

(2013) 02 DEL CK 0135

In the Delhi High Court

Case No : Criminal Appeal No. 354 of 2012

Hardayal Singh

APPELLANT

Vs

State NCT of Delhi

RESPONDENT

Date of Decision : 13-02-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 106, 161, 162, 313

Evidence Act, 1872 — Section 24, 25, 26, 27, 28

Penal Code, 1860 (IPC) — Section 201, 302, 363

Citation : (2013) 2 ILR Delhi 1081

Hon'ble Judges : Siddharth Mridul, J; Sanjiv Khanna, J

Bench : Division Bench

Advocate : Ajay Verma, Mr. Gaurav Bhattacharya and Mr. Shiv Kumar Dwivedi, for the Appellant; Sanjay Lao, APP, for the Respondent

Final Decision : Dismissed

Judgement

Siddharth Mridul, J.—This appeal impugns the judgment dated 22.12.2010 and subsequent order on sentence dated 24.12.2010 delivered by District Judge-VIII, Rohini Courts, Delhi in Sessions Case No. 88/2010 whereby the appellant was convicted u/s 302 of the Indian Penal Code, 1860 (for short "IPC") for having committed murder of his step-son Monu @ Gurpreet Singh aged about 4 years. The conviction arose out of FIR No. 835/2006 (Ex.PW-4/A) registered at Police Station-Tilak Nagar under Sections 363 /302 /201 IPC. Upon conviction u/s 302 IPC, the appellant herein has been sentenced to undergo imprisonment for life.

BRIEF FACTS

On 7.11.2006 at about 2:10 pm, a missing complaint vide DD No. 15 (Ex.PW-18/A) was registered by the appellant, before the Police Post Khyala, PS Tilak Nagar alleging that his step-son Monu @ Gurpreet Singh, aged 4 years, had been missing from home since 06.11.2006. The said missing report (Ex.PW-18/A) was recorded by PW-5 Ct. Om Prakash and he proved the same before the Trial Court. The appellant had also furnished to the police, description of his step-son

Monu @ Gurpreet Singh.

2. Thereafter, on 08.11.2006, Babli (PW-3), who is the wife of the appellant and mother of the deceased Monu @ Gurpreet Singh, approached the Police Post and gave a statement which is Ex.PW-18/B. Babli (PW-3) stated that she is a house wife and that her son Monu @ Gurpreet Singh aged about 4 years was born out her first marriage with one Gurdev Singh. She further stated that after her divorce with Gurdev Singh, she got married with Hardayal Singh, the appellant herein on 25.06.2006 and then she along with her son Monu came to stay with the appellant in her new matrimonial home located at H. No. 59, Vishnu Garden, Delhi. She complained to the police that the appellant was unhappy about the fact of her bringing along her son Monu @ Gurpreet Singh to stay with them. She further stated that the appellant used to beat Monu @ Gurpreet Singh as also pick quarrels with her on account of Monu staying with them. The appellant even told her to send Monu to her parent's house which was opposed by Babli who insisted that Monu would stay with her.

3. Babli further stated that on 06.11.2006 at about 6:30 pm, her husband Hardayal Singh took the child Monu @ Gurpreet Singh on his two wheeler scooter No. DL-4S-1224 for a ride and returned at about 7:00 pm without Monu. On his return, Babli questioned him about Monu @ Gurpreet Singh to which appellant replied that after the ride on the scooter, he had left the child Monu in the gali. Thereafter, she searched for the child. Then she along with the appellant went to PS Khayala and lodged DD No. 15 (Ex.PW-18/A) dated 07.11.2006 regarding missing of the child Monu. She further stated that while she was inquiring about Monu, one woman Beero informed her that her child Monu @ Gurpreet Singh was seen by the latter being taken by her husband Hardayal Singh (appellant). She suspected that her child Monu @ Gurpreet Singh was secreted somewhere by her husband, the appellant herein.

