

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

**RESERVED ON: 12.07.2011
PRONOUNCED ON: 22.07.2011**

+

CRL.A. No.149/2011

PHOOL SINGH

..... Appellant

Through : Mr. Rajesh Mahajan, Advocate

Vs

STATE (GNCT OF DELHI)

..... Respondent

Through : Sh. Jaideep Malik, APP.

CRL.A.150/2011

TEK CHAND

..... Appellant

Through: Ms. Ritu Gauba, Advocate.

versus

STATE (GNCT OF DELHI)

..... Respondent

Through: Sh. Jaideep Malik, APP.

CORAM:

**MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE G.P. MITTAL**

- | | | |
|----|---|-----|
| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

MR. JUSTICE S.RAVINDRA BHAT

%

1. The appellants in this case are aggrieved by a judgment and order of the learned Additional Sessions Judge dated 16-8-2010 and 31-8-2010 in SC No.786/2007 by which they were convicted for the offences punishable under Sections 362/302/34/377 read with

Section 511, IPC, and sentenced to undergo life imprisonment, and also undergo rigorous imprisonment for 5 years. The appellants were in addition, directed to pay fine.

2. The prosecution alleged that on 03-01-2007, the dead body of a 5-6 year old boy was found in a naked condition hanging from a window grill near the boundary wall on the rear side of the Pump House of the BJRM Hospital Mortuary Complex, Jahangir Puri. Blood was found on the mouth of the child and on the penis along with a swelling of the testicles; the tongue was hanging outside the mouth. A cloth was found around the neck with two knots on it and blood was found on the ground under the penis. The boy's clothes were also found nearby. No eye witnesses were however, found at the spot. The body was identified by PW-2 Kishan Kumar as being that of his son Hunny, *alias* Kali who had been missing since the previous evening. One tea vendor, PW-3 Harish informed the police that he had seen the boy with the Appellants (Tek Chand and Phool Singh, referred to hereafter by their names) at about 8:00 PM the previous day and they were entering the hospital complex. The prosecution alleged that on 06-01-2007 the police received information about the Appellants' presence at the Jahangir Puri bus station, which led to their apprehension, interrogation and eventual arrest. The prosecution alleged that the Appellants made their disclosure statements admitting their involvement in the crime. Charges against the accused were framed under sections 362/302/377/34 of the IPC; they entered the plea of not guilty, and claimed trial.

3. In support of its case, the prosecution relied on the testimonies of 23 witnesses, besides several exhibits. After considering them and hearing submissions on behalf of the parties, the Trial Court held that the prosecution had established the Appellants' guilt, and convicted them as it did, by the impugned judgement, and handed down the sentences indicated in the earlier part of this judgment. The Appellants are aggrieved by the said conviction and sentences.

4. The impugned judgment has relied mainly on the testimonies of PW-2 and PW-3 to hold that the deceased was last seen in the company of the Appellants in the evening of 2-1-2007, after which he went missing, till his body was discovered at 3:00 PM the next day, i.e 03-01-2007. The Trial Court has also relied on the testimonies of PW-4 and PW-18.

5. Counsel for the Appellants argued that the Trial Court fell into grave error in believing the testimonies of PW-2 and PW-3. It was urged that there were clear variations and internal contradictions in the depositions of these two witnesses, which should have been duly noted by the Trial court. Learned counsel submitted that PW-2, the father of the

deceased child, contradicted himself in material particulars between the earlier statement recorded to the police, under Section 161, Cr. PC, and the testimony in court, as regards how he became aware that the two Appellants had taken his son, on 02-1-2007. It was pointed out that even though this witness had stated that he had a discussion with Harish (PW-3) about the missing child, yet, the next morning, when he (PW-2) met him (PW-3), the latter did not reveal the identity of those whom the young boy had accompanied, before he went missing. PW-2 later admitted that someone else in the family had been told about the identity of those taking the deceased; however no such witness was produced or examined, during the trial. Similarly, the witness contradicted himself by stating that after learning that the Appellants had taken away his son, he went to ask them, and they pushed him away- a fact not mentioned by him, in the previous statement recorded by the police. Not being an eyewitness, PW-2 as the father could have fairly disclosed the source of his knowledge about the involvement of the Appellants. In fact, if he did become aware about the identity of the abductors, and tried to gather information from them, and was treated by them in the manner alleged by him, there was every ground for reasonable suspicion. However, PW-2 did not intimate or complain to the police about the alleged strange behaviour of the Appellants, and did not report these facts to the police. Nor did the prosecution prove that these facts were disclosed to the police, when the family members went the previous day, even though the child's grandmother, according to PW-3, had become aware of it. These aspects rendered his testimony unworthy of acceptance.

