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

+ **CRL.A. 342/2018 & CrI.M.(Bail) No. 488/2018**

KALIM SHEIKH

..... Appellant

Through: Mr. Madhav Khurana with
Ms. Aarushi Singh, Advocates

versus

STATE

..... Respondent

Through: Mr. Kewal Singh Ahuja,
Advocate for State

**CORAM:
JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA**

JUDGMENT

10.05.2018

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1. This is an appeal against the judgment dated 10th November 2017 passed by the learned Special Judge (NDPS)/Additional Sessions Judge in Sessions Case No.45003/2015 arising out of FIR No.35/2013 registered at Police Station ('PS') Khajuri Khas whereby the Appellant, Kalim Sheikh (A-1), was convicted for the offence under Sections 364 and 302 Indian Penal Code ('IPC'). This appeal also seeks to challenge the order on sentence dated 6th December 2017 whereby, for each of the offences committed under Sections 302 and 364 IPC, the Appellant was sentenced to imprisonment for life and a fine of Rs.5,000/ and in default of payment of fine, to undergo further rigorous imprisonment for six months. The sentences have been directed to run concurrently.

2. At the outset, it requires to be noticed that the Appellant was sent up for

trial along with co-accused, Raju @ Hira Lal (A-2), who was acquitted by the trial Court by the same impugned judgment dated 10th November 2017.

The charge

3. The charges framed qua both the accused were that in furtherance of their common intention, both of them kidnapped Shakeel, aged around fourteen months, on the morning of 19th January 2013 by taking him away from the lawful custody of his parents, Reema Bibi (PW-1) and Saleem Sheikh (PW-2), from their home at House No.134, Gali No.3, D-Block, Sri Ram Colony, Delhi in order that he may be murdered. They were further charged with, after having kidnapped him, murdering the victim by throwing him into a *nala*/drain underneath the bridge at Geeta Colony, Delhi and therefore, causing the victim to die due to asphyxia as a result of ante-mortem drowning. Thereby, the two accused were charged with having committed offences punishable under Section 363, 364 and 302 read with Section 34 IPC.

Background

4. PW-1 was initially married to A-1. Subsequently, she married the elder brother of A-1, Salim Sheikh (PW-2). The deceased child was born to PWs-1 and 2. According to PW-1, on 19th January 2013, at around 10 am, A-1 along with A-2 came to the house of PWs-1 and 2 when the child was also present. A-1 told PW-1 that he still loved her and insisted on her coming along with him. PW-1, however, declined to do so. PW-2, upon being informed by PW-1 about the advances made by A-1, chased away A-1 and A-2.

5. Thereafter, PW-2 left for his job as a rickshaw-puller. According to PW-1, the victim-child was at that time, sitting in the main courtyard of their house. At around 10:30 am, she went to the roof of the house to put some clothes out to dry. When she came downstairs after about ten minutes, she found the child missing. She thought he might have crawled away somewhere. When she was unable to locate the child, she called PW-2 on his phone. PWs- 1 and 2 then went to the house of A-1 in Shastri Park. They were unable to find A-1 there. They continued searching for A-1 and the child till around 4:30 pm the following day, i.e. 20th January 2013. Being unsuccessful in their search for their missing child, they lodged a report at PS Khajuri Khas. This was noted as DD No.30A and the suspected involvement of A-1 in the crime was mentioned therein.

Investigation and retrieval of body

6. The Station House Officer ('SHO') of PS Khajuri Khas, Inspector J.S. Mehta (PW-18), marked the investigation of this case to Assistant Sub-Inspector Gopal Dass (PW-10) who immediately got the photograph of the victim-child uploaded on the website of missing persons. PW-2 informed PW-10 that he suspected A-1 of being responsible for the kidnapping of the victim-child. He accompanied PW-10 to the residence of A-1 in Shastri Park but that place was found locked.

7. On 21st January 2013, PW-10 along with PW-2 and Head Constable Yashbir Singh (PW-8) again reached the house where A-1 stayed. He was found present in the room and upon being pointed out and identified by PW-2, PW-10 interrogated A-1. PW-10 deposed that A-1 did not provide a

satisfactory explanation as to the whereabouts of the missing child. He was arrested (Ex.PW-2/A) and searched (Ex.PW-2/B). A-1 was interrogated again after being brought back to PS Khajuri Khas. This time, he disclosed that he had thrown the victim-child into a *ganda nala* in Shantiban.

8. PW-10 brought these facts to the notice of PW-18 who himself took up the interrogation of A-1. A-1 then give a disclosure statement where *inter alia* he has stated that he along with the co-accused (A-2) visited the house of PWs- 1 and 2 and asked PW-1 to return with him. However, when the matter was not resolved, he states that he and the co-accused picked up the victim-child and took him away in a rickshaw which belonged to the co-accused. He goes on to state that, thereafter, they threw the victim-child into the *ganda nala*.

