

Date of decision: 25.07.2012

+ CRL.A. 419/2011

RABINDER MISHRA @ RABIN MISHRA @ RAMIN MISHRA
..... Appellant

Through Mr. Bhupesh Narula and Mr.
Yash Tandon, Advocates.

versus

STATE GOVT NCT OF DELHI
Through Mr. Sanjay Lao, APP for State.
Inspector Mahender Singh, PS-
Palam.
SI Ajay Pratap, PS-Tilak Nagar.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE S.P.GARG

SANJIV KHANNA, J. (oral)

This appeal by Rabinder Mishra impugns judgment dated 12th July, 2010 passed by the Additional Sessions Judge convicting him under Section 302/363/201 of the Indian Penal Code, 1860 (IPC for short). The appellant also impugns order on the point of sentence dated 15th July, 2010 by which the appellant has been sentenced to rigorous imprisonment for life and pay a fine of Rs.2,000/- under Section 302 IPC, in default of payment of fine, undergo simple imprisonment of two months. The appellant stands sentenced to

rigorous imprisonment for three years and pay a fine of Rs.1,000/- under Section 363 IPC and in default of payment of fine, undergo simple imprisonment of one month. Lastly, the appellant has been sentenced to rigorous imprisonment of three years and a fine of Rs.1,000/- under Section 201 IPC and in default of payment of fine, undergo simple imprisonment of one month.

2. At the very outset, we may notice that the appellant was also tried for the offence under Sections 366 and 376 IPC, but has been acquitted for the said charges.

3. The allegation against the appellant is that he had committed murder of the child 'P' aged 6 years, daughter of Ram Pati and Amla Devi and sister of Kiran. They had appeared as PW-3, 6 and 4 respectively. The learned Additional Session Judge has accepted the case of the prosecution that the appellant had lifted and taken away child 'P' on 7th March, 2004 at 7.00 P.M. Subsequently her body was found in a gutter in a park on 20th March, 2004. The appellant absconded and was subsequently arrested on 25th June, 2004 from his native village in Bihar.

4. There is no direct evidence and the case of the prosecution is based upon circumstantial evidence. The circumstances relied upon by the prosecution are; (i) Last seen (ii) Recovery and (iii)

Abscondence.

5. As far evidence of last seen is concerned, the prosecution relies upon testimony of PW-3 Ram Pati, PW-4 Kiran, and PW-6 Amla Devi, in addition to the testimony of PW-7 Girdhari, a shopkeeper. PW-4 Kiran is a sister of the deceased. When her statement was recorded in the Court on 23rd March, 2007, she was 10 years of age. In March, 2004, her age would be about 7 years. Her statement was recorded without oath after the Court had put questions to PW-4 to verify whether she could understand Hindi and give answers satisfactorily. PW-4 has stated that she and her sister 'P' were playing near their Jhuggi on the occasion of Holi festival. The appellant came and inquired about her parents. She told him that they were not at home. After some time the appellant again came and inquired about her parents. She again replied that her parents were not at home. Thereafter, the appellant asked why he was not being served with food and liquor. He took sister of PW-4 Kiran, with him on the pretext that he would get her biscuits and balloons. She objected, but the appellant carried her sister on his shoulder and went to the shop of Girdhari and purchased biscuits and balloon for her sister and took her away on his shoulder. When PW-4 Kiran objected, she was slapped and told that after feeding her sister 'P' he would sent her back to the house. In the

evening she narrated the incident to her parents. However, in the cross-examination she stated that she had not told anyone from the neighbourhood that the appellant had taken away her sister. She had not informed the police. She stated that police and her parents told her to narrate the facts before the Court as advised and suggested by them. In the end of the cross examination, she admitted that the appellant had not taken away her sister in her presence. After permission PW-4 Kiran was re-examined by the Additional Public Prosecutor. In the re-examination also she reiterated that she had not seen her sister being taken away by the appellant in her presence. The relevant portion of the examination and re-examination of PW-4 Kiran are reproduced below:-

“Police and my parents also told me to narrate this fact before the Court as advised/suggested by them. I have no knowledge about my statement in the Court. Police came to our house at about 10.04.2004. My parents tried to search my sister on the same day when she went missing. Police also inquired from me about the age of my sister and her name. I had not told anything to the police. It is correct that accused had not taken away my sister in my presence. It is incorrect to suggest that I am deposing falsely.

