

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

1. CRA-S-1809-SB-2003 (O&M)
Date of decision : 03.07.2019

Harvinder Singh @ Bindri

...Appellant

Versus

State of Punjab

...Respondent

2. CRR No.313 of 2004 (O&M)
Date of decision : 03.07.2019

Gurcharan Singh

...Petitioner

Versus

State of Punjab and another

...Respondents

3. CRR No.314 of 2004 (O&M)
Date of decision : 03.07.2019

Gurcharan Singh

...Petitioner

Versus

Harvinder Singh @ Bindri and another

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. K.S. Boparai, Advocate for the appellant
(In CRA-S-1809-SB-2003)

Mr. T.S. Chauhan, Advocate for the petitioner
(In CRR Nos.313 and 314 of 2004)

Mr. Surinder Pal Singh Tinna, Additional A.G. Punjab.

Mr. Pankaj Bali, Advocate for respondent No.2
(In CRR No.313 of 2004)

ANIL KSHETARPAL, J. (ORAL)

By this judgment, CRA-S-1809-SB-2003, CRR Nos.313 and 314 of 2004 arising from a common judgment passed by learned Additional Sessions Judge (Adhoc), Fast Track Court, Ludhiana dated 16.09.2003 shall stand decided.

Appellant in the Criminal Appeal-Harvinder Singh @ Bindri has been convicted under Section 364 of the Indian Penal Code, sentenced to undergo imprisonment for a period of four years, to pay a fine of ₹1000/- and in default of payment of fine, further undergo rigorous imprisonment for a period of three months whereas other accused i.e. Rulda Singh was ordered to be acquitted. These two revisions have been filed, one against judgment acquitting Rulda @ Ruldu Singh and second one for enhancement of the sentence awarded to Harvinder Singh.

Case set up by the prosecution is that complainant Gurcharan Singh had moved an application before Director General of Police and other senior officials of the Police Department by stating that he is resident of Village Mohoun, Tehsil Khanna, District Ludhiana. Harvinder Singh-appellant took Manjinder Singh (son of the complainant Gurcharan Singh) from his house on the pretext of getting a LPG gas cylinder refill but Manjinder Singh, thereafter, did not return and he has not been heard of till

the filing of the complaint. It is further case of the prosecution that efforts to trace out him have failed. It has come to the knowledge of the complainant that both the accused namely Harvinder Singh and Rulda Singh alongwith Manjinder Singh had consumed liquor at Khanna and thereafter a scuffle took place between them. Several requests made to both the accused to provide information/whereabout of Manjinder Singh have not borne any fruits and instead they have threatened with dire consequences if he (Gurcharan Singh) ever raises the issue with the higher officers. On the basis of the aforesaid complaint, FIR was registered and investigated. After completion of investigation, final report under Section 173 Cr.P.C. was submitted to the Area Magistrate, who further committed the case to the Court of Sessions, assigned to learned Additional Sessions Judge (Adhoc) Fast Track, for trial. The Court found a prima facie case under Section 364 IPC against the accused. Accused were charge sheeted, to which they pleaded not guilty and claimed trial.

Prosecution in order to prove its case has examined PW1 Banarsi Dass who had registered formal FIR Ex.PA/1 and handed over investigation to ASI Mohinder Singh, PW2 who has stated that he conducted raids to search the accused and the missing boy Manjinder Singh. He further stated that he recorded statements of some of the witnesses on 13.09.2001 and 05.10.2001 and thereafter he arrested Harvinder Singh and Rulda Singh. PW3 ASI Jai Singh, another Investigating Officer has deposed that during investigation, statements of Surjit Singh, Bakhtawar Singh were recorded and efforts to trace out Manjinder Singh did not yield positive result.

The most important witness i.e. Gurcharan Singh, complainant has been examined as PW4. Surjit Singh brother of Gurcharan Singh has also been examined as PW5. Gurcharan Singh has stated that Harvinder Singh-appellant took Manjinder Singh from his house for getting top up of LPG cylinder and both the accused and Manjinder Singh had consumed liquor at Khanna on the same day and they had a scuffle with each other. It was further stated that Manjinder Singh has not returned since then. He expressed apprehension that Manjinder Singh might have been murdered by both the accused. The aforesaid statement of Gurcharan Singh is corroborated by Surjit Singh. On the other hand, when accused were examined under Section 313 Cr.P.C., they denied having committed the offence and claimed that they are innocent. In defence, one witness namely DW1 Mohinder Singh son of Arjan Singh was examined.

