
(2011) 03 DEL CK 0055
In the Delhi High Court
Case No : Criminal Appeal 122 of 1999

Sunil Kumar

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 07-03-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 27

Citation : (2011) CriLJ 2622 : (2011) 181 DLT 528 : (2011) 2 JCC 1181

Hon'ble Judges : Suresh Kait, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Bhupesh Narula, for the Appellant; Pawan Sharma, for the Respondent

Judgement

Pradeep Nandrajog, J.—The Appellant has been convicted for the offence of having kidnapped and murdered Mukesh, aged 6 years, as per the impugned judgment and order dated 26.10.1998. Vide order on sentence dated 27.10.1999, for the offence of murder, the Appellant has been sentenced to undergo imprisonment for life and for the offence of kidnapping has been sentenced to undergo imprisonment for 10 years.

2. The learned trial judge has sustained the conviction on the findings returned that 2 incriminating circumstances have been proved by the prosecution and that the two are sufficient wherefrom the guilt of the Appellant can be inferred. The first circumstance held established is that the deceased and the Appellant were last seen together in the company of each other at 10 PM on 12.10.1997, a fact proved through the testimony of Bal Kishan PW-4 and that nobody saw young Mukesh thereafter. The second incriminating circumstance held to be established is, the dead body of Mukesh being recovered pursuant to the disclosure statement made by the Appellant; followed by the Appellant leading the police to a dirty water drain (ganda nala) and pointing out the spot and getting the dead body recovered. This, as per the learned trial judge is a circumstance established

and proved through the testimony of Hari Mistri PW-3, Rewati Raman PW-5, Giri Raj PW-8, SI Shri Kishan PW-11, Virender Sherawat PW-13 and Insp. Ashwani Kumar PW-14.

3. Before analysing the evidence relied upon by the learned trial judge and analysing the conclusions arrived at by the learned trial judge, we would highlight that it is the duty of a judge adjudicating an offence, where the punishment may attract the highest sentence i.e. that of death, to painstakingly, with a hawk's eye, minutely see each and every fact established and the attendant circumstance enwombing the facts, before drawing any conclusion. We are noticing a large number of decisions in which facts favourable to the accused or attendant circumstances favourable to the accused are being blatantly ignored, resulting in wrong and incorrect or imperfect conclusions being drawn. We would only highlight that with respect to evidence which is circumstantial in nature, while drawing an inference, it has to be ensured that the inference drawn is the only inference possible and is the logical culmination arrived at with reference to the proved facts and not by the process of a two stage inference. It is impermissible to take two facts and therefrom draw an inference and use the inference to draw a further inference.

4. As deposed to by Hari Mistri PW-3, the father of Mukesh, his son, the deceased, was missing since 9:00 PM on 12.10.1997 and since he could not be located he had lodged a missing person's complaint the next day and since he suspected the Appellant of having kidnapped his son as he had received information that his son was seen in the company of the Appellant, he made the complaint Ex.PW-11/A on basis whereof the FIR Ex.PW-2/B was registered at 8:00 PM on 14.10.1997. As deposed to by SI Shri Kishan PW-11, he had scribed Ex.PW-11/A and had got the FIR registered. As further deposed to by SI Shri Kishan when he was still in the company of Hari Mistri, a boy came there and told that some boys were beating another person in Harijan Basti and those persons were saying "Nanhi jaan ko kyon gayab kar diya" and thus he and Hari Mistri along with Ct. Devender reached the place where the boys were beating a boy. As further deposed to by SI Shri Kishan he interrogated the boy being beaten i.e. the Appellant and recorded his statement Ex.PW-8/B in which it stands recorded that the Appellant had, after manually strangulating Mukesh, thrown the dead body in an open drain (gandanala) near Harijan Basti. Thereafter, as deposed to by SI Shri Kishan, Appellant pointed to a spot in the ganda nala wherefrom dead body of Mukesh was recovered.