4. On the basis of the said statement made by PW-3, Babli, on 08.11.2006, a ruqqa (Ex.PW-18/B) vide DD No. 23A was prepared at about 7:05 pm, and thereafter, the FIR No. 835/2006 (Ex.PW-4/A) was recorded initially u/s 363 IPC at Police Station Tilak Nagar noting that Monu @ Gurpreet Singh had been missing from the evening of 06.11.2006. After the FIR was registered, the investigation was handed over to PW-18 ASI Subh Ram who tried to search the child but in vain. As suspicion was raised by PW-3 Babli against her husband Hardayal Singh, appellant herein, the investigating officer took him into police custody to carry out his interrogation since there were incriminating circumstances against him.

5. It is further the case of the prosecution that during investigation, on 09.11.2006, the appellant made a disclosure statement Ex.PW-1/A pursuant to which a body of a child wearing a blue shirt and black pant was discovered by the Police from the ganda nala in front of Water Treatment Plant, Vikaspuri, between 1:00 to 1:30 pm in the afternoon. The details relating to the seizure of the dead body is Ex.PW-1/C. The dead body was recovered with the help of

PW-14 Kishan, who was employed with the Fire Brigade department who proved seizure memo Ex.PW-1/C. The recovery was made in the presence of PW-3 Babli, PW-1 Sukhwant Singh (father of Babli), PW-6 SI Vijender Singh, PW-7 Ct. Satish Kumar and an independent witness Vijay. The body was identified by PW-3 Babli and PW-1 Sukhwant Singh to be that of Monu @ Gurpreet Singh. Some photographs were also taken. A crime team report was also prepared at the spot which is Ex.PW- 15/A. The clothes of the deceased Monu @ Gurpreet Singh were also seized vide Ex.PW-7/A.

6. Subsequently, on 09.11.2006 itself, the appellant was arrested by the police at about/3:00 pm. The arrest memo (Ex.PW-6/A) records that the appellant was arrested from his home by PW-18 ASI Subh Ram. In these circumstances, a charge u/s 302 IPC against the appellant was added to FIR No. 835/2006 (Ex.PW-4/A).

HOMICIDAL DEATH

7. After the recovery of the body of the deceased, on 10.11.2006, at about 12:30 pm, the post mortem examination of the body discovered was conducted at DDU Hospital. The post mortem report is Ex.PW-9/A. It delineates following injuries on the body:-

- a. Deformity of nose with fracture of the underlying bone with localized haematoma at fractured site.
- b. Fracture of mandible with loosening of teeth central and lateral incisor tooth both jaws with laceration inner mucosal aspects of gums and buccalmucose with localized bloods and clots
- c. Both lips contused with effusion of dark redish blood and clots underneath on incision.

8. According to the opinion of PW-9, Dr. Anil Shandil, who conducted the post mortem examination, the death was due to asphyxia as a result of ante mortem closure of external air passage nose, mouth which was sufficient to cause death in ordinary course of nature. Thus, PW-9 Dr. Anil Shandil opined that the death was homicidal in nature. The time of death was ascertained to be 3 1/2 to 4 days before conducting the post-mortem. As the post-mortem was conducted on 10.11.2006, an inference can be drawn that the death occurred on 06.11.2006.

9. The only question which subsists is whether Hardayal Singh, the appellant herein, is responsible for the death of Monu @ Gurpreet Singh?

10. The entire case of the prosecution hinges upon circumstantial evidence as there was no eyewitness to the incident. The prosecution examined as many as 19 witnesses. Three circumstances were relied on by the prosecution against the appellant, namely:-

(i) Deceased Monu @ Gurpreet Singh was last seen alive in the company of the Appellant herein.

(ii) On the basis of disclosure statement made by the appellant (Ex.PW-1/A), body of deceased Monu@ Gurpreet Singh was recovered from ganda nala near Vikaspuri.

(iii) Appellant had pointed out the place of occurrence to the police in the pointing out memo Ex. PW-1/B.

