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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

DECIDED ON: 27.02.2012

+ **CRL.A. 374/2011 & CRL.A. 516/2011**

CRL.A.No.374/2011

AMZAD

..... Appellant

Through: Appellant present in person.

CRL.A. No.516/2011

SAGIR

..... Appellant

Through : Mr. Deepak Vohra, Advocate

versus

STATE (GNCT OF DELHI)

..... Respondent

Through: Mr. Sanjay Lau, APP.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. The Appellant Amzad has been produced in police custody. The Appellant Sagir is represented by counsel, Shri. Deepak Vohra. With consent of counsel for parties, these two appeals were finally heard, (since the appellants had undergone detention for over 8 years). The Trial Court records are in the Court and the paper books had been prepared; they were furnished to counsel for all the parties.

2. The Appeals are directed against the judgment and order of

the learned Additional Sessions Judge dated 27.04.2010 in Session Case No.141/2009. The appellants were convicted for the offences punishable under Sections-366/376/377/302/34 IPC.

3. The prosecution had alleged that the appellants had conspired and lured the victim Gudiya, daughter of the complainant/informant, Rahmat Ali (PW-2) earlier on 12.12.2003 at around 6:00 PM and thereafter proceeded to commit rape on her and killed her. It was alleged that Gudiya was asked to accompany the accused, with the promise that she would be given a toffee. The evidence and materials on record reveal that Gudiya's body was discovered in the morning, on 13-12-2003, after her abduction, at 09:52 AM, within the jurisdiction of PS Geeta Colony; evidenced by Ex.PW-9/A. PW-2 was the complainant or first informant; his statement about the disappearance of Gudiya had been recorded in the night of 12-12-2003. After the conclusion of investigations, during the course of which, the appellants were arrested, they were charged with committing the various offences which they were ultimately convicted for; they denied guilt, and claimed trial.

4. To prove its case, the prosecution relied upon the testimonies of 20 witnesses including the informant -who deposed as PW-2, the victim's mother, PW-10 and PW-2's brother Shaukat Ali, PW-20.

5. The Court after considering all the materials and the oral testimonies of witnesses, which included the recoveries, postmortem report and other documents, held that the prosecution had established the appellants' guilt beyond reasonable doubt.

6. Counsel for Sagir argued that the entire prosecution story could not have been believed. He highlighted the fact that even though PW-2 deposed as though he was an eyewitness, he kept silent about the fact that when Gudiya went missing, he was not even at home. It was pointed out that even the *rukka* was recorded, at 12:50 AM on 13-12-2003, as if PW-2 had witnessed the abduction of Gudiya. Mr Deepak Vohra, learned counsel for Sagir, pointed out that it was only during cross examination that the witness confessed that he was not present when Gudiya went away from home, early evening on 12-12-2003. In these circumstances, he was not an eyewitness, the version given by him, was wholly inadmissible.

7. Learned counsel submitted that the prosecution story cannot be believed, because even though the eyewitnesses claimed that they went to the police station to intimate about the police disappearance of Gudiya, at 09:00 PM, the FIR was recorded much later, i.e. in the early morning hours of 13-12-2003. No explanation about the delay in recording of the FIR was forthcoming on the part of the prosecution. This was an important circumstance, which casts doubt about the veracity of the allegations made against the accused, as it strongly suggested false implication.

8. It was next argued that a combined reading of the testimonies of PW-2 and PW-10 would reveal a vital discrepancy as to who went to inform PW-2. Whereas one deposed that Shahnawaz, (the elder son of PW-2 and PW-10) went to the factory where PW-2 worked, the other deposed that another son, Sabir had

gone to fetch PW-2. Similarly, learned counsel argued that the testimony of PW-20 clearly suggested that PW-10 had not seen the girl going away with anyone. In the deposition, PW-20 had stated that PW-10 had asked where Gudiya was. Such a query would not have been asked, if in fact PW-10 had seen her daughter going away with the accused. This according to counsel was not a mere discrepancy, but a contradiction between the witnesses, which went into the root of the matter. The Court, therefore, could not have given credence to the version of either witness. Under the circumstances, argued Counsel, Sagir was entitled to the benefit of doubt.

