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

+ CRL.A. 1075/2018

RAMJANI

..... Appellant

Through Mr. S.B. Dandapani, Advocate.

versus

STATE

..... Respondent

Through Ms. Aashaa Tiwari, APP for the State

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Reserved On: 27th February, 2020

Date of Decision: 06th March, 2020

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J:

1. Present appeal has been filed by appellant-convict challenging the judgment dated 5th July, 2018 and the order on sentence dated 7th July, 2018 passed by Additional Sessions Judge, Pilot Court, North District, Rohini Courts, Delhi in Sessions Case No. 240/2017 arising out of FIR No. 573/2016 registered with Police Station Bhalaswa Dairy, whereby he had been convicted under Sections 302 of the Indian Penal Code (hereinafter referred to as 'IPC') and was sentenced to rigorous imprisonment for the remainder of his life with a fine of Rs. 10,000/- for an offence punishable under Section 302 IPC.

CASE OF THE PROSECUTION

2. The prosecution's case, as noted by the Trial Court, is reproduced hereinbelow:-

"1. On 13.11.16 at 22.36.07 hours a call was received from telephone number 7840081286 and caller informed "caller ki beti khushbul age 6 years jisne red frock aur nage par hai jo 8 baje se gayab hai, need police". On this information, DD No. 36A Ex.PW2/A was recorded at PS Bhalswa Dairy at 22.46 hours. ASI Narender along with Ct.Umesh reached Mukund Pur, Labour Chowk, where Mohd. Ramjani met him. He reported that he is residing as tenant in H.No. 8, Near Labour Chowk, Macchi Chowk, Mukund Pur and working as a mason. At about 6.30 p.m. he returned home along with his wife and at about 7.00 p.m. he along with his wife went to the market to make purchases. When they were leaving home, their daughter Khushbul also followed them but they sent her back. They returned home at about 7.45 p.m. Their son told them that Khushbul is not at home. He searched for Khushbul but she was not found anywhere. Her daughter Khushbul was 6 years of age, 3-1/2 ft height, blackish complexion, round face and was wearing red colour frock, black colour t-shirt, green colour payjami and was bare feet. On this complaint, FIR No. 573 U/s 363 IPC was registered.

2. On 14.11.16 at 10.15 p.m., Ramjani came to PS Bhalswa Dairy and informed that he got registered the complaint regarding missing of his daughter Khushbul who was found by his nephew Hashim, residing under Azadpur Metro Station. He had sent his daughter along with his wife Sahana Khatoon to his village Havid, Post Office Puri, PS Bhahri, Distt. Dharbanga, Bihar. He also told that no untowards incident had taken place with his daughter and that no search be conducted further for his daughter.

3. On 17.11.16, a message was received at 12.32 pm that near Golf Course, Bhalswa Dairy, dead body of a girl aged 4-5 years is lying. The description of the dead body matched with the description of missing girl Khushbul. Mohd. Ramjani was called

to identify the dead body but he told that dead body was not of his daughter Khushbul. However, the dead body was identified as of Khushbul by the earlier husband of Shahana namely Jameer as Khushbul and also by Surender, the landlord of Mohd. Ramjani as Khushbul. Mohd. Ramjani was asked to produce his daughter which he could not. He also made a call to a lady and made the police to talk with her. She told that she is Sahana. She also made that police officer to talk with Khushbul. HC Santosh who was already in Darbhanga was asked to find out Sahana and Khushbul. She visited the addresses but neither Sahana nor Khushbul was found. Postmortem on the dead was got conducted and the doctor opined that cause of death is asphyxia secondary ante mortem drowning. Section 302 IPC was added. Accused Mohd. Ramjani was arrested. After completion of investigation, charge sheet against the accused was filed. Ld. M.M. after complying with the provision U/s 208 Cr.P.C. committed the case to the sessions court as the offence punishable under Section 302 IPC is exclusively triable by the Sessions Court.

4. Accused was charged for the offence punishable under Section 302/201 IPC to which he pleaded not guilty and claimed trial. Thereafter, the case was fixed for prosecution evidence.”

FINDING OF THE TRIAL COURT

3. The Trial Court held the appellant-convict guilty under Section 302 IPC. However, in absence of any material to prove that the appellant-convict had destroyed evidence, he was acquitted under Section 201 IPC. The conclusion of the Trial Court is reproduced hereinbelow:-

“74. After hearing the arguments and going through the record, I found that so far as DNA finger printing report Ex.PW21/A and Ex.PW21/B is concerned, according to that report Jameer was not the biological father of the body. It is important to mention here that according to the story Khushbul was born out of the wedlock of Jameer and Sahana. Blood sample/DNA of Sahana could not be obtained to establish that she is biological mother of deceased. It is important to note that when accused lodged the

missing report, he has given the description of clothes which she was wearing and also the description of her daughter. The clothes which he described in his complaint which his daughter was wearing when she went missing that is the red frock, black t-shirt and green pyjama, which matched with clothes found on the body. As mentioned above, Ex. PW8/A is admissible. PW7 also deposed that Khushbul was wearing red colour frock and green pyjama at that time and he identified those clothes on the dead body and that dead body is of Khushbul. Keeping in view this fact, I found that accused has deliberately refused to identify his daughter.

