

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

RESERVED ON : OCTOBER 28, 2017
DECIDED ON : NOVEMBER 25, 2017

+ **CRL.A. 1502/2013**

KALIMULLAH

..... Appellant

Through : Mr.Chetan Lokur with Mr.Nitish
Chaudhary, Advocates.

versus

STATE

..... Respondent

Through : Ms.Aashaa Tiwari, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

HON'BLE MR. JUSTICE C.HARI SHANKAR

S.P GARG, J.

1. Challenge in this appeal is a judgment dated 09.05.2013 of learned Additional Sessions Judge in Sessions Case No.56/2011 arising out of FIR No.77/11 registered at Police Station Bharat Nagar by which the appellant-Kalimullah was held guilty for committing offences punishable under Sections 302/201 IPC and Section 23 read with Section 26 of Juvenile Justice (Care and Protection of Children) Act, 2000. By an order dated 30.05.2013, the appellant was sentenced to undergo Rigorous Imprisonment for life with fine ₹1,00,000/- under Section 302 IPC; Rigorous Imprisonment for three years with fine

₹2,000/- under Section 201 IPC and Rigorous Imprisonment for three years with fine ₹5,000/- under Section 23 read with Section 26 of Juvenile Justice (Care and Protection of Children) Act, 2000. All the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that DD No.27A came to be recorded on 16.04.2011 at 6:43 PM at Police Station Bharat Nagar to the effect that 15-20 individuals of F Block JJ Colony, Wazirpur had brought dead body of a child aged about 10-11 years, having injury marks, at Kabristaan, Kewal Park, Azadpur, Delhi. The investigation was assigned to SI Deepak Dahiya who along with Ct.Devender, ASI Durga Prashad, ASI Shashi Kumar and others reached F Block, JJ Colony, Wazirpur. From there he came to know that the body of the child had been taken to Kabristaan Kewal Park from House No.F-280, JJ Colony, Wazirpur. The investigation was taken over by PW-42 (Inspector Ashok Kumar). On inspection of the body, he noticed various injuries on it. PW-25 (Rahis Khan), present at the spot, informed that the body was brought from F Block, JJ Colony, Wazirpur for its burial by 15/20 persons. Mohd. Khalilullah (since convicted), Mohd.Moti-ur-Rehman and Chamman Ahmed were present there. On inquiry, Mohd. Khalilullah informed that the body was that of the child Moim @ Chotu who worked with his elder brother Mohd.Kalimullah (the appellant) to make bindis; he also lived there. He further informed that on 16.04.2011 at about 3.00 p.m. when he had gone to see the appellant at F-280, JJ Colony, Wazirpur, he saw the dead body of a child and brought it to the graveyard at Kewal Park. The Investigating Officer along with staff went to F-280, ground floor, JJ

Colony, Wazirpur along with Mohd.Khalilullah. The crime team was called; scene of the crime was photographed; the Investigating Officer prepared the rukka (Ex.PW42/A) and lodged the FIR. Necessary proceedings were conducted at the spot; various articles lying therein were recovered. The body was sent for post-mortem examination.

3. During investigation, Rajav Ali, a child worker kept in the house of Shabbir Ahmad (since convicted), was recovered from there in the presence of his wife Farida. Juvenile Welfare Officer was informed; he recorded Rajav Ali's statement and after his medical examination; the child was sent to Child Welfare Committee and from there to Mukti Ashram.

4. On 20.04.2011, the Investigating Officer received information that other children were kept at Bhalaswa at Gaffur's house. Two children, Sayeed Ansari and Nasim (who was deaf and dumb) were recovered from there. Sayeed Ansari informed that the appellant used to give beatings to the children for getting the work done from them. Statement of child Sayeed Ansari was recorded. At his instance, weapons of offence were recovered from appellant's house and seized vide seizure memo Ex.41/B. Both the children were medically examined and sent to Mukti Ashram after producing them before Child Welfare Committee.

