

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

Judgment Reserved on: November 07, 2014

% *Judgment Delivered on: November 11, 2014*

+ **CRL.A. 402/2013**

BHAIRO SINGH

..... Appellant

Represented by: Mr.K.B.Andley, Sr.Adv.
instructed by Mr.M.L.Yadav,
Adv.

versus

STATE GOVT. OF NCT OF DELHI

..... Respondent

Represented by: Ms.Aashaa Tiwari, APP for the
State with Insp.Sushil Kumar
and Insp.Dharmender Kumar,
SHO PS Krishna Nagar.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Bhairo Singh is convicted for the kidnapping and murder of Lakshay, a five year old child and the destruction of evidence, vide the impugned judgment dated January 29, 2013 and directed to undergo imprisonment for life and to pay a fine of ₹5,000/- for offence punishable under Section 302 IPC, rigorous imprisonment for 7 years and a fine of ₹2,000/-for offence punishable under Section 364 IPC and rigorous imprisonment for a period of 4 years and a fine of ₹1,000/- for offence punishable under Section 201 IPC vide the impugned order dated February 05, 2013.

2. Assailing the circumstantial evidence on the basis of which the appellant is convicted, learned counsel for the appellant contends that the last seen evidence of both Narender Kumar PW-1 the neighbour and Isha

PW-15 the sister of the deceased cannot be relied upon as they do not speak about Lakshay being seen with the appellant immediately on finding Lakshay missing. The circumstance of absconsion as held against the appellant has not been proved by the prosecution as no witness has deposed about the same. The recovery of the Tabiz and the locket from the appellant after 3 days of the alleged incident cannot be relied upon as the same is not mentioned either in the FIR or hue and cry notices published after the incident and the articles have been later planted on the appellant. The MLC of the appellant disproves the motive as alleged by PW-14 Sanjeev Kumar, the uncle of the deceased and the employer of the appellant. Though no defence evidence has been led by the appellant who claims innocence and false implication due to misapprehension, Bhairo Singh in his statement under Section 313 Cr.P.C. denied that he absconded on the pretext of taking medicine and did not come back. Bhairo Singh stated that he remained at the shop of Sanjeev Kumar.

3. Lakshay, a 5 year old child was found missing by his father Sushil Kumar PW-10 at about 7.00 PM on October 13, 2009 when he returned back home from his shop and was not found despite search. PW-10 made a PCR call about the missing of his son on the same day which was recorded vide DD No.33A at PS Krishna Nagar. On the Police arriving at the spot statement of PW-10 was recorded vide Ex.PW-10/A wherein he gave the age, height, description and the clothes worn by Lakshay and that he had burn marks on his feet. The rukka was dispatched on October 14, 2009 at 00.30 AM on the basis of which FIR No.393/2009 was registered under Section 363 IPC. Messages were relayed and hue and cry notices were pasted to trace the child.

4. On October 14, 2009 itself statement of Isha, the 6 year old sister of Lakshay was recorded under Section 161 Cr.P.C. who stated that Bhairo had taken Lakshay with him for getting the toffee in his lap. Thus, efforts were made to trace Bhairo Singh. On the same day Narender Kumar, a neighbour also informed Sushil Kumar that he had seen Lakshay with the servant of Sanjeev Kumar taking him towards Mandir when he was standing on the shop of Shetty and on coming to know that Lakshay was missing he has given the said information. His statement under Section 161 Cr.P.C. Ex.PW-1/A was recorded on October 15, 2009. On October 16, 2009 ASI Udham Singh PW-12 the investigating officer received an information from PCR with regard to dead body of a boy lying in the drain in Sri Ram hospital. He reached the spot along with HC Gurvinder. Crime team and senior officers were called on the spot. The complainant also reached the spot. The dead body was identified by the complainant Sushil Kumar and Bharti Gupta PW-2 to be that of Lakshay.

5. The post-mortem noted five reddish bruises on the face, forehead and the lips and the cause of death was kept pending awaiting the viscera report. After examining the post-mortem report findings and FSL report which gave negative test for common poison and intoxication Dr.S.Lal PW-13 opined that the cause of death was possible due to asphyxia as a result of smothering. The body was found in a highly decomposed position. The time since death was about three days.

6. When the dead body was recovered, Sushil Kumar pointed out that a black thread having Babaji ka photo and a small gold 'OM' were missing from the neck of the deceased. Statement of Sushil Kumar was recorded vide Ex.PW-3/B along with the identification of the dead body. On a secret

information being received on the same day that appellant was present in Maharana Pratap Bagh, East Azad Nagar, a raid was conducted and appellant was arrested. On his personal search a purse of brown colour containing cash of ₹20/-, his own photograph and a locket having photograph of one Sadhu along with a black thread and one gold locket of 'OM' were recovered which was converted into a sealed pullandah. Test identification of the recovered articles were done by the Sushil Kumar vide Ex.PW-16/B who identified the locket with the photograph of Babaji and gold 'OM' in a black thread before PW-16 the learned Metropolitan Magistrate.