5. Relevant would it be to note that Hari Mistri PW-3 also deposed on similar lines with respect to what happened after his statement was recorded by PW-11. Revati Raman PW-5 has deposed to the facts very cryptically by stating: "On 12.10.1997 son of Hari Mistri was missing. I got this information on 13.10.1997 after taking the meal. I went to the mandir. The boy was searched. I got information on the night of 14.10.1997 through my brother Hari complainant. Then I went to nala at 11:00 pm. There were several persons. The dead body

was taken out by the police. I cannot say as to at whose instance it was taken out." It is apparent that PW-5's testimony is useless.

6. Giri Raj PW-8 has corroborated PW-11 with respect to events deposed to by PW-11 after statement Ex.PW-11/A of the complainant was recorded and we must highlight that he stated that public was beating the Appellant. Similarly, Virender Sherawat PW-13, another witness to the stated recovery who has corroborated PW-11, also stated that public persons had gathered and had apprehended the accused.

7. Insp. Ashwani Kumar PW-14 has deposed to the facts after dead body had already been discovered. Thus, his testimony is of no use.

8. It may be noted that an unproved MLC No. 08836 pertaining to Sunil i.e. the Appellant, bearing the time 3:30 AM and the date 15.10.1997 exists in the trial court record which shows that the Appellant had been assaulted.

9. Before discussing the testimony of Bal Kishan PW-4, the witness to prove the deceased being seen in the company of the Appellant in the night of 12.10.1997, we would like to discuss the testimony of PW-3, PW-8, PW-11 and PW-13.

10. No doubt, the witnesses have deposed in harmony with each other and at first blush one would reach a conclusion that the Appellant made the disclosure statement Ex.PW-8/B and thereafter pointed out the spot in a nala wherefrom dead body of Mukesh was recovered; justifying an inference that a fact got discovered upon the disclosure statement of the Appellant, which fact was not hitherto-fore in the knowledge of the police i.e. the place where the dead body of Mukesh was lying and Appellant having knowledge thereof. But, in our opinion, this would be a very hasty conclusion.

11. From the testimony of PW-3, PW-8, PW-11 and PW-13, an important fact, of the Appellant being apprehended by the public and being beaten has emerged as also the fact that the public was accusing the Appellant of taking the life of a young child. From the testimony of these 4 witnesses, another important fact has emerged. The dead body was recovered from a drain carrying effluent (ganda nala) which was flowing adjoining the Harijan Basti. The nala was flowing through an open area and there is no evidence that the nala was a covered nala.

12. A question certainly arises for consideration. The question is: Whether the possibility of somebody spotting the dead body of a child and since Appellant was already a suspect, letting his imagination ensnare the Appellant, can or cannot be ruled out? The relevance of the question is to find out whether there is a possibility, on the given evidence, of somebody having knowledge of the dead body lying in the drain and said information being put by the police in the mouth of the Appellant.

13. Revisiting the evidence of the 4 witnesses, it strikes us that as per all four, public persons had not only caught the Appellant, but were beating him and were accusing him of having taken the life of an infant. Evidence suggests that the

dead body had been spotted by the public in the drain. The drain in question is running next to the Harijan Basti. The Harijan Basti is adjoining Raj Park i.e. the place where the deceased resided. There is no evidence as to how deep was the drain and what was the depth of the water therein. Deficiency of this evidence must be accorded a weightage in favour of the accused for the simple reason criminal jurisprudence guides us that at the evaluation of the evidence, wherever a situation of reasonable doubt arises, benefit thereof has to be given to the accused. Now, we factor in the public beating the Appellant before the police had arrived. Why would people do that? Obviously out of anger. What caused the anger? Something detected by the public which roused their passion. What could have roused the passion of the public? Dead body of a young child being noticed. Why would the public single out the Appellant?