6. It was urged that the prosecution allegations were based principally on the testimony of PW-3, the tea vendor who allegedly sold tea outside the hospital. It was submitted that the veracity of this witness is highly suspect, because by his admission, the deceased's grandmother had talked to him, after the boy went missing. He had seen the boy, and concededly did not tell her that the boy had been seen (by him) last in the company of the Appellants. Furthermore, the witness (PW-3) stated that PW-2 had told him about the missing son; yet he (PW-3) did not reveal to him that the boy had gone with the Appellants. Crucially, he deposed not having met the family members of the deceased, which was contrary to PW-2, who testified that PW-3 had met him on the morning of 03-01-2007. Most importantly, urged learned counsel for the Appellants, though PW-3's statement implicated the Appellants, and was recorded after he went to the police station at 6:30 PM on 03-01-2007, the FIR, which was lodged at 07:25 PM the same evening, omitted mentioning that he (PW-3) had noticed the Appellants taking the boy. This omission – as regards mention of PW-3's knowledge, was

fatal to the prosecution story, because the Appellants were actually arrested on 06-07-2007. Reliance was placed on the decision in *Jaharlal Das v State of Orissa* 1991 (3) SCC 27, to say that such an omission is fatal to the prosecution case. Learned counsel submitted that since the witness PW-3 appeared to be running an unlicensed and unauthorized tea stall, the chances of his being a tutored witness, who had never seen the incidents alleged, could not be ruled out. It was also submitted that if indeed PW-3 knew that the Appellants had abducted the deceased, nothing prevented him from voicing his suspicions; he however, disclosed this for the first time to the police, after 6:30 PM in the evening. This delay and conduct on part of PW-3 falsified his version, and the Trial Court erred in basing its findings on his testimony.

7. It was next urged that the testimony of PW-18 clearly established that there was no injury on the body of the deceased, and no signs of any sexual assault, or sodomy. In view of the medical report, and deposition of the prosecution witness, the conviction recorded by the Trial Court under Section 377 IPC could not be countenanced. It was urged that the Trial Court lost sight of the most fundamental principle in criminal cases, i.e. that wherever the prosecution relies on circumstantial evidence, the circumstances from which the inference of guilt is to be drawn should be fully established; the circumstances should be of conclusive nature; the facts established should be consistent only with the hypothesis of the guilt of the accused; the circumstances established should be incompatible with the innocence of the accused and the chain of evidence should be complete so as to show that in all probability the act must have been done by the accused. Reliance is placed upon *Sharad Birdhichand Sarda v. State of Maharashtra*, AIR 1984 SC 1622 for this purpose. The Appellants' counsel also submit that since the prosecution alleges that the Appellant had been last seen in the company of the deceased, it was incumbent on them to prove that there was no possibility of the deceased being with anyone else. It was urged that the discovery of the body was in the afternoon of 3-1-2007; however, the deceased was allegedly last seen in the Appellants' company, at 8:30 PM the previous evening. The gap between when the deceased was last with the deceased, and recovery of the latter's body, was, thus considerable, during which the crime could have been committed by anyone.

8. The learned APP argued that the Trial Court's findings are well reasoned, and do not call for interference by this court. It was submitted, that the two witnesses, PW-2 and PW-3 had no reason to falsely implicate the Appellant. It was submitted that PW-2 clearly deposed having been informed by PW-3 about the latter having seen his son with the Appellants.

Though PW-2 was not an eyewitness to the incident, the appellants did not reveal any motive on his part to falsely implicate them. Being a parent, PW-2 would have wanted the real culprit to be brought to book, and would not have under any circumstances, levelled false allegations against innocent people.

