

\$~1

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

CRL.A. 483/2017

ABHINAV ANAND @ BABBAL & ANR.

..... Appellants

Through: Mr.B.S.Rajesh Agrajit, Advocate with
Mr.Veer Singh, Ms.Dipti Singh,
Advocates.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Amit Chadha, APP for State.

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

JUDGMENT

%

21.05.2018

1. This is an appeal against the judgment dated 1st February, 2017 passed by the learned Special Judge (NDPS), North-East in Sessions case No.44916/2015 arising out of FIR No.281/2012 registered at Police Station ('PS') New Usmanpur convicting both the Appellants for the offences under Section 367 read with Section 34, Section 377 read with Section 34 and Section 302 and Section 34 of the Indian Penal Code ('IPC'). The appeal is also directed against the order on sentence dated 21st February 2017 whereby the trial Court sentenced each of the Appellants to rigorous imprisonment ('RI') for 10 years with a fine of Rs.5,000/-, and in default of payment of fine to undergo further RI for 1 year for the offence under Section 367 read with Section 34 and an identical sentence for the offence under Section 377 read with Section 34 IPC. Further, each of the Appellants was also sentenced to RI for life with a fine of Rs.10,000/-, and in default of

payment to undergo further RI for 1 year for the offence under Section 302 read with Section 34 IPC.

2. The charge against both the Appellants was that at around 7 pm on 22nd October 2012 from near 2nd Pushta, Sharab Ka Theka, Usmanpur both of them in furtherance of their common intention kidnapped Shafikul (aged about 10 years), S/o Sukuruddin (PW-7); voluntarily committed carnal intercourse against the order of nature and thereafter murdered him thereby committing the aforementioned offences.

3. An FIR was registered at PS Usmanpur at around 7:30 pm on 23rd October 2012 after PW-7 gave a statement that since around 7 pm on 22nd October 2012 his son (the deceased) aged 10 years had gone missing from home and that PW-7 stated that he had been searching for the boy without success. He suspected that some unknown persons had forcibly taken away his son. SI Rajender Kumar (PW-23) was assigned the investigation of the above FIR. He proceeded along with PW-7 to the spot, that is, outside the house of PW-7 from where the child had gone missing. PW-7 produced before PW-23 three children, that is, Jameer (aged 12 years) (PW-9), Joseph (aged 9 years) (PW-15) and Ishu (aged 7 years) (PW-16) who were playing with the deceased at the relevant time. PW-23 made inquiries from them and recorded their statements. According to the three children, the deceased was playing with them at the 2nd Pushta on 22nd October 2012 when two other older boys came there and took the deceased away with them promising to give him empty beer bottles (as scrap) and Rs.100/-. Thereafter efforts were made to trace the missing child but without success.

4. On 24th October 2012, PW-23 received information through DD No.14A in the morning hours at around 10 am that the dead body of a child was found lying near Machali Bazar, First Pushta, Yamuna Khadar, Delhi. Accompanied by SI Satbir Singh (PW-18) and Constable ('Ct.') Kulbir (PW-13), PW-23 reached the spot and found the dead body of a child in the bushes. It matched the description of the missing child. PW-23 then called PW-7 who came there and identified the dead body to be that of his son. The upper portion of the dead body was naked and the trousers were only up till the level of his knees. The left face of the dead body appeared to have been eaten by some wild animal. There were reddish marks on the chest and abdomen of the body indicating that the child had been severely beaten. There was blood under his head.

5. The crime team was called to the spot and photographs were taken. Exhibits were lifted from the spot. PW-23 found one blood stained piece of thermocol. Blood stained earth control, blood stained portion of concrete and one blood stained brick were lifted from the spot. These were seized and sealed. One shirt was lying at some distance from the dead body and was identified by PW-7 to be that of the deceased. This was also seized and sealed.

