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IN THE HIGH COURT OF DELHI AT NEW DELHI

R-11

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CRL.A. 140/2014

MOHD. JAMAL

..... Appellant

Through: Mr. A.J. Bhambani, Senior Advocate
with Ms. Inderjeet Sidhu, Advocate
(DHCLSC).

versus

THE STATE

..... Respondent

Through: Ms. Kusum Dhalla, APP.

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

ORDER

28.02.2018

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Dr. S. Muralidhar, J.:

1. This appeal is directed against the impugned judgment dated 29th November 2013 passed by the learned Additional Sessions Judge-3/South District, Saket Courts, New Delhi (ASJ) in Sessions Case No.23 of 2013 arising out of FIR No.89 of 2010 registered at Police Station ('PS') Fatehpur Beri convicting the Appellant for the offence under Sections 302 and 201 IPC. This appeal is also directed against the order on sentence dated 30th November 2013 whereby for the offence under Section 302 IPC he was sentenced to undergo imprisonment for life with a fine of Rs. 5,000 and, in the event of non-payment of fine, to further undergo simple imprisonment ('SI') for a period of one year. By the same order, for the offence under Section 201 IPC, he was sentenced to undergo five years of rigorous imprisonment ('RI') with a fine of Rs. 2,000, and in default of payment

of fine, to undergo further SI for a period of six months.

2. At the outset, it requires to be noticed that the Appellant was also charged with the offence under Section 363 IPC but has been acquitted by the trial Court of that offence. Although the FIR included Section 376 IPC, he was not charged for that offence.

Case of the prosecution

3. The deceased in this case, Shabnam, was aged 11 years at the time of death. She was the daughter of Hazra (PW-6) and Abdul Sattar (PW-5), both of whom are residents of Mandi Pahadi Village, Bapu Colony, Fatehpur Beri, New Delhi.

4. The case of the prosecution is that on the intervening night of 16th/17th May 2010, PW-5 came to PS Fatehpur Beri and lodged a complaint about the deceased having gone missing from his house since 6 pm on 16th May 2010. This was noted down as DD No.4A (Ex.PW-18/A and 1/A) and was marked to Assistant Sub Inspector (‘ASI’) Lal Singh (PW-1). In the said entry it was noted that a 11-year-old girl who was around 4 feet in height, fair coloured and round faced, wearing black *hawaii chappal* and yellow coloured *salwar* suit and who was studying in Class V had gone missing. PW-5 informed the police that his daughter was at home with his wife, Hazra (PW-6), at 4 pm. Thereafter, at 6 pm, they realized that their daughter was not to be found. Assuming that the child had left their home without informing them, they searched the neighbourhood but were unable to find her. PW-5 specifically stated that “*hame kissi par koi shaq shukwa nahi hai*”.

5. It appears that PW-1 went to the house of the complainant at 45-A, Bapu Camp, Mandi Pahadi, Delhi, prepared the *tehrir* (Ex.PW-1/A) and then dispatched it to the PS for registration of the FIR. He went back to the spot to record the statements of both PWs 5 and 6 under Section 161 Cr PC (neither of which have been exhibited). PWs 5 and 6 stated that they suspected one Jamal @ Rafu who lived in the neighbourhood and took the child away at around 4 pm stating that he needed help with some iron (*loha*) lying in the jungle and that he would pay the deceased Rs. 20. This was the initial statement of PW-5 and also the first time the Appellant's name figured. Nevertheless, at that stage, the police do not appear to have taken any steps which is strange considering that the Appellant is a resident of the same area.

6. According to PW-5, on 19th May 2010, he came to know through certain public persons that the body of a child was lying in the ridge area of Mandi Pahadi. In the morning, at 8.45 am on 19th May 2010, Inspector A.K. Singh (PW-16) was informed of this development. He reached the spot where the dead body of the child was found. When he arrived there, PSI Amit, HC Mahavir (PW-8) and Ct. Dinesh had already reached. The dead body was in a highly decomposed state. PW-5 was already present and he identified it to be that of his daughter, Shabnam.

7. Since FIR No. 89 of 2010 had already been registered under Section 363 IPC, Inspector A K. Singh (PW-16) took up the investigation. With his own digital camera, he took some photographs (Ex.PW-16/P1 to P5) and also prepared a rough site plan (Ex.PW-16/A) of the location where the dead

body was found. From the spot, PW-16 lifted body fluid mixed with earth and hairs of the deceased in separate plastic containers. These were then sealed with the seal of 'AKS'. The dead body was shifted to All India Institute of Medical Sciences ('AIIMS').

