
(2007) 03 DEL CK 0024
In the Delhi High Court
Case No : Criminal Appeal No. 109 of 2001

Mohd. Aizaz

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 08-03-2007

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 365

Citation : (2007) 95 DRJ 555

Hon'ble Judges : R.S. Sodhi, J;P.K. Bhasin, J

Bench : Division Bench

Advocate : Mukesh Jain, for the Appellant; Ravinder Chadha, APP and Jagdish Prasad, for the Respondent

Final Decision : Allowed

Judgement

R.S. Sodhi, J.—Criminal Appeal 109 of 2001 seeks to challenge the judgment dated 20.11.2000 of the Additional Sessions Judge in Sessions Case No. 32/99 arising out of F.I.R. No. 922/98, Police Station Patel Nagar, whereby the learned Judge has held the appellant guilty u/s 302 IPC and further by order dated 21.11.2000 has sentenced the appellant to imprisonment for life with a fine of Rs 15,000/- (rupees fifteen thousand) and in default of payment of fine to undergo rigorous imprisonment for a period of one year.

2. Brief facts of the case as noted by the learned Additional Sessions Judge are as follows:-

Kalu aged three and a half (3") years was the son of complainant Lal Chand. On 13th of December, 1998 he was found to be missing from his house around 1.00 p.m. His father looked for him and unable to find him lodged DD report at P.S. Patel Nagar on the same day at about 10.40 p.m. DD No. 32-A was recorded on this information.

On the next day, FIR No. 922/98 u/s 365 IPC was lodged at P.S. Patel Nagar as Kalu could not be traced out. The investigation of the case was initially taken up

by SI Ram Phal. It was revealed that accused Mohd. Aizaz who was residing on the second floor of the house in which complainant Lal Chand was residing was also missing from his room. Mohd. Aizaz was apprehended from Railway Station Delhi Main while he was trying to board a train. He made a disclosure statement and led the police party to a place in Ghaziabad from where he got recovered the dead body of Kalu which was lying near some bushes in a polythene bag. The dead body was sent for postmortem examination and the doctor who conducted postmortem on the dead body opined that Kalu had been strangled to death. After the completion of the investigation, a challan u/s 302 IPC was filed against the accused.

3. The Prosecution in order to establish its case examined as many as 13 witnesses. Of these PW-1, Lal Chand, is the complainant. He is the father of the deceased, Kalu and deposes to the effect that on 13.12.1998 his son Kalu had gone missing and he had lodged a report in the police station and subsequently, on the next day he lodged an F.I.R. He deposes that in his presence Mohd. Aizaz was apprehended from platform no.12, Railway Station, Delhi. He further goes on to depose that on interrogation the accused made a disclosure statement which then led the police party to Ghaziabad, from where the dead body of Kalu was recovered, packed in a plastic bag and thrown in the bushes. This witness identified the dead body of his son.

4. PW-2, Smt. Kamlesh, is the mother of the deceased and deposed that on 13.12.1998 at around 12.00 noon she had seen the deceased sitting with the accused in his room. She had gone there to get her son for a bath but the accused persuaded her to let him watch television. The witness got busy in household chores and thereafter at 2.00 p.m. she again went upstairs but found the room of the accused locked. She searched for her son but he could not be traced. She narrated this incident to her husband who thereupon filed missing persons report on the same day.

5. PW-3, Santosh Kumar, resides in the same building and deposed to the effect that on 13.12.1998, he came home for lunch at 12.00 noon and saw Kalu in the room with Mohd. Aizaz. After taking lunch he returned to the factory and thereafter came back at 7.00 p.m. when he found that Kalu was missing from the house. Mohd. Aizaz was also not available in his room. He had told Lal Chand that Kalu was seen with the accused. On 14.12.1998 this witness accompanied Lal Chand and Ram Pal in search of Kalu and Mohd Aizaz but they could not be traced. On 15.12.1998 at about 12.00 noon, Mohd. Aizaz was spotted at the Railway Station. The accused was apprehended and interrogated. He made a disclosure statement, upon which the Police was taken to a place near Police Post Lal Kuan, Ghaziabad and got the dead body of Kalu recovered.

6. PW-4, Head Constable Ratan Singh was the Duty Officer and on 13.12.1998 at about 10.40 p.m. he recorded the missing person's report in D.D. No.32-A, which is Ex. PW-1/A. On 14.12.1998 at 7.30 p.m. the witness recorded F.I.R. No. 922/98 u/s 365 IPC which is Exhibit PW-1/B.

7. PW-5, Dr.Sarvesh Tandon, conducted the postmortem on the body of Kalu. On examination he found following injuries:-

- (i) Bruise over right side of face on lower part 2 c.m. x 1 c.m. Size, red in colour, 2 c.m. right of right angle of mouth.
- (ii) Bruise over left side lower face 2 x 0.5 c.m. size, red in colour, just at the left angle of mount.
- (iii) Both lips bruised at mucocutaneous junction on inner side.
- (iv) Nail scratch mark over right side neck 0.4 c.m. size, curved, 3 c.m. to the right of mid line, crescentic shape.

His opinion about the cause of death is stated as under:

Cause of death is asphyxia due to antemortem smothering causing mechanical obstruction of respiratory passages by manual hand pressure by other party. All injuries are antemortem and fresh. Manual hand pressure causing smothering is sufficient to cause death in ordinary course of nature.