Re-examination by Sh. G.S. Guraya, Substitue Addl. P.P. for the State after permission.

It is incorrect to suggest that accused had taken away my sister in my presence. It is incorrect to suggest that I am deposing falsely.”

6. Before we go to the statement of PW-3 Ram Pati, it will be relevant to refer to the statement of PW-6 Amla Devi, the mother of the deceased 'P'. In her statement she has stated that the appellant used to visit their house and on 7th instance (March, 2004) about three years ago around Holi, the appellant had come to their house and remained there till 3-4 p.m. At about 5-6 p.m. the appellant went out of the house and took her daughters 'P' and Kiran. Kiran came back, but 'P' thereafter never returned. She searched her daughter 'P' in the locality, but she could not be found. After about 15 days, body of child 'P' was located. She identified the dead body of child 'P', who was about 6 years of age. In the cross-examination, PW-6 admitted that she had searched for her daughter 'P' in Jhuggies and then in the Tilak Nagar area and in the area where the appellant used to visit. She stated that no other public person, except the shopkeeper Girdhari, had told her that he had seen her daughter being taken away by the appellant. She and her husband had gone to the police station for lodging a report. The police had also accompanied them in search of their daughter in different areas. She denied the suggestion that the accused had come to their house and had taken liquor on 6th March, 2004 with her husband and her husband had to pay an amount of Rs.1500/- to the appellant and there was altercation between her

husband and the appellant on the issue of settlement of the accounts of tea shop.

7. It is noticeable that there are substantial differences on material aspects in the statements made by PW-4 Kiran and PW-6 Amla Devi. PW-4 had stated that her parents were not at home and the appellant twice inquired about her parents who were not at home. Thereafter, appellant had taken away child 'P' on his shoulder. She had objected. As per the statement of PW-6 Amla Devi, the appellant was with them in their house till 5-6 P.M. and in the presence of PW-6, he had taken both the daughters Kiran and 'P' with him. What is interesting and has been brought to our notice is that statement of PW-6 Amla Devi was not recorded under Section 161 Code of Criminal Procedure, 1973(Cr.P.C. for short). The so called statement given by Amla Devi under Section 161 Cr.P.C. in fact is not her statement. It is a statement made by a male. The said statement does not refer to the factual matrix stated by PW-6 Amla Devi in her examination-in-chief. The statement appears to be as that of Girdhari, who had appeared as PW-7 in the trial court. In other words, Statement of PW-6 Amla Devi under Section 161 attributed to her, is not her statement. Her presence and what has been averred and stated by her becomes a grave suspect. Other discrepancies in her statement and creditworthiness have been

examined below.

8. PW-3 Ram Pati is the father of the deceased-'P'. In his examination-in-chief he has stated he knew the appellant and his daughter Kiran had told him that the appellant had met Kiran and 'P' when they were playing outside their jhuggi and he took child 'P' with him on the pretext that he would give biscuits to child 'P'. On objection by Kiran, the appellant had slapped her. On the next day i.e. 8th March, 2004, he had made search for the appellant, who used to pull rickshaw near Kesho Pur Mandi. He went to Kesho Pur Mandi and inquired from the appellant about her daughter. On this, the appellant made an excuse that he was going to get his slippers but did not return. He contacted and made inquiries from PW-7 Girdhari, who told him that the appellant had come to his shop with child 'P' and had purchased biscuits and balloons for her. The appellant was carrying child 'P' on his shoulder. Rickshaw of the appellant was lying there but when the appellant did not return. PW-3 took the rickshaw to the police station Tilak Nagar. The rickshaw was seized vide memo Ex.PW3/A. Thereafter, statement of PW-3 Ram Pati Ex.PW3/B was recorded. Police could not trace child 'P'. Later on dead body of child 'P' was found and he had gone to DDU Hospital along with his wife to identify the dead body of child 'P'. After about three months the

appellant was arrested from Bihar and brought to Delhi.

