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

Judgment reserved on 05th December, 2018

Judgment pronounced on 4th February, 2019

+ **CRL.LP. 655/2017**

STATE

..... Petitioner

Through: Mr. Ranbir Singh Kundu ASC (Crl.) with
Ms. Suman Saharan and Mr. Bhagat Singh,
Advocates for State with SI Amit Rana,
Police Station - Swaroop Nagar

versus

ASHISH @ NIRMAL & ANR.

..... Respondents

Through: Mr Akhil Sharma and Ms. Isha Aggarwal,
Adv. for respondent No. 1.
Mr. K. Kaushik, Advocate for respondent
No. 2.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. The present leave petition has been filed by the State under Section 378 (4) of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C') assailing the impugned judgment dated 04.03.2017 passed by learned Additional Sessions Judge-II (North-West), Rohini Courts, Delhi in case FIR No. 125/2012 under Sections 302/363/201/120B of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') registered at Police Station-Swaroop Nagar

whereby the respondents were acquitted of the charges framed against them under section 302/363/201/120B IPC.

2. The brief facts of the case, as recorded by the learned Trial Court are reproduced as under:-

“Case of the prosecution is that the accused no.1 was the tenant in the house of Ranbir Singh, situated at J Block, House No. 1423, Gali No.2 Swaroop Nagar, Khadda Colony, Delhi (said house). Since, Ranbir Singh objected to the visit of the accused No.1 to the house of the accused No.2 and had also objected to the visit of Islam @ Bunty (JCL) to his house to meet the accused no.1 and also scolded him, once he spitted tobacco on the staircase, accused no.1 became inimical towards him. Consequently, on or before 13.07.2012, both the accused along with the JCL hatched a criminal conspiracy to kidnap and murder Gaurav, son of Ranbir Singh (the child). In pursuance thereto, on 13.07.2012, at about 6.00pm, the accused no.1 along with the JCL kidnapped the child from the said house and took him at Ganda Naala, opposite Oriental Bank of Commerce, PS Swaroop Nagar (Ganda Naala) and committed murder of the child by strangulating him and threw the dead body of the child in the Ganda Naala. Subsequently, they caused the evidence of murder to disappear to save themselves from the legal action.”

3. In order to bring home the guilt of the respondents, the prosecution examined 25 witnesses in all. The statements of the respondents were also recorded under Section 313 Cr.P.C. wherein they pleaded their innocence by denying all incriminating circumstance and claimed to have been falsely implicated.
4. Mr. Ranbir Singh Kundu, learned APP appearing for State while opening his arguments in the present leave petition submitted that

the judgment rendered by the Trial Court is based on surmises and conjectures; that the deceased was last seen in the company of respondent No. 1 which emerged from the testimony of PW13; that the prosecution has been able to bring home the guilt of the respondents by proving the complete chain of circumstances through the testimonies of PW-9 and PW-13; that minor discrepancies in the testimonies of the witnesses cannot be discarded in toto; that the Trial Court erred in not appreciating the extra judicial confession made by the respondent to PW-20; that the prosecution has also been able to bring on the record the motive behind the alleged crime through the testimony of PW-9, father of the deceased child.

5. Per contra, learned counsel appearing on behalf of the respondents submitted that the respondents have been falsely implicated in the present case; that the testimonies of PW 9 and PW 13 are not reliable as they are overburdened with material contradictions which miserably fails the prosecution to prove its case beyond all reasonable doubts; that PW-20 is a planted witness as no extra judicial confession was ever made by the JCL to him; that a perusal of the postmortem report and FSL report does not substantiate the case of the prosecution and in no way proves that the bones recovered were of the missing child; that the prosecution has failed to lead evidence which proves the motive of the alleged murder of the child; that the prosecution has made the respondents their scapegoat to hide their deficiency in carrying out a fair investigation and have only falsely implicated them to draw out a conclusion.

6. We have heard the rival submissions made by the counsel appearing on behalf of the parties and have perused the material evidence available on record.