Medical Evidence

8. The post-mortem of the deceased was performed by Dr. Akhilesh Raj (PW-13). In his post-mortem report dated 19th May 2010 (Ex.PW-13/A) he *inter alia* noticed that the body was in an advanced stage of decomposition. He noted that a foul smell was emanating from the body and there were maggots distributed all over the body. He noticed that a *salwar* and a *kurta* were present on the body and skeletisation of skull was present. The right leg below the knee was missing. The left leg below the knee was also missing but fibia was found attached to the knee joint. Both hands were missing. Numerous maggots were present over the anterior neck, vagina and anus. There were 11 teeth in the upper jaw and 6 teeth in the lower jaw and 15 teeth were loosely attached to the sockets. There was extravasation of blood into the subcutaneous tissues of the lateral aspects of the neck and also into inter-muscular planes and muscles. It is also noticed that the hyoid bone was found to be fractured. A bruise of size 6 x 4 cm was present over middle back, 3 cm right of midline, 17 cm above right iliac crest. A bruise of size 10 x 7 cm was present in the middle back, 2 cm lateral to midline towards left side and 15 cm above left iliac crest. No external injuries are applicable. Right fibia and fibula and left fibula are separately present.

9. The time since death was noted as three days. Among the swabs taken

were vaginal swab, anal swab, control swab, sternum for DNA and blood in gauze. The opinion as to the cause of death was asphyxia due to throttling. The viscera was preserved to rule out any intoxication. The possibility of sexual assault could not be commented upon till the results of the vaginal and anal swabs were known.

Arrest of the Appellant and subsequent recoveries

10. On 21st May 2010, Inspector Vijender Jain (PW-15), who was the Station House Officer ('SHO') of PS Fatehpuri Beri took over the investigation of the case. He received information that the Appellant might be present at the Mandi bus stand. Accompanied by Head Constable ('HC') Mahavir (PW-8) and Ct. Prem, he reached the bus stand and at the instance of the informer, apprehended the Appellant. His disclosure statement (Ex.PW-8/E2) was recorded. In the said disclosure statement, *inter alia*, the Appellant offered to get recovered a slipper of the deceased, the water bottle which the deceased had brought with her and his own underwear which had the blood stains of the deceased which he had thrown away in the jungle.

11. According to PW-15, the Appellant first took them to his own house at 57, Bapu Camp, Mandi and got recovered a yellow colour shirt of check design which he purportedly was wearing at the time of the incident. The shirt was purportedly having human hairs on it. The shirt was then kept in the *pulanda* and sealed with the seal of 'VJ' and seized under memo Ex.PW-8/F.

12. The Appellant then took the police to the jungle area of Mandi Pahadi

from where he purportedly got recovered “one pair of *hawai chappal* make Relaxo” which were of the deceased. The Appellant also supposedly pointed out another place at Mandi Pahadi and got recovered from near a bush one small ear-ring of orange colour having some hair on it belonging to the deceased. After his medical examination was undertaken, the Appellant apparently again took the police to the area of Mandi Pahadi and from near the bushes got recovered the underwear which he was wearing at the time of the incident.

S. 164 Cr PC statement of PW-6

13. On 12th August 2010, the statement of PW-6, the mother of the victim, was recorded before the learned Metropolitan Magistrate (‘MM’) under Section 164 Cr PC. In the said statement (Ex.PW-14/F), PW-6 stated as under:

“On 16th of May of this very year, I had taken some medicines and gone to sleep. At around 3 or 4 p.m. my daughter Shabnam woke me up and informed me that Rafu had asked her to take some water and come to the pit because there was some iron belonging to him which was lying there and that he was calling the kabadiwala to that very spot to dispose of that iron and he would pay her Rs.20/-. I do not know what happened thereafter.”

14. Thereafter, the charge-sheet was filed on 16th August 2010 against the Appellant for the offences under Sections 302/376/363 and 201 IPC. As already noticed earlier, when charges were framed against the Appellant by the order dated 8th August 2011, there was no charge framed under Section 376 IPC. He was, however, charged with the offences under Sections 363/

302 and 201 IPC.

Forensic evidence

15. While the trial was in progress, the results of the Forensic Science Laboratory ('FSL') were made available. The DNA Fingerprinting Unit sent its report dated 15th March 2011 stating, *inter alia*, that DNA could not be isolated from Ex.3 which was one ear-ring having some filamentous material type of hair. Further, a DNA profile could not be generated even from the shirt seized from the Appellant which appears to have long filamentous material like hair attached to its buttons.