14. Some more evidence needs to be noted.

15. The Appellant is a native of Bihar and as per his statement u/s 313 Code of Criminal Procedure he was working as a labourer in shop No. 166 Raj Park, Sultanpuri. We must hasten to add that we have recorded Appellant being a resident of Bihar, not with reference to any evidence before the learned Trial Judge, but with reference to a verification report submitted by the SHO PS Sultanpuri to this Court, when Appellant had sought bail and as per which report, the Appellant has no roots in Delhi. None of his relatives reside in Delhi. His entire family resides in Village Mokimpur District Bhagalpur, Bihar. Now, there is enough evidence to show that infant Mukesh aged 6 years was missing since 9:00 PM on 12.10.1997. There is a strong possibility of this information spreading like wild fire in the colony and in the adjoining Harijan Basti. The rumour mill was at work. Bal Kishan PW-4 had been claiming having seen the Appellant in the company of the deceased and it can not be ruled out that this information with Bal Kishan was known to the public. There is every possibility that when the dead body was spotted by somebody, the public anger was roused against the Appellant due to aforesaid circumstances.

16. This is our reason for penning a thought in para 3 above. The learned Trial Judge ought to have weighed the testamentary value of the deposition of the 4 witnesses to the recovery of the dead body in the context of the fact that the public was beating the Appellant and was accusing the Appellant of having murdered a young child. We do not find any discussion in the impugned judgment, with reference to the aforesaid circumstance.

17. It is settled law that incriminating circumstance should be of a quality that it not only points out towards the guilt of an accused, but should additionally rule out the possibility of innocence. We are constrained to hold that the circumstance of the Appellant being caught by the public and being beaten by the public followed by the claim of the police that the Appellant made a disclosure statement and got the dead body recovered coupled with the circumstance of the recovery being made from an open drain flowing through an area accessible by the public, does not rule out the possibility of the Appellant being framed to

admit to the disclosure statement.

18. We should highlight that the post-mortem report Ex.PW-12/A proved through the testimony of its author Dr. Ashok Jaiswal, PW-12 evidences that Mukesh was strangled to death somewhere in the intervening night of 12th and 13th October 1997, meaning thereby that whosoever strangled the young boy had dumped the body in the drain the same night, an inference which is further reinforced by the fact that the body was noted with soddening and wrinkling of skin of palm and sole, indicative of the body being in water for considerable length of time. This is also a factor which weighs in the possibility of the dead body being noticed by somebody.

19. It is thus apparent that the so-called incriminating circumstance of the Appellant making a disclosure statement and pursuant thereto getting recovered the dead body of Mukesh is on a very weak wicket, requiring the Appellant to be given the benefit of doubt qua the incriminating weightage of said circumstance.

20. Qua the evidence of last seen, it is true that the testimony of PW-4 Bal Kishan, which has not been shaken, does establish that the Appellant was in the company of Mukesh at around 10:00 PM on 12.10.1997 and the place was near where Ramleela was being staged.

21. During Dusshera period, Ramleela is staged at various places in the city of Delhi and commencing from around 8:00 or 9:00 PM continues till between 10:00 or 11:00 PM.

22. From the testimony of Bal Kishan it is apparent that the Appellant and Mukesh were spotted at the Ramleela ground. Mukesh had left his house at around 9:00 PM to watch Ramleela and never came back.

23. The evidence of accused being last seen in the company of the deceased, by itself, is not incriminating, unless the circumstance of the two last seen together, coupled with the proximity of the time between last seen and death as also the proximity of the place of last seen and where the dead body is recovered is of a kind which rules out the possibility of an outsider being the offender. It is only this kind of last-seen circumstance which requires a satisfactory explanation from the accused as to when he parted company with the deceased; and in the absence of one, an inference of guilt to be inferred.

24. The place where Appellant and deceased were last seen together is near the Ramleela ground. Thousands would have visited the Ramleela ground that night. We do not know the distance between the site of the Ramleela ground and the drain where the dead body of Mukesh was recovered. The attendant circumstances of the evidence do not rule out the possibility of anybody interacting with young Mukesh and committing the crime. In any case, the circumstance of last seen in the instant case is hardly incriminating.

