

(2013) 05 DEL CK 0045
In the Delhi High Court
Case No : Criminal Appeal No. 345 of 2012

Virender

APPELLANT

Vs

State of NCT of Delhi

RESPONDENT

Date of Decision : 14-05-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, 363, 377

Citation : (2013) 3 JCC 1611

Hon'ble Judges : V.P. Vaish, J; Sanjiv Khanna, J

Bench : Division Bench

Advocate : Amit Khemka, Mr. Rishi Sehgal and Ms. Sanorita D. Bharali, for the Appellant; Richa Kapoor, APP, for the Respondent

Judgement

Sanjiv Khanna, J.—Appellant Virender impugns his conviction u/s 302 of the Indian Penal Code, 1860 (IPC for short) for murder of Vishal in prosecution case arising out of FIR No. 571/2006, P.S. Sarita Vihar, vide judgment dated 23rd December, 2011. By order of sentence dated 24th December, 2011 the appellant has been sentenced u/s 302 IPC to undergo life imprisonment and pay fine of Rs. 10,000/-, in default of which, he has to undergo rigorous imprisonment of two months. The appellant has been also convicted for the offence u/s 363 IPC to undergo rigorous imprisonment for seven years and pay fine of Rs. 2,000/-, in default of which he has to undergo rigorous imprisonment for 15 days. We may note that in the charge-sheet allegations u/s 377 IPC were made but no charge was framed under the said Section. The prosecution case is based upon circumstantial evidence and the core issue is whether or not the appellant is the perpetrator of the said crime.

2. The factum that the deceased, the young boy aged about 3 1/2 years had died a homicidal death is not seriously disputed before us and in any case is proved beyond doubt by Dr. Millo Tabin (PW-7) who has proved the post mortem report Ex. PW 7/A. As per the post mortem report, cause of death was strangulation of

the neck which was ante mortem in nature and sufficient to cause death in ordinary course of nature. The said post mortem was conducted on 06.11.2006 and the post mortem report records that the date of death was about one week back. The deceased had also suffered diffused hematoma along the strap muscles of neck and there was fracture of left side of hyoid bone. The upper portion of the dead body was discoloured, distended, disfigured and decomposed. Eye balls were sunken into cavities. There was degloving of skin of both hands. The hair of scalp could be easily plucked off. Maggots ranging from one to two Centimeter in length were present all over the body.

3. Rambir Singh (PW-1), the father of the child had made a complaint (Ex. PW-1/A) on 2nd November, 2006 at about 5.20 a.m. that Vishal had gone missing and was untraceable. The said complaint was taken into writing and recorded as DD No. 14 (Ex. PW 1/A). The said DD entry merely records that Vishal aged about 3 1/2 years who was wearing red and blue colour t-shirt and orange colour knicker was missing since 1st November, 2006 from about 2.00 p.m. In the said complaint, the name of the appellant is not mentioned. The complainant did not suspect anyone. It was further indicated that the complainant had made search and had tried to locate Vishal, but was unsuccessful.

4. Subsequently, second statement of Rambir Singh was recorded on 4th November, 2006, which was marked Ex. PW 1/B. In this statement, PW-1 expressed apprehension that his son had been kidnapped by someone. However, in the said statement, he did not mention the name of anyone or state to the effect that he suspected any person. On the basis of the said statement, rukka was recorded and FIR u/s 363 IPC was registered vide DD entry No. 4A on 4th November, 2006 at 10.10 a.m. The timing of and the recording of the said DD entry indicates that the statement of PW-1 (Ex. PW-1/B) was recorded in the morning of 4th November, 2006 at about 9.40 a.m.

5. The dead body of Vishal was found by Shahid (PW-8) on 5th November, 2006 at about 3.00 p.m. He has deposed that he was present near house No. D-41, J.J. Colony, where some children were playing on the street. The children informed him that one child was lying in the drum in House No. D-42, J.J. Colony. He immediately went inside the House No. D-42, J.J. Colony, through a broken window, and found a child aged about 3 1/2 years was lying inside a drum. The dead body had swollen. He informed the police at No. 100, who arrived at the spot and removed the child from the drum. Photographs were taken. PW-8 correctly identified the body of the child, as well as the premises in the photographs.

