A SANJAY RAJAK

v.

THE STATE OF BIHAR

(Criminal Appeal No.1070 of 2017)

B JULY 22, 2019

[ASHOK BHUSHAN AND NAVIN SINHA, JJ.]

Penal Code, 1860: s.364(A) – Conviction and rigourous imprisonment for life – Acquittal of co-accused by High Court – C *Prosecution case was that the co-accused kidnapped 6 years old child – In confessional statement, both the accused disclosed that after kidnapping the child, they killed him and buried the corpse in the bed of river – Both the accused were last seen together along with the victim – Police made no effort to make recovery of body –* D *Trial court convicted both the accused on circumstantial evidence – High Court affirmed the conviction of appellant while acquitted the co-accused – On appeal, held: The classmate of the victim deposed that while they were standing at the gate of school, a man with his face covered approached the victim and told him that his father was calling him and that the victim recognized him and called* E *him uncle – The evidence of the parents of the victim was to the effect that the co-accused had worked as a servant in their house earlier and being acquainted with co-accused, the child naturally must have gone along with him – They also deposed that a demand for ransom was made on phone by co-accused as they could recognize his voice – Several prosecution witnesses saw the appellant* F *and co-accused with the victim on the day of occurrence – Recovery of victim's bag was made from the house of the appellant which was identified by the father of the victim – No explanation was offered by the appellant about the said recoveries – In the facts and circumstances of the case, the failure of the police to recover the* G *dead body was not of much consequence in the absence of any explanation by the appellant both with regard to the victim being last seen with him coupled with the recovery from his house of the belongings of the deceased – Therefore, interference with order of conviction not called for.*

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Evidence: Identification of a person – Every individual has a distinctive style of speaking which makes identification by those acquainted possible – Identification of a known person by voice in darkness has been well recognized in criminal jurisprudence – Even if a person tries to camouflage his voice in one call, given the limitations of human nature there will be a tendency to state certain words or sentences in an inimitable style exposing the identity – In the instant case, High Court without considering these factors, erred in granting acquittal opining that no recorded voice sample was available – Criminal jurisprudence – Penal Code, 1860 – s.364(A).

Evidence: Circumstantial evidence – Corpus delicti not found – It is not an invariable rule of criminal jurisprudence that the failure of the police to recover the corpus delecti will render the prosecution case doubtful entitling the accused to acquittal on benefit of doubt – It is only one of the relevant factors to be considered along with all other attendant facts and circumstances to arrive at a finding based on reasonability and probability based on normal human prudence and behavior – Penal Code, 1860 – s.364(A).

Dismissing the appeal, the Court

HELD : 1. PW-10, aged about 8 years and a classmate of the victim deposed that while both of them were standing at the gate of the school at about 12 o'clock, a man with his face covered with a napkin approached the victim and told him that his father was calling him. The victim addressed him as "uncle uncle". The man took the school bag of the child on his shoulder, fed him ice-cream and took the victim away. PW-11 and PW-12 the parents of the victim deposed that the acquitted co-accused had worked as a servant in their house earlier. In the said facts, the significance of the victim addressing co-accused as "Uncle! Uncle!", cannot be lost sight of and unfortunately did not fall for consideration by the High Court at all. [Para 5] [658-H; 659-A-C]

2. PW-11 and PW-12 deposed that co-accused had made calls on mobile demanding ransom. Co-accused having worked earlier in the house of the witness, there is no infirmity in their statement of having recognised his voice. Every individual has a

distinctive style of speaking which makes identification by those acquainted possible. Identification of a known person by voice in the darkness has been well recognized in criminal jurisprudence. Even if a person tries to camouflage his voice in one call, given the limitations of human nature there will be a tendency to state certain words or sentences in an inimitable style exposing the identity. The High Court without considering these factors, unfortunately granted acquittal opining that no recorded voice sample was available. [Para 6] [659-C-E]

3. PW 5, the liquor shop owner deposed that on the day of occurrence itself the appellant and co-accused had come to his shop to purchase liquor. The appellant introduced co-accused as his relative. They were accompanied by a boy aged 5-6 years wearing pink shirt, blue pant, blue socks, black belt, red tie. They consumed liquor at his shop for about two hours and then left along with the child. Nonetheless co-accused acquitted by the High Court on the reasoning that his identity as the abductor could not be established as PW-10 stated that the abductor had his face covered with a napkin and therefore the dock identification was doubtful. The prosecution did not choose to challenge the acquittal. The mere acquittal of a co-accused in the facts and circumstances of the case can be of no benefit to the appellant. PW-8 deposed that the appellant had come to his hotel with a child aged 5-6 years and requested for food to be served. Likewise, PW-9 also deposed having seen the appellant with the child. Subsequently in the evening when he saw the photograph of the missing child on the television, he was able to identify the child accompanying the appellant. The witness then went to the police station to give information. The house of the appellant was raided in presence of seizure witnesses PW-6 and PW-7. The black coloured school bag of the victim was recovered from the house of the appellant. The school diary and copies inside the same bore the name of the victim. The school diary also contained his home phone number and the mobile number of his father. The recovered items were identified by PW-12, the father of the victim. The appellant offered no explanation about the said recoveries, except for denying the same. [Paras 7, 8] [659-F-H; 660-A-C]