This Court has heard learned counsel for the parties at length and with their able assistance gone through the judgment passed by the learned Additional Sessions Judge and the record.

Before this Court adverts to the arguments of the learned counsel for the parties, certain facts are required to be noticed in proper perspective. As per the case of the prosecution, Manjinder Singh was taken away from his residence in the presence of Gurcharan Singh and Surjit Singh on the pretext that Harvinder Singh-appellant was to get a top up of LPG cylinder on 13.06.2001. It is the case of the prosecution that Rulda Singh, came to Gurcharan Singh on 14.06.2001 and disclosed that he, Manjinder Singh and Harvinder Singh had taken liquor on 13.06.2001 and thereafter they quarreled with each other. It is claimed that on 15.06.2001,

Gurcharan Singh had gone to the Police Station for lodging FIR but police did not take any action.

First document is DDR No.13 dated 08.07.2001. A reading of the aforesaid DDR, it is apparent that this DDR was registered on the basis of statement of Gurcharan Singh at 4:00 PM on 08.07.2001 when complainant alongwith various persons had gone to the police station for lodging the report. In this report, he has stated that Manjinder Singh @ Happy went to Khanna on 13.06.2001 from home with Harvinder Singh @ Bindri-appellant herein. They left the home at 3 PM afternoon but thereafter his son did not return. It has been stated that Harvinder Singh @ Bindri has told him that Manjinder Singh got down from the scooter of Harvinder Singh at Lalheri Fatak, Khanna (Lalheri Railway Crossing). It is further stated that Harvinder Singh had admitted that he and Manjinder Singh had consumed liquor and since Manjinder Singh became drunkard, therefore, he did not accompany him and thereafter he does not know where he has gone. After describing the clothes which Harvinder Singh was wearing and his overall appearance, it has also been stated in the DDR that he has come to know that Manjinder had gone to Faizgarh and called Rulda (accused who has been acquitted) son-in-law of his sister-in-law of Gurcharan Singh on telephone to Khanna and both of them also had consumed liquor. It has further been stated that the family has no enmity with anyone or these two accused. He further states that we have enough love with Harvinder Singh @ Bindri and Rulda.

Thereafter, next application submitted to Director General of Police, on 03.09.2001, resulted in lodging of First Information Report

Ex.PA/1. In this application, it has been stated that Manjinder @ Happy, the missing boy aged 24 years was called by Harvinder Singh from residence and thereafter he has not returned. It has been stated that Harvinder Singh had admitted that he, Manjinder and Rulda consumed liquor at Khanna and thereafter his son Manjinder was not traceable and he had repeatedly asked both the accused to tell the whereabouts of his son but they have been putting off. They have also not cooperated in the efforts to trace his son and rather threatened with dire consequences if Gurcharan Singh raises the issue with higher officials.

Next important document is Ex.PF, copy of the application submitted to Hon'ble Chief Minister, Punjab with copy to various officials. In this application, apart from the fact that Harvinder had taken away Manjinder Singh, it has also been stated that Harvinder Singh has admitted that he, Manjinder and Rulda consumed liquor at Khanna and thereafter his son is not traceable. To the similar effect is application Ex.PG addressed to Deputy Inspector General of Police dated 07.09.2001.

One more statement of Gurcharan Singh has come on record which is Ex.DA dated 10.09.2001 recorded during enquiry by Superintendent of Police (H), Khanna. In this statement, for the first time, Gurcharan Singh comes up with a story that Harvinder Singh had taken away Manjinder Singh for refilling/top up of LPG gas cylinder. Apart from that, it was also stated that next day, Rulda Singh had come to his house and told him that they (all three) had consumed liquor together and thereafter quarreled with each other. FIR was registered on 12.09.2001.