Last Seen Theory

7. Before venturing into rival submissions advanced on behalf of the counsel for the parties, it is relevant to mention here that the instant case entirely rests upon the circumstantial evidence and the prosecution case begins with the theory of last seen.
8. The law with regard to last seen theory came up for consideration in various cases and has been succinctly elucidated in the case of **Anjan Kumar Sarma vs State of Assam** reported in **AIR 2017 SC 2617** wherein the Apex Court observed as under:-

“The circumstance of last seen together cannot by itself form the basis of holding the Accused guilty of the offence. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. The other circumstances relied upon by the prosecution were not proved and that the circumstances of last seen together along with the absence of satisfactory explanation were not sufficient for convicting the Accused.”

9. **State of Karnataka v. Chand Basha** reported in **(2016) 1 SCC 501**, wherein the Apex Court held as under:

"14. This Court has time and again laid down the ingredients to be made out by the prosecution to prove the "last seen together theory". The Court for the purpose of arriving at a finding as to whether the said offence has been committed or nor, may take into consideration the circumstantial evidence. However, while doing so, it must be borne in mind that close

proximity between the last seen evidence and death should be clearly established....."

10. In ***State of Karnataka Vs. Chand Basha*** reported in **2015 (3) ACR 3439**, wherein the Apex Court has observed :

"This Court has time and again laid down the ingredients to be made out by the prosecution to prove the 'last seen together' theory. The Court for the purpose of arriving at a finding as to whether the said offence has been committed or not, may take into consideration the circumstantial evidence. However, while doing so, it must be borne in mind that close proximity between the last seen evidence and death should be clearly established."

11. In ***Mahavir Singh v. State of Haryana*** reported in **(2014) 6 SCC 716**, the Apex Court has observed:

"12. Undoubtedly, it is a settled legal proposition that last seen theory comes into play in a case where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead (sic is small). Since the gap is very small there may not be any possibility that any person other than the accused may be the author of the crime...."

12. Keeping in view the settled principle of law, let us now examine, whether the prosecution has been able to conclusively and beyond reasonable doubt able to prove that the deceased was last seen in the company of the respondent No.1. For this purpose, the prosecution has examined PW-13. The paramount question is as to whether testimony of this witness is reliable.

13. According to the prosecution, Jai Narayan is closely related to the complainant Ranbir Singh, who is the father of the missing child/deceased. Jai Narayan claimed to have seen the child lastly in the company of the respondent No. 1 and juvenile accused Islam @ Bunt on 13.07.2012 at about 6:30 p.m. when they were taking the child in a bicycle. This witness entered into the witness box as PW-13 and deposed that :

“I saw Gaurav son of Ranbir in the lap of the Ashish a tenant of Ranbir and Ashish was sitting on the carrier of the bicycle and bicycle was driven by an another person. I thought that they were taking Gaurav for a round. Thereafter I went to my house.

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On the next day I went to Mandi for my work. In the evening time when I return back at around 6.30-7.00PM, I came to know that Gaurav s/o Ranbir was missing. I met Ranbir and informed him that I had seen Gaurav in the lap of Ashish and one another person was driving the bicycle but Ranbir did not believe the same. On 15.07.2012 Ranbir took the possession of mobile phones of Ashish, Bunt @ Islam and thereafter they ran away from their residence and did not return. Then Ranbir believed my information. On 16.07.2012 I alongwith Ranbir went to the police station Swaroop Nagar and I gave all information to the police and police recorded my statement”.

14. This witness was cross examined at length and during his cross examination stated that :

“I am relative of Ranbir Singh now as I become relative from last seven – eight months. Vol. At the time of incident I was not relative of Ranbir Singh. I used to visit house of Ranbir Singh for the last four-five years and Ranbir used to come to my house since that time. I

had informed Ranbir on 14.07.2012 that I saw Gaurav in the lap of Ashish on 13.07.2012. My house is situated in the back gali of Ranbir just behind his house but our wall is not common. On 14.07.2012 in the morning I left for my work at mandi at around 9.30-10.00AM and I normally returned by 6.30-7.00PM. I was in Delhi on 13.07.2012 and 14.07.2012.

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Younger brother of Ranbir is Sandhoo/co-brother of my son and have been married to real sisters. My family members did not tell me on 13.07.2012 that son of Ranbir was missing.

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I was at home on 15.07.2012. Vol. It was a Sunday. On 15.07.2012 I had tried to search for the child in the area alongwith Ranbir and even on 16.07.2012 I tried to search for the child in the area and had even gone to the police station with him. We had searched for him in the colony and the surrounding jungle but I did not go inside the nala. The entire colony was looking for the child and some persons had also searched for the child near the nala”.