11. As the entire case of the prosecution is based upon circumstantial evidence, in order to sustain a conviction, circumstantial evidence must be complete and incapable of any other explanation or hypothesis, other than the guilt of the accused. The following conditions must be fulfilled before a case against an accused can be said to be fully established on circumstantial evidence:-

(1) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely "may be" fully established,

(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. (Sharad Birdhichand Sarda Vs. State of Maharashtra,)

12. In Balwinder Singh Vs. State of Punjab, , it has been laid down that the circumstances from which the conclusion of guilt is to be drawn should be fully proved and those circumstances must be conclusive in nature to connect the accused with the crime. All the links in the chain of events must be established beyond "reasonable doubt and the established circumstances should be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In a case based on circumstantial evidence, the Court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, however strong they may be, to take the place of proof.

13. Keeping in view the aforesaid principles, we now proceed to scrutinize whether the circumstances mentioned above prove the guilt of the accused beyond reasonable doubt.

LAST SEEN EVIDENCE

14. In order to substantiate the allegation that the deceased Monu @ Gurpreet Singh was last seen alive in the company of the appellant, the prosecution had

produced two witnesses PW-2 Beero and PW-3 Babli.

15. PW-2 Beero was a neighbour of the appellant. PW-2 Beero, deposed to the effect that on 06.11.2206 at about 6:15 pm she was standing in the gali in front of her house which is when she saw appellant passing through that gali with one small child sitting on the pillion seat of the scooter. She further deposed that on the same night Babli (PW-3) came looking for her child when she (Beero) told Babli that she had seen the appellant going with the child on a scooter on the above mentioned date and time. PW-2 Beero, when queried by the public prosecutor about the name of the child, stated the name of the child to be Monu @ Gurpreet Singh as was told to her by the mother of the child Babli (PW-3) when she met her. It is relevant to note that on 08.11.2006, PW-2 Beero gave an analogous statement to the police u/s 161 of the Code of Criminal Procedure, 1973 ("CrPC" for short).

16. PW-3 is Babli who as stated earlier is mother of the deceased child and wife of Hardayal Singh, the appellant herein. She testified that on 06.11.2006 at about 6:30 pm, the appellant took her son Monu @ Gurpreet Singh out on the pretext of giving him a joy ride on the scooter No. DL-4S- 1224. She further stated that the appellant returned to the house on the scooter alone at about 7:00 pm. She had asked him as to where he left Monu @ Gurpreet Singh, to which the appellant replied that he had left the child Monu in the gali after giving him a ride on the scooter. Next, she searched for her child Monu along with the appellant but could not find him. Thereafter, on the next day i.e. on 07.11.2006, the appellant lodged a missing report (Ex.PW-18/A) at PS Khayala vide DD No. 15. PW-3 Babli also stated that on inquiring personally from the persons of the neighbourhood, one Beero (PW-2) who was residing in the gali at the back of her house told her that she (Beero PW-2) had seen the appellant taking her son Monu on the scooter at about 6:15 pm in the evening. On receiving this information, in view of the strong suspicion raised against the appellant, she had lodged a report with the police.

17. PW-18 ASI Subh Ram, the investigating officer deposed that he made inquiries about deceased Monu @ Gurpreet Singh from PW-2 Beero on 08.11.2006. He further deposed that PW-2 Beero informed him that she had seen the appellant giving joy rides to the deceased in the evening of 06.11.2006. PW-18 ASI Subh Ram also deposed that on 08.11.2006 itself he went to search for the appellant but the appellant was not present at his home.

18. In State of U.P. Vs. Satish, , the Supreme Court has stated that the principle of last seen comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased was found dead was so small that the possibility of any person other than the accused being the author of the crime becomes impossible. However, even in such cases as pointed out by the Supreme Court in Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh, , the courts should look for some corroboration.