6. The post mortem of the deceased was performed by Dr. Arun Kumar (PW-10) at around 11:30 a.m. on 25th October 2012 at the GTB Hospital, Delhi. As many as 38 lacerated and abrasive wounds were found all over the body. The skull was found fractured, the brain congested. There were injuries to the anal opening extending up to the anal sphincter. Extravasation

of blood was present in the soft tissue. Time since death was indicated to be two and a half days prior to the post mortem. The cause of death was shock as a result of extensive craniocerebral damage. Injury to the anal region was 'suggestive of penetration by hard blunt object'. Injuries No.1 to 9 collectively were opined to be sufficient to cause death in the ordinary course of nature. Exhibits including swab and smear from the perianal, anal and anal canal of the deceased were taken. PW-10 was not subjected to any cross-examination.

7. PW-23 proceeded to record the statements of various witnesses. On 29th October 2012, Ct. Devender (PW-12) was patrolling his beat area and at about 9.30 pm when he reached at 1st Pushta service road, New Usmanpur, he noticed that a boy aged 19-20 years was standing there. The appearance of that boy matched the description given to PW-23 by PW-9, which had been circulated by the Station House Officer (SHO) of the PS. When PW-12 started making inquiries from that boy, he became perplexed and started trying to get away. He was immediately apprehended by PW-12, who through telephone then informed PW-23.

8. After reaching there, PW-23 made inquiries from the said boy, who disclosed his name as Abhinav Anand (A-1). His disclosure statement revealed to the police the name of the co-accused, that is, Phool Kumar (A-2). A search was made for A-2 but he could not be found. Thereafter, from the house of A-1, they were able to recover clothes worn by him at the time of the incident. These were seized and sealed.

9. As the police party along with the A-1 reached the 1st Pushta, there was a boy aged about 19-20 years standing in front of a Balmiki temple. A-1 pointed him out and identified the boy as A-2. A-2 started to run upon seeing the police but was immediately apprehended. His disclosure statement was recorded. Pursuant thereto, he took the police to his house and got recovered one shirt worn by him at the time of the incident. This was seized and sealed. Both accused persons were also medically examined.

10. In the meanwhile, statements under Section 164 Cr PC were recorded by Jameer (PW-9) and Joseph (PW-15). A test identification parade (TIP) was arranged but both the accused refused to proceed on the ground that they had already been shown to the witnesses in the PS prior thereto.

11. At the end of the investigation, a charge sheet was filed and by an order dated 15th July 2013 charges were framed against both the accused for the aforementioned offences.

12. On behalf of the prosecution, 27 witnesses were examined. In their respective statements under Section 313 Cr P C, both the accused denied the incriminating circumstances put to each of them. As far as A-1 is concerned, when asked whether he had anything else to say, he claimed to have been falsely implicated. The same was the stand of A-2 as well. According to him, the clothes shown as belonging to him were planted by the police. He claimed that nothing was recovered at his instance.

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

(i) It was proved through medical evidence that the death of the deceased was homicidal.

(ii) The testimony of PW-9 was consistent, cogent and truthful. Although specific questions were not put to PW-9 to test his capacity to give rational answers, the trial Court found that from his examination-in-chief as well as cross-examination, that he was a competent witness. At the time of his examination-in-chief, PW-9 was 13 years old. Consequently, his evidence could not be discarded only on the ground of his age.

(iii) PW-9 had correctly identified both the accused in the Court and clearly answered in the negative when asked in the cross-examination whether he was tutored by PW-7 to make a false statement against the accused persons.

(iv) PW-9 aged 13 years used to collect scrap. He might not have been able to correctly understand English characters and, therefore, his inability to recall the day, time and month of the incident was not surprising. The fact that his statement by the police was not recorded at the spot and instead was recorded at the PS would not be a variation strong enough to be considered a contradiction. Even confrontation of PW-9 with his statement under Section 164 Cr P C was minimal and did not shake the core of his testimony about the deceased being seen last in the company of both the accused. The failure to have his injury examined also was not surprising keeping in view the strata of society to which PW-9 belonged. PW-9 was truthful and reliable.

(v) PW-15 corroborated PW-9 on material aspects. He too was consistent and unable to be shaken in the cross-examination. He had fully corroborated PW-9 as regards the Appellants forcibly taking away the deceased.