9. Learned Counsel submitted that similarly, the prosecution did not care to rely on independent and objective corroboration of the circumstances; in this regard, it was urged that the accused's clothes seized during investigations did not show any blood; nor did any blood sample match the blood found on those clothes, or any article seized and proved as part of the record. Likewise, argued counsel, the accused's undergarments were not seized; there was no scientific evidence in the form of testing or matching of semen found on the deceased. It was further highlighted that the prosecution had placed great emphasis on the recovery of a torn pocket from near the crime scene; in fact the same was not even shown to PW-2. Under the circumstances, there could have been no reliance on that piece of evidence.

11. It is submitted on behalf of Amzad that the prosecution's version about the Appellants was that they were tenants in the

premises which formed a part of the same building where PW-2 the informant had also rented out a separate accommodation. However, the evidence clearly showed that both the accused did not stay together, and were in fact in separate rooms on separate floors in the building. The common allegations against both were that they had lured Gudiya with the promise of giving her toffee and thereafter abducted, raped and killed her. Learned counsel pointed out that PW-2 and PW-10 had not even named the appellant Amzad and that the only witness who attributed a specific role to him is PW-20. Commenting on this, counsel urged that in the present case, the judgment principally was hinged on the last seen circumstance said to have been proved.

12. The appellant Amzad urged through his counsel that “*the last seen*” circumstance is inherently weak circumstantial evidence and the present incident was not proved. Pointing out that while PW-2 and PW-10, the deceased’s parents, even after mentioning that Amzad and Sagir were co-tenants in same premises and, therefore, knew them, had specifically attributed the kidnapping only to Sagir; they were conspicuously silent about Amzad’s role. Similarly, it was submitted that the Trial Court’s reliance on PW-20 testimony was misplaced. Here, it was pointed out that the witness merely stated that Amzad used to live in the same premises as Sagir; he however stated that only Sagir took away Gudiya on the fateful day. Learned counsel emphasized that even in the earliest intimation to the police and the *rukka*, produced as Ex.PW-13/B, the informant had ascribed a specific role only to

Sagir, the co-accused and had not mentioned Amzad as a suspect or stated that he was last seen with Gudiya.

13. It was argued that the Trial Court fell into grave error in believing the entire prosecution story, despite the fatal inconsistencies. In this context, it was urged that the “last seen” circumstance is essentially a weak one, and should not be the sole basis for returning a conviction of any accused, in a criminal case. In this context, reliance was placed on the judgment reported as *Bodh Raj @ Bodha & Ors. v. State of Jammu and Kashmir*, (2002) 8 SCC 45, in which the Supreme Court held that the last seen theory comes into play where the time gap between the point of time when the accused and 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 author of the crime becomes impossible. Counsel also relied on *Mohibur Rehman & Anr. v. State of Assam*, (2002) 6 SCC 715, a decision in which the Supreme Court observed as follows:-

“10. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide.....”

14. Learned APP submits that there is no error or infirmity in the impugned judgment, calling for interference by this court, in the exercise of its appellate jurisdiction. It was urged that there was in fact no delay in recording the *rukka*, or the FIR. The APP urged that advantage cannot be taken by the appellants, on account of the omission to mention Amzad's role in Ex.PW-13/B because often the names of the suspects or accused are not mentioned by the informant or not taken down by the police and such omission should not be considered fatal. It was urged that the account of PW-10 suggested that PW-2 was not an eye witness and had been told about the role of appellant. However, PW-20 was present at the time of occurrence, i.e., Gudiya's going away. He clearly saw both accused leaving in the company of the deceased. Learned counsel sought to emphasize that PW-10 specifically mentioned that her *Jeth* was present at that time. It was argued that having regard to the other circumstances, i.e., both the appellants' absconding from their premises, and the recoveries made, particularly of a shirt with a torn pocket, the Trial Court's findings cannot be characterized as arbitrary and not based on facts.

15. It was also argued that the prosecution had clearly proved that both accused lived in the same building as the deceased's parents and therefore were in the know as to the habits of the young girl, and her parents. Besides the oral testimony, the strong circumstance which pointed unerringly to the guilt of the accused arraigned in this case was the circumstance that they were both named even before the discovery of the dead body. Similarly, three

toffees were found near the body of the deceased, which further corroborated the prosecution's version, and that of PW-10 about Gudiya being lured away with the promise that she would be given toffees.