5. On 21.04.2011, the appellant was arrested from Inderlok Metro Station. Pursuant to his disclosure statement (Ex.PW-41/F), certain recoveries were effected from his house. Statements of witnesses conversant with the facts were recorded. Mohd.Khalilullah, Md.Shabbir and Md.Haseeb were also arrested; they were interrogated

and their disclosure statements (Ex.PW41/M, Ex.PW41/N and Ex.PW41/O) were recorded. Rajav Ali and Sayeed Ansari recorded their statements under Section 164 Cr.P.C. During investigation, the post-mortem examination report was collected. The weapons of offence were sent to the examining doctor to seek opinion if injuries sustained by the victim were possible with the said crime weapons. Upon completion of investigation a charge-sheet was filed against the appellant- Kalimullah and co-convicts Khalilullah, Shabbir and Abdul Haseeb in the court for committing various offences. The prosecution in order to establish its case examined 42 witnesses and relied on several documents. In their 313 statement, the appellant and co-convicts denied their involvement in the crime and pleaded false implication. After considering the contentions of the learned counsel for the appellant and the other co-convicts and on appreciation of the evidence adduced by the prosecution, the learned Trial Court by the detailed impugned judgment, held the appellant guilty for the offences mentioned previously. The appellant was, however, acquitted of the charges under Sections 377 IPC and Section 16 of Bonded Labour System (Abolition) Act, 1976. It is pertinent to note that the prosecution did not challenge the appellant's acquittal under those offences. It is apt to note that co-convicts Khalilullah, Mohd.Shabir and Abdul Haseeb were held guilty for the offence under Sections 201/34 IPC only. Being aggrieved and dissatisfied, the appellant has filed the instant appeal.

6. We have heard the learned counsel for the parties and have scrutinized the evidence on record minutely.

7. Homicidal death of the child Moim @ Chotu, aged around 10/11 years is not in dispute. On 16.04.2011, his dead body was taken to graveyard in haste for burial. PW-25 (Rahis Khan), a consultant with Intazimia Committee, Muslim Kadimi Kabristan, Kewal Park Road, Azadpur, became suspicious and called the PCR. Before the PCR could arrive, the individuals who had brought the body fled the spot. The child had injury marks on the body. In the post-mortem examination report (Ex.PW15/A), after observing several injuries on the body, PW-15 (Dr.V.K.Jha) was of the opinion that cause of death was combined effect of hemorrhagic shock and asphyxia consequent to repeated blunt forced impact diverted upon the body. Post-mortem findings were consistent with repeated assault as evident from the injuries of different durations; time since death was opined approximately five days. The cause of death suggested by the expert was not challenged in the cross-examination. Apparently, it was a case of culpable homicide.

8. PW-24 is Nazma Khatoon, victim's mother. In her court statement, she informed that Shabir (who had his maternal uncle's residence at her native place) brought Moim to Delhi to educate and teach him. She however did not implicate the appellant or co-convicts for inflicting injuries to her son during his stay at Delhi. She rather informed that whenever she had conversation with Moim on phone, he always told her that he was 'well'. After coming to know from the villagers about Moim's death, she along with her mother-in-law came to Delhi to perform his last rites. She did not attribute any role, whatsoever, to any of the convicts for her son's death. Learned Addl.Public Prosecutor was permitted to put leading questions as the

witness was not providing complete details. She informed that her other son Nasim had also come to Delhi along with Moim; Nasim was deaf and dumb. She denied if both the children were brought by the appellant to educate and teach them at Delhi. She volunteered to add that it was Shabir who had brought them to Delhi. She further denied that during conversation with Moim, he had informed her that he was engaged in the work of making 'bindis' and that Kallimulah (the appellant) used to frequently thrash him. Again, she volunteered to state that he had informed that Shabir was keeping him well. Addl. Public Prosecutor after seeking court's permission, cross-examined the mother. In the cross-examination, she denied if the appellant was related to her. She emphatically stated that she even did not know him. When confronted with her statement Ex.PW24/PX1, she denied the contents recorded therein. She even declined to identify the appellant in the court.