15. Before acting upon the testimony of PW-13, we deem it appropriate and proper to discuss the testimonies of other material witnesses. PW-9, the complainant of the missing child, in his cross-examination category stated that he knew PW-13 Jai Narayan and on 13.07.2012 he searched his son in the entire area and the people in the area by and large came to know that his son was missing. Strange enough the entire area knew about his missing son but PW-13 Jai Narayan, who is also a relative of PW-9 did not turn to come forward to tell that he had seen the missing child in the company of respondent No.1. Further, it has emerged from the testimony of PW-

21 Ashish Chugh, a local resident of the area that PW-13 Jai Narayan was searching the missing child since 13.07.2012. This witness during his cross examination categorically stated that **“Jai Narayan was also with us while searching the child since 13.07.2012. Vol. Persons from the area were searching for the child in the area. I did not see Jai Narayan searching on 13.07.2012 but on 14.07.2012 I saw him searching the child with other persons. I was with the complainant Ranvir on 14.07.2012 while search for the child but Jai Narayan was not with us. Vol. We had constituted separate team for search the child on different places. Jai Narayan was not in my team on 14.07.2012 but I had seen him searching for the child.”**

16. From the foregoing paragraph, an inference can easily be drawn that PW-13 was in constant touch with the complainant since the missing of the child. Had he witnessed the missing child going with the respondent No. 1 on a bicycle in the evening of 13.07.2012, he would have immediately brought this fact to the notice of the complainant or the investigating agency. Such failure of the part of PW-13 makes it very difficult for us to trust and act upon his testimony.

DNA and Identification of Skeleton

17. As per the case of the prosecution, the body of the deceased was found in decomposed condition. PW-8 Dr. Bhim Singh conducted postmortem on the body of the deceased but failed to decipher the cause of death as the body of the deceased was at advance stage of decomposition. Pieces of bones of deceased (Exhibit-1) along with

blood sample of PW-9 Ranvir Singh, father of the deceased (Exhibit-2) and blood sample of Priya, mother of the deceased (Exhibit-3) were sent to CFSL for DNA profiling. PW-24 Ms. Seema Nain, Senior Scientific Officer (Biology) examined the said samples and proved her report Ex.PW24/A and concluded that :

“Conclusion:

From the above observation, it is concluded that :

1. Male DNA profile (Y-Chromosomal STR patterns) could not be obtained from Bones (Source code of Deceased : Exhibit:1) might be due to severe degradation hence, opinion regarding biologically paternal relation with Ranbir Singh (Source of Exhibit:2 : Blood sample on Gauze Piece) could not be opined.
 2. The results obtained from autosomal DNA profiles of Bones (source of Deceased: Exhibit:1 : Mark 1-1, 1-2, 1-3, 1-4) are partial or multiple and degraded alleles hence, opinion regarding biological parental relation with Ranbir Singh (Source of Exhibit:2 : Blood Sample of Gauze Piece) and Priya (Source of Exhibit:3 : Blood Sample on Gauze Piece) could not be opined.”
18. Samples were again sent to CFSL for DNA analysis. PW-22 Dr. B. K. Mohapatra, SSO (Biology) examined the samples Office and proved his report Ex.PW22/A. According to PW-22 no comparison could be established between the samples for want of insufficient material i.e. Bone Power of the deceased/child. A joint reading of medical expert's reports goes to show that the body recovered was of a male child aged between 6-8 years, but prosecution failed to bring on record that the same was of the missing child of PW-9.

Extra-judicial confession

19. Extra-judicial confessions are generally those that are made by a party to or before a private individual which includes even a judicial officer in his private capacity. An extra-judicial confession can be relied upon by the Court subject to same is made voluntary and in a fit state of mind. It has to be proved like other evidence. An extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility.

20. In *Aftab Ahmad Anasari vs. State of Uttaranchal* reported in (2010) 2 SCC 583, wherein the Apex Court observed that :

“Though extra judicial confession is considered to be a weak piece of evidence by the courts, this Court finds that there is neither any rule of law nor of prudence that the evidence furnishing extra judicial confession cannot be relied upon unless corroborated by some other credible evidence. The evidence relating to extra judicial confession can be acted upon if the evidence about extra judicial confession comes from the mouth of a witness who appears to be unbiased and in respect of whom even remotely nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused.”