8. PW-10, Udai Kumar Thakur, deposes that he was living with his maternal uncle, Rajan Kumar at House No. WT-13, Gali No. 21, Baljit Nagar. Mohd. Aizaz was also living in the same house in the adjoining room. On 13.12.1998, when the witness came to his room at about 1.00 p.m., Mohd.Aziz met him and requested him to help him take a bus from ITO. The Accused told him that he was illiterate and could not read numbers of the bus but wanted to go to Bihar. This witness picked up the attache-case of Mohd.Aizaz which was of grey colour and escorted him to Shadipur Depot. At Shadipur Depot the accused was put on a bus for ITO.

9. The Trial Court while assessing the evidence was of the opinion that the two questions that arose for adjudication on the presentation of the challan were

- (i) the last seen evidence, namely, the deceased was last seen in the company of the accused and
- (ii) the recovery of the dead body at the instance of the accused. It held that PW-2, Smt.Kamlesh and PW-3, Santosh, corroborated each other to the extent that the deceased was last seen with Mohd. Aizaz at 12.00 noon on 13.12.1998. It also concluded that PW-1, Lal Chand, PW-3, Santosh Kumar and PW-11, Vijender have proved that the accused was apprehended at railway station, Delhi (main) in possession of an attache-case, which is Exhibit PW-2/2 and a railway ticket. On interrogation by S.I. Ram Pal the accused made a disclosure statement which led the police party to Hapur, Ghaziabad, from where the body of Kalu was recovered. The recovery at the instance of the accused was proved by PW-12, Prem Shankar Dwivedi. Consequently, the Trial Court held the appellant guilty u/s 302 IPC.

10. We have heard learned Counsel for the parties and with their assistance

carefully gone through the material placed before us. It is contended by counsel for the appellant that the story put forth by the prosecution is not borne out from the material on record and that the Trial Court has unnecessarily chosen to discard evidence of witnesses who depose to the child, having been seen after 12"O Clock when the appellant was not present in his room. He also submits that the disclosure statement and recovery pursuant thereto is doubtful. Counsel has taken us through relevant material, from an analysis whereof it appears that PW-1, Lal Chand, who made a report of missing of the child on 13.12.1998, did not state that the child was last seen in the company of Mohd. Aizaz. It also transpires that on the following day when the F.I.R. was recorded this aspect was again not brought to the forefront, even though PW-2, Smt. Kamlesh states that she had narrated this fact to her husband at 5"O Clock on his return on 13.12.1998. We also find that PW-3, Santosh Kumar in his cross-examination states that -"when I came home on 13.12.1998 I had seen two or three children playing. Kalu was also playing with those children". This witness claims to have returned home around 12.00 noon for lunch and gone to the factory thereafter. In other words, this witness claims to have seen the child playing with other children after 12.00 noon, which was the time given by PW-2, Kamlesh, as having seen Kalu in the company of Mohd. Aizaz and watching television. From this, it is doubtful that the deceased was last seen in the company of the appellant. However, going a little further, we find from the testimony of PW-1, Lal Chand, that the appellant was arrested and interrogated on 14.12.1998 at police station Patel Nagar after he was apprehended from the Old Delhi, Railway Station at 10.00 p.m. However, Santosh deposes that the appellant was arrested and interrogated on 15.12.1998, in the evening at Patel Nagar Police Station. Both the witnesses depose that the disclosure statement of the appellant was recorded at Police Station Patel Nagar. Constable Vijender, PW-11, deposes that the appellant was arrested at the Old Delhi Railway Station where he made a disclosure statement which was recorded at the railway station itself and from the railway station they had gone straight to Ghaziabad. It is also on record that when the appellant was arrested the attache-case was taken into custody and searched. The seizure memo prepared of the search shows that the attache-case was empty, whereas Lal Chand deposes that the attache-case was found to contain iron press, clothes, utensils etc.

11. Udai Kumar Thakur, PW-10, deposes that on 14.12.1998 he was called by the police at the police station at 4.00 p.m. and accused was already present at the police station when he was taken there. He deposes that nothing was recovered in his presence. The inconsistency brought from the deposition of the witnesses regarding the arrest and disclosure, makes it dangerous to rely upon the Prosecution story as put forth through Constable Vijender, the Arresting Officer.

12. Further, PW-3, Santosh, deposes to the effect that the bag in which the body was packed was visible from the kuchha passage. Lal Chand and Santosh depose that the police had taken them twice to Ghaziabad on the fateful night. Santosh deposes to the effect that from the police station Patel Nagar they had proceeded

to the place where the dead body was lying. He and Lal Chand were dropped short of the place of recovery and one constable was left with them and two constables proceeded and returned after 45 minutes. He further deposes that he and Lal Chand were again left at police post and police party came after 15 minutes. He goes on to depose that the police had not taken them beyond police post on the first two occasions. From the deposition of this witness it is clear that none of them were witnesses to the recovery and that the recovery itself is not free from doubt. There is certainly more to it than meets the eye. Another fact which we find strange is that the body of the child of 3" years, according to the Prosecution, was packed in the attache-case carried by the accused and then disposed of at Ghaziabad where after the accused returned to Delhi to catch a train. There is nothing on examination of the attache-case to suggest that a dead body was packed in it. Further, there is nothing on record to show that the attache-case was large enough to pack a child of 3" years.

13. Taking into consideration the material placed before us, as a whole, we find it would be highly dangerous to convict the appellant u/s 302 IPC for the murder of Kalu on the basis of deposition and material referred to above. Consequently, we set aside the judgment of conviction dated 20.11.2000 and order on sentence dated 21.11.2000 of the Additional Sessions Judge and acquit the appellant, Mohd, Aizaz, of all charges. Criminal Appeal 109 of 2001 is allowed and disposed of. Mohd. Aizaz, who is in custody, shall be set at liberty forthwith unless wanted in any other case.