(2012) 5 AD 591 : (2012) 3 JCC 1797

Delhi High Court

Case No: Criminal Appeal 1006 of 2011 and Criminal M. (Bail) 1423 of 2011

Arvind Kumar		APPELLANT
	Vs	
State (NCT of Delhi)		RESPONDENT

Date of Decision: May 30, 2012

Acts Referred:

- Evidence Act, 1872 - Section 27
- Penal Code, 1860 (IPC) - Section 302, 363, 364A, 365

Citation: (2012) 5 AD 591 : (2012) 3 JCC 1797

Hon'ble Judges: S.P. Garg, J; S. Ravindra Bhat, J

Bench: Division Bench

Advocate: D.B. Goswami and Sh. S.G. Sasan, for the Appellant; Richa Kapoor, APP., for the Respondent

Final Decision: Allowed

Judgement

Mr. Justice S. Ravindra Bhat

1. The appellant challenges a judgment and order of the learned Additional Sessions Judge dated 13.04.2011 in SC No. 1078/2009 by which he was convicted for committing offences punishable under Sections 363/302/364A IPC and was sentenced to undergo imprisonment for life. He was also sentenced to pay fine. The hearing of this appeal was expedited, since the convict/ appellant has been in custody for over 7 years and 4 months. The prosecution case is that on 18th January 2005, one Jitender Pal went to the Police Post, Khayala and recorded that his nephew Deepak @ Noni went missing. The next day i.e. 19th January, 2005, the boy''s father Anil Kumar (who also deposed as PW-1) went to the Police Station Tilak Nagar and recorded his statement. In that statement he told the police that on 18.01.2005, his 10 year old son, Deepak left home to purchase sugar and had not returned thereafter. The case was accordingly registered; the offence alleged in the FIR was u/s 363 IPC. After the registration of the FIR, the police went to Anil Kumar''s house and recorded the statements of various people. It was

alleged that the present appellant, Arvind Kumar and another individual, co-accused Rajesh, who were tenants of Anil Kumar, were not present and their room was locked. In the morning of 21st January, 2005, the body of the child was found near House No. 221/175; it was wrapped in a bed-sheet and tied with insulated wire. After the body was cremated and PW-1, the complainant returned home, he came across a ransom note near the electric meter. In this note, a demand for Rs. 2 lakh had been made. It is alleged that on 21.01.2005, pursuant to secret information, Arvind Kumar and co-accused Rajesh were apprehended near a hospital at Khayala. They were arrested. The prosecution alleged that the arrest of Arvind Kumar led to his disclosure statement being recorded; he led them to the room of co-accused Amit Kumar (Proclaimed Offender), i.e. House No. S-221/175, Gali no.4, Vishnu Garden where he pointed to the cutting plier with which he had cut the electric wire used to tie the body of Deepak after wrapping him in a bed sheet. It was also alleged that other articles, such as plastic can containing some kerosene oil, an exercise book or copy from which he had torn a page used to write the ransom note and one stone with which he had delivered a blow on Deepak''s head, were seized. They were taken into custody by the police.

2. After the completion of investigation, a chargesheet was prepared and filed in Court. The accused were charged with committing the offence. The co-accused, Amit could not be apprehended and he was declared a P.O. by an order 10.09.2005. The co-accused Rajesh died on 20.03.2005; he committed suicide while in Judicial Custody. The present appellant denied his guilt and claimed trial. During the proceedings before the Trial Court, the prosecution relied on the testimonies of 28 witnesses. It also placed on record documentary evidence in the form of exhibits, Postmortem Report, Forensic Science Laboratory Reports etc.

3. After consideration of these and after considering all the submissions made on behalf of the parties, the Trial Court delivered the impugned judgment and convicted the appellant. He has, therefore, appealed against that judgment.

4. The Trial Court held that the prosecution proved its case beyond reasonable doubt. The Court held that the testimony of eye witnesses had proved the "last seen circumstance" and that the ransom note had been made by the Appellant. It was also held that the tenancy of the premises where the kidnapped boy was murdered had been proved and that the stone used to kill him, and the cable used to tie the body were seized and linked with the accused. All the circumstances alleged were proved conclusively; also each link forming the chain was equally proved and all the evidence irresistibly pointed to the accused''s guilt.

5. Counsel for the appellant argued that the conviction and sentence are unsustainable. It was submitted that the Trial Court could not have held that the "last seen" theory was proved, because the so-called eye witness did not mention this fact till 20th January, 2005. This witness, urged counsel, claimed that he saw the deceased in the company of the accused on the evening of 18.1.2005; he, however, did nothing to inform PW-1 or the

boy''s relatives.