75. Keeping in view the above discussion and also the facts of the case, I found that besides the above circumstances, there is postmortem report proved on record as Ex. PW3/A that she died due to asphyxia secondary to ante mortem drowning. No other injury was found on the body. This clearly shows that it is a case of homicide. It is also important to note that once the circumstance of last seen was established the onus was upon to accused to explain when he separated from deceased and from where. His defence is that his daughter is safe and alive but he has failed to produce his daughter and tell her whereabouts. His own nephew is residing in Delhi i.e. Hasim who found his daughter according to the accused after she went missing but he did not examine him or even his wife with whom he allegedly sent his daughter. Under the circumstance and keeping the view fact that prosecution has proved the circumstance of last seen, the circumstance to lodge false report to the police regarding missing report, I hold him guilty and convict him under Section 302 IPC. However, no such evidence has brought on record that he tried to destroy any evidence to save himself from law and therefore he is acquitted under Section 201 IPC.”

ARGUMENTS ON BEHALF OF THE APPELLANT-CONVICT

4. Mr. S.B. Dandapani, learned counsel for the appellant-convict contended that the prosecution had failed to conclusively establish that the recovered dead body was of the stepdaughter of the appellant-convict

namely Khushbul as the dead body was in a highly decomposed condition and could not be identified. He pointed out that to prove the identity of the deceased child, blood sample of her alleged father – Jamir was taken and a DNA analysis was conducted, which proved that Jamir was not the biological father of the deceased. He emphasised that during identification of the dead body, the appellant-convict had admitted that though the clothes of the deceased were similar, yet the body was not of his deceased stepdaughter. Consequently, according to him, the circumstance of Ramjani refusing to identify his daughter did not exist.

5. Learned counsel for the appellant-convict stated that the appellant-convict had filed a missing report qua his step daughter on 13th November, 2016 and on the next day i.e. 14th November, 2016, he had informed the police that his stepdaughter had been found and he had sent her along with his wife to his native village to attend a wedding. He pointed out that ASI Narender Singh (PW-8) had deposed that he had spoken to a woman who claimed to be the appellant-convict's wife - Sahana and thereafter, that woman had made him speak to the appellant-convict's stepdaughter – Khushbul. According to the learned counsel for the appellant-convict, this proved the appellant-convict's claim that he had sent the stepdaughter and wife to his village and the prosecution had failed to disprove the said claim. In view of the aforesaid, he contended that the circumstance of lodging of false complaint by the appellant-convict did not exist.

6. Mr. S.B. Dandapani contended that the mother of the deceased i.e. Sahana had not been found by the police despite visiting her village. He laid emphasis on the fact that landlord of the appellant-convict i.e. Surender (PW-7) had deposed that the appellant-convict and Sahana used to fight a lot

and the landlord's wife had asked them to vacate the house due to the frequent quarrelling. Consequently, according to the learned counsel for the appellant-convict, Sahana had deserted the appellant-convict and disappeared along with Khushbul.

7. Learned counsel for the appellant-convict relied upon the statement of Dr. Anshul Saxena (PW-3) to contend that the deceased child was not killed and thrown into the water, but she had possibly strayed from her home and fallen into the Bhalaswa *jheel* accidentally. He contended that in view of the testimony of Dr. Anshul Saxena (PW-3), there was no evidence to show that the death of the child was homicidal in nature.

8. He contended that the testimony of Surender (PW-7) was full of inconsistencies and improvements, and therefore, his testimony cannot be relied upon to establish the 'last seen' circumstance.

9. Learned counsel for the appellant-convict lastly stated that since the prosecution had failed to establish the chain of events, the appellant-convict ought to be acquitted.

ARGUMENTS ON BEHALF OF THE STATE

10. *Per contra*, Ms. Aashaa Tiwari, learned APP for the State stated that the appellant-convict had lodged a false missing person complaint regarding his stepdaughter Khushbul on 13th November, 2016 and then withdrawn the same on the next day so as to prevent any investigation. She stated that while withdrawing the missing person complaint, the appellant-convict had specifically mentioned in the DD No. 38A (Ex. PW-1/A) that his stepdaughter had been found by his nephew-Hasim and thereafter, she had been sent to the native village along with his wife-Sahana. She pointed out that the accused-convict had neither examined nor produced his wife Sahana

or his nephew- Hasim. She contended that the appellant-convict now cannot take a contradictory stand and contend that his wife-Sahana had deserted him after taking the stepdaughter along with her.