19. In a recent case of Sahadevan and another Vs. State of Tamil Nadu, , with regard to last seen theory, the Supreme Court has observed as under:-

28. With the development of law, the theory of last seen has become a definite tool in the hands of the prosecution to establish the guilt of the accused. This concept is also accepted in various judgments of this Court. The Court has taken the consistent view that where the only circumstantial evidence taken resort to by the prosecution is that the accused and deceased were last seen together, it may raise suspicion but it is not independently sufficient to lead to a finding of guilt.

...

30. Even in the case of State of Karnataka Vs. M.V. Mahesh, , this Court held that merely being last seen together is not enough. What has to be established in a case of this nature is definite evidence to indicate that the deceased had been done to death of which the Respondent is or must be aware as also proximate to the time of being last seen together. No such clinching evidence is put forth. It is no doubt true that even in the absence corpus delicti it is possible to establish in an appropriate case commission of murder on appropriate material being made available to the Court.

32. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. But this theory should be applied while taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

(underlining added)

20. In the present case, according to the Dr. Anil Sandil, PW-9, the deceased had died 31/2 to 4 days before the autopsy was conducted. The post- mortem was admittedly conducted on 10.11.2006 at about 12:30 pm in the afternoon which implies that the deceased would have died sometime in the evening on 06.11.2006. Further, as per the statement of PW-2 Beero, it is established beyond doubt that the child Monu was last seen alive in the company of the appellant at about 6:15 pm in the evening of 06.11.2006. It was not suggested that PW-2 Beero had any animosity towards the appellant. PW-2 Beero gave a similar statement to the police after the incident and has stood through the test of cross-examination and therefore, testimony of PW-2 Beero is credible, trustworthy and reliable.

21. PW-3 Babli has also deposed to the effect that the appellant had taken the deceased for a scooter ride in the evening of 06.11.2006. She made a similar statement to the police on the basis of which ruqqa (Ex.PW-18/B) was prepared. In examination in chief before the court she conformed to the statement made by her before the police and no material discrepancy has crept in while she was put to cross-examination. Thus, PW-3 Babli is also a credible and a reliable

witness who does not appear to be either doctored or tutored. Her testimony confirms the fact that it was the appellant who took the deceased for a scooter ride on the fateful evening.

RECOVERY OF DEAD BODY

22. One of the formidable incriminating circumstance against the appellant is that the dead body of the child was recovered as pointed out by the appellant. The memo registering pointing out of the spot by the appellant is Ex.PW-1/B. As per prosecution, the statement of appellant which led to the discovery of the body is Ex.PW-1/A and admissible portion of it reads as under:-

I can point out that place and can get the body of Monu @ Gurpreet recovered.

23. The said disclosure by the appellant was recorded by PW-18 ASI Subh Ram in the presence PW-3 Babli, PW-1 Sukhwant Singh (father of Babli), PW-6 SI Vijender Singh and PW-7 Ct. Satish Kumar.

24. Pursuant to the said disclosure, on 09.11.2006 at about 1:00 pm, the police recovered the body of the deceased child from the ganda nala in front of Water Treatment Plant, Vikaspuri at the instance of the appellant and thus, according to the prosecution as the recovery had been effected upon the statement made by appellant, the same is admissible by virtue of Section 27 of the Indian Evidence Act, 1872 (hereinafter referred to as "Evidence Act").

25. It is urged by the learned counsel appearing for the appellant that the contents of the disclosure statement are in admissible u/s 27 of the Evidence Act in as much as on 09.11.2006, the appellant was arrested by the police at about 3:00 pm (Ex.PW-6/A) whereas the body of the deceased was recovered at about 1:00 pm in the afternoon of the same day which is indicated by the crime team report (Ex.PW-15/A). Therefore, the appellant was neither in the custody of the police nor accused of an offence so as to make a disclosure as envisaged u/s 27 of the Evidence Act.

26. In our considered view, there is no substance in the contention advanced by the counsel for the appellant. We say so for the following reasons.

27. Section 27 of the Evidence Act provides that provided when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact there by discovered, may be proved.

