

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 02.04.2009

+ **CRIMINAL APPEAL NO. 136 of 1994**

RAGHUBIR SINGH Appellant

- versus -

STATERespondent

Advocates who appeared in this case:

For the Appellant : Mr. Anurag Jain

For the Respondent : Mr. M.N. Dudeja, APP.

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE P.K. BHASIN

1. Whether Reporters of local papers may be allowed to see the Judgment?(Yes)
2. To be referred to the Reporter or not?(Yes)
3. Whether the judgment should be reported in the digest?(Yes)

BADAR DURREZ AHMED, J (ORAL)

1. This appeal is directed against the judgment of the learned Additional Sessions Judge dated 13.05.1994 delivered in Sessions Case No. 23/92. The case relates to FIR No. 466/91, registered under Sections 364/387/302/201 read with 34 of the Indian Penal Code (hereinafter referred to as 'IPC') at Police Station Rajouri Garden. Initially, two persons were sent up for trial, including the appellant. The other person was his wife Ram Betti. The trial court came to the conclusion that the prosecution did not establish any case against the accused persons under Sections 364 and 387 read with Section 34 IPC. Consequently, both the accused persons, including the present appellant were acquitted of the said charges. The trial court also came to the conclusion that the prosecution failed to establish the charge against co-

accused Ram Betti under Sections 302/201 IPC. Consequently, she was acquitted of these charges also. However, the trial court found the present appellant, Raghubir Singh, to be guilty of having committed the murder of a boy named Suraj and he was convicted under Section 302 IPC as well as Section 201 IPC. Thereafter, by a separate order on the point of sentence, passed on the same day, the trial court sentenced the appellant to undergo rigorous imprisonment for life under Section 302 IPC and to pay a fine of Rs. 3,000/- and in default thereof to undergo rigorous imprisonment for a period of one year. For the offence under Section 201 IPC, the appellant was also sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs. 1,000/- and in default thereof to suffer rigorous imprisonment for a period of four months. All the sentences were directed to run concurrently.

2. Being aggrieved by the impugned judgment and order on sentence, the present appeal has been preferred by the appellant. The learned counsel for the appellant submitted at the outset that though initially charge was also under Section 364/387 IPC, the trial court had acquitted the parties of those charges and the appellant has only been convicted under Sections 302/34/201 IPC. The learned counsel submitted that this was a case based purely on circumstantial evidence and importantly this was a case where the dead body of the deceased Suraj has not been recovered. He submitted that the four circumstances which were put forth by the prosecution were:-

(I) The last seen evidence of PW12, Subhash;

(II) The extra judicial confession allegedly made by the appellant to PW8, Sohan Lal;

(III) The recovery of one *pajama* and a *bali* allegedly belonging to the deceased Suraj from the house of the appellant at his instance; and

(IV) The motive of extortion.

3. The learned counsel appearing on behalf of the appellant pointed out that the trial court has not believed the testimony of PW12 Subhash. In this connection, he drew our attention to paragraph 22 of the judgment where the trial court was of the view that the behavior of the said witness i.e., PW12 Subhash was quite unnatural. The trial court concluded that it would not have been possible for the said witness to identify either the accused persons or the photographs of the boy and, therefore, it would not be safe to place reliance on his testimony.

4. Insofar as the question of extra judicial confession made to PW8 Sohan Lal is concerned, the learned counsel pointed out that PW8 Sohan Lal turned hostile and consequently his testimony was discarded by the trial court. As regards the motive of extortion, the learned counsel for the appellant submitted that inasmuch as the appellant as also his co-accused have been acquitted of the charges under Sections 364 and 387 IPC, there is no question of there being any motive behind the alleged kidnapping for the purposes of extortion of money. The learned counsel submitted that the only

circumstance taken into consideration by the trial court for convicting the present appellant was the circumstance of recovery of one *pajama* and a *bali* belonging to the deceased Suraj from the house of the appellant at the instance of the appellant. The learned counsel for the appellant also submitted that the most vital and important aspect of the case is that the dead body of Suraj has not been recovered and there is no circumstance on record which would enable us to infer that Suraj is dead. He submitted that it is not one thing that the body is not discovered and it is quite another thing that the factum of death itself is not established. He submitted that unless and until the factum of death is established either by direct evidence or by circumstantial evidence, no case under Section 302 IPC can be made out. He placed reliance on a recent decision of the Supreme Court in the case of **K.T. Palanisamy Vs. State of Tamil Nadu: (2008) 3 SCC 100**, wherein it has been observed in the context of the case before the Supreme Court as under:-