16. The *rukka* (Ex. PW-2/A) in this case was dispatched at 12:50 AM on 13.12.2003, as may be seen by the endorsement Ex. PW-13/B. The incident, i.e. Gudiya leaving the premises of her parents, took place at 06:00 PM on 12.12.2003. The FIR was registered at PS Gandhi Nagar late next morning; the body of Gudiya was subsequently found within the jurisdiction of PS Geeta Colony; as is evident from DD Ex.PW-9/A. The body was recovered on 13.12.2003 at 09:52 AM in the morning.

17. The testimony of PW-2, the father and informant is to the following effect: -

“Accused Amjad present before the court and Accused Sagir who is also present before the court were also living as tenant in the same house in different portions. On 12.12.2003 my all the children along with my wife including my elder daughter Guriya aged around eight years were present at home at about 5.30 P.M. Accused Sagir took my daughter Guriya from our house on the pretext of getting her ‘Toffee’. Guriya did not return home for some time.”

11. The material portion of PW-10's testimony reads as follows:
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“On 12.12.2003 at about 6:00 p.m. accused Sagir, present in the court (correctly identified by the witness) came to my house. He was living on rent

in my neighbourhood. He started talking with me and with my children. Other accused Amjad present in the court was standing at ground floor at that time. Accused Amjad used to reside in a room adjacent to my room. Accused Sagir used to reside at Ground floor in the same house, where I was residing. I was residing at First Floor. After sometime, accused Sagir told me that he is taking my daughter Guriya, aged about 8 years with him to give her toffees from a shop. He took my daughter Guriya with him and did not return. My daughter Guriya also did not return. I waited upto 8:00 to 9:00 p.m. My husband had come during that period, I told this fact to him. My husband took my brother-in-law Sokat (Jeth) who also works at Gali No.8 in that area to search for my daughter Guriya and the accused persons, present in the court, but they could not trace them.”

17. The testimony of PW-20 is as follows: -

“I used to visit house of my brother Rehmat Ali father of deceased Gudia. On 12.12.03 at about 6.00-6.30 pm I reached his house. In the street just 2-3 steps away from the house, accused Amjad and Sagir (both present in the Court today correctly identified by witness) were going in the company of Gudia daughter of my brother Rehmat Ali. Accused Sagir was holding the finger of Gudia. Accused Amjad was following them. I asked Gudia “beta kahan ja rahen ho”. She replied that she is going with uncle to take toffee. Thereafter, I went inside the house. In the house wife of Rehmat asked me to sit and have tea. I sat down there and took tea. I remained there for sometime. Electricity went off. I took out a match box from the pocket and lit the candle. Wife of Rehmat asked her son Sabir that where Gudia has gone. I told her that I had seen

her in the company of accused Amjad and Sagir and on my asking Gudia told me that she is going to have toffee with uncle. Sabir went out and search for Gudia. On the request of wife of Rehmat I remain seated there as there was no electricity and she asked me to go after electricity comes. After sometime Sabir came back and told that Gudia is not found by him. Then Rehmat also reached there. Me and Rehmat started searching for Gudia at different places. Wife of Rehmat and Sabir also searched Gudia at different places. Throughout night we kept on searching for Gudia.”

18. These eye witnesses particularly PW-10 and 20 claim to have seen the incident as it took place during the time of occurrence i.e. 06:00 PM. However, there are variations as to the role of the appellant Amzad. Whereas PW-2 omits any mention of Amzad as one of the individuals who took away Gudiya, PW-20 states that he saw Sagir holding Gudiya's finger and also saw Amzad following him. On being asked, Gudiya is alleged to have said that she was going with “uncle” to take toffee. Having regard to the variations in testimonies of PW-2, 10 & 20, and the circumstance that PW-10 stated that her husband was not at home at the time of the incident and he came to know later when he was told about the events (that had preceded the disappearance of Gudiya), we are of the opinion that ocular testimonies could not have been conclusive as regards the role attributed to Amzad. We are reinforced in our finding by the *rukka* Ex.PW-13/B which is a detailed account given by the PW-2 Rehmat Ali who did not that Amzad as one of the individuals who had abducted the deceased.