11. She relied upon the testimony of ASI Santosh (PW-18) to contend that the dead body of deceased Khushbul was identified by her father – Jamir, who had started weeping after seeing the photo of the deceased. She pointed out that ASI Santosh (PW-18) had deposed that the family members of Jamir had also identified the dead body to be of Khushbul. The relevant portion of the testimony of ASI Santosh (PW-18) is reproduced hereinbelow:-

“On 18.11.2016 I was in Madhubani District Bihar when I received telephone from ASI Narender Singh of PS Bhalswa Dairy who informed that Ramjani has lodged a false report of missing of his daughter Khushboo and he had killed his daughter whose dead body was found. ASI Narender Singh also gave me the residential address of Sahana Khatoon and also sent the photograph of dead body of a girl on my whatsapp. ASI Narender directed me to find out Sahara Khatoon and request her to reach Delhi and contact police station Bhalswa Dairy with regard to her daughter Khushboo. I went to village Habidih District Darbanga Bihar but she was not found at her house. However, I met the mother of Sahana Khatoon and informed the above fact and requested her to send her daughter Sahana to Delhi. The mother of Sahana Khatoon informed me that her daughter got married with Jamir R/o Village Ammapatti District Darbanga Bihar who had divorced her. The mother of Sahan Khatoon also informed me that her daughter remarried with Ramjani R/o Village Innai, District Darbanga Bihar. I reached at the said village where I met the first wife of Ramjani who informed me that Ramjani is not residing in the village and he had remarried with one female. Now Ramjani is residing with the said female and child in Delhi. Thereafter, I went to village Ammapatti where I met Jamir who is deaf and dumb. I had

shown the photograph of dead body of a girl child to him in the screen of my mobile phone. Jamir started weeping after seeing the photo of dead body of the girl on the screen of my mobile. The other family members of Jamir also identified the dead body of a girl as of Khushbool who is daughter of Jamir. I alongwith Jamir reached at Delhi and presented him before SI Kuldeep who prepared inquest papers for the postmortem of Khusbbool."

12. Learned APP for the State contended that the appellant-convict had not given any explanation in his statement recorded under Section 313 CrPC with respect to the 'last seen' circumstance, which was established by the testimony of Surender (PW-7). In fact, the learned APP pointed out that the appellant-convict in his statement recorded under Section 313 Cr.P.C. had even denied the factum of his nephew finding his stepdaughter, which he had stated in DD No.38A (Ex. PW-1/A). The relevant portion of the appellant-convict's statement recorded under Section 313 Cr.P.C. is reproduced hereinbelow:-

"Q.12 It is further in evidence against you that on 14.11.16 at 10.15 PM you went to PS and lodged report regarding kidnapping of your daughter Khushbul vide FIR 573/16 Ex.PW-17/A. On 14.11.16 at about 10.15 PM you informed to PW 1 ASI Amrit Lal vide DD no. 38A Ex. PW-1/A that your daughter was found by your nephew Hasim, under Azadpur Metro station and you requested for stopping the investigation with regard to search of your daughter Khushbul, who had gone to Dharbanga with your wife. What have you to say?"

Ans. It is correct that I went to police station and lodged report regarding kidnapping of my daughter Khushbul but the date was 12.11.16 and not 14.11.16. However later part is incorrect."

13. She stated that the prosecution had established all the circumstances in the present case and the impugned judgment calls for no interference.

COURT'S REASONING

LAW RELATING TO A CASE BASED ON CIRCUMSTANTIAL EVIDENCE ENUMERATED

14. The present case is based upon circumstantial evidence as there is no eyewitness to the incident. The law relating to a case based on circumstantial evidence has been recently discussed by this Court in ***Amit Sehrawat @ Lamba vs. State, Crl.A. 242/2018 decided on 20th February, 2020.*** The relevant portion of the said judgment is reproduced hereinbelow:-

*“21. Having heard the learned counsel for the parties and having perused the evidence on record, this Court is of the opinion that the present case is based on circumstantial evidence. Consequently, it is essential to outline the conditions that have to be fulfilled before such a case can be said to be fully established. The Supreme Court in ***Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116*** after referring to its earlier decision in ***Hanumant, Son of Govind Nargundkar vs. State of Madhya Pradesh, 1952 SCR 1091*** stated the five golden principles, constituting the Panchsheel, of proof of a case based on circumstantial evidence as follows:-*

“(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 [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783]* where the 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.”