28. Section 25 to 26 of the Evidence Act prohibits the admissibility in evidence of a confession made to the police by accused. However, a confession leading to discovery of fact which is dealt with u/s 27 is an exception to the rule of exclusion of confession made by an accused in the custody of a police officer. Section 27, which unusually starts with a proviso, lifts the ban against the admissibility of the confession/statement made to the police to a limited extent

by allowing proof of information of specified nature furnished by the accused in police custody. In that sense Section 27 is considered to be an exception to the rules embodied in Sections 25 and 26 (*Udai Bhan Vs. The State of Uttar Pradesh*,).

29. In *State of Rajasthan Vs. Bhup Singh*, , the Supreme Court observed the following as the conditions prescribed in Section 27 of the Evidence Act for removing the cover of ban against admissibility of statement of accused to police, (1) a fact should have been discovered in consequence of the information received from the accused; (2) he should have been accused of an offence; (3) he should have been in the custody of a police officer when he supplied the information; (4) the fact so discovered should have been deposed to by the witness. The Court observed that if these conditions are satisfied, that part of the information given by the accused which led to such recovery come out of the purview of prohibition laid down u/s 25 and 26 of the Evidence Act and it becomes admissible in evidence.

30. The words "from a person accused of any offence" and "in the custody of the police officer when information is supplied" have been interpreted by the Supreme Court in decision of *State of U.P. Vs. Deoman Upadhyaya*, . In the said decision, it has been held as under:-

7. Section 27 of the Indian Evidence Act is one of a group of sections relating to the relevancy of certain forms of admissions made by persons accused of offences. Sections 24 to 30 of the Act deal with admissibility of confessions, i.e., of statements made by a person stating or suggesting that he has committed a crime. By s. 24, in a criminal proceeding against a person, a confession made by him is inadmissible if it appears to the court to have been caused by inducement, threat or promise having reference to the charge and proceeding from a person in authority. By s. 25, there is an absolute ban against proof at the trial of a person accused of an offence, of a confession made to a police officer. The ban which is partial under s. 24 and complete under s. 25 applies equally whether or not the person against whom evidence is sought to be led in a criminal trial was at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression "accused person" in s. 24 and the expression "a person accused of any offence" have the same connotation and describe the person against whom evidence is sought to be led in a criminal proceeding. As observed in AIR 1939 47 (Privy Council) by the Judicial Committee of the Privy Council "s. 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation". The adjectival clause "accused of any offence" is therefore descriptive of the person against whom a confessional statement made by him is declared not provable, and does not predicate a condition of that person at the time of making the statement for the applicability of the ban.

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12. There is nothing in the Evidence Act which precludes proof of information given by a person not in custody, which relates to the facts thereby discovered; it is by virtue of the ban imposed by s. 162 of the Code of Criminal Procedure, that a statement made to a police officer in the course of the investigation of an offence under Ch. XIV by a person not in police custody at the time it was made even if it leads to the discovery of a fact is not provable against him at the trial for that offence. But the distinction which it may be remembered does not proceed on the same lines as under the Evidence Act arising in the matter of admissibility of such statements made to the police officer in the course of an investigation between persons in custody and persons not in custody, has little practical significance. When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police.

18. Counsel for the defence contended that in any event was not at the time when he made the statement, attributed to him, accused of any offence and on that account also apart from the constitutional plea the statement was not provable. This contention is unsound. As we have already observed, the expression "accused of any offence" is descriptive of the person against whom evidence relating to information alleged to be given by him is made provable by s. 27 of the Evidence Act. It does not predicate a formal accusation against him at the time of making the statement sought to be proved, as a condition of its applicability.