“In this case, corpus delicti has not been proved. The same need not be but the death as a fact must be proved. Even death has not been proved in this case”

5. The learned counsel for the appellant also submitted that the alleged recovery of *pajama* and *bali* allegedly belonging to Suraj is also not free from doubt. He pointed out that first of all the recovery was made after three months of the alleged date of the incident. The alleged incident took place on 13.06.1991 whereas the alleged recovery was on 06.09.1991. Secondly, he pointed out that though the recovery was from village Sonamai, P.S. Jawa, District Aligarh, UP which is outside the territory of Delhi, yet no local

police involvement has been shown nor any independent witness has been produced with regard to the recovery. Thirdly, it was submitted that the appellant was available at all points of time and had not disappeared. He submitted that in fact the appellant's house had already been searched thoroughly much prior to the recovery. On this aspect of the matter, the learned counsel made a reference to the testimony of PW4 Bankey Lal (father of the boy, Suraj) where he stated that 2 ½ months after the incident, the house of the appellant was searched. The said witness also stated that he went to the village Sonamai twice and that the accused/appellant met him only once and not the other time. In his testimony, the said witness has also stated that on the first date when the house was searched, the accused/appellant was present. The learned counsel submitted that from this it can be inferred straightaway that on the date of the alleged recovery i.e., on 06.09.1991, the accused was not present at the time of the recovery. He also referred to the testimony of PW4 Bankey Lal to indicate that all the writing work with regard to the recovery of *pajama* and *bali* was done at the Chowki and not at the place of recovery. Therefore, the learned counsel for the appellant submitted that the factum of the recovery itself is not free from doubt.

6. The learned counsel for the appellant supported the judgment and order on sentence. He submitted that it is not necessary that the dead body must be recovered i.e., there must be *corpus delicti*. He submitted that even where the dead body is not recovered, if it can be established from the

circumstances that the death has taken place then that would be sufficient to convict a person provided the other circumstances prove the guilt of the accused. He placed reliance on a decision of the Supreme Court in the case of *Mani Kumar Thapa Vs. State of Sikkim: AIR 2002 SC 2920*. In particular he referred to paragraph (4) four of the said decision, where the Supreme Court held as under:-

“It is a well-settled principle in law that in a trial for murder, it is neither an absolute necessity nor an essential ingredient to establish corpus delicti. The fact of the death of the deceased must be established like any other fact. Corpus delicti in some cases may not be possible to be traced or recovered. There are a number of possibilities where a dead body could be disposed of without trace, therefore, if the recovery of the dead body is to be held to be mandatory to convict an accused, in many a case the accused would manage to see that the dead body is destroyed which would afford the accused complete immunity from being held guilty or from being punished. What is therefore required in law to base a conviction for an offence of murder is that there should be reliable and plausible evidence that the offence of murder like any other factum of death was committed and it must be proved by direct or circumstantial evidence albeit the dead body may not be traced.”

The Supreme Court placed reliance on its earlier decision in the case of *Sevaka Perumal and another v. State of Tamil Nadu: 1991 (3) SCC 471*.

7. Mr. Dudeja, the learned additional public prosecutor, who appeared for the State also placed reliance on a decision of the Division Bench of the Gujarat High Court in *Kantu Chhagan Vs. State of Gujarat: 1982 Crl. L. J. 1110*. In that decision, several decisions of the Supreme Court were referred to including *Raghav Prapanna Vs. State of U.P.: AIR 1963 SC 74* and

Rama Nand Vs. State of Himachal Pradesh: AIR 1981 SC 738. After referring to the said decisions, the Division Bench of the Gujarat High Court came to the conclusion that:-

“Therefore, it seems to be well settled that where the inference of guilt of an accused person is to be drawn from circumstantial evidence alone, those circumstances must be established beyond reasonable doubt and they should point towards the guilt of the accused, meaning thereby that the totality of the circumstances must unerringly lead to the conclusion that within all human probability the accused and none else had committed the crime in question.”