(emphasis supplied)

SURENDER (PW-7) IS A NATURAL AND INDEPENDENT WITNESS WHO HAD PROVED THE ‘LAST SEEN’ CIRCUMSTANCE AS WELL AS IDENTIFIED THE DEAD BODY OF KHUSHBUL AND HIS TESTIMONY HAS A RING OF TRUTH, IS CLEAR, COGENT, CONSISTENT, CREDIBLE, TRUSTWORTHY AND CORROBORATED BY EVIDENCE ON RECORD.

15. Keeping in view the aforesaid mandate of law, this Court is of the view that the testimony of appellant-convict’s landlord-Surender (PW-7) has to be examined as the prosecution has strongly relied upon it to establish the ‘last seen’ circumstance and to identify the deceased. Surender (PW-7) had seen the appellant-convict leaving the house with Khushbul on 13th November, 2016 at about 7 pm and then coming back alone (i.e. without Khushbul) around 7:45 pm. The relevant portion of the testimony of Surender (PW-7) is reproduced hereinbelow:-

“Accused Ramjani was my tenant since 02.11.16. Accused Ramjani was residing in my premises under my tenancy with his family members i.e. wife, one son and one daughter. On 13.11.16 at about 7 PM I was sitting outside my house and I saw

accused Ramjani came out of his house with his daughter. When accused along with his daughter were going outside, I wished him and asked as to where you are going with your daughter. Accused replied that he is going to market with her daughter. At about 7.45 PM accused alone returned to his house. I asked from accused as to where your daughter had gone. Accused replied that his daughter is playing outside. I along with accused searched his daughter from 8.30 PM to 8.45 PM but she was not found anywhere. When we reached at the house of accused where Sehna, wife of accused was weeping and she told us that her daughter was not found anywhere and daughter went missing. I and accused separately again went for the search of daughter of Ramjani/accused but she was not found anywhere. When I returned to my house after searching the daughter of accused, the accused was already present at his house with his wife. I came to know from my wife that accused had already lodged a missing report with police with regard to his daughter. We searched the daughter of accused but she was not found. Accused and his wife went to their house in the late night.

On 14.11.16 accused and his wife left to perform their duties as a labourer in the morning. At about 8.30 PM accused alone returned to his home. I asked accused “aapko appki ladki mil gayi” Accused replied that, “meri ladki mere rishtedar ke pass mil gayi thi Azadpur mai aur mene apni patni aur beti ko Azad Pur station se gaon bhej diya hai kyonki gaon mai shadi hai.”

On 24.11.16 I was called by the police and I reached at BJRM hospital mortuary where I was shown a dead body of a child and I identified the dead body of child as daughter of accused. Daughter of accused is known and called Khusbul. I identified the dead body vide my statement Ex.PW-7/A bearing my signature at point A. When I lastly saw the daughter of accused with him, she was wearing red colour frock and green colour pyjama. When I saw the dead body on 24.11.16 she was wearing the same clothes....”

(emphasis supplied)

16. The aforesaid testimony is corroborated by the *tehrir* (Ex. PW-8/A). In the missing person complaint filed by the appellant-convict on 13th November, 2016, the appellant-convict had admitted that he had returned home at about 7:45 pm. In fact, the appellant-convict himself had given a description of the clothes that Khushbul was wearing on 13th November, 2016 in the *tehrir* (Ex. PW-8/A) which is similar to the description given by Surender (PW-7) in his deposition. The description of clothes given by appellant-convict and Surender (PW-7) matches with the clothes that the deceased was wearing.

17. Post 7:45 p.m. on 13th November, 2016, the stepdaughter of the appellant-convict had not been seen alive by anyone and a dead body was recovered on 17th November, 2016. Surender (PW-7) had also identified the body of the deceased to be of Khushbul.

18. This Court has also seen the photographs of the dead body and it is of the opinion that the dead body was clearly identifiable. Accordingly, the contention of the appellant-convict that the dead body was highly decomposed and was not identifiable is not correct.

19. Further, though the DNA report has confirmed that Jamir was not the biological father of the deceased-Khushbul, yet the same has no effect on the prosecution's case inasmuch as the present case is not a paternity suit. The fact that the deceased was not born out of the wedlock cannot result in the acquittal of appellant-convict.

20. Keeping in view the aforesaid, the prosecution has successfully proved that Khushbul was last seen alive with the appellant-convict on 13th November, 2016 and at that time, Khushbul was wearing a "*red frock and green colour pyjama*" and the same clothes were found on the deceased

which conclusively proves that the deceased was Khushbul.

21. Consequently, this Court is of the opinion that Surrender (PW-7) is a natural and independent witness who had proved the 'last seen' circumstance as well as identified the dead body of Khushbul and his testimony has a ring of truth, is clear, cogent, consistent, credible, trustworthy and corroborated by evidence on record.

THOUGH THE APPELLANT-CONVICT WAS LAST SEEN WITH THE DECEASED-STEPDAUGHTER, YET HE FAILED TO ADDUCE ANY EXPLANATION AS TO HOW HIS STEPDAUGHTER HAD DIED. CONSEQUENTLY, SECTION 106 OF THE EVIDENCE ACT IS ATTRACTED TO THE PRESENT CASE.

