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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 15.02.2011

Decided on: 28.02.2011

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Crl. L.P. 102/2009

STATE (G.N.C.T.) OF DELHI

..... Petitioner

Through : Sh. Sanjeev Bhandari, Addl. Standing Counsel,
for the State.

versus

SANJAY

..... Respondent

Through : Nemo.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE G.P. MITTAL

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| 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

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1. In this petition, the State seeks leave to appeal against a judgment and order of the learned Additional Sessions Judge dated 28.03.2008 by which the respondent was acquitted of the charge of having committed offences under Sections 353/302/376/201 IPC.

2. The facts necessary for the purposes of this order are that according to the prosecution, on 24.11.2004, Shri Mukesh S/o Shri Upender Jha lodged a complaint in Police Post Prem Nagar, regarding the kidnapping of his four year old daughter namely "S". He said that she left the house at about 5 PM, the previous day, on 23.11.2004 and

had not returned since then. Accordingly a first information report (FIR No. 1418/2004) under section 363 IPC was registered by police. On 24.11.2004, an unidentified body of a girl was found in the lake near Railway Station Mundka, whom Mukesh identified as his daughter "S". The dead body was sent to the mortuary, SGM hospital. The prosecution alleged that on 26.11.2004 it recorded the statement of Gulab Singh (PW-5). He claimed having seen "S" with a boy aged about 24-25 years near Naag Mandir and also that he could identify that boy.

3. The police recorded the statement of Dinesh (PW-6) on 01.12.2004 to the effect that accused Sanjay had made an extra judicial confession before him about rape and murder of "S". Finding sufficient material against Sanjay, he was arrested on 03.12.2004 (as per the arrest memo available) and charged for committing offences punishable under Section 353/302/376/201 IPC. Sanjay denied the charges, and was accordingly tried. By the impugned judgment, he was acquitted of all charges. Therefore, the State seeks leave to appeal, urging that the impugned judgment is erroneous.

4. The prosecution case is solely based upon circumstantial evidence. The five important incriminating circumstances presented by the State Counsel are that firstly, the accused was last seen in the company of the deceased; secondly, that he made an extra judicial confession to PW-6, thirdly that the conduct of the respondent accused was suspect, since he remained absconding; fourthly that he refused to participate in the Test Identification Parade (TIP) and lastly that he was involved in another kidnapping case.

Last seen with the deceased:

5. Gulab Singh (PW5) deposed having seen the deceased with the accused on 23.11.2004 at about 5 pm, and even spoke to the accused who claimed to be taking the child for roaming about. PW5 observed that the accused was under the influence of liquor. The Trial court found the evidence of this witness PW5 doubtful as it was contrary to normal human conduct and did not appeal to commonsense. PW5 claimed to have seen the young daughter of a known person in the company of a stranger, who was holding her hand and was also drunk, but does not take any step to take away the child from the stranger or inform her parents about her whereabouts. It was also reasoned that the presence of this witness at the place (where he claims to have seen the accused and

deceased together) is also unnatural as he was not a resident of that area; even his shop was not located in that area. He claims to have been there to collect some payments from one Nanu Gupta. PW-5 however, could not furnish the address or location of Nanu Gupta. He was unable to place on record any evidence of any transaction, between him and Nanu Gupta. Therefore the Trial court did not accept his evidence.

Extra Judicial Confession:

6. The respondent accused is alleged to have made an *extra judicial confession* before Dinesh (PW6) who ran a scooter repair shop. According to PW6, the accused used to visit him to borrow money to buy liquor and drugs and on 30.11.2004 he (the accused) visited him in the evening and confessed to having raped and murdered a young girl. The respondent allegedly requested the witness to save him; but the latter (PW-6) refused help and informed the police on 01.12.2004. However, in cross examination PW6 deposed that he had never given money to the accused and that the accused came to his shop asking for money for the first time on that day. He also deposed that accused was neither his friend nor was he related to him. It is further a matter of record that the respondent, according to the witness, was known to him (PW-6) for about two or two and a half months before the incident. Significantly, PW-6 stated that the respondent confessed to his crime, in the presence of 5-6 other villagers and their names had been disclosed to the police. He further deposed that he did not know the name and address of the accused and had not given this information to the police in his statement. However, in his statement given to the police at Ex. PW6/DA, the name of the father of the accused and the address of the accused are both mentioned. PW-6 also deposed that on 30.11.2004 he met Constable Surender and narrated to him about the confession and he (Surender) advised him to go to the Police Station the next day, i.e. 01.12.2204 and have his statement recorded by the SHO.

