

(2014) 10 DEL CK 0102
In the Delhi High Court
Case No : CrI.A. 1117/2012

Pankaj

APPELLANT

Vs

State NCT of Delhi

RESPONDENT

Date of Decision : 01-10-2014

Acts Referred:

Evidence Act, 1872 — Section 65B

Penal Code, 1860 (IPC) — Section 120B, 201, 302, 34

Citation : (2014) 4 JCC 2515

Hon'ble Judges : Pradeep Nandrajog, J; Mukta Gupta, J

Bench : Division Bench

Advocate : K.K. Manan, Nipun Bhardwaj, Ankush Narang and Ronak Satpati, Advocate for the Appellant; Lovkesh Sawhney, APP and Kailash Bisht, Insp, Advocate for the Respondent

Judgement

Mukta Gupta, J.—The appellant challenges his conviction under Sections 302/201 IPC vide the impugned judgment dated August 28, 2012 and order on sentence dated August 30, 2012 whereby he has been sentenced to undergo imprisonment for life and a fine of Rs. 20,000/- and in default of payment of fine to undergo 1 year simple imprisonment for offence punishable under Section 302 IPC and rigorous imprisonment for 5 years and a fine of Rs. 10,000/- and in default of payment of fine to undergo 6 months simple imprisonment for offence punishable under Section 201 IPC.

2. Learned counsel for the appellant assails the judgment on the ground that there is no opinion as to the cause of death as the body was recovered after 14 days. No DNA report has been produced to show that the dead body was of Sunny. No blood sample of the deceased was taken by the post-mortem doctor to conduct the DNA nor any evidence led as to how the DNA of the father of the deceased was taken. The link evidence showing the custody of DNA samples is not proved. The two disclosure statements of appellant were allegedly recorded on November 09, 2010, however no attempt was made to recover the dead body on November 9th or 10th, 2010. The material witnesses ASI Bhanu Prakash and

HC Jaivir were not associated while making alleged recovery of the dead body on November 11, 2010. Admittedly as per ASI Bhanu Prakash PW-21 appellant had been summoned by the investigating agency for 10 days. Amazingly nothing was disclosed in these 10 days and immediately on arrest two disclosure statements were made. Though it is the case of the investigating officer that the key of the factory was kept behind the door and thus the key being not in exclusive possession of the appellant, it cannot be said that the place where the dead body was recovered was in exclusive possession of the appellant. No seizure memo of the key or the lock was prepared. No attempt was made to lift the finger or foot prints. Crime team was not called. Only a private photographer was called to make the videography. There is no certificate that the videography done by him was not tampered with. Statement of witnesses qua recovery is not creditworthy and no reliance can be placed on it. Call details between appellant and the deceased have not been proved in accordance with law. There is no legal evidence on record that the factory from where allegedly the dead body was recovered belonged to the father of the appellant. The case rests on circumstantial evidence. The evidence proved by the prosecution does not form a complete chain so as to rule out every hypothesis of innocence of the appellant and thus he be acquitted.

3. Process of law was set into motion on October 04, 2010 when Shri Kartar Singh PW-7 lodged the missing report of his grandson namely Sunny at PS Govindpuri. The information was recorded vide DD No. 9A and entrusted to ASI Hari Singh for investigation. On October 11, 2010 Suresh Kumar PW-2 the father of Sunny got recorded his statement to the Police that his son Sunny aged about 18 years, height 5 feet, wearing black pant as well as black and red colour sandals who was residing with his grandfather i.e. Shri Kartar Singh has left the latter's house on September 30, 2010 at 7.30 PM without informing anybody and he suspected that someone had kidnapped his son. Thus, on this information FIR 325/2010 was registered for kidnapping and matter proceeded further and the investigation was transferred to SI Bhanu Prakash.

