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**(2017) 11 DEL CK 0361**

**In the Delhi High Court**

**Case No : Criminal Appeal No. 1145 Of 2013**

Raju

APPELLANT

Vs

State (Govt.Of Nct) Of Delhi & Anr

RESPONDENT

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**Date of Decision : 17-11-2017**

**Acts Referred:**

Indian Penal Code, 1860 — Section 302, 377  
Code Of Criminal Procedure, 1973 — Section 161, 313, 315  
Evidence Act, 1872 — Section 3

**Citation : (2017) 11 DEL CK 0361**

**Hon'ble Judges : S.P.Garg, J;C.Hari Shankar, J**

**Bench : Division Bench**

**Advocate : K.Singhal, Vani Singhal, Aashaa Tiwari**

**Final Decision : Allowed**

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## **Judgement**

S.P.Garg, J

1. Aggrieved by a judgment dated 05.10.2012 of learned Addl. Sessions Judge in Sessions Case No.156/2011 arising out of FIR No.134/2011 PS

Adarsh Nagar whereby the appellant "Raju was held guilty for commission of the offences punishable under Sections 302/377 IPC, he has

preferred the instant appeal. By an order dated 20.10.2012, the appellant was sentenced to undergo imprisonment for life with fine Rs. 1 lac under

Section 302 IPC and RI for ten years with fine Rs. 10,000/- under Section 377 IPC. The sentences were to operate consecutively.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 23.05.2011 at an open field, Delhi Jal Board, near road No.51,

Azadpur, the appellant committed murder of a boy Sohan aged around ten years after committing carnal intercourse.

3. On 24.05.2011 at around 11.26 a.m. Daily Diary (DD) No.10A (Ex.PW-5/A) came to be recorded at PS Adarsh Nagar, Delhi, conveying information about dead body of a child aged around 8 / 10 years lying at the spot. The investigation was assigned to SI Chander Bhan who along with Const.Pradeep went to the spot. Efforts were made to identify the body but its identity could not be established. Crime team and photographer were summoned at the spot. SI Chander Bhan prepared rukka (Ex.PW-16/A) and lodged the FIR. The investigation was taken over by PW-18 (Insp.Binod Kumar Singh). Statement of the witnesses conversant with the facts were recorded. Umesh Mukhiya, Chowkidar, informed the Investigating Officer that he had seen the child Sohan in the company of the appellant Raju on 23.05.2011 at around 08.30 p.m. Efforts were made to find him out, however, he was not traceable.

4. On 25.05.2011 post-mortem examination on the dead body was conducted and the body was handed over to the legal heirs. On 26.05.2011, the appellant was arrested from House No.221/6-6A, Gali No.6, Vishnu Garden, Khyala, Delhi. Pursuant to the disclosure statement (Ex.PW-13/G), the appellant recovered his underwear having semen stains lying at a distance of 70 â? 75 paces from the spot; it was seized vide seizure memo (Ex.PW-13/I). During further investigation, the exhibits were sent for examination to Forensic Science Laboratory. Upon completion of investigation, a charge-sheet was filed against the appellant in the Court for commission of offences under Sections 302/377 IPC.

5. To establish its case, the prosecution examined eighteen witnesses in all and relied on several documents. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and pleaded false implication; he did not produce any evidence in defence. The trial resulted in conviction as mentioned previously. Being aggrieved and dissatisfied, the instant appeal has been preferred.

6. We have heard the learned counsel for the parties and have examined the file minutely. Homicidal death of the child Sohan is not in dispute. The child's body was found at an isolated spot. As per post-mortem examination report (Ex.PW-11/A), cause of death was asphyxia as a result of ligature strangulation inflicted by the other party. Ligature mark was ante-mortem in nature and sufficient to cause death in ordinary course of nature;

time since death was approximately 41 hours. It was further suggested that post-mortem examination was consistent with sodomy before the victim's death. Apparently, it was a case of culpable homicide.

7. At the outset, it may be mentioned that the prosecution case is based upon circumstantial evidence only. The appellant's conviction rests upon the material circumstance of 'last seen' with the victim on 23.05.2011 at around 08.30 p.m.