7. The trial court reasoned that a detailed study of the evidence of PW6 raised doubts about its authenticity. The respondent was neither a friend nor a relative of PW-6. The witness was also not a person in authority to whom someone would go and seek help; therefore, the basic principles of an *extra judicial confession* were inapplicable, when the person to whom confession is alleged to have been made is an absolute stranger

or a formal acquaintance. It was noted, crucially, that the confession was allegedly made in the presence of 4-5 other villagers. Confession by its very nature would not normally be made in the presence of a crowd. If a person has to confess, he ordinarily would confide in one person in whom he can repose trust or confidence. Confessing before 5-6 people therefore, according to the Trial court did not appeal to commonsense. Furthermore, those in whose presence the alleged confession was made and whose names were revealed to the police were not cited by the police as witnesses. Although no query was put to the witness, Ex. PW-6/DA is silent about the names and whereabouts of the other persons who are said to have heard the confession.

8. Another aspect noticed by the Trial court was that PW6 claimed to have informed Constable Surrender about the confession by accused on 30.11.2004. However Surrender could not be located by the IO. PW-26 deposed that the identity of Constable could not be fixed to whom PW6 had disclosed about confession of the accused. The Trial court observed that PW6 had deposed that he did not know the address or parentage of the accused and had not given the same to the IO in his statement. However, he was confronted with this statement recorded by IO during investigation, which recorded the father's name as well as the address. This indicates an effort by the IO to create evidence, against the accused. PW6 deposed that his statement was recorded after the apprehension of the accused, i.e. on 30.11.2004 whereas the arrest memo of the accused reveals that he was arrested on 03.12.2004. There was, thus a contradiction in the testimony of Dinesh vis-à-vis rest of the investigation. In view of these factors, the Trial Court disbelieved the testimony of PW-6 regarding the extra judicial confession by the accused.

Conduct of the accused in remaining absconding:

9. The Trial court refused to give weightage to this factor, observing that there was no evidence to indicate that police party had taken steps to arrest the accused on any date before 03.12.2004. On 03.12.2004 he was arrested from outside his house and therefore the argument, that he was absconding, did not apply.

Refusal to participate in Test Identification Parade

10. On this aspect, the impugned judgment notes that Ms. Archana Sinha, MM (PW25) deposed that on 16.12.2004 the accused refused to participate in Test Identification Parade. She proved her report as Ex.PW25/C. Therefore it is established that accused had refused to join Test Identification Parade.

Conviction in FIR No. 1178/04, PS- Sultanpuri

11. The accused was held guilty for the offence punishable under Section 363 read with 511 IPC in Case No. 462/06, FIR No. 1178/04. The prosecution argued, therefore, that the accused was a serial offender, who was habituated in kidnapping and raping minor children. On this contention, the Trial court observed that in the absence of other circumstances indicating the involvement of accused in the present occurrence, such circumstance alone cannot be sufficient to hold the accused guilty.

12. The learned APP argued that the trial court mis-appreciated the evidence, particularly of PW-5, who was clearly an eyewitness to the accused being last seen in the company of the deceased. It was submitted that the so-called unnatural conduct of this witness is a subjective factor which incorrectly crept into the mind of the learned Judge, who ought to have seen that unless the witness felt there was anything suspicious, he would not have intervened with the accused, and stopped him from proceeding with the minor girl. It was further submitted that the court also introduced another extraneous fact, i.e. that the witness did not belong to the locality. Here, it was submitted that PW-5 had a cogent explanation for his presence, i.e. to recover money lent by him. In brushing aside the explanation, the trial court had erred in law.

13. It was urged next that the Court rejected the testimony of PW-6, and entirely discounted the extra judicial confession made by the respondent. It was submitted that there is no blanket bar to an extra judicial confession being considered by a court in the course of a criminal trial. The learned APP also urged that the court should not have needlessly doubted PW-6's statement about the respondent having committed the crime, to him.