6. It was argued that the deposition of PW-3 could not have been believed about the tenancy created in favour of the accused. Counsel emphasized the fact that according to the prosecution, Arvind was a tenant of PW-1; yet, this witness stated that he and the PO, Amit rented the room on the second floor, over his shop. There was no corroborative material of this fact apart from his testimony. Further, even though this witness was in his shop throughout the day, and even till late into the night, he never said that the accused had been seen by him with the child on any of the days, in the vicinity of the premises. Counsel emphasized the fact that the shop was on the ground floor, where the witness sat throughout the day, and importantly, was in a position to observe who all went to the upper floors, since there was a joint entrance. The only incriminating material deposed by him was about having seen the appellant in the morning of 19-1-2005. The inability of the prosecution to mention who among the two (Arvind and Amit) was the tenant of PW-3, and indeed his silence as to who paid him rent, besides the other deficiencies, rendered his deposition suspect. The Trial Court should not, therefore, have concluded that the appellant and Amit had joined together to do away with the deceased boy, Deepak.

7. It was argued that the prosecution story about the ransom note, accepted so easily by the Trial court, was transparently false and unbelievable. Counsel submitted that the IO admitted that the place from where the said note had been seized had concededly not been marked through any sketch plan; the witness, PW-1 who furnished it to the investigating agency, did so on 20 th January. If the prosecution were to be believed, the boy was kidnapped on 18, and killed a few hours later, without the kidnappers having any inkling whether the ransom note allegedly kept in the parents'' house, was in fact seen by them. It was emphasized that the prosecution''s inability to mention whether the ransom note was in fact delivered at all to its intended recipients, undermines its version. Without any proof of threat or even a demand, the Trial Court could not have concluded that the deceased had been kidnapped for ransom by the Appellant and that the latter killed him. It was submitted that even if the testimony of prosecution witnesses were to be believed, all that could be said to have been positively established was that the appellant had rented a room in PW-1''s premises. He was known to have been friendly with Deepak since PW-11 testified having seen both together on a number of occasions. Even PW-4 who claimed to have seen them both together at about 06:00-6:30 PM on 18.01.2005, did not find this to be unusual or strange. Having regard to these circumstances, the medical evidence about the time of death i.e. one and a half days before the beginning of the postmortem procedure (which was at 12:00 noon on 20.01.2005) reinforced that the time of death was at 12:00 midnight during the night intervening 18.01.2005 and 19.01.2005. The time gap between the last seen circumstance and the death of the boy was, therefore, considerable. Having regard to the law on the subject, this circumstance itself could not have been considered incriminating since the prosecution itself had stated that the boy went out from his house at the behest of PW-1. Therefore, the possibility of his having been taken away by someone else could not altogether have been ruled out.

Learned counsel emphasized that the PW-1 admittedly had asked his son to go and fetch something from the market. In these circumstances, the possibility of someone else''s involvement could not be eliminated which itself falsified the last seen circumstance.

8. Learned APP, on the other hand, urged that the findings of the Trial Court do not call for any interference since the entire evidence had been appreciated in the correct perspective. It was argued that in this case the disappearance of the boy was reported to the police on the same day itself i.e. 18.01.2005 at 11:00 PM. Since the whereabouts could not be found despite this reporting, a formal FIR was registered next day at 08:00 PM. This is corroborated by the fact that a copy of the FIR mentioning an offence u/s 365, IPC was sent by way of special report to the Magistrate next morning at 10:00 AM. However, by then, Deepak''s body had been discovered and later the matter was again reported to the Magistrate and the offence under Section-302, IPC was added. It was argued that the testimony of PW-4 was both credible and trustworthy because he knew PW-1 and his family for quite some time. There was no delay in recording his statement because he had gone to Karnal on 19.01.2005 and, therefore, was not in a position to attach any significance to the last seen circumstance. It was upon his returning to Delhi and learning about the death of Deepak that he disclosed the last seen circumstance to the police, which was then promptly recorded. Learned counsel emphasized that the appellant and Rajesh were not traceable and were arrested on 21.01.2005. Learned APP submitted that the article seized i.e. the exercise book which contained the admitted handwritings of the appellant, the ransom note Ex.PW-1/E and the specimen handwritings of the appellant were all matched and the handwriting expert stated that in his opinion the questioned writings and the writings on the ransom note were written by the same person. This objective material proves beyond reasonable doubt that the motive for murder was ransom. The learned APP submitted that once the authorship of the ransom note was proved, the so-called improbability of its delivery or that its intended recipient in fact had not received it, would be irrelevant circumstances. The accused then was expected to state the circumstances in which he wrote the ransom note. The proof of ransom note and the proof of the last seen circumstance together with the testimony of PW-3, who had rented out a room to Amit and the present appellant, proved beyond any doubt that they were culpable.