4. SI Bhanu Prakash obtained the call details of the mobile phone of the deceased and got to know that he was in regular touch with Pankaj @ Pinchoo and both of them had talked several times to each other on the day Sunny went missing. He also analyzed their Cell Ids to find out their position and it was revealed that on September 30, 2010 at 20.35.32 hours Pankaj was at property No. 712, Khasra No. 526, Village Mussoori, Dasana industrial area, Ghaziabad till 23.57.44 hours. Similarly on September 30, 2010 at 20.29.31 hours Sunny the victim was at 2079, Ghaziabad, Dasana Coke Airtel and thereafter there was no call from the phone of Sunny. Pankaj was finally arrested on November 09, 2010 when he disclosed having murdered Sunny and buried the dead body in the factory. Thus an application was filed seeking permission to exhume the dead body on November 10, 2010. On November 11, 2010 on the said permission being granted Pankaj led the Police to a factory situated at C-60, UPSIDC, PS Mussoori, Ice factory, Ghaziabad and on digging the earth a dead body was

recovered. Thus Sections 302/ 201/ 120B/ 34 IPC were also added.

5. Dr. R.P. Singh PW-8 conducted the post-mortem and exhibited the report as Ex.PW-8/A. He opined that the cause of death in this case could not be ascertained because the body had decomposed. However, the viscera which was also decomposed and sternum bone were preserved for chemical analysis and DNA examination. He noticed the following injuries.

"A dried decomposed wound 10 x 4 cm size over left side face extended to left ear up to the face 5 cm lateral to left angle of mouth. One electric wire was found tied around the neck of the dead body. The clothes on the dead body were; one T-shirt, one pant with belt, underwear, one pair of sandal, one iron kada, one bracelet, one plastic electric wire and kalawa were sealed with the seal of hospital and were handed over to Police constable. Viscera of the deceased was also sealed with the seal of hospital and was handed over to Police constable.

Sternum bone of the deceased was also sealed and handed over to the Police for DNA examination. The identity of the dead body revealed as of Sunny, S/o Shri Suresh Kumar Gulati."

6. Besides the appellant two other accused i.e. Thakur Dass @ Raja @ Sonu and Mala Rani were also tried for conspiracy, however they have been acquitted.

7. The case of the prosecution rests on circumstantial evidence of recovery of the dead body at the instance of the appellant. The witnesses to the recovery of the dead body are Insp. Kailash Bisht PW-26, Brij Kishore (the Tehsildar) PW-10, Suresh Kumar (the father of deceased) PW-2, Ashok Kumar (the uncle of the deceased) PW-4, Ct. Jeet Singh PW-15 and SI Om Prakash PW-20.

8. Suresh Kumar deposed that on November 11, 2010 he received a phone call from the Police asking him to reach at Sangam Ice factory, Ghaziabad as they had to tell something to him. His brother Ashok was also with him and thus both of them went to Ghaziabad and reached the factory at about 3.30/4.00 PM. A lot of people were there. Pankaj was present in Police custody. Police asked Pankaj to open the lock of the factory. The Police officials asked Pankaj about Sunny and he took the Police inside the factory on the Southern side near 5th / 6th pillar in the gallery. He pointed out to the place and told that he had buried Sunny at the said place. The place was dug up by the labour. After digging, the dead body of his son Sunny was found out. He identified the dead body on the basis of his hair, bracelet, kalawa which he was wearing on his hand and his black colour jeans.

9. Even Ashok Kumar PW-4 the uncle of the deceased deposed about visiting Ghaziabad to Sangam Ice factory on November 11, 2010 along with his brother when local Police of Ghaziabad and Delhi Police personnel were also present there. According to him Pankaj was in the custody of Delhi Police. The gate of the factory was opened. Pankaj was asked where the dead body had been buried and he pointed towards the place near the 5th and 6th pillar in the gallery. Thereafter the digging started and dead body of Sunny was exhumed. The photographs and

the videograph of the proceedings were taken and he identified the dead body to be that of Sunny on the basis of clothes and sandals.

10. Brij Kishore Dubey PW-10 the Tehsildar has deposed on the same lines. He also deposed that an electric wire was found around the neck of the dead body. The father and uncle of the deceased identified the dead body to be that of Sunny and also identified the T-shirt, jeans, sandals which were on the dead body.