(underlining added)

31. In *Aghnoo Nagesia Vs. State of Bihar*, , the accused came to the police station and informed that police that he had committed the murder of certain persons and that he can get their bodies recovered. FIR was lodged on basis of information given by the accused. Pursuant thereto, the accused got recovered the bodies of the deceased person(s) and the weapon of offence. One of the question which arose before the Supreme Court was whether the accused was in the "custody" of a police officer within the meaning of Section 27 of the Evidence Act at the time when he gave the aforesaid information to police. The Supreme Court proceeded on the premise that the accused was in constructive custody of the police at time of furnishing the relevant information. The relevant portion is extracted below:-

21. Section 27 applies only to information received from a person accused of an offence in the custody of a police officer. Now, the Sub-Inspector stated he arrested the appellant after he gave the first information report leading to the discovery. Prima facie therefore, the appellant was not in the custody of a police officer when he gave the report, unless it can be said that he was then in constructive custody. On the question whether a person directly giving to police officer information which may be used as evidence against him may be deemed to have submitted himself to the custody of the police officer within the meaning

of Section 27, there is conflict of opinion. See the observations of Shah, J. and Subba Rao, J. in *State of U.P. Vs. Deoman Upadhyaya*, . For the purposes of the case, we shall assume that the appellant was constructively in police custody and therefore the information contained in the first information report leading to the discovery of the dead bodies and the tangi is admissible in evidence. The entire evidence against the appellant then consists of the fact that the appellant gave information as to the place where the dead bodies were lying and as to the place where he concealed the tangi, the discovery of the dead bodies and the tangi in consequence of the information, the discovery of a blood-stained chadar from the appellant's house and the fact that he had gone to Dungijharan Hills on the morning of August 11, 1963. This evidence is not sufficient to convict the appellant of the offences u/s 302 of the Indian Penal Code.

(underlining added)

32. In *Deoman Upadhyaya* (supra), the Supreme Court has held that a person may not be accused of the offence at the time when the disclosure is made. The Supreme Court has held that when a person not in custody approaches a police officer investigating an offence and offers information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police. Thus, in *Deoman Upadhyaya* (supra), the Supreme Court has noticed that if a person not in custody of the police walks into a police station and makes a disclosure before the police officials which eventually leads to recovery, then such a person is deemed to have surrendered before the police. Hence, the statement made by the accused in such circumstances would be admissible as per the mandate of Section 27 of the Evidence Act.

33. In the present case, on 9.11.2006, appellant was being interrogated by the PW-18 ASI Subh Ram at his home when he made the said disclosure and therefore, though the appellant was not formally arrested by the police, he was in constructive custody of the police at that time when he made the disclosure statement (Ex.PW-1/A). The disclosure statement Ex.PW-1/A as noted above was recorded by PW-18 ASI Subh Ram and that to in the presence of PW-3 Babli, PW-1 Sukhwant Singh (father of Babli), PW-6 SI Vijender Singh and PW-7 Ct. Satish Kumar all of whom deposed to the effect that the disclosure statement was made in their presence. Therefore, in view of reasoning of the Supreme Court in *Deoman Upadhaya* (supra) it can be established that the disclosure statement (Ex.PW-1/A) by the appellant was made in the custody of police and therefore, the same falls under the purview of Section 27 of the Evidence Act and any discovery made pursuant to said disclosure statement would also be relevant if the fact discovered distinctly relates to the information supplied.

34. Therefore, the recovery of the dead body of the child Monu @ Gurpreet Singh pursuant to the disclosure statement (Ex.PW-1/A) made by the appellant is admissible u/s 27 of the Evidence Act and clearly stands as a strong incriminating circumstance against the appellant.

POINTING OUT MEMO (EX.PW-1/B)

35. Counsel for the appellant submitted that the appellant was never taken to place of occurrence and therefore the pointing out memo (Ex.PW-1/B) prepared by the prosecution is false.

36. In this regard, it is sufficient to note at the spot in the attendance of PW-18 ASI Subh Ram, PW-7 Ct. Satish Kumar and PW-6 SI Vijender Singh who are official witnesses.

37. PW-18 ASI Subh Ram testified that the accused Hardayal Singh pointed out the place of occurrence i.e. Najafgarh Drain in front of Keshopur Depot at a distance of one kilometre from the depot. He further deposed that the pointing out memo Ex.PW-1/B was prepared by him and thereafter, the crime team and divers from the fire brigade were called on the spot for locating the body of the deceased.