Now let us discuss the statement of Gurcharan Singh who has

appeared as PW4 (father of missing boy-complainant in the FIR). In this statement, he reiterates that Harvinder Singh @ Bindri had come to his house. He took away his son Manjinder Singh on his scooter on the pretext that he was to get a refill of gas cylinder from the city Khanna but Manjinder Singh (missing boy) never returned and when enquired, Harvinder Singh did not satisfactorily reply but on 14.06.2001, Rulda Singh came to him and told him that he, Manjinder Singh and Harvinder Singh consumed liquor on 13.06.2001 and thereafter they quarreled with each other. On 15.06.2001 they went to the Police Station for lodging FIR but the police did not take any action. In cross-examination, he has stated that Rulda Singh came to his house at 4 PM on 14.06.2001. Rulda Singh is son-in-law of his sister-in-law and his village is at distance of 10/15 KMs from the village of Gurcharan Singh. It has been further stated that they (including Gurcharan Singh) went to Tavern (the place for drinking liquor) where all three had consumed liquor. For the first time, in cross-examination with a view to impute motive to the accused, Gurcharan Singh stated that his son Manjinder Singh had quarreled with Rulda Singh two months prior to the occurrence but no DDR was got entered. He further stated that Manjinder Singh had also told him that he had quarreled with Harvinder Singh two months prior to the occurrence. Gurcharan Singh was confronted with the improvements made by him with reference to the various complaints made by him as noticed in the previous part of the judgment and it has been found that Gurcharan Singh has made lot of improvements. Relevant part of the statement of Gurcharan Singh is extracted as under:-

“My statement was recorded by ASI but it was

recorded by Reader of SP Headquarter Khanna. I do not remember whether in my statement I had got recorded that when accused Harvinder Singh came to me my brother Surjit was also present (confronted with statement mark D2 wherein it is not so recorded). I had got recorded in the statement that accused Harvinder Singh came on the scooter No.PB-26/6040 (confronted with mark D2 wherein it is not so recorded). I do not remember whether I recorded in the statement mark D2 and that I along with Surjit Singh went to the house of accused Harvinder Singh (confronted with mark D wherein it is not so recorded). I had not got recorded in my statement mark DA that Harvinder Singh and his mother met us. I had not got recorded in Ex.PF and Ex.PG that Harvinder Singh took my son Manjinder Singh for filling gas cylinder. I got recorded this fact in the application given to the Human Right Commission. (confronted with Ex.D3 wherein it is not so recorded). I had not got recorded in the application above mentioned that we went to the house of Harvinder Singh there accused Harvinder Singh and his mother were present. I do not remember whether I got recorded in Ex.D3 that I alongwith my brother Surjit Singh was present when Harvinder Singh accused took my son on the scooter. I had got recorded in Ex.D3 that my son and both the accused took liquor and then quarreled with each other (confronted with Ex.D3 wherein it is not so recorded).”

Gurcharan Singh, thereafter, went on to depose that Manjinder @ Happy was residing in the house of accused Harvinder Singh and helping him in cultivation. He denied the suggestion that Manjinder Singh was working as a driver with his maternal uncle. The defence also gave suggestion with reference to Parkash Singh, Ex Sarpanch of Village that

Harvinder Singh-accused has been falsely implicated because father of Harvinder Singh namely Rachhpal Singh had filed a civil suit against Parkash Singh (Ex. Sarpanch) and others, and he is helping Parkash Singh, Ex Sarpanch.

Learned counsel for the appellant, while drawing attention of the Court to the various factors has submitted that the prosecution has failed to prove its case beyond reasonable doubt. He further submitted that the offence under Section 364 IPC is not made out as there are no allegations in the first complaint that Manjinder Singh had been kidnapped with intention to kill or murder. Hence, he submitted that Court has committed an error in convicting the appellant.

On the other hand, learned counsel for the complainant who is also represents petitioner in the revision petitions has submitted that Manjinder Singh has not been traced till date and, therefore, it must be assumed that he has died and, hence, the case should be remitted back to the trial Court after framing charge under Section 302 of the Indian Penal Code. He supported the judgment of the trial Court with respect to conviction of Harvinder Singh. He further submitted that insufficient sentence has been awarded and wrongly acquitted Rulda Singh.