8. Admitted position is that the appellant was distantly related to the victim's family; he used to frequently visit them. PW-13 (Achchey Lal

Kushwaha) 'victim's father lived at House No.B-44, Kewal Park, Azadpur, Delhi, with his wife and four children. His two co-brothers

(Sadhoo) i.e. Bhura and Surender along with their families also lived with him, his father-in-law 'Har Lal Kushwaha also lived there. The house

was under construction; it was owned by PW-9 (Mahesh Chand Aggarwal). In his Court statement, he deposed that on the night of 23.05.2011, he

came to know from his watchman Umesh Mukhiya working at the site that Achchey Lal Kushwaha's son was missing. He instructed Umesh

Mukhiya to search the missing boy and in case, he was not traceable, to inform the police. On 24.05.2011 when he visited the site, he came to know

that Achchey Lal Kushwaha's son had been murdered and the body was lying in the bushes near Delhi Jal Board. PW-13 (Achchey Lal

Kushwaha) used to work as labour at the said construction site. It is admitted that the appellant was maternal uncle of Achchey Lal Kushwaha's

wife Bhagwati and he lived at Vishnu Garden and worked as a mason. Admittedly, he used to visit PW-13 (Achchey Lal Kushwaha's house.

9. On scanning the testimonies of various witnesses examined by the prosecution, we are of the view that the prosecution has failed to establish

beyond reasonable doubt that the appellant was 'last seen' with the child Sohan on 23.05.2011. The child went missing on 23.05.2011 in the

evening. When victim's parents came to know that Sohan was missing, searches were made to find him but in vain. Relevant to note is that the

victim's family did not opt to lodge any 'missing report' of the child with the police on 23.05.2011. On 24.05.2011, the body was found at an

open ground near road No.51, Delhi Jal Board, Azadpur. Intimation to the police was conveyed by one Sumit Bhardwaj on phone and DD No.10A

(Ex.PW-5/A) came to be recorded at 11.26 a.m. The body could not be identified. Rukka (Ex.PW-16/A) sent at around 02.40 p.m. reveals that no

eye witness was available at the spot. Apparently, the victim's parents or PW-10 (Umesh Mukhiya) were not present at the spot when the rukka

(Ex.PW-16/A) was sent at 02.40 p.m. The body was sent for post-mortem examination. Till the police remained at the spot on 24.05.2011, none of the

family member of the victim contacted them. It is not clear as to when PW-13 (Achchey Lal Kushwaha) came into contact with the police and

identified the body.

10. PW-13 (Achchey Lal Kushwaha) did not suspect the appellant's involvement in the crime on 24.05.2011. In the cross-examination, he

admitted that till 26.05.2011, he was not aware as to who had killed his son. Inconsistent and conflicting version has emerged on record in the

testimonies of PW-13 (Achchey Lal Kushwaha) and PW-18 (Insp.Binod Kumar Singh), the Investigating Officer as to when Achchey Lal

Kushwaha's statement under Section 161 Cr.P.C. was recorded. PW-18 (Insp.Binod Kumar Singh) claimed that on 24.05.2011 when he reached

the spot at around 04.00 to 04.30 p.m., SI Chander Bhan and Achchey Lal Kushwaha met him. At around 05.00 to 05.15 p.m., he along with

Achchey Lal Kushwaha and Const. Puran went in search of Raju at Vishnu Garden but he could not be found. He did not clarify as to when Achchey

Lal Kushwaha's statement under Section 161 Cr.P.C. was recorded. Trial Court record reveals that his statement came to be recorded under

Section 161 Cr.P.C. on 24.05.2011 and Achchey Lal Kushwaha informed the investigating agency that the child was "last seen" with the

appellant Raju. Needless to say Raju was a suspect on 24.05.2011. However, no sincere efforts were made to apprehend him on 24.05.2011. PW-13

(Achchey Lal Kushwaha) categorically admitted that he did not visit the appellant's house on 24.05.2011. In the cross-examination, he was fair

enough to inform that he did not visit the appellant's house on 23.05.2011 or 24.05.2011. He further clarified that he went to the appellant's

house only on 26.05.2011 with the police. This contradicts the statement given by PW-18 (Insp.Binod Kumar Singh) about his visit along with

Achchey Lal Kushwaha to the appellant's house on 24.05.2011. Had the victim's father Achchey Lal Kushwaha suspected Raju's

involvement on 24.05.2011, there was no occasion for him not to visit his house soon after the child went missing. Appellant's house was not at

far away. The natural reaction of the victim's family could have been to contact Raju at first instance to find out as to where the child was.