9. It was urged that PW-3 was a natural witness, who saw the deceased being taken by the appellants. Being a tea vendor whose stall was located near the hospital (where the deceased's body was found) and the witness was at a vantage point to notice the movements of passers-by. PW-2 (and his son, the deceased) lived in the neighbourhood. Therefore, PW-3 noticed that the boy had accompanied the two Appellants. He also informed the police about having witnessed this fact. It was urged that the Appellants' attempt to highlight discrepancies, is not based on any actual contradiction, but a contrived one, because in cross examination this witness remained unshaken in his testimony as regards his witnessing the Appellants taking the boy with them. It was also submitted that the omission to mention PW-3's name in the FIR or any such contemporaneous document, cannot be considered fatal, as the so-called discrepancies were minor in nature.

10. It was next urged that the post-mortem report revealed that the deceased's body contained undigested *gajar halwa*. This, submitted the learned APP, was extremely important, because PW-4 deposed to having found a packet of the *halwa*, and starting to eat it, when the Appellants reached there, and said that it belonged to them. This, urged the APP, corroborated the prosecution version about their involvement, in the disappearance, and death of the deceased boy.

11. In this case, the prosecution relied mainly on the eyewitness testimony of PW-2 and PW-3, to say that the deceased was seen last in the company of the Appellants. PW-2 Kishan is the deceased's father. He deposed that he had four children and the fifth was Hunny alias Kali who was about 5-6 years old and slightly retarded. He said that his son used to roam around with other children in the *gali* and in the BJRM hospital compound. On 02-01-2007 when Hunny did not return the family members started searching for him. They went to the police station and were told to return with a photograph of his missing son. They went to the Prayas Institute later, and gave information about the missing son. On 03-01-2007 they received information that the body of a young boy was found in the hospital compound hanging from a grill. His (PW-2's) father and mother went there and identified the body after which he reached the place himself. The police were present and the body was taken to the

Mortuary of the BJRM Hospital; the post mortem examination was carried out on the body. His statement regarding the identification of the body was taken and the body returned after the examination. He further deposed that a tea stall owner, PW-3 Harish, told him that he had last seen his son in the company of the Appellants, after which he made enquiries regarding the whereabouts of his son from the accused and they pushed him outside the building. In cross examination, he admitted that his son was not mentally retarded and studied at Nursery of a government school. He would come home at about 5:00 PM and play with the neighbourhood children till about 07:00 PM in the *gali*. On 02-01-2007 he did not return till 9 PM and so he went to look for him. PW2 also said that PW3 Harish lived opposite his house. He admitted that almost all residents of the *gali* knew that his son was missing and had searched for him in adjoining *galis*. He also said that he met PW-3 Harish in the morning of 03-01-2007 on his way to work and that he (PW-3) had said nothing to him at the time. It is only in the evening that PW3 Harish told his family members that he had seen Hunny *alias* Kali with the appellants but did not give the information directly to him, which contradicts his previous statement.

12. PW-3 Harish deposed that he owned a teashop near the main gate of BJRM Hospital. On 02.01.07 at around 8 PM he saw Hunny with the appellants. PW-3 says that they were all going into the Hospital. Hunny lived in the house opposite to that of the witness. PW-3 knew the appellant Phool Singh, stating that the latter worked in BJRM Hospital as a *Safai Karamchhari*. The witness claimed that the accused used to stay in the hospital even at the time of night. PW-3 deposed that on 2.01.2007 he had reached home, when the child's (the deceased's) grandmother went to his shop at about 9.30 PM to enquire about him. PW-3 deposed having told her to look nearby for the child as he used to keep playing in or around the area of the hospital. He did not mention to the grandmother of child about having seen the child with accused persons as he used to frequently visit the area. On 2.1.07 he did not speak to PW-2 Kishan Kumar in the night as he went off to sleep, shortly after reaching home. On 3.1.07, PW-3 was sleeping in the afternoon, when his mother informed him about the death of Hunny @ Kali at about 03.00 PM. He then reached at the spot where dead body had been discovered. He did not meet the family members of deceased on 03.1.07. On that day, he reached the police station about 6.30 PM and remained at there for about 25 minutes. PW-3 told the police about having seen the deceased Hunny @ Kali entering the hospital with the Appellants. His statement was recorded by the police.