9. Learned APP submitted that testimonies of PW-1, 3 and 4 were all trustworthy. The accused had searchingly cross-examined PW-3 and 4 both of whom were not family members nor were known to have any affiliation with the deceased''s relatives. Despite such cross-examination, no major contradiction or discrepancy could be elicited. On the other hand, their version turned out to be objective and true. These as well as the articles seized in the form of cable wire, cutting pliers and the stone used for killing the boy, at the behest of the accused, established his complicity. The disclosure statement to the extent that it was corroborated by recoveries was admissible in view of Section-27 of the Indian Evidence Act.

10. It can be seen from the above discussion that the entire prosecution case was based on circumstantial evidence and the last seen theory. The boy, Deepak, went missing on 18-1-2005, in the evening, around 6-6:30 and disappeared thereafter. His body was discovered early morning on 20th January, 2005. It was first seen by a chowkidar, wrapped in a bedsheet, and tied around with a cable. The FIR for this was registered the same morning (the previous complaint had been registered as a case for the offence u/s 365 IPC) and investigations were conducted. The record reveals that the post mortem of the body was conducted around 12 AM on the same day. According to the doctor, the child died of smothering. There was some injury on the head too. The post mortem report said that the approximate time of death was about 1 and a half days prior to the commencement of the procedure. This meant that the time of death was around 12 midnight, on 18-1-2005.

11. The prosecution banked on two important testimonies, i.e that of PW-4 who had last seen the deceased with the present appellant, and a ransom note said to have been recovered (or rather, taken into custody by the IO) after the death of Deepak, and after his body had been cremated. PW-1, Deepak''s father, said that the ransom note was discovered by him near an electric meter, after the family returned home, in the evening of 20th January, 2005.

12. This Court is aware that the "last seen" circumstance can be relied on by the prosecution, when the witnesses are credible about that fact, and the time gap between that circumstance, and the death in the given case, is so small as to rule out the possibility of anyone else''s involvement. When the prosecution relies on evidence of the deceased having been last seen in the company of the accused, such cases are a species of circumstantial evidence based prosecutions. In such "last seen" prosecutions, the court has to additionally be aware that apart from proof of all the circumstances, and the equally rigorous rule for proof of link of the chain of circumstances, the theory comes into play only when the time gap between the Appellant and the deceased being last seen together alive and the time of death is so small that the possibility of anyone else being the author of the crime is impossible (Ref State of U.P. Vs. Satish, Malleshappa Vs. State of Karnataka, In Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir, , the Supreme Court held that the last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being author of the crime becomes impossible. Counsel also relied on Mohibur Rahman and Another Vs. State of Assam, a decision in which the Supreme Court observed as follows:-

10. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death a rational mind may be

persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide.....

13. In the present case, the crucial witness for the "last seen" circumstance, PW-4 stated that he saw the deceased with the appellant on 18-1-2005, at around 6-6:30 PM. The testimony of PW-1 is that Deepak went to buy sugar from a shop at about 5 P.M. or so and did not return thereafter. The deposition of his wife, PW-2 on the other hand, is that Deepak went out to buy sugar at 5 PM, but returned after 10 minutes. She stated that the boy changed his shoes and went out again. Crucially, however, PW-2 did not say the time when Deepak went out. PW-1 was clear that his son did not return after he went out to buy sugar. This aspect is important, because if one were to go by the deposition of PW-4, the boy was seen by him at 6 or 6:30 PM. The lack of clarity about the time, when the boy went out (according to PW-2''s version) and the categorical statement of PW-1 that he went out only once, to buy sugar, is a vital contradiction.