9. No extraneous motive can be attributed to the mother to spare the appellant for the alleged crime. She being the victim's mother must be interested to bring the real offender to book, she is not expected to be won over by the appellant for any consideration. Needless to state, she completely exonerated the appellant.

10. PW-21 Khanija Khatoon, deposed that it was Shabir who had brought her grandson Rajav, aged around 8/9 years to Delhi to provide proper education. She also deposed that during her conversation with Rajav on telephone, he always informed her that he was being kept properly by Shabir. She came to Delhi on the call of Delhi Police after Moim's murder. Rajav was at Ibrahim Pur that time and when she saw him there, he had injury marks on his body. On enquiry from Rajav

about the injuries, he informed that it was the appellant who had given him beatings. In the cross-examination, she fairly admitted that the appellant was neither known nor related to her.

11. PW-21's deposition is in the nature of hearsay evidence; no injuries were inflicted on the person of Rajav or Moim in her presence. She did not implicate the appellant-Kalimullah for inflicting injuries to Moim. It is relevant to note that PW-22 (Rajav Ali) was medically examined vide MLC PW-13/B on 17.04.2011, PW-13 Dr. Neeraj Chaudhary informed that as per local examination, no fresh injuries were seen on his body. It is not, thus, clear as to when the alleged injuries were caused to Rajav and if so by whom.

12. The prosecution further examined another child PW-40 (Syed Ansari), aged around 11 years. At the time of his examination learned Presiding Officer observed that the witness was smelling tabacoo/gutkha. The child witness completely exonerated the appellant and did not assign any role, whatsoever, in causing victim's death. He was examined in question-answer form. In response to the questions put to him, he informed that he had come to Delhi alone to study; Shabir used to teach him at his house without charging any fee. Learned Addl. Public Prosecutor was permitted to put leading questions as the child did not disclose the complete facts. The witness denied to have made a statement under Section 161 Cr.P.C. (Ex.PW40/PX1) to the police. He denied if he used to work in the appellant's factory along with Boka, Moim and Kalim; he denied if the appellant used to get work done from them from 7:00-8:00 a.m. to 12:00-1:00 AM (midnight) and used to give beatings. He denied if the appellant had

given beatings with a hot iron rod on Rajav's hip or that the appellant used to give them beatings with stapler, iron rod and 'dal-gotni'. He further denied that on 15.04.2011, the appellant had beaten Moim tied his hands and feet with a rope and had hit his head against the wall several times as a result of which he became unconscious. He further denied if the appellant had hit Moim's chest with a 'sill-batta' as a result of which Moim expired at midnight. Learned Addl. Public Prosecutor sought court's permission to cross-examine the child as he was a hostile witness. In the cross examination, he denied if he was a tutored witness at Shabir's behest. He declined to identify the appellant to have any acquaintance with him.

13. In the cross-examination, PW-40 merely admitted the suggestion that Rajav had left the factory to go to Shabir due to fear of beatings by the appellant. He, however, did not testify if the appellant had given beatings to Rajav any time in his presence. The deposition of the child witness is of no benefit to the prosecution

14. Next comes the testimony of PW-22 (Rajav Ali), aged around nine years in question-answer form. In his court statement, he disclosed that after coming to Delhi along with Shabir, he stayed with him. He disclosed that only for few days, he had lived at the appellant's residence. Thereafter, he was made to flee after beating him. (Usne muje maar peet kar bhaga diya). Shabir had got him medically treated and he incurred lot of expenses for his treatment. In response to the question 'Tum kitni baar Delhi Aaye', the witness responded that he visited Delhi twice. During his first visit, the appellant did not give him beatings; he was beaten during the second visit. In answer to the