11. Though all these three witnesses deposed about opening of factory none of them deposed as to from where the keys to open the factory were found out. Admittedly no such key was found out on the personal search of Pankaj nor at his instance pursuant to his disclosure. Further neither Suresh Kumar nor Ashok Kumar deposed that the factory belonged to Suresh Kumar.

12. The three other witnesses to the recovery of dead body are the Police officials. Ct. Jeet Singh PW-15 has also not stated as to from where the key was recovered and how the factory was opened. He only deposed that he along with Insp. Kailash, SI Bhanu Prakash, Ct. Kuldeep and Pankaj visited the factory at Ghaziabad. SI Om Prakash from PS Mussoorie also accompanied them where Tehsildar Shri B.K. Dubey had also come and Pankaj pointed towards the place near 5th and 6th pillar on the Southern side of the wall of the factory. On exhumation proceedings being conducted a dead body was found which was identified by the father and uncle of the deceased. He also said that the private photographer conducted the photography and videography of the exhumation proceedings.

13. SI Om Prakash PW-20 a Police officer from PS Mussoorie simply stated that the lock of the factory was got opened and thereafter they went inside the factory and Pankaj pointed out to a place on the south side of the factory and on exhumation proceedings being conducted the dead body was recovered.

14. Insp. Kailash Bisht PW-26 deposed that on November 10, 2010 he was posted at PS Govindpuri when he visited the house of Mala Rani. She got her disclosure statement recorded and she was arrested. Pankaj was already in Police custody in the case having been arrested by SI Bhanu Prakash. He went to District Magistrate, Ghaziabad. On November 11, 2010 he along with SI Bhanu Prakash, Ct. Jeet Singh, Ct. Har Gyan, Ct. Raj Karan, accused Pankaj and videographer Raj Kumar went to PS Mussoorie and sought Police assistance. SI Om Prakash, Ct. Yoginder and Ct. Omkar joined them from the said Police station. Ilaka Tehsildar Shri B.K. Dubey was already present at the spot. One dead body of a male wearing clothes was recovered in the Southern side of the gallery. In cross-examination he stated that the key of the entry gate of the factory at C-60, UPSIDC was concealed under the door of the gate.

15. Two disclosure statements of Pankaj were recorded on November 09, 2010. As per the first disclosure statement Ex.PW-18/B he stated that he handed over Sunny to Saleem after intoxicating him and asking him to keep him in

confinement for two months and he could get recovered Sunny from the colony near Meerut Railway station. In his supplementary disclosure statement he disclosed that he along with Thakur had dug a pit in the factory and buried Sunny and thereafter poured two bag of salt on it. Disclosure statement has no reference to the keys of the factory. No evidence has been led by the prosecution to show that the factory belonged to the father of Pankaj though it is the case of the prosecution. Further no keys were recovered from the possession of Pankaj. Even as per Insp. Kailash Bisht the keys were lying under the gate and thus it could not be said that they were in exclusive possession of the appellant. The prosecution has also not proved that during this period the factory was lying locked and nobody accessed the factory.

16. As per the post-mortem report the dead body was found in a highly decomposed position. The prosecution has been able to prove beyond reasonable doubt that the dead body was of Sunny. Sternum bone of the dead body was handed over by the post-mortem doctor for DNA analysis which was junked. The blood sample of Mr. Suresh Kumar PW-2 the father of deceased were also taken and as per the FSL report Ex.PW-26/G the DNA profile from the source of Ex."2" (blood sample of Mr. Suresh Kumar) is the biological father of source of Ex."1" (sternum bone of deceased Sunny).

