sheikh Sattar was residing on the middle floor i.e. beneath the floor which he had let out to Sheikh Zahir. Dead body of Sheikh Sattar was found in the third floor in the morning of May 28, 2011 because his servant who came to the shop at the usual time of 8.00 A.M. found that Sheikh Sattar had not come to the shop till 8.45 A.M. and he went to the house of Sheikh Saidul, the elder brother of Sheikh Sattar, who rang up Sheikh Sattar but found no response. He went to the house of his brother and found the floor locked. He spoke to Mst.Nargis PW-10, the wife of Sheikh Sattar who was in Kolkata, having left the previous evening, who instructed him to inform the police. He did so.

5. SI Arvind Kumar PW-19 accompanied by Ct.Joginder PW-14 reached the spot. In the meanwhile Sheikh Saidul, PW-2 and public gathered had already broken open the lock. Sheikh Sattar's dead body was seen. The almirahs had been ransacked. SI Arvind Kumar recorded the statement Ex.PW-2/A of Sheikh Saidul and sent the same for FIR Ex.PW-5/D to be registered for the offence of murder and surprisingly none of the offence of robbery.

6. Being relevant for our discussion, we note that in his statement Ex.PW-2/A, Sheikh Saidul said that when he reached the house in the morning on being informed by the servant of his brother that his brother had not reached the shop, he was told by a tenant in the building named Abdul Hassan Gazi that in the night between 11.00

P.M. and 11.30 P.M. along with one person, Sheikh Zahir had come to the building and that Sheikh Zahir had not paid rent to his brother.

7. Since nothing incriminating against the appellants has been brought out in the evidence concerning seizure of a button, a strand of hair and chance finger prints lifted from the scene of the crime, we do not burden ourselves by noting the relatable evidence of the exhibits lifted from the scene of the crime, the deposition of the various witnesses to the recovery thereof and the visit by the crime team.

8. The dead body of Sheikh Sattar was seized and sent to the mortuary of Aruna Asaf Ali Hospital where doctor Asitesh Bajwa PW-8 conducted the post-mortem and authored the post-mortem report Ex.PW-8/A recording therein the fact that Sheikh Sattar had been strangulated to death 24 to 36 hours before the post-mortem was conducted, which probabilizes the time of Sheikh Sattar's death to be around the mid-night of the intervening night of May 27, 2011 and May 28, 2011. Ten external injuries suggestive of resistance offered by Sheikh Sattar and neck being throttled was noted by him. The left jugular vein was torn and hyoid bone at the left side was fractured. Soft tissues under the ligature marks on the neck evinced rupture of the arteries. The death was obviously homicidal.

9. In view of Sheikh Saidul's statement Ex.PW-2/A on basis whereof the FIR was registered, in which he had disclosed that the tenant on the top floor Abdul Hassan Gazi had told him that in the night he had seen Sheikh Zahir along with one more person in the building, the investigating officer recorded Abdul Hassan Gazi's statement u/s 161 Cr.P.C. in which he said that at around 11.00 P.M. or 11.30 P.M. he had seen Sheikh Zahir along with one person at the entrance of the building and at that time he saw three males on the street out of whom one boy used to occasionally visit Sheikh Zahir whose name was Rashidul Miyan. He further disclosed that around 1 O'clock in the mid-night, he and his wife, to visit the toilet, came to the third floor and saw a man standing outside, who on seeing them went inside. He and his wife used the toilet and returned. Next day morning he learnt that Sheikh Sattar had been murdered.

10. In this manner, the prosecution had two named suspects, one was Sheikh Zahir and the other was Rashidul Miyan. The prosecution also had information through the mouth of Abdul Hasaan Gazi that in the night at around 11.30 P.M. Sheikh Zahir had come to the building with Rashidul Miyan and there were males standing on the street outside. Further information was that around 1 O'clock in the mid-night Abdul Hassan Gazi had seen one person on the third floor.

11. As deposed to by SI Ashish Kumar PW-15, SI Avinash Singh PW-17, Insp.Videsh Singal PW-21 and Insp.Raj Kumar PW-25 on May 31, 2011 secret information was received by PW-25 at around 4.45 P.M. that Rashidul Miyan could be apprehended at a factory operating from G-316 Lado Sarai, Delhi and thus a raiding party comprising said four police officers and two constables was formed. Rashidul Miyan

was apprehended and his disclosure statement Ex.PW-15/A was recorded. He led the police party to Pocket D-11, Sector 7, Rohini where Basheer Ansari was apprehended and on his personal search, as recorded in the memo Ex.PW- 15/G the following was recovered:-

- (i) Dark brown colour purse (raxine) containing cash Rs. 1160/- only.
- (ii) A photo identity card of Election I .Card relating to Basheer Ansari. (iii) A photocopy of PAN card related to Basheer Ansari.
- (iv) Some photograph and (illegible) card.
- (v) A mobile phone make "LAWOW" made in China having IMEI No. 35454404215817 and 354544042195825 with double SIM number Voda SIM No. 8000717156542.