16. As far as the Biology Division of the FSL was concerned, in its report dated 11th July 2011, it found no reaction as far as semen stains on the Appellant's own underwear was concerned. In the report of the same date, the semen stains could not be detected on control swab of the deceased (Ex.P-1), the vaginal swab of the deceased (Ex.P-2), the anal swab of the deceased (Ex.P-3) or the Penile Swab of the Appellant (Ex.R-2). This perhaps was the reason why no charge for the offence under Section 376 IPC was framed against the Appellant by the order dated 8th August 2011.

17. Eighteen witnesses were examined by the prosecution. In his statement under Section 313 Cr PC, the Appellant denied the circumstances put to him by the prosecution and stated that he has been falsely implicated in this case.

Impugned judgment of the trial Court

18. In the impugned judgment, dated 29th November 2013, the learned trial

Court came to the following conclusions:

- (i) The argument that PW-6 herself did not see the accused and the deceased going together and what was told to her by the deceased was nothing but hearsay, was without substance. PW-6 was present in the house when the deceased left the house and there was no time gap in the “narration of the act of her going by her daughter to her”. Since the fact was conveyed by the daughter herself and not by anyone else, the deposition of PW-6 was considered to be in the “nature of *res gestae* which is very much admissible in law by virtue of Section 6 of the Evidence Act”.
- (ii) There was no delay in the registration of the FIR.
- (iii) Non-joining of an independent public witness in the recovery of the dead body did not cast any doubt on the prosecution story.
- (iv) The evidence of PWs 4 and 5 as regards identification of the dead body was believable.
- (v) The argument that there was a considerable time gap in the recovery of the dead body and the girl having gone missing and the possibilities of any other person, other than accused, being the author of the crime was without substance. The mere delay in holding the TIP on 12th July 2010, forty days after the recovery of the *chappal* on 22nd May 2010, was not fatal to the prosecution case since the prosecution case otherwise stood on firm ground.

- (vi) The recovery of the articles upon the disclosure statement given by the Appellant were believable and admissible under Section 27 of the Indian Evidence Act ('IEA').
- (vii) The offence under Section 363 IPC was not made out as there was no evidence to show that the deceased was taken away from the guardianship of her mother without the consent of the mother. However, the guilt of the Appellant for the offences under Sections 201 and 302 IPC was proved beyond reasonable doubt.

19. This Court has heard the submissions of Mr. A.J. Bhambani, learned Senior counsel and Ms. Inderjeet Sidhu, learned counsel for the Appellant. Ms. Kusum Dhalla, learned APP, has presented arguments on behalf of the State.

Law relating to circumstantial evidence

20. This is a case based on circumstantial evidence. The law in relation to circumstantial evidence is fairly well-settled. In ***Jawahar Lal Dass v. State of Orissa (1991) 3 SCC 27***, the Supreme Court set out three conditions that required to be satisfied in a case of circumstantial evidence as under:

- “(i) the circumstances from which an offence of guilt is sought to be drawn must be cogently and firmly established;
- (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.
- (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else, and it

should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.”

21. In *Hanumant v. State of MP AIR 1952 SC 343*, the Supreme Court cautioned as under:

“In dealing with circumstantial evidence, there is always the danger that conjecture or suspicion may take the place of legal proof. It is therefore right to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency, and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

22. In the same judgment, the Court referred to the warning issued by Baron Alderson to the jury in *Reg v. Hodge (1838) 2 Lew. 227*, where he said:

“The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to apply some little link that is wanting to take for granted some fact consistent with its previous theories and necessary to render them complete.”

23. The Court further observed in para 9 of the decision in *Jawahar Lal Dass v. State of Orissa (supra)* as under:-

“It may not be necessary to refer to other decisions of this Court except to bear in mind a caution that in cases depending largely upon circumstantial evidence there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion howsoever strong cannot be allowed to take the place of proof. The court has to be watchful and ensure that conjectures and suspicions do not take the place of legal proof. The court must satisfy itself that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. Bearing these principles in mind we shall now consider the reasoning of the courts below in coming to the conclusion that the accused alone has committed the offence.”

Evidence of ‘last seen’ not proved

24. The first circumstance that has been relied upon by the prosecution in the present case is that the deceased proceeded with the accused upon his asking and she conveyed this to her mother at around 4 pm on 16th May 2010.

25. In order to prove the circumstance, reliance is placed on the evidence of PW-6 herself. It is already noted that at the very first instance when the complaint was lodged with the police by the father of the deceased, i.e. PW-5, at 12:10 am on 17th May 2010, he specifically stated that he did not suspect anyone being involved behind his daughter going missing. What is also significant is that in that statement he states that his daughter left home without informing anyone.