22. Accordingly, it was for the appellant-convict to show how his stepdaughter Khushbul had died and how the dead body was found in the Bhalaswa *jheel* in Delhi, even though he had allegedly sent her to his native village in Bihar. However, the appellant-convict has failed to throw any light upon facts which were specially within his knowledge. Consequently in accordance with Section 106 of the Evidence Act, this Court is of the opinion that the appellant-convict's failure to adduce any explanation is an additional link which forms a part of the chain of events.

THE CONTENTION THAT THE DECEASED CHILD HAD STRAYED AWAY FROM HOME AND ACCIDENTLY DROWNED, GOES AGAINST THE APPELLANT-CONVICT'S DEFENCE THAT BOTH KHUSHBUL AND HIS WIFE-SAHANA WERE IN THEIR NATIVE VILLAGE AND AS NO QUESTION WAS PUT TO THE DOCTOR, THE SAID CONTENTION CANNOT BE RAISED.

23. As per the post mortem report of the deceased (Ex. PW-3/A), the cause of death was opined to be "*asphyxia secondary to ante mortem drowning*". The relevant portion of the post mortem report (Ex. PW-3/A) is

reproduced hereinbelow:-

**“GOVT. OF NCT OF DELHI
BABU JAGJIVAN RAM MEMORIAL HOSPITAL,
JAHANGIRPURI, NEW DELHI-110033
DEPARTMENT OF FORENSIC MEDICINE & TOXICOLOGY**

Post Mortem Examination Report

PM Report No. 1315/16 Date: 24/11/2016 TIME: 03:15 pm
Name of the Deceased: Khusbul d/o Mohd. Jameer Age: 06 yrs/Female
Investigating Officer: S.I Kuldeep PS : Bhalswa Dairy
Identified By:
1. Mohd. Jammer s/o Ishrail
2. Surendra s/o Mange Ram

BRIEF HISTORY AS PER I/O:

As per the inquest paper, the dead body of the deceased was found in a decomposed state on 17.11.16

xxxx

xxxx

xxxx

xxxx

OPINION

The deceased died due to asphyxia secondary to ante-mortem drowning, however the viscera has been preserved to rule out any associated poisoning.

Time since death: No definite opinion regarding time since death can be given due to decomposition of the body in water.

Total inquest papers: 09 (Nine) Papers.

Total pages of PM report: 02 (Two).

Specimen preserved:

- 1) Clothes.
- 2) Femur bone for DNA analysis.
- 3) Viscera in saturated solution of common salt and blood with sodium fluoride as preservative.

With the seal of 'A.S FMT BJRM HOSPITAL'.

Sd/-

(Dr. Anshul Saxena)

S.R. (Forensic Medicine)

B.J.R.M. Hospital Delhi”

(emphasis supplied)

24. The appellant-convict had raised a contention that it was possible that the deceased-child had strayed away from home and accidentally drowned, however the same goes against his own defence that both Khushbul and his wife-Sahana were in their native village. In any event, no question was put to the Doctor to establish whether the present case was of accidental drowning. It is settled law that in case the question is not put to the witness in cross-examination who could furnish explanation on a particular issue, the correctness or legality of the said fact/issue could not be raised [See: ***Mahavir Singh Vs. State of Haryana, (2014) 6 SCC 716***]. Consequently, this Court is of the opinion that the said contention cannot be raised at this stage.

THE STATEMENT MADE BY APPELLANT-CONVICT IN DD NO. 38A THAT HIS STEPDAUGHTER HAD BEEN FOUND BY HIS NEPHEW (RESIDENT OF AZADPUR, DELHI) IS ADMISSIBLE IN EVIDENCE. HOWEVER, THE CONTENT OF DD NO. 38A WAS NOT PROVED BY THE APPELLANT-CONVICT INASMUCH AS HE HAD NEITHER EXAMINED HIS NEPHEW (A RESIDENT OF AZADPUR, DELHI) WHO HAD ALLEGEDLY FOUND HIS STEPDAUGHTER NOR PRODUCED HIS WIFE-SAHANA AND STEPDAUGHTER FROM THE NATIVE VILLAGE.