12. Thereafter Rashidul Miyan took the police party to his residence at Lado Sarai, Delhi and got recovered one SIM card and one camera of make "Olympia" which were seized vide seizure memo Ex.PW-22/E. The SIM card as recorded in the seizure memo is H3- 7002 7281 827.

13. As per the prosecution the said SIM card was of the mobile No. 9999421898.

14. Two out of the three recovered exhibits, the mobile phone from Basheer Ansari at his personal search and the camera at the instance of Rashidul Miyan were subjected to a test identification proceedings before Sh.J.P.Nahar, MM, Karkardooma Courts, Delhi on August 25, 2011 pursuant to the application Ex.PW-24/E submitted to him by Insp.Raj Kumar on August 10, 2011, and as recorded in the TIP proceedings Ex.PW-6/A S.K.Sabir PW-6, the brother-in-law of Sheikh Sattar successfully identified the two as belonging to the deceased.

15. Being relevant, and curiously indeed, the mobile phone which was taken out from the pullanda bearing seal "ASY" has been described by Sh.J.P.Nahar PW-24, in the record of TIP Ex.PW-6/A as follows:-

"Mobile phone of LG make".

16. How could the mobile phone of "LAWOW" made in China having IMEI No. 35454404215817 and 354544042195825 with double SIM number Voda SIM No. 8000717156542 which was seized on the personal search of Basheer Ansari, as recorded in the seizure memo Ex.PW-15/G become a mobile phone of LG make has baffled us and indeed during arguments the learned Public Prosecutor.

17. It is apparent that the case property was tampered with and the reason is obvious. In her statement u/s 161 Cr.P.C. Mst.Nargis PW-10, the wife of the deceased, had said that her husband was using a mobile phone of LG make.

18. S.K.Sabeer PW-6 the brother-in-law of the deceased who was the witness at the TIP proceedings, during cross-examination had admitted the fact that he was not aware of any specific mark of identification on the camera which could differentiate

it from other cameras of similar brand and make available in the market.

19. From the fact that the investigating officer has planted the LG make mobile phone by tampering with the case property, the recovery of the camera from co-accused Rashidul Miyan also has to be seen with eyebrows raised, and from the fact that the planted mobile phone was identified during TIP proceedings by S.K.Sabir, as that of his deceased brother- in-law, there would be taint in S.K.Sabir's TIP identification of the camera. There would be taint in the dock identification of the two seized exhibits by S.K.Sabir and Mst.Nargis PW-10.

20. The learned Trial Judge has even held that the recovery of the SIM card pertaining to the mobile No. 9999421898 pursuant to the disclosure statement made by Rashidul Miyan is incriminating evidence, but we wonder as to wherefrom the learned Trial Judge has opined that the SIM card Ex.P-3 was that of the mobile No.9999421898. What has happened is that the learned Trial Judge has simply believe the testimony of SI Raj Pal PW-22, who alone of the four police officers associated in the recovery has said that when Rashidul Miyan got recovered the SIM card it was of the telephone No. 9999421898.

21. No witness of the telecom company has been examined. As noted above, the seizure memo Ex.PW-22/E notes the number of the SIM card to be H3 7002 7281 827. To link the SIM card to the deceased, with reference to its number, evidence had to be led by examining a witness from the telecom company. None being examined, the recovery of the SIM card in question attributable to Rashidul Miyan looses its incriminating sting.

22. We now turn to the last seen evidence. The witness is one. Abdul Hassan Gazi PW-3.

23. He has deposed that he was residing on the fifth floor of the building as a tenant under Sheikh Sattar who was residing on the third floor and that absconder co-accused Sheikh Zahir was residing on the fourth floor as a tenant and since a month and prior to the date of the incident. That Sheikh Zahir had defaulted in payment of monthly rent and therefore Sheikh Sattar has asked him to either pay arrears of rent or vacate and this issue had resulted in exchange of hot words between the two. That on May 27, 2011 the wife and children of Sheikh Zahir left for the village and at about 11.00 P.M. or 11.30 P.M. Sheikh Zahir returned in the company of one person. At that time three persons, one of whom was Basheer Ansari were seen by him on the road outside the house. Sheikh Sattar asked him as to who had come and he told him that Sheikh Zahir had come with his associates. He went to his room and slept. At about 1 O'clock or 1.30 in the night, he and his wife awoke to attend the call of nature and saw Rashidul Miyan entering the house and proceed to the room of Sheikh Zahir. That Rashidul Miyan used to occasionally visit Sheikh Zahir. His further testimony regarding what happened next morning in the presence of the police, being not relevant, is not noted by us.