Strange enough, no attempt whatsoever was made to contact the appellant to ascertain the whereabouts of the child; he was not even contacted after

the body of the child was found. It raises serious doubt if the child was seen in the company of the appellant soon prior to his homicidal death.

11. The prosecution has heavily relied upon the testimony of PW-10 (Umesh Mukhiya) who worked as a chowkidar / watchman at House No.B-44,

Kewal Park, Azadpur, Delhi, which was under construction. PW-10 (Umesh Mukhiya) started living at the construction site since 02.05.2011; his

employer Mahesh Chand Aggarwal had directed him to guard the site as watchman. The contract for construction was given to private contractor

Anwar Ali who had employed Achchey Lal Kushwaha and Surender as masons. Undisputedly, the appellant was not acquainted with PW-10 (Umesh

Mukhiya) prior to the incident. In his statement recorded under Section 161 Cr.P.C. purportedly on 24.05.2011 PW-10 informed the investigating

agency that the appellant had visited the site and the victim was seen with him at about 08.15 p.m. that night. Conduct of this witness is quite

unreasonable and unnatural. He did not inform the police about Sohan's disappearance on 23.05.2011 or 24.05.2011 prior to recovery of the body.

The body was found lying at a nearby place hardly at a distance of 3/4 k.m. from his place of work. He was not present there till the time of sending

Rukka at 02.40 p.m. In his Court statement, he testified that on 23.05.2011 at about 05.30 p.m. a boy under the influence of liquor had come at the

site. On enquiry about his identity, Achchey Lal Kushwaha's sister-in-law disclosed that he was Raju and was her maternal uncle in relation. At

about 08.15 p.m. he noticed the appellant talking with Sohan. When he was cooking food, he noticed that Sohan was accompanying the appellant

Raju. When Raju went upstairs with Yasoda and other labourers, Achchey Lal Kushwaha was not there. At around 09.00 p.m. when Achchey Lal

Kushwaha on return enquired about his son, he informed him that Raju had taken Sohan with him. On 24.05.2011 at around 12.00 to 01.00 p.m. they

came to know that the body of the child was lying in the bushes near Delhi Jal Board.

12. The appellant was not familiar with PW-10 (Umesh Mukhiya) prior to the incident. In the Court statement, he informed that when he enquired about appellant's identity and Achchey Lal Kushwaha's sister-in-law informed him that he was Raju, her maternal uncle in relation. The prosecution, however, did not examine Achchey Lal Kushwaha's sister-in-law who had allegedly told the witness about appellant's identity and relation. The Investigating Officer did not furnish any plausible explanation as to why Achchey Lal Kushwaha's sister-in-law was not joined during investigation and why she was not produced to corroborate PW-10's version. She was a material witness to depose if the appellant had visited the site on 23.05.2011 at 05.30 p.m. and that she had disclosed the appellant's identity to PW-10 (Umesh Mukhiya). The appellant was arrested on 26.05.2011. The investigating agency, however, did not move any application for conducting Test Identification Proceedings. Since the appellant was not acquainted with PW-10 (Umesh Mukhiya), the Investigating Officer was expected to get Test Identification Proceedings conducted to enable PW-10 (Umesh Mukhiya) to participate therein and to identify the appellant to be the individual who had visited the site that day. Adverse inference is to be drawn against the prosecution for not holding Test Identification Proceedings. Appellant's identification for the first time in the Court by PW-10 (Umesh Mukhiya) is suspect. This witness did not accompany the investigating agency to apprehend the appellant or to visit his place of residence soon after the child disappeared. It is really doubtful if his statement under Section 161 Cr.P.C. came to be recorded on 24.05.2011.

13. Yasoda with whom the appellant had gone upstairs was not examined. In the examination-in-chief, PW-10 (Umesh Mukhiya) deposed that at about 08.15 p.m. he had seen the appellant talking with Sohan. Thereafter, when he was cooking food, he noticed Raju going upstairs with Sohan, Yasoda and other labourers. He did not disclose as to when the child had come downstairs and if the appellant was in his company at that time. In the cross-examination, he disclosed that Achchey Lal Kushwaha enquired about Sohan from him in between 08.30 to 09.00 p.m. PW-13 (Achchey Lal Kushwaha) on the contrary disclosed that he and his wife Bhagwati returned from Parmanand Hospital in the evening. He met the appellant at around 07.30 to 07.45 p.m. on the ground floor of the House No.B-44, Kewal Park, Azadpur, Delhi. At about 08.00 p.m. he went to purchase ration; Raju