(vi) The statement of PW-16 could not be recorded as the trial Court was of the view that he was unable to comprehend and understand the questions put to him on account of his young age. The defence was unable to attribute any enmity or motive for the police to falsely implicate them. Likewise, no previous enmity was attributed to PW-7, 9 and 15 not to disbelieve their evidence as not being objective or truthful.

(vii) The failure to hold TIP was not sufficient to doubt the identity of the accused persons. Although PWs-9 and 15 correctly identified the Appellants in the Court, a mere lapse of investigation in such a case was not sufficient to discard the case of the prosecution. Reliance was placed on the judgment of the Supreme Court in *C. Muniappan & Ors. v. State of Tamil Nadu, (2010) 9 SCC 567*.

(viii) The medical evidence proved that the death was homicidal.

(ix) The forensic evidence in the form of DNA finger printing report shows that the analysis of the blood stain on the shirt of the deceased (Ex.-10) were accounted for in the analysis from the blood stain on the shirt of A-1 (Ex.-12/A) and A-2 (Ex.-13). This also further clinched the case against A-1 and A-2.

(x) The medical evidence also showed injuries to the posterior anal wall of the deceased. The mere absence of semen of the accused persons was not conclusive piece of evidence. The dead body was found naked and trousers were pulled up to the level of knees. Consequently, the offence under Section 377 IPC was also held to be made out against both the accused.

14. The trial Court then proceeded to hold the Appellants guilty of the aforementioned offences and sentenced them in the manner indicated.

15. This Court has heard the submissions of learned Counsel for the Appellants and the learned APP and has perused the entire record. The testimony of PW-9 is clear and cogent as regards both the Appellants forcibly taking away the deceased who was in the company of PWs-9, 15 and 16 at that time. As rightly pointed out by the trial Court, the capacity of PW-9 to understand the questions put to him and give rational answers is evident not only in his statement under Section 164 Cr PC but also in his deposition in the trial Court. He clearly identified both the accused persons.

16. It was pointed out by learned counsel for the Appellants that both PW-9 and 15 stated that both the Appellants were shown to them in the PS. While this justified the accused declining to participate in the TIP, in the absence of any motive being attributed to PWs 9 and 15 who were just aged 12 and 13 years at the time of incident, their correct identification of both the Appellants in the Court is sufficient to prove the circumstance of last seen. The Court concurs with the trial Court's conclusion in this regard.

17. That even prior thereto, the deceased was in the company of the accused

was more than adequately established by the forensic evidence. The DNA of the blood stain on the shirt worn by the deceased (Ex.-10) was accounted for in the blood stains of the shirt of A-1 (Ex.12/A) and A-2 (Ex.13). That the death was homicidal was another circumstance proved by the medical evidence which has been discussed hereinbefore.

18. The forensic evidence, however, did not prove the case of the prosecution as regards the two Appellants having committed an offence punishable under Section 377 read with Section 34 IPC. There were no semen stains on the clothes of either the deceased or either of the accused. They were not found even in the smears taken at the time of post mortem of the deceased from the anal, perianal and anal canal area. Consequently, it would not be safe on the basis of the above evidence to find the Appellants guilty of the offence under Section 377 read with Section 34 IPC. The judgment of the trial Court has rightly analysed the evidence and come to the correct conclusion as regards the guilt of the two Appellants for the other two offences under Section 367 read with Section 34 IPC and Section 302 read with Section 34 IPC.

19. For the aforementioned reasons, this Court concludes as under:

(i) The impugned judgment dated 1st February 2017 to the extent it convicts both the Appellants for the offences under Section 367 read with Section 34 IPC and Section 302 read with Section 34 IPC is hereby affirmed. The judgment of the trial Court is set aside only to the extent of conviction of the two Appellants for the offence under Section 377 read with Section 34 IPC. They are acquitted of that offence.

(ii) The order on sentence dated 21st February 2017 of the trial Court qua the offences punishable under Section 367 read with Section 34 IPC and Section 302 read with Section 34 IPC hereby stands affirmed. The sentence awarded to both the Appellants for the offence under Section 377 read with Section 34 is hereby set aside.

20. With the above limited modification, the appeals are disposed of. The trial Court record be returned forthwith along with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MAY 21, 2018
'anb'