21. In the instant case, Islam @ Bunty (hereinafter referred to as ‘JCL’) is stated to have made extra-judicial confession before PW-20 Ravi, a local resident where the complainant /PW-9 resided. PW-20 in his testimony recorded before the Trial Court deposed that :

“On 18th Islam @ Bunty came to me in the early morning hours and asked me to give him some work. xxxxxxxxx I noticed that Buny was very perplexed and scared (ghabra raha tha) on which I

asked him as to what was the matter on which Islam @ Buntty was initially reluctant but thereafter confided it with me that the missing child had been taken by him and Ashish on the cycle which they had taken from me which was driven by Buntty and Ashish was sitting on the back with the child. After which they took the child to the Ganda Nala. Buntty told me that while he stood on the road near the ganda nala, the accused Ashish took the child inside the nala and came back alone. Buntty further told me that he had asked Ashish as to what happened to the child on which Ashish told him that he had strangled the child and thrown his body inside the nala.”

22. From the testimony of PW-20, it has emerged on record that he came to know about the missing child through announcement made in the locality. The child was missing since 13.07.2012 (Evening) and the confessional statement was allegedly to have been made in the morning of 18.07.2012 but he neither brought this fact immediately to the parents of the missing child or to the police. This witness failed to adduce any reason as to why and what made him to keep quite till the next morning i.e. 19.07.2012. This unnatural behaviour casts a serious doubt on his claim whether any such statement was ever made before him. An extra judicial confession loses its credibility and importance when the same is surrounded by suspicious circumstances. Thus, in our considered view, it is very difficult for us to rely upon extra judicial confession purported to have been made by the JCL to PW-20 Ravi.

Recovery of Skeleton and cloths of missing child

23. As per the case of the prosecution, on 28.07.2012, the skeleton and clothes worn by the missing child were got recovered on the basis of disclosure made by respondent No. 1 and at the relevant time beside many persons, PW-3, PW-9, PW-12, PW-17, PW-20, PW-21, PW-23 were present.
24. We have perused the entire trial court record and upon considering the evidence in its entirety, we are of the considered opinion that the findings recorded by the Trial Court that the presence of PW-9, PW-12, PW-17, PW-20, PW-21 were doubtful.
25. According to PW-19 SI Krishan Kumar, on 19.07.2012, PW-20 came to him and disclosed that on 18.07.2012 JCL came to him and revealed that JCL along with respondent No. 1 took the missing child to the *Ganda Nala* where respondent No. 1 strangled the missing child and threw his body in the *Ganda Nala*. The said fact came to the notice of PW-23 Inspector Jitender Singh on 19.07.2012. Surprisingly, none of the police official acted upon the such vital information and made an effort to search the body of the missing child rather they waited till 28.07.2012 when the respondent No. 1 was arrested and on his disclosure Ex.PW18A, the one dead body was recovered. Such failure on the part of senior police officials casts serious doubt on the recovery of alleged skeleton.
26. Further, a close reading of testimonies of PW-3, PW-21 and PW-23 illuminates material contradictions with regard to the condition of the clothes of the missing child. According to PW-3 and PW-21, only the t-shirt was torn and not the jeans whereas PW-23 deposed

that the recovered clothes were not torn. Further a tagri containing ghungroo, kori mani's etc. were not mentioned by PW-3 while recovering the articles but were stated by PW-23 in his testimony. It is also placed on record that a katta was recovered from the spot which was never produced in court for its identification. Apart from these contradictions, the prosecution failed to produce the recovered articles in the Court. These contradictions and lapse on the part of the Investigating Agency cast a shadow of doubt on the alleged recovery of skeleton and other articles. When an Investigating Officer investigates a case, it is expected that his investigation will be free from any ambiguity, the duty bestowed upon him shall be carried out effectively and efficiently and shall not be overburdened with complexities. Whereas in the instant case, we have time and again observed that the report of the crime team officer and the Investigating Officer is not on the same line as required by the prosecution.