question ‘tum Kalimullah ke pass kya kaam karte the?’; the witness informed that ‘main Kalim ke pass bindi ka kaam karne ke liye aaya’. He further disclosed that the appellant used to give him ₹10/- and his brother used to give him ₹20/-. In response to the question ‘tumne Kalimulla ke yahhan kitne din kaam kiya?’ The witness stated that ‘maine uske yahan das din kaam kiya. Usne mujhe lohe se daga. Uske baad Shabir ne mera ilaj karaya’. He also disclosed that the appellant had inserted an iron pipe in his private part and he was unable to even walk; it was Shabir who took him to the toilet. To the question ‘tum ko wahan lal mirch bhi dali thi?’ The witness replied ‘Ji. Kalimullah ne dali thi. Again, he said ‘Shabir ne hi ilaj karaya tha’. The witness was specifically asked if he knew Moim and whether he lived with the appellant? The witness stated that after his departure, Moim was beaten. He, however, added that he (Moim) was not beaten in his presence.

15. In the cross-examination, the witness was confronted with statement (Ex.PX-3) under Section 161 Cr.P.C. where there were no mention that the appellant had caused any injuries to him with a hot iron rod or had put red chillies. When specifically asked as to what was inflicted on his head; the witness disclosed that it was patri” (wooden plank). He was confronted with his statement Ex.PX-3 where there was no mention if the appellant had hit him on his head. He further admitted that the police had conversation with them outside the court and had informed as to what was to be stated in the court. He denied the suggestion that the appellant had not beaten him.

16. On scrutinizing the testimony of the child witness, it emerges that he did not attribute any role to the appellant in causing injuries to

Moim. The witness was evasive to respond if Moim used to live with the appellant. His testimony reveals that he was given beatings at some stage by the appellant. It has, however, not come on record as to when the beatings were given. It is unclear if any complaint was lodged by the child or his parents or maternal uncle Shabir who had got him medically treated against the appellant. No medical record of the child's treatment has been produced on record. The victim's grandmother PW Khanija Khatoon (PW-21) did not corroborate his statement if any information was ever conveyed by her grandson about the beatings given by the appellant to him. As observed above, at the time of medical examination on 17.04.2011, the child Rajav Ali did not have any fresh injury on his body. The child informed about his visits twice to Delhi and no beatings were given to him during his first visit. Again, it is not clear as to what was the duration of his first visit and what was at the time of second visit. No charge for inflicting injuries to PW-22 (Rajav Ali) was framed in the present proceedings.

17. No other witness, whatsoever, has been examined to connect the appellant with the victim's murder. The allegations that the appellant committed carnal intercourse with the victim remained unsubstantiated and it resulted in appellant's acquittal under Section 377 IPC.

18. The prosecution examined several witnesses to prove that the appellant was guilty of commission of offence under Section 201 IPC for causing disappearance of evidence with an intention of screening the offence from legal punishment. Again, the evidence adduced on this aspect is highly deficient and no positive evidence has emerged to infer if any overt act was done by the appellant in causing

disappearance of the evidence. PW-25 (Rahis Khan), who had suspected something foul with the body of the child brought at the graveyard by a group of 20/22 persons on 16.04.2011 informed the PCR. He, however, did not depose as to who were the individuals who had brought the body of the child to the graveyard or if the appellant was one of them. PW-26 (Rahis Ahmed), appellant's landlord, had let out the ground floor of house No.F-280 to the appellant about 4/5 months prior to the occurrence. He was, however, unable to give details of the family members or the children who lived with him. He did not implicate the appellant for any crime stating that on 16.04.2011 he had gone to secure the admission for his son in a school and was not aware of the incident. In the cross-examination by the learned Addl.Public Prosecutor, he denied the contents of the statement (Ex.PW-26-PX1) to have been recorded by him before the police. He categorically denied if in the night intervening 15/16.04.2011 at about 1:00 am (midnight), while returning from the house of his relative, when he reached House No.280; after hearing hue and cries of a child; he knocked and inquired from the appellant. He further denied if he was informed by the appellant that one of the children had become ill and he was being treated by him in spiritual manner. He denied if the appellant did not open the door and he went to his house. He further denied if on the said day at around 3-3:30 p.m. many public persons had gathered in front of the appellant's house and when he enquired from the co-convict Khallillulah, he responded that the child who was ill had expired. He further informed that the appellant had gone to attend the morning prayers. He also denied if the appellant was among those who had