was present in the house that time. When he returned after purchasing the ration at around 08.00 - 08.30 p.m., the appellant was not present in the house that time. They waited for Sohan and Raju till 09.00 p.m. and thereafter searched them till 12.00 night. Had PW-10 (Umesh Mukhiya) apprised the victim's father Achchey Lal Kushwaha that the victim was seen in his company at around 08.30 p.m. there was no plausible reason for Achchey Lal Kushwaha and his family members not to immediately visit the appellant's residence at Vishnu Garden instead of searching here and there; this was not done. During investigation, whereabouts of the appellant were not ascertained. As per PW-13 (Achchey Lal Kushwaha)'s testimony, no visit was paid to the appellant's residence before 26.05.2011. This conduct of the victim's father is highly unreasonable and unnatural and belies the statement of PW-10 (Umesh Mukhiya) that he had seen the appellant in the company of the child at 08.30 p.m. or that he had informed about it to the victim's father. The prosecution did not examine any witness from Achchey Lal Kushwaha's family to ascertain till which time the appellant Raju had remained in the house after he had allegedly gone upstairs with the child Sohan and Yasoda etc. PW-9 (Mahesh Chand Aggarwal) who had come to know about Achchey Lal Kushwaha's son missing on 23.05.2011 from Umesh Mukhiya did not testify if he was informed that the child was in the appellant's company. This information was not conveyed by Umesh Mukhiya to his employer even on 24.05.2011.

14. In 313 Cr.P.C. statement, the appellant was fair enough to admit that on 23.05.2011 he had taken liquor with his brother-in-law (jija); he further admitted that he and his jija had gone to purchase ration. He was emphatic to state that the child was sitting in the rickshaw that time and had not accompanied them. No adverse inference can be drawn against the appellant because of his fair admission to have visited the site on 23.05.2011 and to have taken liquor with his jija. In the disclosure statement (Ex.PW-13/G) recorded on 26.05.2011, the appellant had allegedly informed that his brother-in-law and nieces used to live at Kewal Park along with their families and he had visiting terms with them. On 23.05.2011 at about 05.15 p.m. he had gone to his jija Har Lal's residence and had consumed liquor that time. The Investigating Officer did not examine Har Lal Kushwaha and

other family members residing with Achchey Lal Kushwaha at House No.B-44, Kewal Park, Azadpur, Delhi. None of them was examined to find out

as to when the appellant had left their place of residence.

15. The prosecution also did not collect any evidence from the appellant's place of residence at Vishnu Garden to find out as to since when he

was absconding or had not visited his residence. The Investigating Officer did not join any independent public witness when he allegedly visited the

appellant's residence on 24.05.2011. No surveillance was mounted at his residence. In a dramatic manner, his arrest on 26.05.2011 has been

shown. It is highly unbelievable that the appellant after having come to know that the police had visited his residence on 24.05.2011, would come to his

house to be apprehended by the police on 26.05.2011. Apparently, there was no credible evidence of abscondance. Nothing has surfaced on record if

the appellant had not attended his place of work on 24.05.2011 or 25.05.2011. The place of work was not visited by the police during these two days

and no statement of the appellant's employer was recorded. Since the appellant was acquainted with the family of the victim and was frequent

visitor to them and their relatives residing there, his presence at the spot on 23.05.2011 in the evening cannot be taken as incriminating circumstance.

It was not unusual for the appellant to be present at the spot that day. The prosecution was, however, unable to establish beyond doubt if the appellant

was last seen in the company of the child and he was the only person who was with the victim prior to his death.

16. No Call Details Record was collected during investigation. PW-13's cross-examination reveals that the appellant had a mobile; PW-13

(Achchey Lal Kushwaha) had a talk with him on mobile about six months prior to the incident. PW-13 (Achchey Lal Kushwaha) did not give reason

as to why no attempt was made to contact the appellant on mobile. The Call Details Record was very relevant to ascertain as to with whom the

appellant was in touch on the relevant date and time and what was his location. No call details of either of the appellant or PW-10 (Umesh Mukhiya)

or anyone else is on record and it creates serious doubt about the case of the prosecution.