8. While coming to this conclusion, the Division Bench of the Gujarat High Court had also set out at length what had been stated in the Supreme Court’s decision in **Rama Nand** (*supra*). The Supreme Court in that decision had taken the view that the traditional provision where the discovery of a dead body was a must and that it was the only mode of proving *corpus delicti* in a murder had to be come up in view of the circumstance of the change in law. Earlier, according to the Supreme Court, this had to be observed as execution was the only punishment for murder and the need for adhering to this cautionary rule was greater. However, since the punishment now can also be life imprisonment, the Supreme Court observed that a blind adherence to this old doctrine would open the door wide open for many a heinous murderer to escape with impunity simply because he was cunning and clever enough to destroy the body of the victim. The Supreme Court was of the view that where a dead body of the victim in a murder case is not found, other cogent and satisfactory proof of the homicidal death of the victim must

be adduced by the prosecution. Such proof may be by the direct ocular account of an eye-witness or by circumstantial evidence, or by both. The Supreme Court further observed that where the fact of *corpus delicti*, i.e., 'homicidal death' is sought to be established by circumstantial evidence alone, the circumstances must be of a clinching and definitive character unerringly leading to the inference that the victim concerned has met a homicidal death. The Supreme Court, however, further observed that even so, this principle of caution cannot be pushed too far as requiring absolute proof. Perfect proof is seldom to be had in this imperfect world and that absolute certainty is a myth.

9. Relying on these decisions, Mr. Dudeja submitted that the fact that PW12 had last seen the boy Suraj in the company of the appellant and his co-accused and then had also seen the appellant and co-accused together in the absence of Suraj meant that they had done away with Suraj and that it can be inferred from this fact coupled with the factum of the recovery of the *pajama* and the *bali*. Mr. Dudeja also submitted that there was no doubt about the recovery as the *pajama* as well as the *bali* were in fact recovered from the house of the appellant at his instance. He also submitted that another important circumstance was the testimony of the photographer PW5 Madanlal Senger. He submitted that though this witness had turned hostile, the first portion of his testimony can be relied upon where he stated that he had seen the photograph of the boy which was Ex. P-11 and he admitted that he had taken this photograph. Mr. Dudeja submitted that photographer PW5

was at Kasganj, District Etah, UP and the boy Suraj was a resident of Delhi. The very fact that the photograph of the boy was taken at Kasganj, District Etah, UP meant that the boy had been taken there and had been photographed. This coupled with the fact that PW12 Subhash had last seen the boy Suraj in the company of the appellant and co-accused establishes the factum of the death of Suraj and that too at the hands of the appellant.

10. We may note that the prosecution case is that on 13.06.1991, one Beer Singh S/o Shiv Charan: resident of B-142, Raghbir Nagar, New Delhi came to the Police Post and made a report that Suraj, son of his brother PW4 Bankey Lal, aged about four years, who had wheatish complexion and was about 2 ½ feet in height with stout body, round face and curly hair, who was wearing a cream coloured *kurta pajama* with a golden *bali* in his left ear had gone to play in the park at about 8.00 a.m. but had not returned since. Thereafter, a search had been conducted and the report of the missing of the boy was recorded. On the next date i.e., on 14.06.1991, PW4 Bankey Lal, father of the said boy Suraj came to the Police Post and lodged a similar report stating that he had made efforts to trace out his son but he was not traceable. He had expressed his suspicion that somebody had kidnapped his son. Consequently, the police registered a case, initially, under Section 363 IPC. In the course of the investigation on 16.06.1991, PW4 Bankey Lal produced a letter which he had allegedly received through post and through which a payment for ransom of Rs. 60,000/- was made in default of which it was stated that the boy would be killed. Thereafter in the course of the

investigation, the accused persons were arrested and the present appellant Raghbir Singh is said to have made a disclosure statement on 03.09.1991. Thereafter the offences punishable under Sections 302/201 IPC were added. After completing the investigation, the challan was put up. In all, thirteen prosecution witnesses were examined and after going through the entire evidence on record, the trial court acquitted the co-accused Ram Betti of all charges and convicted the present appellant under Sections 302/201 IPC.

11. We have also indicated the main points of challenge by the learned counsel for the appellant. The first point to be addressed in this case is whether the factum of death of the boy Suraj has been established by the prosecution either through direct evidence or circumstantially. We may note that as far back as in 1962 when the Supreme Court was confronted with a similar question in the case of *Raghav (supra)*, the Court took the view that the mere fact that person was missing was not sufficient for holding that the person must have been murdered. In that case, two persons named Kamla and Madhusudan were missing, the Supreme Court observed that the fact that Kamla and Madhusudan had not been seen since the evening of 05.04.1961 and that blood stains, not proved to be of human origin, were found in a room, were not sufficient for holding that they must have been murdered, however strongly one may suspect it in view of the unlikelihood of their having left the house for any other place. Since then several decisions of the Supreme Court have pointed towards the fact that although it is not essential that a dead body must be recovered for returning a conviction for the offence

of murder, it must be proved a fact that homicidal death has taken place. The proof of homicidal death may be through direct evidence or it may be through circumstantial evidence, but death as a fact has to be established. In this case, we find that the only circumstances which the prosecution has been able to point out, which according to them lead to the inference that homicidal death has been taken place, are:-

- (I) Suraj is missing;
- (II) He was last seen in the company of the appellant and his wife by PW12 Subhash;
- (III) One *pajama* and *bali* are said to have been recovered from the house of the appellant at his pointing; and
- (IV) That the boy was photographed at Kasganj by the photographer PW5.