14. In the light of the above evidence, one has to carefully examine the evidence of the other witnesses. PW-4 says that he saw the boy with the accused at 6-30 P.M. He was well known to PW-1 (the latter used to lend him money at times). However, he did not find anything unusual in this. The fact however remains that Deepak''s family kept searching for the boy the evening he went missing and even lodged a report at 11 PM. PW-4 did not live too far away from the deceased''s house. It was not as if the evidence of last seen circumstance in this case was such that the possibility of any other individual being with Deepak had to be ruled out. By all accounts, it was not unusual for the child to be with the appellant; even PW-11 testified to that aspect. If one keeps in mind that Deepak was apparently known in the neighborhood - evident from the testimonies of different prosecution witnesses, such as PW-4, PW-3 and PW-11, and even the fact that it was not unusual for him to run errands for his parents, and do some local shopping, the mere fact that he was seen by PW-4 sometime in the evening, by itself cannot be considered incriminating. If one keeps in mind the fact that PW-3 does not anywhere say that he saw the accused going up on 18-1-2005, and certainly not with the deceased (admittedly he had a vantage view, since he used to sit near the common entrance), this last seen circumstance, in view of the time lag between the death and the "sighting", i.e of about 6 hours cannot be considered incriminating.

15. The next evidence which was relied by the prosecution and the Trial Court was the ransom note - Ex PW-1/E. During the trial, PW-1 stated that he came across this note after the boy''s death was known, and after his cremation. Apart from him, no one has mentioned how this note, which was discovered near an electric meter, was noticed. Two aspects have to be considered here. The first is that the kidnapping took place, according to the prosecution in the evening of 18-1-2005; the boy was killed in about six hours'' time. If that is correct, and the motive of kidnapping was indeed ransom, it is strange that the kidnappers were unsure whether the ransom note was received and within no time, decided to kill the boy. This aspect cannot be brushed aside, because the ransom note

surfaced a good two days after the boy''s disappearance, and after his body was discovered, and cremated. The sheer improbability of such a circumstance and the lack of any corroboration by any witness (neither PW-2, nor PW-4 nor PW-5) improbabilize the entire story. The second aspect to be kept in mind is that the IO admitted that no plan was prepared as to where the ransom note was discovered. Most importantly, he does not mention when the accused''s specimen signatures were taken. There is also no corroboration from the extracts of the malkhana register (Ex. PW-19/E) that this seized ransom note was deposited. Further, the handwriting expert''s report (Ex. PW-26/A) dated 18th May, 2005 reveals that the IO PW-23 sent the handwriting samples (along with the ransom note) under cover letter dated 11-4-2005. There is, interestingly, no entry in the malkhana register coinciding with the withdrawal of any packet from the custody. These deficiencies were serious, if not fatal; the prosecution made no attempt to address them, during the trial proceedings. The Trial Court, all too credulously, overlooked these aspects, which undermine the entire story of the ransom note. The prosecution had also, interestingly, propounded a theory that the deceased had clutched some hair; those were sent to ascertain whether they matched with the appellant''s hair samples, seized during the investigation. The FSL report, however, was negative on this aspect.

16. The Trial Court had accepted the prosecution story about the severed cable ends having been recovered from the appellant''s premises, and that they matched with the cable lengths used to secure the dead body of Deepak. Similarly, the court had held that the exercise book seized from the appellant''s premises, had some torn ends, pointing to missing pages, which had been used to write the ransom note. As held earlier, seizure pertaining to the ransom note are suspect for many reasons. As regards the cable ends, and the pliers, this Court is of opinion that even if they are held to have been established, it would be unsafe to found a conviction having regard to the overall facts of this case. This court recollects the oft used phrase in criminal trials that "men may lie, but circumstances do not", where the prosecution is unable to rely on any direct or eyewitness testimony about the crime. To get to the truth, the vital requirement of proving the prosecution allegations beyond reasonable doubt remains unchanged. The threshold of proof is as constant, in cases involving circumstantial evidence as in other cases. Since the mind has a tendency to boggle, a few tests have been mandated in a string of judgments. In Hanumant v. State of Madhya Pradesh, AIR 1953 SC 343, the Supreme Court indicated the correct approach of the Courts, in the following words:

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability

the act must have been done by the accused.

17. This approach has been consistently followed and applied in several other judgments, notable among them being Tufail v. State of U.P., (1969) 3 SCC 198 Ram Gopal Vs. State of Maharashtra, and in Sharad Birdhichand Sarda (supra). Sarda an authority on this and other important aspects of criminal justice/law, put the matter in a remarkably succinct manner:

152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved as was held by this Court in Shivaji Sahebrao Bobade v. State of Maharashtra 1973CriLJ1783 where the following observations were made:

certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.

(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.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

On an overall conspectus of the facts, in this case, and for the reasons discussed previously, this Court is of opinion that the prosecution could not establish all its allegations beyond reasonable doubt to secure a sustainable conviction of the appellant for the crimes he was charged with. The impugned judgment, therefore, is set aside. The appellant shall be set at liberty forthwith, unless required in any other case. The appeal is allowed in the above terms. Order dasti.