6. Rambir Singh (PW-1) in his court deposition, recorded on 1.04.2009, has stated that the appellant was known to him and was residing in front of their house. He has stated that his younger daughter Shabnam had informed him that Vishal was taken away by the appellant on the pretext of getting toffee. We record that Shabnam has not appeared in the witness box. Secondly, we have already noticed the statements made by Rambir Singh Ex. PW 1/A and Ex. PW 1/

B, wherein the name of appellant is not mentioned. The police diary was examined by us and we do find that the name of the appellant was not mentioned or suspected till the dead body was recovered.

7. One of the incriminating facts relied by the prosecution is that the appellant Virender was absconding. Rambir Singh (PW-1) in his deposition has stated that he had inquired from the mother of the appellant about Virender on 01.11.2006 and subsequently met Virender at his home on 01.11.2006 at 9.30 p.m. At that time, he had inquired from Virender where he had taken Vishal with him. The appellant Virender had denied that he had taken Vishal with him. This is a clear indication that Virender was in his house on 01.11.2006 at 9.30 p.m. and was not absconding. Interestingly, in the cross-examination by the appellant's counsel recorded on 02.04.2009, PW-1 has stated as under:-

From 01/11/2006 to 05/11/2006 I did not meet Virender at his home. He had come and had run away. I had visited Virender's house only on 01/11/2006 and not after that. I did not visit police post from 02/11/2006 to 04/11/2006 (Vol. I myself was searching my son).

Thus, PW-1 has been contradicting himself. In his court deposition on 1st April, 2009, PW-1 had accepted that he had met the appellant at his home on 1st November, 2006 at 9.30 p.m. The said deposition and statement on 1st April, 2009 cannot be overwritten by subsequent assertion on 2nd April, 2009 that he had not met the appellant at his home from 1st November, 2006 to 5th November, 2006. In fact, PW-1 after his court deposition on 1st April, 2009 had an opportunity to rethink and modulate his version when he appeared on 2nd April, 2009. PW-1 has made an effort to alter and change his deposition but he has also contradicted himself on the question of abscondence as he has deposed that he had visited the appellant's house only on 1st November, 2006 and not thereafter. Thus, PW-1 was not personally aware whether the appellant had absconded or not after 1st November, 2006.

8. PW-1 has deposed that he had informed police that he doubted Virender and stated that Virender might have kidnapped his son. However, the said fact is not mentioned in the two statements Ex. PW 1/A and Ex. PW 1/B. The last statement (Ex. PW-1/B) was recorded on 04.11.2006 at about 9.40 a.m. There is nothing in the police diary to show that the police had tried to interrogate or contact the appellant till the dead body was found on 05.11.2006. Clearly, the appellant was never suspected.

9. PW-1 has deposed as to the manner and how the appellant was arrested. It is stated that the appellant was arrested at Nehru Place while sitting on a scooter parked at Paras Cinema Hall. The appellant, therefore, was roaming around on a scooter and was found at a nearby place, at a distance of 4-5 kms. There is no evidence or material to show that the appellant had absconded on 01.11.2006 onwards till the dead body was found on 05.11.2006. In case Shabnam, daughter of PW-1, had made any statement to her father, suspicion and doubt

about involvement of the appellant was natural. The fact that the small child had gone missing was a serious concern for the family of PW-1 and others living in the neighbourhood. Hence, abscondence would have made the appellant the prime suspect. Police would have been informed. But neither was the police informed nor did they make any such investigation or inquiries about the appellant.

10. The other purported incriminating circumstance relied upon by the prosecution is the evidence of last seen. The prosecution relies upon statement of Raj Kumar (PW-3), who was a resident of the same locality i.e. Madanpur Khadar, J.J. Colony. In his testimony, PW-3 has stated that he had seen the appellant with the deceased on 01.11.2006 at about 2.00 p.m. at Jalevi Chowk, RTV Bus Stand. PW-3 identified the appellant. In the cross-examination, PW-3 has stated that he had earlier also seen Vishal in the company of appellant Virender on several occasions. PW-3 has deposed that he had visited the spot where the dead body of Vishal was recovered i.e. D-42, J.J. Colony, Madanpur Khadar. However, it is noticeable that his statement u/s 161 Cr. P.C. was recorded on 10.11.2006 i.e. five days after the dead body was recovered and nearly nine days after Vishal had gone missing. During this period, Raj Kumar (PW-3) had not made any statement or informed anyone that he has seen Vishal in the company of the appellant on 01.11.2006 at 2.00 p.m. We note that PW-1 in his deposition has stated that after Vishal went missing, he had circulated hue and cry notices and had got in touch with the neighbours in order to locate the child. He had searched for Vishal, here and there but without success. There is no reason or ground forthcoming why Raj Kumar (PW-3) had kept quiet for ten days after the day Vishal went missing and five days after his dead body was found.