9. According to PW-10, A-1 then led the police team to the *ganda nala* at Shantiban and pointed out the spot where he had thrown the child. According to PW-10, the child was not visible from that spot. He deposed that the *ganda nala* was around 15 ft deep at that point. One private videographer, Ajay (PW-3), was called so as to record the entire process of recovery of the child's body. Constable Aas Mohammad (PW-13), with the help of a rope, climbed down into the *ganda nala* and found the body of the victim-child. PW-2 identified the body as that of his son. The child's body was then brought to the mortuary of GTB Hospital.

Post-mortem report

10. The post-mortem examination of the child was performed at GTB Hospital between 3:00 pm and 4:00 pm on 21st January 2013. The time since

death was estimated to be about 1 ½ days. The cause of death was determined to be “asphyxia as a result of ante-mortem drowning.”

Case of the defence

11. After the investigation was concluded, the charge sheet was filed by the prosecution. By an order dated 17th May 2013, the trial court framed the charges as noted hereinabove. Nineteen witnesses were examined on behalf of the prosecution.

12. In his statement under Section 313 Cr PC, A-1 denied the incriminating circumstances put to him. According to him, he was apprehended by the police on 20th January 2013 itself and was wrongly shown to be arrested on 21st January 2013. According to him, he has been falsely implicated in the case. His explanation was that he was called by PW-1 to the Khajuri Bus Stop on 16th December 2012. When he reached there, PW-1 purportedly told him that PW-2 used to beat her and her son. According to A-1, PW-1 asked him to take her to his house but he refused. He claimed that at that time, he had given her some money and she gave him a phone number. He further claims that on 13th January 2013, PW-1 had again called him to the same bus stop and informed him that she had been beaten by PW-2 and turned out of the house and asked him again to take her to his house.

13. A-1 went on to state that on 20th January 2013, he was again called by PW-1 to Shastri Park Traffic Signal Bus Stop but this time he was apprehended by the police at her instance and forced to sign some blank papers. According to him, on the morning of 21st January 2013, the police

tortured him so as to make him accompany them to a bridge in Geeta Colony. According to him, no dead body of the child was recovered by the police and he did not point out any place to the police. He concludes his statement by claiming that on 19th January 2013, he was with his parents and had taken his father to the hospital.

14. Fatima Bibi (DW-1), the mother of A-1, was examined on his behalf. She deposed that on 19th January 2013, she and A-1 had taken her husband, late Sheikh Habib, to Irwin Hospital for treatment. According to her, they had left for the hospital at 4:00 am and returned home at 7:00 pm. She states that A-1 was with her at the hospital for the entire duration. However, in the cross-examination by the learned APP, DW-1 stated that she had no document to substantiate the claim of her husband having been taken for treatment to Irwin Hospital. She claims that she has misplaced medical documents “while changing our room.”

Trial Court judgment

15. In the impugned judgment, the trial Court came to the following conclusions:

- (i) A-1's motive for committing the crime was his anger due to his advances being refused by PW-1. A-1 wanted to take revenge and, therefore, committed the crime.
- (ii) With A-2 having no motive to commit the crime, it was only A-1 who could be held responsible for the crime.
- (iii) Even at the stage of the registration of the FIR, PW-1 had expressed her suspicion about the crime having been committed by A-1. The

non-mention of the visit by A-1 to her house by PW-1 in the FIR was held by the trial Court to be non-fatal to the case of the prosecution, since the FIR was at the stage of commencement.

- (iv) As regards the delay in lodging the FIR, the trial Court was of the view that the delay has been properly explained particularly since the parents of the child were searching for them throughout the day on 19th January 2013 and for some time on the following day.
- (v) Finally, the trial Court noted that the homicidal killing of the child was proved by the prosecution. In the circumstances, the trial Court came to the conclusion that all the instances in the chain of circumstances stood proved beyond reasonable doubt and pointing unerringly to the guilt of A-1 and no one else.

Analysis and findings

16. This Court has heard the submissions of Mr. Madhav Khurana, learned counsel on behalf of the Appellant, and Mr. Kewal Singh Ahuja, learned APP on behalf of the State.

17. The present case is based on circumstantial evidence. Mr. Khurana has sought to point out the inconsistencies in the depositions of PWs- 1 and 2. In particular, he points out to the aspect of PW-1 calling PW-2 on his mobile phone to inform him that the child had gone missing. He also points out the seeming contradiction in the deposition of PW-1 wherein she claims, in her examination-in-chief, that she was alone at home and even the landlord and his children were not present but then, in her cross-examination, goes on to state that the son of the landlord had made the call to her husband.