24. Sheikh Saidul PW-2 deposed facts which we have already noted hereinabove concerning his role as to what led the police party to the house where his brother Sheikh Sattar was murdered. But relevant would it be to note that he additionally deposed that Rashidul Miyan was known to him having worked in his unit for about 8 to 9 years and that he owed him Rs. 10,000/- . He claimed that Abdul Hassan Gazi had told him in the morning when he went to his brother's house of having seen Rashidul Miyan in the company of Sheikh Zahir in the night when his brother Sheikh Sattar was murdered.

25. Since the evidence concerning the recovery of the mobile phone at the personal search of Basheer Ansari and the recovery of the camera and the SIM card at the instance of Rashidul Miyan have been found to be tainted, we would be obliged to put under a microscopic analysis the testimony of Abdul Hassan Gazi, PW-3 for the reason apart from refusal to participate in the TIP, the evidence of last seen would be the only other incriminating evidence.

26. From the testimony of Abdul Hassan Gazi, who was a tenant in the building on the top floor under the deceased Sheikh Sattar it emerges that Sheikh Zahir had been inducted as a tenant on the fourth floor about a month and a half back when the incident took place. His claim that Sheikh Zahir had defaulted in payment of rent has to be taken with a pinch of salt for the reason it is a common practice, in fact is a universal practice, to take the rent for the first month in advance as also to take some security deposit from the tenant. It would be of no use to Sheikh Zahir to murder Sheikh Sattar to avoid paying a month's rent and in the process loose the security deposit. We have noted in paragraph 9 above Sheikh Saidul's statement Ex.PW-2/A on basis whereof the FIR was registered. As noted in paragraph 24 above, while deposing in Court he said that Abdul Hassan Gazi had told him of having seen Rashidul Miyan in the company of Sheikh Zahir in the morning when he reached his brother's house. But we do not find any reference to said fact in the statement Ex.PW-2/A. As deposed to by Sheikh Saidul, he knew Rashidul Miyan because he had worked in his unit for about 8 to 9 years. It may be true that a witness under trauma may forget to state the facts with graphic details whilst under trauma, but certain facts are so important to a situation that even a witness under trauma would not forget them. A murder had taken place on the third floor of a building. The tenant on the fourth floor was absconding. The commonsense of the tenant on the fifth floor would tell him that there is something suspicious concerning the fact that the tenant on the fourth floor was missing. If Abdul Hassan Gazi had indeed seen Rashidul Miyan in the company of Sheikh Zahir in the night he would have named Rashidul Miyan by name and not referred to him as a person. Abdul Hassan Gazi has deposed that he knew Rashidul Miyan because he used to visit Sheikh Zahir. In his statement Ex.PW-2/A Sheikh Zahir had said that when he reached the building in the morning he was told by Abdul Hassan Gazi that in the night between 11:00 PM and 11:30 PM Sheikh Zahir had come to the building along with one person.

27. The contemporaneous information given by Sheikh Saidul highly probablizes the fact that Sheikh Zahir was seen by Abdul Hassan Gazi in the company of a person whose name was not known to Abdul Hassan Gazi. Further, if Abdul Hassan Gazi told Sheikh Saidul that in the night at around 11:00 PM or 11:30 PM he had seen Sheikh Zahir in the company of another person, he would have certainly told him, if this fact was true that there were three other person seen by him standing on the road.

28. Thus, there being a taint in the evidence of last seen, in a case of circumstantial evidence it would be unsafe when the evidence of last seen is of the kind which we have noted above.

29. As regards Rashidul Miyan and Basheer Ansari refusing to participate in the TIP, they have given a reason : that they were paraded before TV Journalists and on the television channel Aaj Tak they were prominently shown to the public at large. It may be true that the two have not led any defence evidence to prove said fact but we find that said fact has been disclosed to them to Sh.J.P.Nahar PW-24 the Metropolitan Magistrate before whom they were produced for TIP proceedings on June 06, 2011. It is not that the two said fact when examined u/s 313 Cr.P.C.

30. The quality of the evidence concerning last seen not inspiring confidence of the kind which should be instilled in a Court and especially where the offence is one which is punishable with capital punishment, we allow the appeals and set aside the impugned order dated October 24, 2013 convicting Basheer Ansari and Rashidul Miyan for the offences punishable u/s 396/412 IPC. We quash the order on sentence dated October 30, 2013. We direct the two to be set free forthwith unless required in custody in some other case.

31. Two copies of the decision be sent to the Superintendent Central Jail Tihar for compliance and his record.

32. TCR be returned.