17. The recovery of the appellant's underwear having semen stains is inconsequential. The alleged recovery was effected after appellant's

arrest on 26.05.2011. It is highly unbelievable that the police won't be in a position to recover the said underwear lying at a distance of 70 " 75

paces from the spot at the time of recovery of the other articles near the dead body on 23.05.2011. As per FSL reports (Ex.PW-18/G, Ex.PW-18/H

and Ex.PW-18/I), only human semen was detected on the underwear, however, its group could not be ascertained. It is unclear if the semen on the

underwear was that of the appellant. Moreover, no semen could be detected on Ex.4 (Gauze cloth piece having dirty stains kept in glass bottle

described as "Anal swab"), Ex.5 (One underwear having dirty brownish stains), Ex.6 (A dirty piece of cloth having brown stains along with

threads described as "ligature material"), Ex.8 (Few dirty nail clippings described as "Nail clipping of left hand") and Ex.9 (Few dirty nail

clippings described as "Nail clippings of right hand"). Blood could not be detected on Ex.4 and Ex.10 (One underwear having dirty stains). The

FSL report does not connect the appellant with the commission of crime of carnal intercourse with the child.

18. A statement under Section 313 Cr.P.C. simplicitor cannot normally be made the basis for conviction. In "Raj Kumar Singh @ Raju vs. State of

Rajasthan", 2013 (5) SCC 722, the Supreme Court held :

"41. In view of the above, the law on the issue can be summarized to the effect that statement under Section 313 Cr.P.C. is recorded to meet the

requirement of the principles of natural justice as it requires that an accused may be given an opportunity to furnish explanation of the incriminating

material which had come against him in the trial. However, his statement cannot be made a basis for his conviction. His answers to the questions put

to him under Section 313 Cr.P.C. cannot be used to fill up the gaps left by the prosecution witnesses in their depositions. Thus, the statement of the

accused is not a substantive piece of evidence and therefore, it can be used only for appreciating the evidence led by the prosecution, though it cannot

be a substitute for the evidence of the prosecution. In case the prosecution evidence is not found sufficient to sustain conviction of the accused, the

inculpatory part of his statement cannot be made the sole basis of his conviction. The statement under Section 313 Cr.P.C. is not recorded after

administering oath to the accused. Therefore, it cannot be treated as an evidence within the meaning of Section 3 of the Evidence Act, though the

accused has a right if he chooses to be a witness, and once he makes that option, he can be administered oath and examined as a witness in defence

as required under Section 315 Cr.P.C. An adverse inference can be taken against the accused only and only if the incriminating material stood fully

established and the accused is not able to furnish any explanation for the same. However, the accused has a right to remain silent as he cannot be

forced to become a witness against himself. â??

19. Normally, last seen theory comes into play where time gap, between the point of time when accused and deceased were seen last alive and when

deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime, becomes impossible. In the

present case, it will be highly hazardous to come to a conclusion of the appellant's guilt on the basis of â??last seenâ?? circumstance alone as

possibility of someone else to be with the victim cannot be ruled out. The area was surrounded by so many family members of the victim; many

labourers were there. None else has been examined to corroborate the statement of PW-10 (Umesh Mukhiya) to have seen the victim only with the

appellant prior to his death.

20. In the light of above discussion, we are of the considered view that the prosecution was unable to establish its case beyond the shadow of a

reasonable doubt. Well settled law is that before a person is convicted entirely on circumstantial evidence, the Court must be satisfied not only that

those circumstances were consistent with his having committed the act, but also that the facts were such so as to be inconsistent with any other

rationale conclusion other than the one that the accused is the guilty person.

21. In the case of a circumstantial evidence, the judgment remains essentially inferential. The inference is drawn from the established facts as the

circumstances lead to particular inferences. The Court has to draw an inference with respect to whether the chain of circumstances is complete and

when the circumstances therein are correctly considered, the same must lead only to the irrational conclusion, that the accused alone is the perpetrator

of the crime in question. All the circumstances so established, must be of a conclusive nature, and consistent only with the hypothesis of the guilt of

the accused. If there are two views possible on the evidence, one pointing to the guilt of the accused and the other to his innocence, the view which is

favourable to the accused should be adopted. Suspicion, however, grave it may be, cannot take the place of proof.

22. Resultantly, the appellant deserves benefit of doubt; the judgment of the Trial Court recording conviction cannot be sustained. The appeal is

allowed. Conviction and sentence are set aside. The appellant shall be released forthwith if not required to be detained in any other case.

23. Trial Court record be sent back forthwith with the copy of the order. Intimation be sent to the Superintendent Jail.