25. The motive for the crime sought to be proved by the prosecution was a frowned upon love affair between the Appellant and Birja PW-17, the sister of the

deceased and the daughter of Hari Mistri, who has denied any affair with the Appellant. We note that Hari Mistri PW-3 has not even attempted to prove any motive. He has not uttered a word of having scolded the Appellant for having an affair with his daughter. But, we do note that at the instance of the Appellant a photograph Ex.P-12 was recovered which shows the Appellant standing side by side Birja, with the two clasping each others' hand.

26. But, in the absence of Hari Mistri deposing anything on the issue, we have no material to infer that the Appellant was seeking revenge against Hari Mistri for Hari Mistri objecting to the Appellant having an affair with Birja.

27. Sh. Pawan Sharma, learned Counsel for the State had relied upon a decision reported as 2010 (2) JCC 1034 Dost Mohd. and Anr. v. State, wherein a Division Bench of this Court, incidentally the same Bench as us, had held recovery of a dead body and the disclosure statement pertaining to the condition of the dead body as highly incriminating evidence. With reference to said decision, learned Counsel had highlighted that in the disclosure statement of the Appellant it was disclosed that Mukesh had been manually strangled, a fact established by the post-mortem report Ex.PW-12/A of Mukesh. Counsel highlighted that it was not simply the dead body being recovered pursuant to the disclosure statement of the Appellant, but the fact that the dead body of Mukesh showed him being manually strangled to death, a fact i.e. the cause of death, not in the knowledge of the police.

28. In para 23 and 24 of the decision in Dost Mohd's case (supra) it was observed as under:

23. In the celebrated decision reported as AIR 1947 PC 67 Pulukuri Kottarya and Ors. v. Emperor (para 10) Section 27 Evidence Act of the Evidence Act is wholly applicable when a person in police custody produces from some place of concealment some object, such as a dead body. In the decision reported as 1989 Cri LJ (NOC) 200 (Gauhati) Chakidhr Paharia v. State of Assam. Parimal Banerjee Vs. The State, and Ram Lochan Ahir Vs. State of West Bengal, the recovery of a dead body lying concealed is a highly incriminating evidence where it is found that the person was murdered. Such a recovery incriminates the person at whose instance the dead body was recovered.

24. It assumes importance that Dost Mohd. had disclosed to the police that Hassan Ali was shot. Thus, the fact that PW-22 noted a fire shot injury and recovered a bullet from the thoracic cavity of the skeleton i.e. the dead body of Hassan Ali is also incriminating against Dost Mohd.

29. No case can strictly be a precedent in a criminal matter for the reason no two criminal trials would unfold the same story and the same evidence. Thus, a decision cited pertaining to the destination reached at a particular criminal voyage has to be carefully applied, on a principle of law, in a subsequent voyage.

30. In Dost Mohd's case (supra) the skeleton remains of the deceased Hassan Ali

were recovered on the disclosure statement made by Dost Mohd. followed by his leading the police to a private sugarcane field, a place not accessible by public, he pointed out a spot, which had to be dug up and from the womb of the earth, the skeleton remains of Hassan Ali were recovered. Before the skeleton remains of Hassan Ali were recovered, Dost Mohd. had in his disclosure statement stated that he had shot Hassan Ali in the chest. Forensic evidence, when the skeleton remains were forensically examined, was the recovery of a bullet from the thoracic cavity of the skeleton. It was in this context the evidence was found to be incriminating.

31. In the instant case, as already discussed by us, the dead body was found in a drain which was flowing adjoining Harijan Basti, a place accessible to the public. We have highlighted the possibility of the dead body being noticed by the public and the Appellant being framed. There is much qualitative and quantitative difference between the evidence in the instant case vis-a-vis that in Dost Mohd's case (supra).

32. We conclude by holding that if not more, the Appellant would be entitled to a benefit of doubt.

33. The appeal stands disposed of setting aside the impugned judgment and order dated 26.10.1998. The Appellant is acquitted of the charge of having kidnapped and then murdered the deceased Mukesh. We set aside the order dated 27.10.1998 inflicting the sentence upon the Appellant.

34. Since the Appellant has been admitted to bail, we discharge the bail bond and the surety bond.