12. With regard to the alleged recovery from the testimony of PW4 itself, we find that PW4 Bankey Lal had gone to the appellant's house at his village Sonamai on two occasions. He stated that on the first occasion, the appellant was present and that on that occasion itself which was roughly about 2 ½ months after the incident, the house was searched. At that point of time, neither the *pajama* nor the *bali* were discovered or recovered. The said witness further stated that out of his two visits to the appellant's house at village Sonamai, it is only on one occasion that he met the appellant. Since this witness has already stated that he met the appellant on the first visit, it

can be inferred that on his second visit when the alleged recovery is said to have taken place i.e. 06.09.1991, the appellant was not present. This circumstance in itself makes the recovery doubtful.

13. In the absence of the factum of recovery having been established, we are left now with the other two circumstances, namely, that PW12 is said to have seen the boy in the company of the appellant and his wife on 17.06.1991 near the bridge on the way to Kasganj and the other circumstance being the photographs taken by the photographer PW5. If we examine the testimony of PW12 in detail, we find that he stated that he along with his brother were *en route* to Kasganj from his village in District Bulandshehar. On the way they stopped at the bridge near the two canals and he observed the appellant and his wife to be sitting near the canal and that the boy Suraj was with them. He stated that for five or seven minutes, the three of them continued to be sitting near the canal and thereafter they left. He further stated that about 45 minutes later, the appellant and his wife returned minus the boy Suraj. Of course this witness did not think this incident to be of much importance inasmuch as he never reported the same. The said witness has further stated that after 17.06.1991 he had been to Kasganj two or three times and once in the month of September he had again seen the appellant and his wife with the police on the same bridge where he had earlier seen them with the child. It is only thereafter that this witness is supposed to have come forward and that he disclosed that he had seen the appellant and his wife in the company of the child Suraj on 17.06.1991. We may observe that first of all, the mere fact

that PW12 allegedly saw the missing boy Suraj in the company of the appellant and his wife does not lead to the conclusion that Suraj is dead. The mere fact that at one point of time he saw them together and 45 minutes later he only saw the appellant and his wife minus the child does not mean that the child had been disposed of or murdered or that the child had died in any other manner. Apart from this fact, we find it a little surprising that the same witness at two different points of time, happened to be at the same bridge when in the first instance i.e. on 17.06.1991 he saw the appellant and his wife in the company of Suraj and on the second instance of September, 1991 again he saw the appellant, but this time in the company of the police. The probability of this co-incidence is infinitesimally small.

14. If we consider the testimony of PW5 to be truthful to the extent that he did photograph the boy, it is not established as to on which day he had photographed the boy. There is every possibility that the boy could have been photographed after 17.06.1991. It cannot be ruled out that the photographs could have been taken either before 17.06.1991 or after 17.06.1991. Once we come to such conclusion, we cannot rule out the fact that even the testimony of PW12 cannot be regarded as the last seen evidence. If the boy had been photographed after 17.06.1991, then the testimony of PW12 loses relevance insofar as the question of establishing the factum of death of Suraj is concerned.

15. For all these reasons, we are of the view that the death of Suraj has not

been established as a fact either directly or even circumstantially. That being the position, the appellant cannot be convicted for the offence punishable under Section 302 IPC as also under Section 201 IPC. We may also note that even if we assume that the recovery has been established that by itself would not establish the death of Suraj. We may note that in *K.T. Palanisamy Vs. State of Tamilnadu (supra)*, the Supreme Court was confronted with a similar situation and the only circumstance was the recovery of golden chain coupled with the last seen evidence. The Supreme Court observed that if assuming that the golden chain has been recovered at the instance of the appellant therein, the same by itself, in their considered view, would not be sufficient for upholding the conviction under Section 302 IPC. Under similar circumstances, we feel that even if we assume the recovery to be made as alleged by the prosecution that by itself would not be a circumstance sufficient enough to convict the appellant under Section 302/201 IPC.

15. As such, we are of the view that the appellant is entitled to an order of acquittal. Consequently, we set aside the impugned judgment and order on sentence and acquit the appellant of all charges. The bail bond stands cancelled and the sureties stand discharged. This appeal is allowed and stands disposed of.

BADAR DURREZ AHMED, J

APRIL 02, 2009/sb

P.K. BHASIN, J