11. The other witness relied upon by the prosecution to establish the evidence of last seen is Zahiruddin (PW-18). PW-18 has resiled and has not supported the prosecution case. A reading of his statement shows that PW-18 is not a truthful witness and the learned counsel for the State is right in observing that he was possibly covering up and has gone out of the way to help the appellant on several aspects. We have doubts on several portions or assertions made by Zahiruddin (PW-18). Still it will be improper and incorrect to ignore PW-18's court deposition to the effect that he had not seen Vishal with the appellant Virender on 1st November, 2006 at 2.00 P.M. and hold to the contrary that he had seen both of them. This will be putting words into the mouth of PW-18 and reading in the court deposition something which has not been stated by PW-18. In law, we can rely on PW-18's deposition in part and to the extent it supports the prosecution case, if the said portion is truthful and credible and supported or corroborated by other evidence. Even if we apply the said principle, there is nothing in PW-18's deposition to support the prosecution version that PW-18 had seen Vishal and the appellant Virender together on 1st November, 2006 at 2.00 P.M.

12. PW-1, the complainant has not mentioned that he was informed by any third

person i.e. PW-3 or PW-18 till 05.11.2006 that they had seen Vishal with the appellant Virender.

13. In view of the aforesaid sketchy evidence, it is very difficult to accept the plea of the prosecution that the appellant is the perpetrator and the culprit, who had committed the said crime. The last seen evidence can be relied upon in case there is some proximity when the accused and the victim were last seen together and the time when the offence was committed. However, the Court must rule out possibility of any third person's involvement. The place where the crime occurred and the location where the accused and the deceased were last seen together is required to be examined. The place where the crime occurred and possibility of presence of the accused at the spot, its accessibility and possibility of presence a third person(s) is a relevant and important factor. In *State of U.P. Vs. Satish*, , the Supreme Court has held that the last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead, is small. The principle being that there is a possible link between the said person and the death of the deceased. But this principle fails when there is a possibility of any other person other than the accused being the author of the crime. Facts of each case therefore have to be examined. (See also *Mohd. Azad @ Samin Vs. State of West Bengal*, and *State v. Mahender Singh Dahiya* 2011(3) SCC 109).

14. In *State of Karnataka Vs. M.V. Mahesh*, the Supreme Court noted that merely being last seen together may not be enough to hold that the accused was guilty, unless there are special factors pointing towards the accused as the perpetrator. There should be definite evidence to indicate that the deceased had been done to death of which the accused was or must be aware, as also that the death was proximate to the time of being last seen together. If no such clinching evidence was put forth, the prosecution case may fail.

15. In view of the said position, in the present case, the prosecution case as far as the last seen is concerned, is not established or proved beyond doubt. We are not inclined to entirely rely upon the last seen theory in the present case even when we feel that PW-18's statement exonerating the appellant is somewhat debatable. We cannot ignore the fact that PW-18 has not even partly supported the prosecution case on last seen and there is no other credible or reliable witness to show that the appellant and Vishal were last seen together.

16. Pertinently, the CFSL report Ex. PW 21/G records that cotton swab was examined but semen could not be detected thereon. Similarly semen could not be detected on the clothes of the deceased. Motive as alleged has thus not been established.

17. In cases of circumstantial evidence, the Court has to be careful and should ensure that the prosecution must prove the case beyond reasonable doubt. The prosecution evidence should not only raise finger on the appellant but rule out possibility of the third person's involvement. 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. [See *Sharad Birdhichand Sarda Vs. State of Maharashtra*,].

18. In *Prem Thakur Vs. State of Punjab*, , the Supreme Court has laid down general principles when the prosecution version relies upon circumstantial evidence. Unquestionably every effort must be made to find out, who has committed the murder, but care and caution should be taken that a priori suspicion should not transform itself into a facile belief that the person accused has committed the offence. Human mind can implicate a person as the author of the crime, as it may not resist the frustrating feeling that no other person has been identified as the perpetrator. Such hazards should be avoided and the Court must ensure that the circumstances established should be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime charged. Unfortunately, the prosecution has not been able to prove their case beyond reasonable doubt. The appeal will accordingly be allowed.

The conviction of the appellant under Sections 302 and 363 IPC is set aside. The appellant will be released unless he is required to be detained in any other case in accordance with law.