25. It is pertinent to mention that the appellant-convict had lodged a missing person complaint regarding his stepdaughter Khushbul on 13th November, 2016. Thereafter, the appellant-convict had withdrawn the said complaint on the very next day i.e. 14th November, 2016 on the ground that his stepdaughter had been found by his nephew (resident of Azadpur) and the said information had been recorded in DD No. 38A (Ex. PW-1/A). The English translation of DD No. 38A (Ex. PW-1/A) is reproduced hereinbelow:-

“GENERAL DIARY

District: North West (Delhi) PS: Bhalswa Dairy GD No.038A
Date: 14.11.2018 Time: 22:15

Entry made for:

Rank/Name/PIS No. of Police Officer: Head Const. Amrit Lal/26382433

GD Type(s): Personal search

GD Subject: Mohd. Ramjani S/o Md. (sic) R/o H.No.6, Near Labor Chowk, Machhi Chowk, M. Pur Village, Delhi-9771383388 (sic) female Khushbul aged 5 years.

GD Brief:

Time: 10:15 PM. At this time, it is entered that the person mentioned in aforesaid Column No.2 came to the Police Station and got recorded, “Today dated 14.11.16, an FIR No.573/16 under Section 363 IPC was registered with regard to missing of a girl namely Khushbul aged 6 years. She was found safe with my nephew Hashim who resides under the Azadpur Metro Station. I do not know the complete address. The marriage of Zubeda Khatoon who is sister of my wife Sahana Khatoon was (to be solemnized) at Village Habibi, Post Puri, PS Baheri, District Darbhanga, Bihar. As my wife had a train ticket for Satrahan Sihani for 6 PM, my nephew had brought my daughter Khushbul to my house at 2 PM. My wife had properly checked my daughter with whom no untoward incident had taken place. Due to the shortage of time, my wife had gone while taking my daughter Khushbul to her parental house at Darbhanga, Bihar. At that time, due to lack of (time), neither I reported anything in the Police Station nor did I think it appropriate to get conducted a medical check up regarding any untoward incident with my daughter. I was on my duty in the day time. After getting my wife and daughter boarded on the train to Bihar and after

having meals at home, I have come to the Police Station for giving the information. The search of my daughter Khushbul aged 6 years may be stopped. I have come for reporting.

LTI Mohd. Ramjani

Attested by: HC/DO

Steps taken at Police Station. The information so received has been entered in the daily diary. In order to take necessary action, MPS form was filled. The same was attended by DO/CI Surender, 1268/Crime vide DD No.14. I.O. ASI Narender Singh was telephonically informed and the person mentioned in column no.2 was instructed to contact the IO in the morning. The SHO was also telephonically apprised regarding the conveying of information.

Scribed by: HC/DO

*Signature
Head Constable (illegible) ”*

26. The statement made by appellant-convict in DD No. 38A (Ex. PW-1/A) is admissible in evidence inasmuch as he was not an accused at that time and he had not disclosed any incriminating fact in the said exhibit. While discussing the law relating to the admissibility of such statements, a Division Bench of this Court in ***Mohd. Shahid Vs. State NCT of Delhi, 2015 SCC OnLine Del 13825*** has held as under:-

“10. Section 154 of Cr.P.C. provides for recording of the first information which is not substantive evidence and can be used to corroborate the informant under Section 157 of the Evidence Act or to contradict him under Section 145 of the Evidence Act, if the informant is called as a witness. If the first information is given by the accused himself, the effect of his giving the information is admissible against him as evidence of his conduct under Section 8 of the Evidence Act. Judgment in the case of Aghnoo Nagesia

(supra) discusses in detail what is meant by the term “confession”, a term not defined in the Evidence Act, to observe that vide definition given in Article 22 of Stephens' Digest of Law of Evidence as “admission made at any time by a person charged with the crime, stating or suggesting the inference that he had committed that crime”, stands discarded in *Pakla Narayanswamy v. the King Emperor*, LR (1939) I.A. 66 wherein it has been observed that a statement that contains exculpatory matter does not amount to confession, if the self-exculpatory statement was of some fact, which if true would negate the offence alleged to be confessed. Confession must admit in terms the offence or at any rate substantially all the facts, which constitute the offence. An admission of a gravely incriminating fact or even conclusively incriminating fact was not by itself a confession. (Confession therefore, we observe is a species of admission.) It was further observed that if an admission was used against the accused, the whole of it should be tendered in evidence and if a part of the admission was exculpatory and a part inculpatory, the prosecution was not at liberty to use in evidence the inculpatory part. But this principle was of no assistance to an accused where no part was exculpatory, and the prosecution tends to use the whole of the statement against the accused. Before ascribing and ruling the aforesaid precept, the Supreme Court observed that Sections 17 to 31 of the Evidence Act grouped under the heading “Admissions” were applicable to criminal trials, subject of course to the bar and prohibitions dealing with such trials.

11. In *Aghnoo Nagesia* (*supra*), the Supreme Court observed that when information report was given by an accused to a police officer and it amounts to a confessional statement, proof of confession was prohibited by Section 25 and such prohibition would not only relate to admission of the offence but of all other admissions of incriminating facts related to the offence contained in the confessional statement. This bar/prohibition against admission was subject to Section 27 of the Evidence Act and save and except the formal part identifying the accused as a maker of the report. Cases where an accused was the first informant and confessed commission of the offence were different from cases

where the accused, though the first informant, claimed innocence and had made a self-exculpatory statement. Bar of Section 25 of the Evidence Act would not exclude or stand in the way of admitting a statement to a police officer by a person subsequently arrested if the same did not amount to confession.