We further notice that prosecution's attempts to match semen and hair samples seized during the investigation with the samples obtained from the accused particularly Amzad were unsuccessful.

19. Barring the eyewitness testimonies of PW-10 and PW-20, who clearly were in the premises when Gudiya was taken away, there is no witness. These two, significantly corroborate each other about Sagir being the only accused who took away the deceased. In these circumstances, the omission of Amzad in the *rukka* assumes great significance, particularly if we keep in mind the fact that it was prepared more than 3 hours after the family members of the deceased had approached the police. The evidence also clearly reveals that Amzad lived in a separate room; the prosecution was unable to show that he was close to, or had any friendly relationship with Sagir. All these facts, taken together, the mere mention of Amzad as one who was there at the time Sagir took Gudiya, (by PW-20) are insufficient to fasten criminal responsibility upon the former (Amzad). His appeal therefore, deserves to succeed.

20. As far as Sagir is concerned, the testimonies of the two eyewitnesses, i.e PW-10 and PW-20 are consistent vis-à-vis his role. Both stated in unison that he held out the promise of giving Gudiya toffee(s); that led her to accompany him. He was also named at the earliest available opportunity, in the *rukka*, at 12:50 AM early next morning. In this case, that fact assumes significance because at that time, Gudiya was reported missing; her body was discovered much later, next morning at 09:52 AM at a distance,

within the jurisdiction of P.S. Geeta Colony. The basic consistency of PW-10 and PW-20 about having witnessed Sagir taking away Gudiya with him, with the promise that she would be given a toffee, cannot, in our opinion, be undermined by the lack of credibility as regards the lack of role of co-accused Amzad. As observed by this court, Amzad lived in entirely different premises; the prosecution was unable to prove that he was intimate or friendly with Sagir. At the same time, Sagir's role has been proved beyond any doubt, as the individual who promised something which led Gudiya to trustingly accompany him. He was also apparently known to Gudiya's parents; therefore PW-10 and the girl's uncle PW-20 unhesitatingly allowed her to leave home with Sagir.

21. It has been repeated time and again that the last seen circumstance should be based on "*close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death*" (*Mohibur Rehman [supra]*). In this case, the eyewitness account fixes the time when the girl left with Sagir at 06:00 PM on 12-12-2003; her body was discovered next morning. The post mortem was started at 12:30 PM on 14-12-2003 (Ex. PW-4/A); the document clearly stated that the time since death was 40 hours from the time of commencement of the procedure. The approximate time of death was therefore around 8:30 PM on 12-12-2003. The evidence in the form of eyewitness testimony is categorical that both Gudiya and Sagir were not seen together after 06:00 PM on the fateful date. The witnesses mention

about their frantic attempts to locate both the girl and Sagir, but in vain. The proximity of time, i.e. just over two hours, between the time when the accused Sagir was seen with Gudiya, and the time of her death, therefore, is a strong and conclusive incriminating circumstance. In his replies to queries under Section 313 Cr. PC, he generally disclaimed any involvement in the incident, and stated that he had come from Bihar a week before the incident, and was living with his brother Nasir in the same building where the complainant lived. He claimed that he had returned home at 08:00 PM and that the police had arrested him from the same premises. However, during the trial court proceeding, no such line of questioning was adopted on his behalf; he also did not choose to put his brother in the witness box. The Court is aware that these facts cannot be taken to incriminate him; yet once the prosecution proved that he was seen last with Gudiya, and also established the narrow time gap between that time, and the time of her death, the onus of furnishing information which was within his peculiar knowledge was upon the appellant Sagir, by virtue of Section 106 Evidence Act. His inability to give any satisfactory explanation also calls for an adverse inference.

15. In the light of the above discussion, Criminal Appeal No.374/2011 on behalf of Amzad deserves to succeed; it is allowed. The appellant Amzad shall be released forthwith unless he

is needed in connection with any other case. Criminal Appeal No. 516/2011, the appeal by Sagir, has to fail. It is accordingly dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**S.P. GARG
(JUDGE)**

FEBRUARY 27, 2012
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