4. It is not an invariable rule of criminal jurisprudence that the failure of the police to recover the *corpus delecti* will render the prosecution case doubtful entitling the accused to acquittal on benefit of doubt. It is only one of the relevant factors to be considered along with all other attendant facts and circumstances to arrive at a finding based on reasonability and probability based on normal human prudence and behavior. In the facts and circumstances of the instant case, the failure of the police to recover the dead body is not much of consequence in the absence of any explanation by the appellant both with regard to the victim last being seen with him coupled with the recovery from his house of the belongings of the deceased. [Para 9] [660-C-E]

Rama Nand and others v. State of Himachal Pradesh **(1981) 1 SCC 511 : [1981] 2 SCR 444 ;** *Sevaka Perumal and another v. State of Tamil Nadu* **(1991) 3 SCC 471 : [1991] 2 SCR 711 – relied on.**

Sattatiya alias Satish Rajanna Kartalla v. State of Maharashtra **(2008) 3 SCC 210 – distinguished.**

Lohit Kaushal v. State of Haryana **(2009) 17 SCC 106 ;** *Iqbal and another v. State of Uttar Pradesh* **(2015) 6 SCC 623 : [2015] 6 SCR 239 – referred to.**

Case Law Reference

(2008) 3 SCC 210	**distinguished**	**Para 3**
(2009) 17 SCC 106	**referred to**	**Para 3**
[2015] 6 SCR 239	**referred to**	**Para 3**
[1981] 2 SCR 444	**relied on**	**Para 9**
[1991] 2 SCR 711	**relied on**	**Para 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1070 of 2017.

From the Judgment and Order dated 14.07.2015 of the High Court of Judicature at Patna (Bihar) in Crl. Appeal (D.B.) No. 813 of 2009.

Prabhash Kr. Yadav, Mansoor Ali, Advs. for the Appellant.

Saket Singh, Ms. Sangeeta Singh, Mrs. Niranjana Singh, Advs. for the Respondent.

A The Judgment of the Court was delivered by

NAVIN SINHA, J.

1. The appellant assails his sentence and conviction under Section 364(A) I.P.C to rigorous imprisonment for life with a default stipulation. Co-accused Balram convicted by the Trial Court has been acquitted by
B the High Court. Consequently, the appellant has been acquitted of the charge under Section 120B I.P.C.

2. The victim, according to the prosecution case was a school going child aged about 5-6 years. According to the allegations, he is said to have been kidnapped from the school on 12.04.2007 at about 12:15
C pm. by the co-accused Balram. The appellant and the co-accused were last seen together along with the victim. In their confessional statement both the accused disclosed that after kidnapping the child they had killed him and buried the corpse in the bed of river Saryu at Chhapra. The police did not make any effort to recover the body. The belongings of
D the deceased victim were recovered from the house of the appellant.

3. Learned counsel for the appellant submitted that according to PW-10, the classmate of the deceased, co-accused Balram had kidnapped him from the school. PW-11 and PW-12, the parents of the victim had further deposed that ransom calls were made by Balram. Acquittal of
E the co-accused makes the conviction of the appellant unsustainable. Reliance on PWs. 5, 8 and 9 that the victim was last seen with the appellant is based on a preponderance of probabilities only. PW-5 had deposed having seen the appellant along with Balram and the victim. The prosecution case against the appellant is based on circumstantial evidence with the link in the chain of events being incomplete. The
F failure to take any step for recovery of the dead body leaves it open to doubt whether any such incident of kidnapping had occurred or not. Reliance in support of the submissions was placed on ***Sattatiya alias Satish Rajanna Kartalla vs. State of Maharashtra,*** (2008) 3 SCC 210, ***Lohit Kaushal vs. State of Haryana,*** (2009) 17 SCC 106 and
G ***Iqbal and another vs. State of Uttar Pradesh,*** (2015) 6 SCC 623.

4. Learned counsel for the State submitted that the acquittal of co-accused Balram is irrelevant in the nature of the evidence available against the appellant. His conviction therefore calls for no interference.