38. PW-7 Ct. Satish Kumar in his deposition before the Court stated that the appellant led them to the place where he had thrown the deceased in the drain and pointed out the same which was recorded by memo Ex.PW-1/B. PW-7 Satish Kumar was not cross examined by the appellant in this behalf despite opportunity been given and therefore, his testimony can be relied upon. PW-18 ASI Subh Ram was not cross examined as to the aspect of pointing out memo (Ex.PW-1/B) and therefore, his testimony is worthy of credence and is rightly relied upon by the Trial Court.

39. PW-6 SI Vijender Singh also deposed to the effect that he reached the nala Najafgarh at about 11:00 am on the appellant taking him to the spot. Thereafter, the appellant pointed out the site of occurrence which was Ex.PW-1/B. He further deposed that the deadbody was recovered at the instance of the appellant in his presence. PW-6 SI Vijender Singh on cross-examination stated that the dead body was recovered by the fire department who reached the spot between 12 to 12:20 pm in the afternoon. During cross-examination as well, no material discrepancies have occurred in the testimony of PW-6 SI Vijender Singh.

40. Therefore, the evidence of PW-18 ASI Subh Ram, PW-6 SI Vijender Singh and PW-7 Satish Kumar establishes beyond doubt that the appellant himself pointed out towards the place from where dead body could be recovered.

EXAMINATION OF THE ACCUSED u/s 313 CrPC

41. This brings us to the next question that whether the recovery of the dead body at instance of the appellant is sufficient to hold that he had himself concealed the same. u/s 313 CrPC, the incriminating circumstances which point towards the guilt of the appellant had been put to him but he did not give any explanation except choosing the mode of denial. In State of Maharashtra Vs. Suresh, , the Supreme Court discussed three possibilities when the dead body is recovered at the instance of the accused. It was held as under:-

26. We too countenance three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act.

(underlining added)

42. Section 106 casts a burden to prove a fact especially within special knowledge of any person upon such persons themselves. In the instant case, the appellant in his statement u/s 313 CrPC has not furnished any explanation whatsoever as regards his knowledge about the place from which the dead body was recovered. Therefore, in view of the mandate of the Supreme Court in Suresh's case (supra) a presumption could be drawn against the appellant that it was he who concealed the dead body of the deceased child.

MOTIVE

43. In criminal cases based on circumstantial evidence, motive assumes significant importance. This proposition is set out in the Supreme Court decision in State of U.P. Vs. Kishanpal and Others, , where it is held that motive assumes great importance in a case of circumstantial evidence and the absence of motive would definitely inure to the benefit of the accused. In the present case, motive behind the alleged crime has been set up to be the fact that the deceased was the step-son of the appellant and on account of that the appellant was not happy to keep the child with him. In order to establish the motive, prosecution examined PW-3 Babli. PW-3 Babli who is the mother of the deceased had stated both in her complaint (Ex.PW- 18/B) and her testimony before the court that the appellant was not happy with deceased child Monu @ Gurpreet Singh, residing with them in their matrimonial home. She has also stated that the appellant used to misbehave with Monu @ Gurpreet Singh. In her cross examination, PW-3 Babli stated that the appellant used to take her son (deceased) out on earlier occasion as well. However, PW-3 Babli was not cross examined on the aspect ill treatment meted out by the appellant toward the deceased and therefore her testimony to that effect is credible and reliable. Thus, it can be inferred from the testimony of PW-3 Babli that accused did have a motive which becomes relevant u/s 8 of the Evidence Act.

44. From the aforesaid analysis, we are of the considered opinion that all the three circumstances which have been established by the prosecution complete the chain and irresistibly point towards the guilt of the appellant. There can be no shadow of doubt that the circumstances have been proven beyond reasonable doubt. In view of the aforesaid premised reasons, we do not find any infirmity in the judgment of conviction and order of sentence recorded by the learned trial Judge and, accordingly, the appeal, being devoid of substance, stands dismissed.