14. In this case, the prosecution is based on circumstantial evidence. It is a settled position that a criminal court can record a conviction in a case based on circumstantial

evidence only when all hypothesis inconsistent with the innocence of the accused is ruled out. This was explained in *Sharad Birdhichand Sarda v. State of Maharashtra*, (AIR 1984 SC 1622). The Court, while dealing with circumstantial evidence held that onus was upon the prosecution to prove that the chain is complete. The conditions precedent, in the words of the Supreme Court, before conviction is based on circumstantial evidence, must be fully established. The conditions precedent, are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

(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.

15. The main legs on which the prosecution rests its case are that the deceased was last seen in the company of the accused and that he (the accused respondent) had extra judicially confessed to having committed the crime. To establish the “last seen” theory, the prosecution relied on PW-5’s testimony. He claimed to be known to the deceased’s father, and having noticed her in the presence of the accused, on the relevant date. In his deposition before Court, he was contradicted with his previous statement, when he deposed that the accused was under the influence of liquor on the 23.11.2004, when he saw him in the company of the deceased. The witness agreed that the respondent accused was a stranger, and unknown to him, and further, that he did not inform the deceased’s

father about her being with a complete stranger. His deposition also revealed that the accused respondent was shown to him earlier in the police station. He did not live in the locality where he claimed to have seen the accused with the deceased, nor was the address of the person whom he had gone to visit known to him. The trial court's reasoning that this witnesses' testimony was uninspiring was based on its assessment that in the normal course of human conduct, a person claiming to know someone else whose child is seen moving around with a stranger in an unknown locality would make further inquiries, and later inform the parents concerned. In this case, no such steps were taken by PW-5; further, he was not aware about the particulars of his debtor, from whom he had to collect money. He was made to identify the accused in the police station.

16. The law on this aspect has been summarized in *State of U.P. v. Satish*, [2005 (3) SCC 114] as follows :

"22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW - 2."

In a later judgment, i.e. *Ramreddy Rajesh Khanna Reddy v. State of A.P.*, [2006 (10) SCC 172] it was observed that:

"27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration".

These circumstances discussed earlier, cast a doubt about this witnesses credibility, and the court does not find the reasoning implausible, or unreasonable.

17. As far as an extra confessional statement is concerned, the Supreme Court summarized the position in *Kusuma Ankama Rao v. State of Andhra Pradesh*, AIR 2008 SC 2819 in the following words:

“Extra-judicial confessions are generally those that are made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164 of the Code of Criminal Procedure, 1973 (in short the 'Code') or a Magistrate so empowered but receiving the confession at a stage when Section 164 does not apply. As to extra-judicial confessions, two questions arise : (i) were they made voluntarily ? and (ii) are they true ? As the section enacts, a confession made by an accused person is irrelevant in criminal proceedings, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, (1) having reference to the charge against the accused person, (2) proceeding from a person in authority, and (3) sufficient, in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him..”

Although an extra judicial confession is *per se* admissible, yet the courts insist upon a cautionary approach while evaluating its probative value. In this case, PW-6's testimony does not inspire much confidence. He is unable to mention who were present when the accused is alleged to have confessed to him. The accused was known to him for about two months or so prior to the date of incident. PW-6 yet mentions that the accused had sought a loan from him. There was a discrepancy between the previous statement made to the police, as regards date when the police recorded the witness' statement. Likewise, there is discrepancy between his statement about having informed constable Surender, and the IO's testimony that such a Constable did not exist. Most crucially he states that the confession was made within the hearing of several other persons; none of them is called during the trial to depose in the proceedings. Even their names are unknown. All these factors persuaded the court to reject the testimony of PW-6 about the extra judicial confession. For these reasons, this court holds that the rejection of PW-6 in the circumstances of this case, was warranted.

18. It is well settled that an appellate court should not liberally grant leave to appeal, and should be satisfied that the grounds are *prima facie* substantial, and that that the Trial Court's reasoning is unsatisfactory, or that it has acted contrary to the record. In the

present case, this court is satisfied, on a consideration of the entire evidence that there exist no grounds, for which the State ought to be granted leave to appeal. For these reasons, the petition has to fail; it is, therefore, dismissed.

(S.RAVINDRA BHAT)
JUDGE

(G.P. MITTAL)
JUDGE

February 28, 2011