9. In the examination-in-chief PW-3 Ram Pati has stated that the appellant was the same person, who had visited them on 7th March, 2004 and also had dinner in his jhuggi. In the cross-examination PW-3 Ram Pati stated that on 7th March, 2004 it was the day of Holi and a holiday. The appellant had come to his house and consumed liquor at his house. A reading of the said statement in the examination-in-chief and the cross-examination, it is apparent that the appellant had come or had remained in the house with PW3, Ram Pati on 7th March, 2004. He had dinner and liquor with PW-3 Ram Pati. As noticed above, PW-4 Kiran in her statement had stated that the appellant had come to their house about 7 p.m. and taken away her sister. PW-6 Amla Devi had stated that at about 5-6 p.m. the appellant had come to their house and had taken out her daughters along with him. Thereafter, child 'P' was not found. This is contrary to what PW-3 Ram Pati has stated i.e. the appellant had dinner and had consumed liquor with him in their house. Thus as per the version and testimony of PW-3, Ram Pati, the appellant was with them even after 7 P.M. Prosecution is unable to explain the discrepancies in the different versions given by PW3, 4 and 6.

10. The first complaint made by PW-3 Ram Pati in the police station

on 8th March, 2004 was recorded as DD No.18B is marked Ex.PW4/A. The complaint reads and states that at about 10:40 in the morning Ram Pati had come to the police station and stated that her daughter 'P' age 6 years had gone missing since 7 p.m. on 7th March, 2004. PW-3 did not mention or name any person as a suspect. Name of appellant is not mentioned. But this is contrary to version and testimony of PW4 and PW6. A reading of Ex.PW4/A and the statement of PW-3 clearly shows that the stories put up by the prosecution and the statement of PW-3, 4 and 6 are not reliable. PW-4 Kiran in her statement had specifically stated that he had narrated the incident of the appellant taking away child 'P' with him in the evening to her parents. PW-6 Amla Devi, as noticed above, had stated that the appellant was with them till 5-6 p.m. and had taken away her daughters 'P' and Kiran with him. Thereafter, her daughter 'P' went missing. PW-3 has also stated that he had gone out to search for her daughter and had also gone to the place where the appellant was residing, but neither the appellant nor her daughter was available there. It is quite clear that till 10.40 a.m. on 8th March, 2004, PW4 and PW6 did not suspect that the appellant was involved. Till that time, PW-4 Kiran had also not told them about the alleged behaviour of the appellant and the fact that he had taken child 'P' on shoulder at about 7 p.m. on 7th March, 2004. PW3 as observed

has contradicted the prosecution version by stating that the appellant had dinner and liquor with him.

11. It has come on record that at about 6.25 p.m. on 8th March, 2004 PW-3 Ram Pati had made a supplementary statement to the police in which he had made allegations against the appellant. The statement is marked as Ex.PW3/B. This was the first time that the appellant was implicated and mentioned as a suspect by PW3. In this statement Ram Pati had mentioned about the inquiries made from Girdhari.

12. Girdhari had appeared as PW-7 before the trial court. He has stated that on 7th March, 2004 at about 7 p.m., the appellant had come to his kiosk with a girl of tender age, who may be about 3-4 years old. He knew the father of the girl as Zaleem and Zaleem used to address the appellant as his brother. The appellant had purchased balloons and biscuits for the said girl and left. On the next day, wife of Zaleem i.e. PW6 Amla Devi was weeping and she made inquiries whether he had seen her daughter as she was missing since yesterday. He told her that the appellant had come to his kiosk with child 'P'. The said facts were narrated by PW-7 Girdhari to the police on 10th March, 2004. He had also identified the appellant as a person with whom he had seen the girl. He identified the photographs of child 'P'. In the cross-examination he has stated that the appellant used to reside with the

family of the deceased.

