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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision:-12th January, 2018.

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CRL.A. 1077/2017 & CRL.M.(Bail) 2087/2017

MOSIN

..... Appellant

Through: Mr.Sumeet Verma, Advocate with
Mr.Aman Chaudhary, Advocate

versus

STATE

..... Respondent

Through: Ms.Radhika Kolluru, APP for State
SI D.P.Singh, PS-S.P. Badli

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE I.S. MEHTA

J U D G M E N T

Dr. S. Muralidhar,J.:

1. This is an appeal directed against judgment dated 13th September, 2017 passed by the learned Additional Sessions Judge-04 (North), Rohini Courts, Delhi in Sessions Case No.58042/16 arising from FIR No.174/2012, registered at Police Station ('PS') Samaipur Badli convicting the Appellant for the offence under Section 302 Indian Penal Code 1860 ('IPC'). It is also directed against the order on sentence dated 23rd September, 2017 sentencing the Appellant to imprisonment for life and to pay a fine of Rs.10,000 and in default of payment of fine, to undergo Simple Imprisonment for a period of three months.

Charge

2. Before proceeding to discuss the case of the prosecution it should be noticed that the charge framed against the accused by the learned Additional Sessions Judge on 23rd November, 2012 was as under:

“I, Rakesh Tewari, ASJ-06 (Outer), Rohini Courts, do hereby charge you Mosin S/o Mohd. Mushtaq as under:

That on the night intervening between 26 and 27.05.2012 in the fields near railway Line Siraspur crossing within the jurisdiction of P.S. S.P. Badli, you kidnapped the minor Sameer @ Piliya aged about three years out of lawful guardianship of his mother Majisha @ Reshma and thus, committed an offence punishable u/s 363 IPC and within the cognizance of this court.

Secondly, on the said date, time and place, you committed murder of said minor boy namely Sameer @ Piliya by intentionally killing him and thus, committed an offence punishable u/s 302 IPC and within the cognizance of this court.

Thirdly, on the said date, time and place, you knowing or having reasons to believe that a murder has been committed, caused the evidence of the commission of the said offence to disappear with the intention of screening yourself from legal punishment and thus committed an offence punishable u/s 201 IPC and within the cognizance of this court.

And I hereby direct that you be tried by this court for the aforesaid offence.”

3. By the impugned judgment of the trial Court, the Appellant has been acquitted of the offences under Sections 363 and 201 IPC. He has been convicted for the offence of murder punishable under Section 302 IPC.

Case of the prosecution

4. It has come in the evidence of Manisha @ Reshma (PW-2) that she was earlier married to one Narsing Adsule and from that wedlock there were two children Aniket and Priya, aged four years and three years respectively. PW-2 stated that her husband used to quarrel with her and their relationship became strained. He ultimately left her with the children at the house of her parents. After the passing away of her father, her mother often used to quarrel with her. During those days the Appellant met her and they developed intimacy. They lived first in the village of the Appellant and later shifted to village Siraspur where they started residing at Rajiv Nursery along with the children. The Appellant was working as a gardener in Rajiv Nursery, which was being run by Rajeev Tomar (PW-5).

Investigation

5. The prosecution case commenced with a call being received in the Police Control Room ('PCR') at 06:33 am on the morning of 27th May, 2012 that at Siraspur village near the railway crossing, close to the railway station in the fields there was a dead body of a young child. There was another PCR call at 06:52 which stated that near the Siraspur railway crossing near Rajiv Nursery, Sameer aged 3 years wearing yellow banyan and black pajami has been missing since the night.

6. It has come in the evidence of the Investigating Officer (IO) Rajesh Kumar (PW-25) that at around 07:40 am he along with three Constables and one Head Constable reached the railway line near Fatak, Siraspur and there they met SI Sandeep and Constable Anil. At the spot a dead body of one

male child aged around 2½ to 3 years was found lying. There were no clothes on the body of the deceased. He was having an injury mark over the left side of his forehead and blood over his nose. By this time the Crime Team had already reached the spot.

7. The Appellant had also reached and was present at the spot. He identified the body to be that of his son Sameer. He also informed the police that he had earlier made a phone call at 100 number regarding his son having gone missing. It is stated that the crime team photographer took photographs of the place of occurrence from different angles. The statement made by the Appellant (Ex.PW24/A) was attested by SI Sandeep. A rukka was prepared (Ex.PW24/B) and on that basis the FIR was registered.