26. While deposing in the Court PW-6 stated:

“my neighbour namely Rafu whose real name I do not remember, had taken my daughter to the mines area on the

pretext that his iron articles were lying and he would bring a rickshaw and stated that he would give her Rs.20/- and he required water.”

27. She then stated that her daughter had taken water in a bottle “and she informed me that she was going with Rafu, who was present in the Court today”. From this it would appear as if the Appellant had, in the presence of PW-6, taken the deceased along with him to help bring the iron lying in the mine area.

28. However, as already noted, in the statement of PW-6 first recorded when ASI Lal Singh, i.e. PW-1, went to their house after receiving the complaint, PW-6 is supposed to have stated that the accused came to the house and informed her that he was taking the child away to help him with some iron belonging to him which is lying in the jungle and that he would pay her Rs.20/- for that. However, this is not what PW-6 stated before the MM when her statement was recorded under Section 164 Cr PC. That statement (Ex.PW-2/B) has already been extracted hereinbefore. In that statement all she says is that her daughter came to wake her up when she was sleeping at around 4 pm and told her that she had been asked by the Appellant to come to the ridge area where his iron was lying and that after disposing it all to a *kabadiwala* whom he had called there, he would pay her Rs. 20. There was a considerable difference between the statement made to the police in the first instance by PW-6 and what she told the MM under Section 164 Cr PC. In other words, she did not herself see the Appellant going away with the deceased. This, therefore, certainly cannot be considered to be ‘last seen’ evidence.

29. The trial Court appears to have been conscious that the above evidence of PW-6 was in the nature of 'hearsay' but has strained itself in reading the evidence so as to somehow bring it under Section 6 IEA and held that it was in the nature of '*res gestae*', i.e. forming part of the same transaction. This Court is unable to agree with the trial Court. There is no clarity whether PW-6 was in fact aware that the child had gone away with the Appellant. In her statement under Section 164 Cr PC, recorded nearly three months after the incident, she makes it appear that the child came and told her about having been called by the Appellant to a certain spot. These two disjunctive statements cannot be said to be the part of 'the same transaction'. It is not possible to infer from the subsequent statement under Section 164 Cr PC that the child was seen actually going away with the Appellant from her house. Needless to say, there is a considerable difference between going along with the Appellant and being asked by the Appellant to reach a particular spot where he would also reach. The long and short of the above discussion is that PW-6 cannot be stated to be a witness to the circumstance to the 'last seen'.

30. In any event, the last seen evidence by itself cannot be a strong circumstance to draw the conclusion about the guilt of an accused. In ***Nizam v. State of Rajasthan AIR 2015 SC 3430***:

"Undoubtedly, "last seen theory" is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well-settled by this Court that it is not prudent to base the conviction solely on "last seen theory".

"Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen."

31. The mere circumstance of last seen cannot be used to arrive at a conclusion as to the guilt of an accused person, particularly when there is a time gap between when the person was last seen and when the dead body of such person was discovered. Secondly, when the place where the deceased was last seen with the accused is different from the place where the body of the deceased was found, that again weakens the circumstance of 'last seen'. In the present case, as has already been noticed, there is no clear and cogent evidence that the deceased was last seen with the accused outside her own house. Secondly, a dead body was found more than three days after she went missing and at a considerable distance from her house. Therefore, in the present case, the above circumstance of last seen cannot be said to have been conclusively proved by the prosecution.

Appellant's subsequent conduct

32. As far as the circumstance of the Appellant absconding after the incident, it is seen that he is a resident of the same area and the only evidence that has come forth is that as a result of some information passed on by a secret informer, the police apprehended him at the Mandi bus stop, which is again in the same area itself. The Court is therefore, not convinced that the Appellant tried to run away after the incident as is sought to be projected by the prosecution.

33. It was submitted by the learned APP that it was incumbent upon the

Appellant to have explained under Section 313 Cr PC as to where he was in the interregnum. It is only if the Appellant is going to plead alibi that there would be a burden on him to explain his whereabouts in the interregnum. However, in the present case, the Appellant is not pleading alibi at all. It is seen that he was in fact arrested from the very same area where he ordinarily resides.

Recovery unhelpful to the prosecution

34. The next important circumstance that is relied upon by the prosecution is the disclosure statement made by the Appellant leading to the recovery of four articles: (i) the ear ring of the deceased; (ii) the *chappal* of the deceased; (iii) the underwear of the accused; and (iv) the shirt of the accused.

35. As regards the recovery of the shirt, as already noticed, it was recovered from the Appellant's house and was not therefore secreted away. The attempt at showing that the human hair found on his shirt belonged to the deceased failed as the FSL report was unable to substantiate this.