13. It is noticeable that statement of PW-7 Girdhari under Section 161 was recorded on 10th March, 2004. There is, as noticed above, another statement under Section 161 which is attributed to Amala Devi recorded on 9th March, 2004. The said statement if read carefully, indicates that it states facts narrated and attributed to be within the knowledge of PW-7 Girdhari. They match and are similar to the statement of PW-7 Girdhari recorded on 10th March, 2004 under Section 161 Cr.P.C. As per the statement of PW-7 Girdhari, wife of Ram Pati, had come to him on 8th March, 2004 inquiring about her daughter 'P' and at that time he had told her that the appellant had come to his kiosk with her daughter. PW-4 Kiran, on the other hand, is clear and categorical that she had seen the appellant with her sister at the shop of Girdhari, where the appellant had purchased biscuits and balloons for her. She was slapped when she objected to the appellant taking away child 'P' with her. Further, she stated that she had narrated the entire incident to her parents in the evening. PW-3 Ram Pati in his statement had stated that he had gone and spoken to PW-7 Girdhari and at that time he was alone. Thus, his wife PW6 was not with her. Further, as per PW7, the appellant was residing in the house with PW3 and PW6. This is not the case of the prosecution. The said

aspect is material in the facts of present case, as the prosecution relies and claims that the appellant was last seen and was with the child 'P' at 7 P.M. on 7th March, 2004.

14. We may note that the prosecution has not been able to state and explain why the statement of Girdhari was recorded on 10th March, 2004, when on 8th March, 2004, the full facts were known to them. PW3 and PW6 as per the prosecution version were aware that Girdhari had seen the appellant with child 'P' and had purchased biscuits and balloons from the shop of Girdhari on 7th March, 2004 in the evening. As per the statement of PW-3 Ram Pati, the appellant remained in his house and had dinner and liquor with him. As per the statement of PW-7 Girdhari, the appellant use to stay in the same house with PW-3 Ram Pati and PW-6 Amla Devi. Their daughter had gone missing since 7 p.m. In case there was involvement of appellant in the said abduction and disappearance of child 'P', the presence of appellant in the house, having dinner and alcohol with the father PW3 is contradictory. The prosecution story suffers from inconsistencies which cannot be reconciled. It is not possible to visualize and accept that the appellant had dinner in the house and had also consumed liquor with Ram Pati, PW-3, even when child 'P' had gone missing after being taken away by the appellant.

15. In view of the aforesaid, we find inherent contradictions in the allegations made by the prosecution and statements made of the witnesses with regard to the allegation of last seen. The same has not been established.

16. On the question of recovery, we find that the trial court disbelieved the version of the prosecution recording as under:-

“39. The recovery of panty of the child at the instance of accused on 30.6.04 pursuant to his disclosure statement Ex.PW13/D does not inspire confidence, as the said recovery had been affected from the same place from where earlier the dead body of the deceased had been recovered on 20.03.04. As per the testimony of PW13 H.C. Munesh Pal, PW14 Inspector Mahender Singh and PW16 Inspector Pratap Singh, the said panty was recovered from near the gutter near the spot from where the dead body was earlier found. As per the deposition of aforesaid witnesses, the said panty was not found concealed underneath the earth or any tree or like place. In any case, the recovery of said panty almost after 4 months of the incident from the place, where earlier dead body of the deceased had been recovered does not appear to inspire any confidence, as at the time of recovery of deadbody, the police would have thoroughly scanned the placed of the said recovery and they would have thoroughly searched for all the vital clues pertaining to the present case in the vicinity of the area, thereafter the said panty was found lying nearby the same place which escaped the notice of the police officials on 20.3.04.

40. Further as per FSL report nothing has come out of the said panty to connect the accused with the same. Even otherwise, as per the testimony (s) of PW13, PW14 and PW16 no public witness was joined at the time of said recovery of panty from the said place,

which also makes said recovery doubtful. In these circumstances, the said recovery of panty of the deceased child pursuant to the disclosure statement of the accused on 30.6.04 has not been proved by the prosecution, but the prosecution has been able to prove that accused was arrested on 25.6.04 from his native place at Bihar. The aforesaid circumstance no.(5) is decided accordingly.”