8. At the instance of the Appellant a blood stained Sando white baniyan and one black colour mud stained underwear were recovered from the fields near the railway line. The Appellant identified them to be the clothes of Sameer. These were bundled into a cloth pullanda and sealed. From that place the blood stained earth control, blood stained leaves were all seized and sealed in containers.

9. The post-mortem of the deceased child was performed on 28th May 2012 by Dr. Bhim Singh (PW-13) at the BJRM hospital, Jahangirpuri, Delhi. The post-mortem report (Ex.PW-13/A) noted that there were two external injuries in the form of swelling in the right frontal parietal area. The opinion to the cause of death was indicated as “cranio-cerebral damage due to head injury”. It was further stated that “All injuries were ante mortem, fresh in duration, caused by hard blunt object, sufficient to cause death in ordinary

course of nature.” This post-mortem took place at around 1:30 pm on 28th May, 2012.

10. The dead body was soon thereafter on 28th May 2012 handed back to the parents of the deceased who took it the burial ground. According to the IO (PW-25) he and the other policemen after handing over the dead body to the relatives accompanied them to the graveyard situated at Bye Pass Mukarba Pass for performing last rites. PW-25 stated that at the said graveyard he met Rajeev Tomar (PW-5) and recorded his statement there itself.

11. At this juncture it is necessary to refer to what PW-5 stated to the IO. According to PW-5 at around 5:30 in the morning of 27th May, 2012 he received a call from the Appellant stating that Sameer had gone missing. PW-5 is stated to have reached the nursery at around 07:30 am and noticed that there were many people gathered there. According to him the Appellant and his family was staying in a room at the nursery itself but none was present at that time in that room. PW-5 learnt that the dead body of the child was lying across the railway line in the field and all persons had gone there. According to PW-5 he also went there and noticed the dead body of Appellant's child.

12. Importantly PW-5 told PW-25 that on 27th May, 2012 the Appellant came to the nursery at around 11:00/11:30 am, sought the help of PW-5 in performing the last rites and also stated that “he had committed a grave mistake that he had committed murder of his son.” According to PW-5 the

Appellant told him that his son had been weeping during the night while his wife was already sound asleep; the Appellant got up due to the cries of his son and picked his son, held him by his legs and thrashed him twice against “a stone lying outside the room.” According to PW-5 he narrated all of this to PW-5 at the graveyard on 28th May, 2012. He also claimed to have spent Rs. 3200 or Rs. 3500/- for burying the dead body.

13. PW-25 has stated that after recording the aforementioned statement and after informing the accompanying police officials he arrested the Appellant from the graveyard itself and took him to the police station. According to PW-25 on 29th May, 2012 itself the Appellant lead them to the place of commission of the offence and pointed out the place where he had committed the murder. In the pointing out memo (Ex.PW-22/B) it is stated that the Appellant pointed out to the stone step outside the room where he is supposed to have smashed the child and on this basis a rough site plan (Ex.PW-25/G) was prepared by PW-25. That rough site plan indicates Mark A which is supposed to be the stone step on which the child was hit by the Appellant.

14. PW-25 went back to the site on 4th August 2012 with the draughtsman to prepare a scaled site plan (Ex.PW-6/A). This scaled site plan indicates at point A outside the room where the Appellant and PW-2 were residing is supposed to be the place “where accused Mosin...killed Master Sameer @ Piliya by hitting his head on concrete step in the intervening night of 26/27-05-2012

Statement of the Appellant under Section 313 Cr PC

15. On the completion of the investigation a chargesheet was filed and later charge was frame as indicated hereinbefore. The prosecution examined 25 witnesses. In his statement under Section 313 of Cr.P.C the Appellant denied having made any extra judicial confession to PW-5. Specifically he stated “PW-5 has deposed falsely in this regard as he used to keep an evil eye upon Manisha”. When asked whether he had anything further to say he stated as under:

“I am innocent and have been falsely implicated in this case. I have no role to play in the alleged incident in any manner. I had not made any extra judicial confession statement before PW5. I was not apprehended and arrested in the manner as alleged. My signatures were obtained on various blank papers and forms, which were subsequently converted into incrimination documents including my disclosure statement.”