On re-analysis of the evidence, it is apparent that prosecution has failed to prove its case beyond reasonable doubt on account of following reasons:-

- 1) It is the case of the prosecution that Gurcharan Singh was informed by Rulda Singh that all three of them had consumed liquor at Khanna and thereafter quarreled with each other. However, still when DDR

No.13 dated 08.07.2001 was registered on the statement of Gurcharan Singh, he has stated that the family has no enmity and Harvinder Singh and Rulda Singh are having good relations and there is love between them. In the aforesaid statement, the story with regard to Manjinder Singh having been taken away on the pretext of refilling of LPG cylinder is also missing, rather it has been stated that after taking liquor since Manjinder had become drunkard, therefore, he did not come back. Next stand of Gurcharan Singh is in FIR wherein for the first time, it has been recorded that these accused have not cooperated in tracing his son and rather they are threatening. In this application also, the story of Manjinder having been taken along on the pretext of refilling of cylinder is again missing. In this application, the factum of Rulda Singh having come to Gurcharan Singh and disclosed about consumption of liquor by all three of them and thereafter quarreled amongst them is also conspicuously absent. Next document Ex.PF is only going to the extent that Harvinder Singh had called his son from his residence and thereafter son had never come back and Harvinder Singh has admitted that all three of them took liquor at Khanna and his son is not traceable. To the same effect is application Ex.PG.

On 10.09.2001, Gurcharan Singh for the first time disclosed that Harvinder Singh had taken Manjinder Singh from his residence to Khanna for refilling of gas cylinder. In this statement, Gurcharan Singh has stated that Harvinder Singh has either killed his son or has kept his son, somewhere. Thus, it is apparent that with passage of time, Gurcharan Singh complainant has made significant improvements.

Gurcharan Singh when he appeared in the Court as a prosecution witness, he has admitted that Manjinder Singh @ Happy was residing in the house of Harvinder Singh and was helping him in cultivation. If that is correct then where is the question of Manjinder Singh having been taken along with Harvinder Singh from the house of Gurcharan Singh and where is the question of kidnapping. Still further, it is apparent from the DDR No.13 i.e. the first statement of Gurcharan Singh wherein he says that there is love between family of Gurcharan Singh and Harvinder Singh and he does not apprehend any mischief on the part of Harvinder Singh or Rulda Singh, both the accused.

- 2) It has come in evidence of Gurcharan Singh that Harvinder Singh, Manjinder Singh (missing boy) and Rulda Singh had consumed liquor on 13.06.2001 at a Tavern at Railway Crossing, Khanna. Gurcharan Singh alongwith certain persons had visited that Tavern to verify this fact, however, no one from the aforesaid place has been examined to prove that three of them i.e. Harvinder Singh, Manjinder Singh and Rulda Singh had in fact consumed liquor and thereafter quarreled. The evidence led by the prosecution with regard to consumption of liquor by three of them and quarrel is based upon alleged information supplied by the accused is also not proved.
- 3) In DDR No.13, Gurcharan Singh has gone to the extent of saying that Manjinder Singh went to Faizgarh i.e. village where Rulda resides and called Rulda and thereafter both of them took liquor. However, this fact has not been proved by leading any evidence. Gurcharan Singh while appearing in the Court has not stated this fact.

- 4) In the present case, in order to attribute motive to the accused, the prosecution has tried to introduce the story of quarrel between Manjinder Singh and Harvinder Singh two months prior to occurrence. Another quarrel between Manjinder Singh and Rulda Singh two months prior to the occurrence has also been stated. These facts have been disclosed for the first time in the Court. It is neither part of applications filed by Gurcharan Singh nor his statement before the Superintendent of Police on 10.09.2001 or thereafter. Had the statement with regard to motive was correct or based upon correct facts then this fact was very much in knowledge of Gurcharan Singh on 13.06.2001 but he never chose to incorporate this fact in his complaints. Therefore, the attempt of the prosecution is clearly an afterthought.

