

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

% *Date of Judgment: 24.09.2013*

+ CRL.L.P. 585/2012 & CrI. M.A. No. 19950/2012
STATE Petitioner
Through Mr. Saleem Ahmed, ASC for the
State.
versus
PAWAN KUMAR @ RAJA CHAND Respondent
Through None.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

1 State is aggrieved by the judgment of the Additional Sessions Judge dated 03.05.2012 whereby the respondent/Pawan Kumar had been acquitted of the charges leveled against him i.e. of charges under Sections 363/377/302 of the IPC. The finding returned was that the prosecution has failed to prove its case.

2 The case of the prosecution is that on 14.04.2009, an information was received in the local police station Kirti Nagar that Bunty aged 5 five years had been kidnapped; efforts to trace out him having failed, an FIR under Section 363 was registered. Two days later i.e. on 16.04.2009, DD No. 11-A was recorded (Ex.PW-5/A) which contained information to the effect that the dead body of a missing child had been found in a gunny bag at Jawahar Camp Jhuggis, MCD gutter. The dead

body was identified by his uncle to be that of Bunty.

3 The FIR was converted to an offence under Sections 302/377 of the IPC.

4 Investigation commenced. Inquest proceedings were ordered. During the inspection of the body, hair found around the neck of the deceased and the gunny bag were seized and sealed by the Investigating Officer SI Bhagat Ram (PW-23) with his seal.

5 The victim was subjected to a post-mortem. Report Ex.PW-11/A was prepared. Cause of death was opined as asphyxia caused by choking of upper respiratory passage; sodomy was also not ruled out.

6 Since there was no eye-witness, the circumstances investigated by the prosecution were pitched in to file the charge-sheet. The first circumstance relied upon by the prosecution was the circumstance of "last seen" for which reliance had been placed upon the testimony of Lallan Jha examined as PW-9. He had deposed that on 14.04.2009, he had seen Bunty playing with the respondent/Raja Chand.

7 Investigation further revealed that since 16.04.2009 i.e. date of recovery of the dead body the accused was not traceable; his mobile had also been switched off. The neighbours of the respondent also informed the Investigating Officer that the behavior of the respondent was not normal.

8 The accused was arrested on 02.05.2009 i.e. after about two weeks from the date of the incident. This was from Sector-23, Dwarka on a secret information. He made disclosure statement confirming the fact that he had committed a wrong act upon Bunty and thrown his dead

body in a gutter. Blood sample and scalp hair of the accused were taken. He was medically examined.

9 Exhibits were sent to the CFSL and as per the report of the CFSL Mr. V. Shankar Narayanan (PW-26) the senior scientific officer on a morphological and microscopical study of the hair in Ex.3 (hair seized from the dead body of the victim and the gunny bag) it was similar in most of their morphological and microscopical characteristics to the hair found in Ex.2 (hair of the accused) except in one strand. The post mortem also revealed the possibility of a sexual assault on the body.

10 The prosecution pitched forth all the aforementioned circumstances to nail the accused. The trial Judge however did not agree with these circumstances. The respondent stood acquitted.

11 We have heard the arguments of learned Additional Standing Counsel for the State. His main challenge to the judgment of acquittal is based on his submission that the trial Judge had failed to appreciate the circumstances in the correct perspective. The FSL report which had opined that the scalp hair of the respondent matched the hair found on the neck of the deceased has been ignored. The trial Judge has failed to appreciate that it was not the doctor who had handed over the hair from the body of the deceased but it was the Investigating Officer himself who had seized them and sealed them in a separate pulanda. Defence set up by the respondent in his statement under Section 313 of the Cr.PC is also false as mere statement based on evasive denials leads to the drawing of an adverse inference against the accused. The judgment of the trial Court is bordered on perversity; it is liable to be set aside.

12 Record has been perused. We have taken the assistance of the police file which has also been perused.

13 The first circumstance was the circumstance of last seen. PW-9 was a witness to the said circumstance. Admittedly this witness was hostile. He did not support the version of the prosecution. This circumstance was rightly dis-believed. In fact no argument has been projected by the learned Additional Standing Counsel on this score.

14 The main thrust of the argument of the learned Additional Standing Counsel is on the report of the CFSL which as per his version has not been appreciated in the correct perspective. The report of the CFSL is dated 19.03.2010 which has been proved as Ex.PW-25/H. Ex-3 is a sealed envelope sealed with the seal of 'BR' i.e. the seal of the investigating officer containing strands of hair; these were hair which had been recovered from the body of deceased and from the gunny bag. Ex-4 is a parcel containing strands of hair sealed with the seal of CMO, DDU Hospital i.e. hair of the respondent.

15 To answer this argument of the learned Additional Standing Counsel, the testimony of the Investigating Officer is relevant. He is SI Bhagat Ram examined as PW-23. As per his version, the hair entangled with the gunny bag on the backside of the neck of the deceased has been seized and sealed with his seal of 'BR'. The hair of the accused had been handed over by the post mortem doctor and seized in a separate pulanda vide memo Ex.PW-25/B.

16 As noted supra, inquest proceedings had been ordered. The submission of the learned Additional Standing Counsel that the trial

Judge has mis-appreciated the evidence and has failed to take into account that hair had been seized from the dead body by the Investigating Officer and that is why it did not find mention in the post mortem report is answered by the finding returned by the trial Judge who has noted that the death report (Ex.PW23/D) and crime report (Ex.PW-10/A) both did not mention the hair entangled with the dead body or gunny bag. In fact the relevant portion of the death report has been quoted in para 44 of the impugned judgment. The exhibits seized by the Investigating Officer had also been detailed in the death report but there was no mention about the seizure of any hair present or entangled with the gunny bag. The hair also did not find mention in the post-mortem report. There is in fact no evidence that the hair of the deceased was seized by the Investigating Officer. Crime team had been summoned at the spot immediately and the crime team report would have mentioned this fact; that apart the exhibits which were seized by the Investigating Officer also did not disclose that any hair from the dead body of the deceased and the gunny bag had been seized. This theory of matching of the hair on the dead body with the hair of the accused was thus rightly doubted and rejected.

17 There was yet another reason for this. The evidence disclosed that the exhibits were deposited in the malkhana after a delay of 27 days. There was no explanation for the same. Obviously since the exhibits remained with the Investigating Officer in this intervening period of 27 days, the possibility of tampering of the sample could be excluded. This was another additional circumstance for dis-believing this circumstance

set up by the prosecution.

18 There was no other evidence with the prosecution to nail the respondent.

19 We may thus note that no case is made out for grant of leave to appeal on merits. That apart there is delay of 55 days in filing the leave to appeal.

20 On all counts, the application seeking leave to appeal is liable to be dismissed. The application seeking leave to appeal and the application seeking condonation of delay in filing the application are accordingly dismissed.

INDERMEET KAUR, J

KAILASH GAMBHIR, J

SEPTEMBER 24, 2013

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