17. Though as per ASI Bhanu Prakash the first lead of the case came from the call detail analysis of Pankaj and Sunny, however the prosecution has not been able to prove during trial that the said two mobile numbers were used by Pankaj and Sunny at the relevant time. The call details of mobile No. 9310073076 which was allegedly used by Pankaj was proved by Col. A.K. Sachdeva PW-19 along with the certificate under Section 65B of the Indian Evidence Act. However, the said SIM card was in the name of one Manoj Kumar. The prosecution has led no evidence to show that the SIM card in the name of Manoj Kumar, R/o house No. 730, Krishna Nagar, Delhi-110053 was being used by Pankaj the appellant herein. Similarly, though it was the case of the prosecution that Sunny was using the mobile No. 9953103855 and the call details along with the certificate under Section 65B thereof have been proved by Shri Deepak PW-16, however the said mobile number was in the name of Mala wife of Suresh Gulati. Again no evidence has been proved by the prosecution that Sunny was using the mobile No. 9953103855 which was in the name of Mala.

18. Thus the circumstantial evidences proved by the prosecution are:

- (i) that Sunny the son of Suresh Kumar went missing on September 30, 2010
- (ii) that the dead body exhumed from Sangam Ice factory Ghaziabad on November 11, 2010 was that of Sunny whose biological father was Suresh Kumar PW-2 and
- (iii) recovery of the dead body of Sunny buried near the 5th and 6th pillar of the factory at the instance of Pankaj.

19. Learned counsel for the appellant relying upon Bakhshish Singh Vs. State of Punjab, and 1999 SCC (Cri) 461 Chhotu Singh Vs. State of Rajasthan submits that merely on the evidence of alleged recovery of the dead body at the instance of the accused this Court would not convict the appellant. Learned APP for the State on the other hand relying upon Sukhvinder Singh and Others Vs. State of Punjab, argues to the contrary.

20. In Bakshish Singh (supra) left with the only circumstance of recovery of dead body by the Police on the information given by the accused it was held that the same merely raises a strong suspicion against the accused but is not sufficient to convict him. Similarly, in Chhotu Singh (supra) the recovery of the dead body from a pit dug on appellant's land pursuant to the disclosure statement made by him was held as not conclusively proving that the accused committed the murder. It was held that it only proves that he had buried the dead body in the pit knowing that the offence of murder was committed and thus he was liable to be convicted under Section 201 IPC and not 302 IPC. In Sukhvinder Singh (supra) relied upon by learned APP the Court upheld the conviction of the appellant therein on the ground that the recovery of the dead body pursuant to his disclosure statement coupled with the conduct of being in perplexed state of mind on the day of occurrence pointed to the only conclusion of guilt of the accused.

21. In Dharam Deo Yadav Vs. State of U.P., the Supreme Court held that recovery of the dead body is a highly incriminating evidence and points out two-three possibilities; (i) that the accused himself would have concealed the dead body and (ii) that he would have seen somebody else concealing it and (iii) he would have been told by another person that it was concealed there. In Dharam Deo Yadav the recovery of the dead body was coupled with the circumstance that the dead body was found in the house of the accused and thus the onus shifted on him to explain as to how the same was found concealed in his house. In the present case though the case of the prosecution was that this factory belonged to the father of Pankaj, however during trial no such evidence has been led.

22. In the judgment of this Court in ILR (2010) 5 Del 174 Babu Lal @ Pappu Vs. State the conviction of the appellant was based on the fact that the dead body was recovered from an iron trunk from the go-down of the sweet shop adjoining the temple where the appellant was working as an employee and thus the place where the dead body was concealed was in the domain of the appellant therein.

23. The prosecution having not proved that the factory in question belonged to the father of the deceased and that there was no access to anybody else into the factory during this period, no motive being proved nor the call record details being proved coupled with the fact that the key from which the gate of the factory was opened was also not recovered from the appellant, in our opinion Pankaj @ Pinchoo is entitled to the benefit of doubt. Consequently, the impugned judgment of conviction and order on sentence are set aside. Pankaj who is in custody be released forthwith if not required in any other case.

24. Appeal is disposed of.

25. T.C.R. be returned.

26. Two copies of the judgment be sent to the Superintendent Central Jail Tihar one for his record and the other to be handed over to the appellant.