Motive

27. The Hon'ble Supreme Court in catena of decisions has laid the law relating to the role of motive in the cases based upon the circumstantial evidence. In ***Pudha Raja and another vs. State, represented by Inspector of Police: (2012) 11 SCC 196***, the Apex Court has observed that:-

“16. Furthermore, in such a case, motive assumes great significance and importance, as the absence of motive puts the court on its guard and causes it to scrutinize each piece of evidence very closely in order to ensure that suspicion, emotion or conjecture do not

take the place of proof. The evidence regarding existence of motive which operates in the minds of assailants is very often, not known to any other person. The motive may not even be known, under certain circumstances, to the victim of the crime. It may be known only to the accused and to none other. It is therefore, only the perpetrator of the crime alone, who knows as to what circumstances prompted him to adopt a certain course of action, leading to the commission of the crime.”

28. In ***Rishi Pal vs. State of Uttarakhand***,: (2013) 12 SCC 551, the Apex Court has held that :

“14. Suffice it to say that the motive for the alleged murder is as weak as it sounds illogical to us. It is fairly well-settled that while motive does not have a major role to play in cases based on eye-witness account of the incident, it assumes importance in cases that rest entirely on circumstantial evidence. Absence of strong motive in the present case, therefore, is something that cannot be lightly brushed aside.”

29. As per the story set up by the prosecution, the respondent No. 1 was the tenant of the father of the missing child. The respondent No. 1 had illicit relations with respondent No. 2 and when the father of the missing child objected the visit of respondent No.1 to the house of respondent No. 2. Further, father of the missing child also objected to the visit of JCL to the house of respondent No. 1 and on one occasion, he scolded the JCL for spitting tobacco on the staircase. These impediments led the respondent No. 1 inimical towards him and committed the alleged crime with the help of JCL.

30. In view of the settled position of law that motive plays a significant role in the cases entirely based upon circumstantial evidence. Undoubtedly, there is no direct evidence to the occurrence. In a case entirely based upon the circumstantial evidence, 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. From the scrutiny of records, we are of the considered view that the prosecution failed to attribute any motive behind the alleged offence or connect the respondents to the present case. In the present case circumstantial evidence adduced by the prosecution, falls short of establishing the chain of events as sought to be projected by the prosecution.

Other evidence

31. As per the case of the prosecution, both the respondents were in constant touch with each other on mobile phone on the day of alleged incident i.e. 13.07.2012. Further, the respondent No. 1 was using mobile No. 7838263126 and respondent No. was using mobile No. 9654062465. It has merged on record that both phones were registered in the name of Nazar Mohd., father of the JCL. The story set up by the prosecution that both the respondents were in touch with each other on the evening of alleged incident, belied by the Call Data Record (Ex.PW11/C) adduced by the prosecution which goes to show that there was no conversation between these two mobile phone from 5:27:10 p.m till midnight of 13.07.2012, the day of alleged incident.

Conclusion

32. In the case of *State of Madhya Pradesh Vs. Dal Singh & Ors.*, reported at *JT 2013 (8) SC 625*, the Supreme Court has held that the appellate court while considering the appeal against the judgment of acquittal shall interfere only when there are compelling and substantial reasons for doing so and if the judgment is unreasonable and relevant material have been unjustifiably ignored, it would be a compelling reason for interference. In the case of *Rukia Begum Vs. State of Karnataka AIR 2011 SC 1585* the Apex Court has held that in case two views are possible and the trial court has taken the view favouring acquittal, the High Court should not disturb the finding.
33. In view of the aforesaid discussion, we are of the considered view that no cogent and believable evidence has been produced by the prosecution to prove its case beyond reasonable doubt and the prosecution has miserably failed to prove the case against the respondents. It is a settled position in law that suspicion cannot take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and the legal proof. At times it can be a case of "may be true." But there is a long mental distance between "may be true" and "must be true" and the same divides conjunctures from sure conclusions. Therefore, on lack of merits and conclusive evidence the present leave petition stands dismissed.
34. Ordered accordingly.

35. Trial Court Record be sent along with a copy of this order.
36. A fair investigation is basic feature of fair trial, we have no hesitation to state that the Investigating Agency failed to conduct the investigation in a fair and proper manner. Vide impugned order dated 04.03.2017, a direction has already been issued to the Commissioner of Police to initiate an inquiry against the erring police official and take necessary action in the matter. A report be called from the Commissioner of Police as to what action has been taken in the matter so far. The report be furnished within two weeks from the date of this order.
37. List on 05.03.2019 for compliance report.

SANGITA DHINGRA SEHGAL, J

SIDDHARTH MRIDUL, J

FEBRUARY 04, 2019
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