The impugned judgment of the trial Court

16. The trial Court, as already noticed hereinbefore, acquitted the Appellant for offences under Sections 363 and 201 IPC. The trial Court based the conviction of the Appellant for the offence under Section 302 IPC essentially on the extra judicial confession made by him to PW5. In para 58 of the impugned judgement the Trial Court concluded that the confession made by the Appellant to PW5 “is clear, unambiguous and unmistakable” and that “there is no doubt about the credibility of PW5”. According to the trial Court the manner of death narrated by PW5, as disclosed to him by the Appellant, stood corroborated by the post-mortem report and in particular

extended injuries found on the body of the deceased.

17. This court has heard the submissions of Mr. Sumeet Verma, learned counsel for the Appellant and Ms. Radhika Kolluru, learned APP for the State.

Evidence of PW-2 Manisha @ Reshma

18. One important prosecution witness was Manisha @ Reshma (PW-2). She, however, did not support the prosecution. She stated that on the fateful day after taking dinner they all had gone to bed. She stated that on that day “gate of our room was not bolted and it was open.” When she woke up in the morning she found that Sameer was missing. Then she and the Appellant searched for him. They also reported to the police that their son had gone missing.

19. According to PW-2, they went to bed on 26th May 2012 at 7:30 pm and she did not realise what had happened during the night hours. The next morning she and Appellant found the dead body of the son near the railway track at around 7 to 8 am. She stated “my child Sameer never disturbed us in the night hours. She volunteered that the Appellant “had not killed my son Sameer.” She resiled from her statement made by her to the police earlier stating that she had never made any statement.

20. On the crucial aspect of motive for the crime, PW-2 did not support the prosecution and stated as under:

“I have not stated to the police that on that day, at unknown time, my son Sameer started weeping or that accused Mohsin tried to wake up

me, but I had not wake up, because of my deep sleeping or that Sameer continued weeping or that after some time I had seen accused Mohsin taking Sameer out of the room or that I was in sleepy condition and listen that Sameer was still weeping, then I felt that accused Mohsin had taken Sameer to outside to pacify his weeping (*chup karane ke liye bahar le gaya*) or that I further gone to sleep. Confronted with portion A to A1 of my statement Mar PW2/A, where it so recorded.”

21. In her cross-examination by the APP, PW-2 stated that occasionally the son would weep in the night hours and she would take care of him and that both she and the Appellant would get up and pacify him. She further added “It is correct that due to weeping of my son Sameer in the night hours accused Mohsin got disturbed. Accused Mohsin when got up in such situation. He never commented anything and he never shown his anger.”

22. It is therefore clear that PW-2 failed to support the prosecution in any manner whatsoever. In her cross-examination by the counsel for the Appellant she confirmed that PW-5 used to keep “an evil eye upon me and also used to pass rude remarks and comments on me.” Just three days prior to her son going missing, the Appellant had stopped PW-5 and asked him not to indulge in such activities as a result of which the Appellant and PW-5 had “verbal dual with each other and accused Mohsin had warned Rajeev Tomar not to indulge in such activities, otherwise we would report the matter to the police.” PW-2 claimed to have disclosed the said facts to the police when they came to inquire about the incident.

Evidence of PW-5

23. Turning now to the deposition of PW-5, he maintained in his

examination-in-chief about the extra judicial confession made to him by the Appellant. In his cross-examination he was confronted by the counsel for the Appellant with his previous statement to the police where he had not stated that he received any phone call from the Appellant at 5:30 am on 27th May 2012 about his son having gone missing or about PW5 telling the police officials that the clothes of the deceased were lying at the distance of 40-50 paces away from the dead body. PW-5 denied that there was any verbal duel with the Appellant over his passing some lewd remarks against PW-2.

Analysis and reasons

24. The crucial question in the present case is whether in a case of circumstantial evidence of this nature the conviction of the Appellant for the offence under Section 302 IPC can be based exclusively on the extra judicial confession purportedly made by him to PW 5?

25. The law relating to extra judicial confessions has been summarised by the Supreme Court in *Sahadevan v. State of Tamil Nadu 2012 [3] JCC 1756* as under:

“Upon a proper analysis of the above-referred judgements of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused.

The principles:

- (i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution
- (ii) It should be made voluntarily and should be truthful.
- (iii) It should inspire confidence
- (iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.
- (v) For an extra-judicial confession to be the basis of conviction, it should not suffer any material discrepancies and inherent improbabilities.
- (vi) Such statement essentially has to be proved like any other fact and in accordance with law.”