7. Narender Kumar PW-1, Sushil Kumar PW-10 and Isha PW-15 deposed in sync with their statements as noted above.

8. The evidence of last seen of the deceased with Bhairo Singh as deposed by Narender Kumar PW-1 and Isha PW-15 has been assailed by the learned counsel for the appellant on the ground that if Isha had seen Lakshay with Bhairo Singh she would have informed her parents but this fact does not find mention in the FIR. Thus Isha had not seen Lakshay with Bhairo Singh. Isha has deposed that she was playing with her brother when Bhairo Singh first asked her to accompany for purchasing toffee but she refused. Then Bhairo Singh asked her brother Lakshay who agreed to go along with him for getting toffee. Thereafter she went to the toilet when her mother was on the first floor. At about 8.00-9.00 PM she went to bed and in the morning she told that she had seen her brother with Bhairo Singh on October 13, 2009 at 7.30 PM. The version of Isha is quite plausible. She was six years old when the incident took place and would have normally slept at 8.00-9.00 PM as she deposed. Further the father searched Lakshay and

finally the rukka was sent at 00.30 AM on October 14, 2009 when Isha was asleep, hence the name of the appellant does not find mention in the FIR. She has deposed that when she did not find her brother in the next morning she told her parents and her statement was recorded by the police at her house. Nothing material has been elicited in the cross-examination of this witness. Further the appellant was the servant of the maternal uncle of the deceased who was staying in the same house and the children occasionally went with him. Thus there was nothing unnatural in the conduct of Isha sleeping at her usual time and informing her parents only in the morning when she got up not to find her brother in the house.

9. Similarly, Narender Kumar PW-1 is also a natural witness living in the neighbourhood who deposed being present at Shetty General Store, Near Durga Mandir on October 13, 2009 at 7.00/7.15 PM when he saw Bhairo Singh taking away child Lakshay aged 4-5 years towards Mandir side. Narender has explained that he thought that Bhairo Singh was taking the child to the shop of his father so he went to his house. On the next day in the noon when Sushil Kumar met him he got to know that Lakshay was missing and thus he told him about seeing Lakshay with Bhairo Singh in the evening on the day earlier. On the next day statement of Narender Kumar was recorded. Thus statements of both Isha and Narender Kumar were recorded much before even the dead body was recovered and efforts were made by the Investigating Officer to trace Bhairo Singh soon after recording of their statements.

10. As regards the conduct of absconsion is concerned PW-14 Sanjeev Kumar with whom Bhairo Singh was working has not deposed in this regard. Sanjeev Kumar deposed that he was running a shop in front of

Raghunath Mandir, Krishna Nagar since 2004 and was residing at 25A, Gali No.3, East Azad Nagar, Delhi. He had employed Bhairo Singh on the monthly salary of ₹2,500/- with meals and clothes. Bhairo Singh also used to work at his house. It may be noted that the residential house of both Sanjeev Kumar and Sushil Kumar is same. Sanjeev Kumar further deposed that Bhairo Singh was quite friendly with Lakshay and Isha. He stated that 6-7 months prior to the incident Bhairo Singh fell ill and was got treated. However, Bhairo Singh suspected that the loss of his mobile phone was due to Sanjeev Kumar and also since wrong treatment was given to him he became impotent and thus held Sanjeev Kumar responsible for the same as well. This witness has not deposed that on the fateful day Bhairo Singh had left earlier and was not traceable thereafter. However, Sushil Kumar, PW-10 the father of the deceased deposed that when he contacted Sanjeev Kumar, his brother-in-law he told him that Bhairo Singh had left his shop on October 13, 2009 on the pretext that he was not feeling well and had to take medicine. However, he did not come back thereafter. This evidence of Sushil Kumar is hearsay having been told to him by Sanjeev Kumar who had not deposed about the same.

11. Moreover the motive as sought to be proved by the deposition of Sanjeev Kumar is also not substantiated in view of the MLC of Bhairo Singh on record which notices that there is nothing to suggest that Bhairo Singh was incapable of sexual intercourse.

12. The recovery of the locket and the Tabiz in the golden thread has been assailed on account of the fact that the same do not find mention in the FIR or the Hue and Cry Notice. The Tabiz and locket in a black thread were hidden under the clothes and thus not being identifiable feature to the people

at large. Thus they may not have been mentioned in the FIR. However, even before the appellant was arrested when the dead body of the child Lakshay was recovered and identified by Sushil Kumar and Bharti Gupta, Sushil Kumar stated to the police that the locket of 'OM' and the Tabiz with the photograph of babaji which Lakshay was wearing in a black thread were missing. The appellant in his statement under Section 313 Cr.P.C does not deny the recovery of the Tabiz and the locket from his pocket but only says that the same were planted. However, the Investigating Officer Inspector Sushil Kumar PW-17 is suggested by the defence that no Tabiz containing Babaji ka photo and gold 'OM' was recovered from the possession of Bhairo Singh. It is further suggested that the said photo of 'OM' never belonged to the deceased child and had never been worn by him. Though it is sought to be suggested that the Tabiz and gold 'OM' were ordinary items easily available in the market however, the Investigating Officer clearly stated that the photo of Babaji was not easily available in the market. Thus we find no reason to disbelieve the recovery made from the personal search of the appellant.

13. Even though the prosecution has not been able to prove the motive and the conduct of absconsion of Bhairo Singh however, in view of the last seen evidence, the death of Lakshay immediately after the time he had been taken away by the appellant having been proved by the post-mortem report and the recovery of his Tabiz and locket with the gold 'OM' and photo of Babaji in a black thread from the possession of the appellant, we find no reason to set aside the impugned judgment of conviction and order on sentence.

14. Consequently, the appeal is dismissed.

15. T.C.R. be returned.

16. Two copies of the judgment be sent to the Superintendent Central Jail Tihar one for his record and the other to be handed over to the appellant.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

NOVEMBER 11, 2014
‘ga’/‘vn’