18. It is true that PW-1 states in her cross-examination that she had a mobile phone whereas PW-2 states that she did not. However, the trial Court observed that PW-2 had confirmed that he received a call from PW-1. In the considered view of the Court, these discrepancies are not material enough to derail the case of the prosecution. The fact remains that PW-2 did receive a call from PW-1 about their child having gone missing.

19. Mr. Khurana then highlighted the inordinate delay in lodging the FIR. According to him, although the child went missing at around 10:30 am on 19th January 2013, it was not until 4:30 pm the following day that the FIR was registered. This, according to him, is very unnatural. He argues that the parents of a fourteen month old child would not wait for more than 24 hours to lodge an FIR. According to him, this inordinate delay has not been satisfactorily explained by the prosecution.

20. From the testimonies of PWs-1 and 2, it is apparent that both of them suspected that it was perhaps A-1 who had taken the child away. A-1 is the younger brother of PW-2 and immediately prior to the child going missing, there was an unpleasant situation in their house with A-1 coming there and demanding that PW-1 should come back to him. Since they are so closely related, it is possible that they must have proceeded on the basis that they would be able to trace A-1 and convince him to return the child. It is only when their personal efforts in tracing the child were unsuccessful and they could not locate A-1 that they felt that they had to go to the police. Two persons may react differently in a particular situation. In this particular case, when

the main suspect happens to be so closely related to both PWs-1 and 2, their circumspection about immediately going to the police appears to be understandable. The Court is inclined to concur with the trial Court that in the facts and circumstances, it cannot be said that the delay in getting the FIR registered was not satisfactorily explained.

21. Mr. Khurana then pointed out that an important link in the chain of circumstances was the motive. While there is no other mention of a quarrel having taken place in the house of PW-2 in the morning of 19th January 2013 with A-1 as spoken to by PWs-1 and 2, only Marium Begum (PW-9) states in her deposition in Court that she heard a quarrel taking place in the house of PW-1.

22. It must be noticed that even PW-1 mentions that PW-2 “chased out A-1 and A-2 away from the house.” Clearly, that implies that there was a disagreement between them with PW-2 feeling compelled to chase out his own brother. PW-9 in her own words stated that, “Both of them (A-1 and A-2) picked up a quarrel with Saleem and Reema and both accused had indulged in calling abuses in that quarrel. After a while both accused then left the house and Saleem also proceeded for his place of work.” The Court is not able to find any serious contradiction in these versions. It is clear that shortly prior to the child having gone missing, there was a heated exchange of words between A-1 on the one hand and PWs- 1 and 2 on the other hand.

23. The alternative theory put forth by A-1 was unable to be substantiated. Even his attempt to establish the plea of alibi by examining his mother as DW-1 was not successful. She was unable to produce any substantiating

evidence of her late husband having been accompanied by her son (A-1) and her to Irwin Hospital.

24. Consequently, the prosecution was able to prove both the motive for the commission of the crime and the presence of A-1 in the house of PWs- 1 and 2 where the child was last seen, immediately prior to the child having gone missing.

25. The next link of the chain of the circumstances which is proved conclusively by the prosecution is the recovery of the dead body of the child from the spot where he was thrown into a 15 ft deep *ganda nala*. The entire sequence of A-1 taking the police to the spot, him pointing out where he had thrown the child, and PW-13 climbing down into the *nala* to recover the body has been recorded by PW-3 on video. This evidence, in the view of this Court, remains unshaken.

26. It is stated by Mr. Khurana that two of the police witnesses, namely Constable Shiv Dutt (PW-7) and Constable Sanjay Kumar (PW-6) raised doubts as to the presence of A-2 at the time of recovery. This doubt that these two witnesses may have created about the presence of A-2 does not really help the case of A-1 since both these witnesses clearly speak about the presence of A-1 and his pointing out the spot for recovery of the dead body pursuant to his disclosure. Apart from these two police witnesses, there were four other witnesses to the recovery, none of whose testimonies has been shaken. Two of them were public witnesses, i.e. Saleem Sheikh (PW-2) and Mohammad Salim (PW-5). In the circumstances, the recovery of the body of the child from 15 ft deep *ganda nala* on the pointing out of A-1 was proved

beyond reasonable doubt by the prosecution. This was perhaps the clinching circumstance.

27. The Court finds no error having been committed by the trial court in coming to the conclusion that all the links in the chain of circumstances qua A-1 have been proved by the prosecution and that the only conclusion that can be drawn is that A-1 and A-1 alone kidnapped the child and then killed him by throwing into the *ganda nala*. The homicidal death of the child stands proved.

28. For the aforementioned reasons, the Court finds no ground for interference in the impugned judgement of the trial Court. The order on sentence also does not call for interference.

29. The appeal and the application are dismissed. The trial court record be returned forthwith together with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MAY 10, 2018

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