17. Dead body of child ‘P’ was found on 20th March, 2004 in a DDA Park near Keshav Pur Village. Prosecution has placed on record DD No.7A Ex.PW5/A. The said DD entry records that wireless operator had informed the reporting room that a dead body was found in a park in front of CRPF camp, DDA Flat, Keshav Pur Village. Subsequently, another DD entry No.52B Ex.PW12/A was recorded. The said DD entry states that a decomposed body was found in the gutter of the DDA Park, Keshav Pur, opposite Ring Road. Subsequently, the said body was identified by PW-3 Ram Pati and PW-6 Amla Devi as that of child ‘P’. At that time, the police had searched the area and had seized belongings/clothes of child ‘P’. PW-12 had stated that he had shifted the dead body to the DDU Hospital mortuary. The appellant was arrested on 25th June, 2004 and had made disclosure statement on 30th June, 2004 marked Ex.PW-13/D. On the basis of the said disclosure statement, panty of child ‘P’ was allegedly recovered from the park. The park in question was known. Recovery of

panty of child 'P' is recorded and attributed after a period of more than three months. It is difficult to believe that panty of the girl would have remained in the park for three months. The area in question was sanitized by the police after the dead body was found in the gutter on 20th March, 2004. We have seen the site plan of the park, which is marked Ex.PW9/A. The said site plan refers to a gutter at the site. There is another site plan Ex.PW16/E. The said site plan was prepared on 30th June, 2004 after the alleged disclosure and recovery. The site plan indicates the gutter, and the location where the body and panty were found. The second circumstance, therefore, has also not been established.

18. The third circumstance relied upon by the prosecution is abscondence. It is clear from the testimony of PW-3 Ram Pati that atleast till 8th March, 2004, the appellant was in Delhi. In the evening on 7th March, 2004, even after the alleged abduction and murder of child 'P', the appellant was with PW3 and PW6. It appears that till that time suspicion and fingers were not pointed towards the appellant. Child 'P' was missing from 7 p.m. on 7th March, 2004. Thus as per the prosecution case, at least till 12 noon on 8th march, 2004 the appellant was certainly available and was seen by the PW-3. As per the statement of PW-3 Ram Pati, the appellant had dinner in the house of

PW-3 and PW-6 Amla Devi. He had also consumed liquor with PW-3 in the night. The appellant was arrested from his native village on 25th June, 2004.

19. The Supreme Court in *Sk. Yusuf Vs. State of West Bengal*, (2011) 11 SCC 754, has observed as under:

“25. Both the courts below have considered the circumstance of abscondance of the Appellant as a circumstance on the basis of which an adverse inference could be drawn against him. It is a settled legal proposition that in case a person is absconding after commission of offence of which he may not even be the author, such a circumstance alone may not be enough to draw an adverse inference against him as it would go against the doctrine of innocence. It is quite possible that he may be running away merely being suspected, out of fear of police arrest and harassment. (Vide: **Matru @ Girish Chandra v. The State of U.P.** AIR 1971 SC 1050; **Paramjeet Singh @ Pamma v. State of Uttarakhand** : AIR 2011 SC 200; and **Rabindra Kumar Pal @ Dara Singh v. Republic of India** : (2011) 2 SCC 490) Thus, in view of the law referred to hereinabove, mere abscondance of the Appellant cannot be taken as a circumstance which give rise to draw an adverse inference against him.”

In the present case, the abscondence we do not think can be treated as positive circumstance which confirms hypothesis of guilt.

20. In the present case, we are not satisfied that the prosecution has been able to make out a case and establish by circumstantial evidence that the appellant was involved and has committed murder of child ‘P’

or had abducted her. The cumulative effect of evidence on record does not establish the case beyond reasonable doubt. The appellant is entitled to benefit of doubt. The impugned judgment and order on sentence are set aside. The appeal is allowed. The appellant will be released forthwith, if not required to be detained in any other case.

SANJIV KHANNA, J

S.P.GARG, J

JULY 25, 2012
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