36. Even the recovery of the semen-stained underwear of the Appellant from somewhere in the ridge area does not really connect the Appellant to the crime. It was unable to be shown by the forensic evidence that there was anything on that underwear which connected him with the deceased.

37. As regards the recovery of the ear ring and a *chappal*, there was no separate site plan drawn up to show the exact area from where these two articles were recovered. Even if this Court were to accept that in the TIP

conducted for these articles more than forty days after the recovery, they were identified correctly by PW-5, the fact remains that unless these two articles were recovered from a place not already visited by the police prior to 22nd May 2010 (when they were actually recovered), this recovery would lose all meaning. It is for this purpose that it was essential for the police to have drawn up a site plan for the recovery of these two articles.

38. The medical evidence in this case shows that the body was severely decomposed and that the arms and legs of the deceased were missing. It should also be remembered that this was a jungle area inhabited by animals and the possibility of the parts of the body being eaten away by the animals could not be ruled out. In that eventuality, finding a *chappal* of the deceased from the same area from where the dead body lay cannot be considered to be an incriminating circumstance vis-a-vis the Appellant. Even as regards the discovery of the ear ring, it was again in an open area and under the bushes and in the same area where the dead body lay. No DNA profile could be generated using the human hair attached to the ear-ring that could connect the Appellant to this crime. Therefore, this recovery also cannot be said to be incriminating vis-a-vis the Appellant.

Possibility of non-homicidal death not ruled out

39. The next circumstance put forth by the prosecution is that the death was said to be homicidal and by throttling of the deceased.

40. The Court has carefully perused the photographs taken of the dead body when it was discovered and also carefully perused the post mortem report. It does appear that the head itself was only in a skeletonised form. It appears

that there were bruises noticed by the Doctors conducting the post mortem. The possibility of the death being caused as a result of attack by wild animals is not totally ruled out by the medical evidence. In other words, the medical evidence does not lend assurance to the Court that the death was only homicidal by human intervention and not in any other manner. So, even the manner of the death of the deceased as described by the prosecution cannot be said to have been proved.

Conclusion

41. In ***Kishore Chand v. State of Himachal Pradesh (1991) 1 SCC 286***, the Supreme Court explained as under:-

“4. ... In a case of circumstantial evidence, all the circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established. All the facts so established should be consistent only with the hypothesis of the guilt of the accused. The proved circumstances should be of a conclusive nature and definite tendency, unerringly pointing towards the guilt of the accused. They should be such as to exclude every hypothesis but the one proposed to be proved. The circumstances must be satisfactorily established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt. It is not necessary that each circumstance be itself be conclusive but cumulative must form unbroken chain of events leading to the proof of the guilt of the accused. If those circumstances or some of them can be explained by any of the reasonable hypothesis then the accused must have the benefit of that hypothesis.

5. In assessing the evidence imaginary possibilities have no role to play. What is to be considered are ordinary human probabilities. In other words when there is no direct witness to the commission of murder and the case rests entirely on circumstantial evidence, the circumstances relied on must be

fully established. The chain of events furnished by the circumstances should be so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused. If any of the circumstances proved in a case are consistent with the innocence of the accused or the chain of the continuity of the circumstances is broken, the accused is entitled to the benefit of the doubt.”

42. The Court in the above decision also emphasised that there is a long distance between ‘may be true’ and ‘must be true’. In that regards, it opined as follows:

“There is a long distance between may be true and must be true. The prosecution has to travel all the way to establish fully all the chain of events which should be consistent only with hypothesis of the guilt of the accused and those circumstances should be of conclusive nature and tendency and they should be such as to exclude all hypothesis but the one proposed to be proved by the prosecution. In other words, there must be a chain of evidence so far consistent and complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that in all probability the act must have been done by the accused and the accused alone.”

43. In the present case, the prosecution has not successfully bridged that gap between ‘may be true’ and ‘must be true’. The Court is, therefore, not able to concur with the trial Court that the prosecution has been able to prove every link of the chain of the circumstances in a manner that the guilt of the Appellant, and the Appellant alone, stands established beyond reasonable doubt. The benefit of doubt ought to be granted to the Appellant.

44. Accordingly, the Court acquits the Appellant of the offences under Sections 302 and 201 IPC and sets aside the impugned judgement dated

29th November 2013 and the order on sentence dated 30th November 2013 passed by the trial Court.

45. The appeal is allowed. The Appellant shall be released forthwith unless wanted in some other case. The Appellant will comply with the requirements of Section 437A Cr PC to the satisfaction of the trial Court. The trial Court record be returned forthwith along with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

FEBRUARY 28, 2018

Rm/dc