12. In Khatari and Hemraj v. State of Gujarat AIR 1972 SC 922, the Supreme Court has elucidated that where an accused gives first information to the police, this fact of his giving the information was relevant under Section 8 of the Evidence Act. If the statement made was not a confessional statement, it would be admissible under Section 21 of the Evidence Act. However, if the statement was confessional, it cannot be used against the accused in terms of Section 25, except to the extent permitted under Section 27 of the Evidence Act. In case of confessional statement resulting in registration of the FIR, the same could be also used for identifying the accused as the maker of the statement.

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15. Having examined the legal position, we would hold and observe that the statement made by Imrana marked Ex.PW-29/A which she affirms and reiterates in her statement under Section 313 Cr.P.C., would not be read as a confession which, in fact, it is not. However, the statement cannot also be read as a primary or core proof of the facts stated therein. The statement Ex.PW29/A, not being confession, would be admissible under Section 8 and also under Section 21 of the Evidence Act, but the prosecution must establish and prove their case and not just refer to the statement Ex.PW29/A. It would be only read as an explanation given by the appellant Imrana and evidence and material must be produced by the prosecution to show and establish that she was the perpetrator or one of the perpetrators involved in the offence.

(emphasis supplied)

27. Consequently, DD No. 38A (Ex. PW-1/A) is admissible as evidence.

28. However, the content of DD No. 38A (Ex. PW-1/A) was not proved by the appellant-convict inasmuch as he had neither examined his nephew (a resident of Azadpur, Delhi) who had allegedly found his stepdaughter nor produced his wife-Sahana and stepdaughter from the native village or any of the relatives who had attended the marriage. In fact, this defence of the appellant-convict is contradicted by the recovery of the dead body of Khushbul on 17th November, 2016.

THE CONTENTION OF THE APPELLANT-CONVICT THAT THE PROSECUTION HAD FAILED TO DISPROVE HIS CLAIM THAT KHUSHBUL AND SAHANA WERE IN HIS NATIVE VILLAGE IS CONTRARY TO FACTS AND EVIDENCE ON RECORD. CONSEQUENTLY, THE INITIAL MISSING COMPLAINT LODGED BY THE APPELLANT-CONVICT AND THE WITHDRAWAL OF THE SAME, ASSUMES IMPORTANCE IN VIEW OF SECTION 8 OF EVIDENCE ACT

29. Further, the contention of the appellant-convict that the prosecution had failed to disprove his claim that Khushbul and Sahana were in his native village is contrary to facts and evidence on record. ASI Narender Singh (PW-8) had deposed that after the dead body was recovered, the appellant-convict was called but he had not identified the deceased to be Khushbul and instead, he had stated that she was in Bihar. ASI Narender Singh (PW-8) had asked HC Santosh to verify the said fact by visiting the native village. However, neither Sahana nor Khushbul were found in the appellant-convict's native village or Sahana's village. The relevant portion of the testimony of ASI Narender Singh (PW-8) is reproduced hereinbelow:-

“.....On 14.11.16 at about 10.15 PM accused reported to duty officer that his daughter Khushbul aged about 6 years was found to his nephew Hasim, who is residing under Azad Pur Metro Station. Accused also informed that his wife Sahana Khatoon

had gone to attend the marriage of her sister Jubeda Khatoon in the village in Dist. Darbanga with daughter Khushbul. Accused also informed that his nephew Hasim had brought their daughter at 2 PM and his wife was to board the train at 6 PM for Dist. Darbanga. Accused also informed that he along with his wife Khusbul went to Railway station and after dropping them, he took dinner and thereafter he reached to the PS for informing that his missing daughter found in a good condition and there is no untoward incident with her, therefore, no medical examination of Khushbul is required. Accused requested for closing the search of his daughter. The accused also put his thumb impression in DD no. 38A. Accused is present in the court today. Witness correctly identified the accused. On 15.11.16 I recorded the statement of Mohd. Ramjani Ex. PW-8/C bearing the thumb impression of Mohd. Ramzani at point A and I attested his thumb impression by my signature at point B. Accused met me and I directed to produce the girl before the police.