13. An oft used phrase in criminal trials is that “men may lie, but circumstances do not”, especially where the prosecution is unable to rely on any direct or eyewitness testimony about the crime. Yet, to get to the truth, the essential requirement of proving the prosecution allegations, beyond reasonable doubt, does not change; the threshold of proof is constant, in cases involving circumstantial evidence. To place the matter in proper perspective, since the mind has a tendency to boggle, a few tests have been mandated in a string of judgments. In *Hanumant v. State of Madhya Pradesh*, AIR 1953 SC 343, the Supreme Court indicated the correct approach of the Courts, in the following words:

“It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

This approach has been consistently followed and applied in several other judgments, notable among them being *Tufail v. State of Uttar Pradesh*, (1969) 3 SCC 198; *Ramgopal v. State of Maharashtra*, AIR 1972 SC 656 and in *Sharad Birdhichand Sarda* (supra). *Sarda* an authority on this and other important aspects of criminal justice/law, put the matter in a remarkably succinct manner:

“152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved as was held by this Court in Shivaji Sahebrao Bobade v. State of Maharashtra 1973CriLJ1783 where the following observations were made:

“certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.”

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

14. In the present case, though PW-3 is the star prosecution witness, his testimony about the Appellants' involvement in the crime, has to be viewed with circumspection. No doubt, as a tea vendor, sitting in a stall outside the hospital, he was in a vantage position to observe passers-by. Yet, his assertion that he saw the Appellants take the deceased child with them at the time they did, cannot be believed. He mentioned that when the child's grandmother went to him on the night of 02-01-2007, he did not tell her about his knowledge regarding the child being taken by the Appellants. This is strange, because the incident (his having witnessed the child being taken by the Appellants) would have been fresh in his mind. He also admitted not telling this to PW-2. Yet, the latter deposed becoming aware of this, and attempting to elicit information from the Appellants, their rebuffing him and even pushing him away. Even later, PW-3 mentioned, in his deposition, that he did not speak to anyone in the deceased's family about his knowledge regarding the Appellants' role.

15. PW-3 Ramesh's testimony appears unnatural, to put it mildly. Here we have a child, who was apparently not normal (PW-2 deposed that the child was "retarded"- a statement which he later resiled from, in his court testimony). If the Appellants had taken the child, PW-3, even as a neighbour, would have informed family members of the child. His multiple inconsistencies in this regard, render his deposition suspect. Further, PW-3 claims to have gone to the police at 06:30 PM on 03-01-2007, and have his statement recorded, which led to the FIR being lodged. If one was to accept that statement, there is no reason why the Appellants' names are absent, and missing from the FIR itself, as is the position in this case.

16. So far as PW-4's testimony, ostensibly corroborating the prosecution story, is concerned, this court is of opinion that nothing emerges from it. The mere testimony of his having eaten some *gajar halwa*, and the Appellants saying that it belonged to them, even if it

is seen with the post mortem report which talks of undigested *gajar halwa*, cannot, in the absence of any recovery, be sufficient to link the Appellants with the crime.

17. We also notice that the Trial court recorded a finding that the Appellants are guilty of committing offences under Sections 377/511 IPC, when the medical evidence in that regard does not corroborate the prosecution story at all. The post-mortem report clearly states that there were no signs of forced anal intercourse or attempt at that. It no doubt records that the child's death occurred due to testicles being squeezed, and the resultant shock. This being the state of the record, the conviction on such a charge could not have been rendered.

18. In view of the above discussion, we are of the opinion that the appeal is entitled to succeed, and the conviction and sentence recorded by the Trial court, upset. Before parting, we must record that this is one instance where the Trial Court plainly overlooked material contradictions and failed to draw the correct conclusions, and was apparently carried away by the ghastly nature of the crime. The prosecution relied on circumstantial evidence to establish the charges in this case. The materials brought on record during the trial are insufficient to hold that each of the Appellants was guilty, beyond reasonable doubt. Further, each circumstance has not been proved beyond reasonable doubt. The prosecution has also not established a conclusive link connecting each individual circumstance with the other, and all the appellants. Crucially, the materials and evidence on the record do not bridge the gap between "may be true" and "must be true" so essential for a court to cross, while finding the guilt of an accused, particularly in cases based on circumstantial evidence. For these reasons, the appeals have to succeed, and are consequently allowed. The Appellants shall be set at liberty forthwith.

(S.RAVINDRA BHAT)
JUDGE

JULY 22, 2011

(G.P. MITTAL)
JUDGE