brought the body of the child to the graveyard. The witness even did not recognize co-convict Shabir and Abdul Hasid. Apparently, the testimony of this witness does not implicate the appellant in the crime.

19. The prosecution examined PW-30 (Mohd.Motiur Rehman) who had joined the procession to the graveyard on 16.04.2011. He deposed that Shabir and Hashim had informed him that a boy had expired; they asked him to arrange a vehicle. Thereafter, he made a call to a driver and vehicle make TATA came there; it was parked near the bus stop No.115. He did not claim if the appellant was present at the spot or that he had any conversation with him any time. He did not elaborate as to whom the telephone call was made; who was the driver and what was the number of the vehicle that arrived at the spot. With the court's permission leading questions were put to him. He denied if on 16.04.2011 at about 3:30-4 p.m. the co-convict Khallillulah informed him to that a child had died due to illness at the appellant's house. He further denied if he had gone to the appellant's house No.F-280, JJ colony and had seen the co-convict Khallillulah, Shabir and Mohd.Hasib, giving bath to the dead body or that when he entered the room, he became suspicious. He denied that at the burial ground co-convicts were in haste to burry the body. The witness even refused to identify the appellant and his brother co-convict Khallillulah; he, however identified Abdul Haseeb and Shabir. In the cross-examination, he denied the contents of the statement (Ex.PW-30/PX1) completely to have been given to the police. PW-31 (Chakkan Ahmed) in similar circumstances did not state any incriminating circumstance against the appellant.

On examining the testimonies of the above noted witnesses, it reveals that none of them has supported the prosecution in its entirety. They all have resiled from their statements recorded under Section 161 Cr.P.C. None of them has assigned any role whatsoever to the appellant in the crime. None of them saw the appellant in the victim's company before he met with death. Their evidence is of no consequence to base appellant's conviction either under Section 302 or 201 IPC.

20. We are now left with the statements of PW-32 (Balwan) and PW-33 (Kamlesh Kumar). Learned Addl.Public Prosecutor urged that from the statements of PWs 32 and 33 it is crystal clear that it was the appellant who had made a telephone call to arrange the vehicle used for transporting the body of the child to the graveyard. We do not think so. PW-33 (Kamlesh Kumar) in his court's statement informed that on 16.04.2011, his owner Balwan had asked him to take the vehicle bearing No.HR-60-0334 make Tempo/TATA 407, to Wazirpur, JJ Colony for taking a funeral procession to the burial ground at Azadpur; he reached at 115 bus stop, JJ Colony, Wazirpur at 4:30 p.m. and he took the coffin along with 15-20 persons to Azadpur Burial ground. After collecting hire charges, he came back to the office. PW-33's deposition does not reveal as to who had paid the hire charges; who had met the witness and who were the individuals present in the procession. PW-33 did not claim if the vehicle was taken to appellant's residence at F-280, JJ Colony, Wazirpur. This witness did not identify the appellant or co-convict in the court to be the individuals present at the time of transportation of the body to the graveyard. PW-32 (Balwan) merely