On 17.11.16 an information was recorded in DD no. 21A of PS Bhalswa regarding one dead body of female child aged about 4-5 years is found near golf course, Bhalswa Dairy, Jheel and the said DD was marked to SI Kuldeep who reached at the spot with Ct. Bansant. SI Kuldeep informed me that dead body of a child girl was found and I am investigating the present case. SI Kuldeep informed that the description of dead body are similar to the missing girl case investigated by me. I went to the house of accused who has not produced his daughter before the police. The accused accompanied me to BJRM hospital mortuary where the dead body of female child was shown to him. After seeing the dead body accused informed that she is not his daughter Khushbul. Accused also informed that the clothes are similar but she is not his daughter. I recorded his statement Ex.PW-8/D bearing his thumb impression at point A and I attested his thumb impression by me signature at point B. I again directed accused to produce his daughter before the police for further action. Accused told me that he can make a call to his wife who would inform me that Khusbul is with her. Accused made a call to his wife from his mobile and handed over me mobile set. I talked to a female, who claimed to be Sahana wife of accused and

informed me that Khusbul is with her. Said female who claimed to be Sahana wife of accused also allowed me to talk Khusbul. I heard the voice of a child who claiming to be Khusbul. HC Santosh was already gone to out of station in Bihar, therefore, I directed HC Santosh to inquire about the missing girl Khusbul in Dist. Darbanga. I furnished addresses i.e. Vill. Dangowai, PS Bahedi, Dist. Darbanga, Bihar and Vill. Hawidi, PO Pari, PS Bahedi, Dist. Darbanga Bihar.

On 24.11.16 HC Santosh informed that on both the addresses neither Sahana nor Khusbul were found.”

(emphasis supplied)

30. In view of the same, the appellant-convict had failed to establish that his wife or stepdaughter had gone to the native village. Consequently, the initial missing complaint lodged by the appellant-convict and the withdrawal of the same, assumes importance in view of Section 8 of Evidence Act. The subsequent conduct of the appellant-convict establishes that he had lodged a false complaint and then in order to stop the police from investigating the matter further, he had falsely informed the police that his stepdaughter Khushbul was found. It is also proved that the appellant-convict had knowingly and deliberately refused to identify his stepdaughter's dead body and the same gives rise to another circumstance in favour of the prosecution's case.

KEEPING IN VIEW THE FOLLOWING CIRCUMSTANCES, THIS COURT IS OF THE OPINION THAT THE CHAIN OF EVENTS IS COMPLETE AND THE CIRCUMSTANCES CONCLUSIVELY PROVE THE GUILT OF THE APPELLANT-CONVICT.

31. Considering the aforesaid findings, the following circumstances have been proved and they form a complete chain of events:-

A. Surender (PW-7) had last seen the appellant-convict along with his stepdaughter Khushbul on 13th November, 2016. Thereafter, Khushbul was not seen alive.

B. The appellant-convict had filed a missing person complaint on 13th November, 2016 qua his stepdaughter Khushbul, wherein he had mentioned that she was wearing “*red frock and green pyjama*”.

C. The appellant-convict had withdrawn the aforesaid missing person complaint on 14th November, 2016 on the ground that his stepdaughter had been found by his nephew, who was a resident of Azadpur, Delhi. He also stated that he had sent his stepdaughter and wife-Sahana to his native village in Bihar.

D. On 17th November, 2016, a dead body of a child was recovered from the Bhalaswa *jheel* in Delhi and the clothes were found to be similar to that of Khushbul.

E. Surender (PW-7) identified the dead body to be of Khushbul and he also identified the clothes on the dead body.

F. The appellant-convict was informed about the dead body and he stated that it was not of his stepdaughter as she was in Bihar (at his native village) and he allegedly made a call to his wife to prove the same. However, he failed to produce his wife-Sahana and his stepdaughter as well.

G. The police went to the native village of appellant-convict and the village of his wife-Sahana but they were not found. Consequently, the false missing complaint lodged by the appellant-convict and the withdrawal of the same, assumes importance in view of Section 8 of Evidence Act.

H. On 24th November, 2016, post-mortem of the deceased was conducted and the cause of death was opined to be “*asphyxia secondary to ante mortem drowning*”.

I. Though the appellant-convict was last seen with the deceased-stepdaughter, yet he failed to adduce any explanation as to how his stepdaughter had died in Delhi. Consequently, Section 106 of the Evidence Act is attracted to the present case.

32. Keeping in view the abovementioned circumstances, this Court is of the opinion that the chain of events is complete and the circumstances conclusively prove the guilt of the appellant-convict. Consequently, the prosecution has successfully proved beyond reasonable doubt that the appellant-convict had murdered his stepdaughter Khushbul.

CONCLUSION

33. In view of the aforesaid, this Court is in agreement with the findings of the Trial Court and affirms the orders on conviction and sentence awarded to the appellant-convict.

34. Accordingly, present appeal, being bereft of merit, is dismissed.

35. Trial court record be sent back.

36. Copy of the judgment be sent to appellant-convict through the concerned Jail Superintendent.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

MARCH 06, 2020

rn/sb