Now let us deal with argument of learned counsel for the complainant. Learned counsel contends that since Manjinder Singh has not been heard off from 13.06.2001 i.e., 18 years have elapsed, therefore, he should be presumed to be dead and hence accused should be tried for murder.

In this regard, there are two relevant provisions i.e. Sections 107 and 108 of the Indian Evidence Act, 1872, which are extracted as under:-

“107. Burden of proving death of person known to have been alive within thirty years:- *When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.*

108. Burden of proving that person is alive who has not

been heard of for seven years - Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.”

On careful reading of Sections 107 and 108 of the Indian Evidence Act, it is apparent that when the question is whether a person is alive or dead and it is shown that he was alive within 30 years, the burden of proving that he is dead is on the person who affirms it. In other words, the person who is alleging that someone is dead with respect to a person who has been heard off seen alive for 30 years, is on the person who asserts so. As regards Section 108 of the Indian Evidence Act, no doubt if a person is not heard off for a period of 7 years by those who would naturally heard off him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms that he is alive. However, Sections 107 and 108 of the Indian Evidence Act, only deal with burden of proof or presumption. Still further, someone cannot be tried for offence under Section 302 of the Indian Penal Code i.e. murder only on the strength of Sections 107 and 108 of the Indian Evidence Act, 1872. The argument of learned counsel for the complainant on this aspect is wholly misconceived.

It is apparent that the present case is based upon circumstantial evidence and prosecution has sought to establish the offence of kidnapping only on the basis of last seen. In the considered view of this Court, circumstantial evidence led in this case does not lead the Court to the only hypothesis to the kidnapping of Manjinder Singh. The chain of evidence is

not complete and leaves more than one loose ends. Link evidence is missing. Five golden principles were culled out by the Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra, (1984) 4 Supreme Court Cases 116**. It was held that before someone can be held to be guilty of an offence on the basis of circumstantial evidence, the Court must apply five golden rules and thereafter draw a conclusion. Those five golden rules have been laid down in para 153 of the aforesaid judgment. Para 153 of the same is reproduced as under:-

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the following observations were made: [SCC para 19, p. 807 : SCC (Cri) p. 1047]

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis

except that the accused is guilty,

(3) The circumstances should be of a conclusive nature and tendency,

(4) They should exclude every possible hypothesis except the one to be proved, and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

Thus, examining this case on the touchstone of those five golden rules, it is apparent that the learned Additional Sessions Judge failed to apply the aforesaid five principles resulting in a wrong conclusion.

For the reasons stated above, it is apparent that the prosecution has failed to establish the guilt of the accused beyond reasonable doubt. On reading of the judgment passed by the learned Additional Sessions Judge, it is apparent that material aspects of the case were overlooked. The Court further committed error in recording a finding that the improvements in the various statements at various stages are minor in nature. Learned Additional Sessions Judge has also overlooked the fact that the motive for committing crime is for the first time sought to be introduced and proved in the statement of Gurcharan Singh while appearing in the Court and that stage also prosecution has failed to prove the same beyond any reasonable doubt. Learned Additional Sessions Judge has further overlooked the fact that Gurcharan Singh has admitted that Manjinder Singh use to reside in the house of Harvinder Singh.

In view thereof, the judgment passed by learned Additional

Sessions Judge (Adhoc), Fast Track Court, Ludhiana dated 16.09.2003 and order of sentence cannot be sustained and, therefore, set aside. Bail bond submitted by the appellant Harvinder Singh be discharged.

Criminal Appeal is allowed.

Since, this Court has found that prosecution has failed to prove its case beyond reasonable doubt, therefore, for the same reasons, acquittal of Rulda Singh is also upheld and hence, CRR No.313 of 2004 shall stands dismissed. CRR No.314 of 2004 in which prayer has been made for enhancement of the sentence has been rendered infructuous in view of the findings arrived at by this Court acquitting Harvinder Singh. Hence, there is no occasion to enhance the punishment. Accordingly, CRR No.314 of 2004 is also dismissed.

03.07.2019

Pawan

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned:- **Yes/No**

Whether reportable:- **Yes/No**