26. Importantly, the Supreme Court has in ***State of Rajasthan v. Raja Ram (2003) 8 SCC 180*** emphasised that an extra-judicial confession will have to be proved like any other fact and will depend on the veracity of the witness to whom it has been made. That witness should appear to be unbiased and “not even remotely inimical to the accused and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused”

27. There are three important aspects of an extra judicial confession. One is its voluntariness; the second is its truthfulness; and the third, and most important, is that it must be corroborated. It has been reiterated in a large number of decisions that an extra-judicial confession must be corroborated by other prosecution evidence and should be supported “by a chain of

cogent circumstances”.

28. As far as the present case is concerned, one important piece of corroboration which was available, but for some reason not gathered by the prosecution, was the control sample of the stone /concrete step outside the room where the Appellant and PW-2 were residing with their children. That was shown in the rough site plan (and later in the scaled site plan) as the precise spot where according to the prosecution the Appellant smashed repeatedly against the stone step, the child by holding his legs. While according to PW-5 the Appellant described it to him as a ‘stone’, it is mentioned in the rough site plan as a stone step and in the scaled site plan as a ‘concrete step’.

29. Be that as it may, there is no explanation why the control sample of that important piece of evidence was not collected. There is not even a photograph of that concrete/stone step although there are photographs of the body of the deceased. Had the control sample been collected, it could have been analysed forensically for the presence of blood, human DNA etc. That would have corroborated the so-called extra-judicial confession made by the Appellant to PW5 about the manner in which he killed the child.

30. Even as regards the motive for the commission of the offence, which is another circumstance which is not insignificant, there is no evidence forthcoming except again PW-5 who states that the Appellant got irritated with Sameer crying. This is, however, completely negated by the evidence of PW-2 who states that even on the rare occasion that Sameer would cry during the night both she and the Appellant would wake up and pacify him.

She has very categorical that the Appellant never lost his temper on such occasion. It has also come in the evidence of other independent PWs like PWs 1 and 7, that the Appellant was fond of and affectionate to the children.

31. Even the conduct of the appellant after the incident is not at all consistent with what he is supposed to have told the PW-5. It is clear that both he and PW-2 immediately went searching for the child and called the police to give a complaint that he had gone missing. There is no explanation forthcoming even as regard the clothes of the child lying 50 paces away from where his body was found.

32. PW5 and the Appellant were in a relationship of employer and employee and this was an important aspect to evaluate both the reliability and truthfulness of the evidence of PW-5. If the evidence of PW-2 is read along with PW-5, it is clear that it would be unsafe to proceed entirely on the evidence of PW-5, to the complete exclusion of the evidence of PW-2, who it must be remembered, was the mother of the deceased child. When she herself has volunteered that PW-5 made lewd remarks about her which led to the verbal dual between him and the Appellant, it was necessary for the prosecution to have some strong independent corroboration of the so-called extra judicial confession purportedly made by the Appellant to PW-5.

33. The trial Court also appears to have overlooked the fact that the room in which they were all sleeping was not bolted from inside on the fateful night. The possibility of the child wandering away during the night has not been completely eliminated by the prosecution.

34. As repeatedly stressed by the Supreme Court in several judgements, in a case of circumstantial evidence the onus lies on the prosecution to prove that the complete chain of events, if proved beyond reasonable doubt, points only to the guilt of the accused and nobody else. In the present case the Court is not satisfied that the above threshold has been met by the prosecution.

Conclusion

35. The court is unable to concur with the trial Court that in the present case the extra-judicial confession purportedly made by the Appellant to PW-5 inspires confidence and has been corroborated by other prosecution evidence. Being a weak piece of circumstantial evidence, without satisfying the above requirement, it cannot be made the sole basis for returning a finding of guilt against the Appellant for the offence under Section 302 IPC.

36. For the aforementioned reasons, the Court sets aside the impugned judgment of the trial Court dated 13th September 2017 and the order on sentence dated 23rd September 2017 and acquits the Appellant of the offence under Section 302 IPC. The Appellant will be set at liberty forthwith, unless wanted in any other case. He will fulfil the requirement of Section 437A Cr PC to the satisfaction of the trial Court.

37. The appeal is allowed but, in the circumstances, with no orders as to costs. The application is disposed of.

38. The trial Court record be returned forthwith along with a certified copy of this judgment.

39. Order *Dasti* under signatures of the Court Master. A certified copy be delivered forthwith to the concerned Jail Superintendent through Special Messenger.

S. MURALIDHAR, J.

I.S. MEHTA, J.

JANUARY 12, 2018

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