informed the court that on 16.04.2011, the appellant had sent a request to his 'office' seeking a vehicle at JJ Colony, Wazirpur for taking a funeral procession and the hire was fixed at ₹800/-. After about 3-4 p.m., he sent two vehicles at the given address; one vehicle was returned due to insufficient numbers of individuals to join the funeral and the vehicle bearing No. HR-60-0334 was retained. Kamlesh who drove the vehicle returned from the burial ground at about 6:00 p.m. Again, this witness was not categorical to inform if the appellant was acquainted with him or that he had contacted him to send any vehicle. He also did not clarify as to by what mode he had received the request from the appellant for the vehicle or as to which place it was to be sent. It is also unclear if the request was received personally or by some official in the office. The testimony of this witness is in contradiction to PW-30 (Mohd.Motiur Rehman)'s statement. As per his testimony, in response to a call to the driver for the vehicle, vehicle make TATA came and it was parked near the bus stop No.115. PW-30 (Mohd.Motiur Rehman) did not claim if the request for vehicle was made at the appellant's behest. No Call Details Record was collected during investigation to ascertain if the appellant was in touch with any individual at the relevant time and where was his location. No inference, whatsoever, can be drawn that it was the appellant who had arranged the vehicle for transportation of the body to the graveyard. No other incriminating circumstance has surfaced to point an accusing finger against the appellant.

21. The prosecution case is full of inconsistencies and contradictions. The evidence adduced to bring home the appellant's guilt is highly scanty; no credible evidence has been collected to prove and establish as to when the appellant had brought the victim or the other children from Bihar to Delhi; when he had employed any of them in a hazardous business or had exploited them. At no stage, the victim or the other children or their family members ever complained that the children were ill-treated/maltreated by the appellant or that they were being sexually assaulted or given beatings. No MLC has been produced to ascertain if any injuries were caused by the appellant to the victim or the other children. Contrary to that, children Sayeed Ansari, Rajav Ali and victim's elder brother were medically examined vide MLC's Ex.PW-13/A to Ex.PW-13/C on 20.04.2011, 17.04.2011 and 20.4.2011 respectively; they did not have any 'fresh' injuries on their bodies, as alleged. PW-14 (Dr.Deepak Chugh) ruled out any sexual assault on their person at the time of their medical examination on 25.04.2011 vide MLC Ex.PW14/A to Ex.PW-14/C. FSL report (Ex.PW42/L) is of no assistance to the prosecution. As per this report, blood could not be detected on Exhibit '1' (one dirty small sized shirt' recovered from the spot); Exhibit '6' (one iron pipe with rusty brownish stains described as 'Iron gas stove pipe'); Exhibit '7' (two wooden pieces described as 'pieces of Danda'); Exhibit 8 (one stapler) and Exhibit 9 (one small and one big piece of stone described as 'Sil and Batta'). Apparently, the crime weapons with whom the victim has allegedly inflicted injuries did not have any bloodstains. Semen could not be detected on Exhibit 3 i.e. one wet foul smelling cotton wool swab described as 'Anal swab'.

22. The appellant was not present at the graveyard till the sending of rukka (Ex.PW42/A) at 10.40 p.m. The Investigating Agency did not collect any document to show if the appellant was carrying on any business of 'bindi making' on 16.04.2011 and if so since when. It is also not clear as to how many workers were employed by the appellant and what kind of machinery was used therein. No books of accounts for the alleged business being carried out by the appellant were collected. No incriminating circumstance connecting the appellant with the crime has been proved beyond reasonable doubt. Gaftoor, from whose house two children were allegedly recovered, was not produced and examined. His complicity in the crime was not investigated. It is not clear as to who was in the victim's company soon before he suffered fatal injuries. Resultantly the appellant's conviction on the basis of mere suspicion, with no acceptable and legal evidence on record, cannot be sustained.

23. The appeal is, thus, allowed. The conviction and sentence recorded by the Trial Court are set aside. The appellant be released forthwith if not required to be detained in any other case.

24. Copy of this order be sent to the concerned Jail Superintendent for information and necessary action. Trial court record be sent back along with a copy of this order.

S.P.GARG, J.

C.HARI SHANKAR, J.

NOVEMBER 25, 2017/sa