5. We have considered the submissions on behalf of the parties
H and carefully perused the materials on record. PW-10, aged about 8

years and a classmate of the victim deposed that while both of them were standing at the gate of the school at about 12 o'clock, a man with his face covered with a napkin approached the victim and told him that his father was calling him. The victim addressed him as "uncle uncle". The man took the school bag of the child on his shoulder, fed him ice-cream and took the victim away. PW-11 and PW-12 Manoj Kumar, the parents of the victim have deposed that the acquitted accused Balram had worked as a servant in their house earlier. In the aforesaid facts, the significance of the victim addressing Balram as "Uncle! Uncle!", cannot be lost sight of and unfortunately did not fall for consideration by the High Court at all. Being acquainted with the co-accused, the child naturally went along without any qualms in this background.

6. PW-11 and PW-12 deposed that Balram had made calls on mobile demanding ransom. Balram having worked earlier in the house of the witness, we find no infirmity in their statement of having recognised his voice. Every individual has a distinctive style of speaking which makes identification by those acquainted possible. Identification of a known person by voice in the darkness has been well recognized in criminal jurisprudence. Even if a person tries to camouflage his voice in one call, given the limitations of human nature there will be a tendency to state certain words or sentences in an inimitable style exposing the identity. The High Court without considering the aforesaid factors, unfortunately granted acquittal opining that no recorded voice sample was available.

7. PW 5, the liquor shop owner deposed that on the day of occurrence itself the appellant and Balram had come to his shop to purchase liquor. The appellant introduced Balram as his relative. They were accompanied by a boy aged 5-6 years wearing pink shirt, blue pant, blue socks, black belt, red tie. They consumed liquor at his shop for about two hours and then left along with the child. Nonetheless Balram has been acquitted by the High Court on the reasoning that his identity as the abductor could not be established as PW-10 stated that the abductor had his face covered with a napkin and therefore the dock identification was doubtful. The prosecution has not chosen to challenge the acquittal. The mere acquittal of a co-accused in the facts and circumstances of the case can be of no benefit to the appellant.

8. PW-8 deposed that the appellant had come to his hotel with a child aged 5-6 years and requested for food to be served. Likewise, PW-9 also deposed having seen the appellant with the child. Subsequently

A in the evening when he saw the photograph of the missing child on the television, he was able to identify the child accompanying the appellant. The witness then went to the police station to give information. The house of the appellant was raided in presence of seizure witnesses PW-6 and PW-7. The black coloured school bag of the victim was recovered from the house of the appellant. The school diary and copies inside the same bore the name of the victim. The school diary also contained his home phone number and the mobile number of his father. The recovered items were identified by PW-12, the father of the victim. The appellant offered no explanation about the aforesaid recoveries, except for denying the same.

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9. It is not an invariable rule of criminal jurisprudence that the failure of the police to recover the *corpus delecti* will render the prosecution case doubtful entitling the accused to acquittal on benefit of doubt. It is only one of the relevant factors to be considered along with all other attendant facts and circumstances to arrive at a finding based on reasonability and probability based on normal human prudence and behavior. In the facts and circumstances of the present case, the failure of the police to recover the dead body is not much of consequence in the absence of any explanation by the appellant both with regard to the victim last being seen with him coupled with the recovery from his house of the belongings of the deceased. ***Rama Nand and others vs. State of Himachal Pradesh,*** (1981) 1 SCC 511, was a case of circumstantial evidence where the corpus delicti was not found. This court upholding the conviction observed:

> "28…..But in those times when execution was the only punishment for murder, the need for adhering to this cautionary rule was greater. Discovery of the dead body of the victim bearing physical evidence of violence, has never been considered as the only mode of proving the corpus delicti in murder. Indeed, very many cases are of such a nature where the discovery of the dead body is impossible. A blind adherence to this old "body" doctrine would open the door wide open for many a heinous murderer to escape with impunity simply because they were cunning and clever enough to destroy the body of their victim. In the context of our law, Sir Hale's enunciation has to be interpreted no more than emphasising that where the dead body of the victim in a murder case is not found, other cogent and satisfactory proof of the homicidal death

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of the victim must be adduced by the prosecution. Such proof may be by the direct ocular account of an eyewitness, or by circumstantial evidence, or by both. But 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. 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 absolute certainty is a myth. That is why under Section 3 of the Evidence Act, a fact is said to be "proved", if the court considering the matters before it, considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The corpus delicti or the fact of homicidal death, therefore, can be proved by telling and inculpating circumstances which definitely lead to the conclusion that within all human probability, the victim has been murdered by the accused concerned…."

10. ***Sevaka Perumal and another vs. State of Tamil Nadu,*** (1991) 3 SCC 471, was also a case where the corpus delicti was not found yet conviction was upheld observing:

"5….In a trial for murder it is not an absolute necessity or an essential ingredient to establish *corpus delicti*. The fact of 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. Take for instance that a murder was committed and the dead body was thrown into flowing tidal river or stream or burnt out. It is unlikely that the dead body may be recovered. If recovery of the dead body, therefore, is an absolute necessity to convict an accused, in many a case the accused would manage to see that the dead body is destroyed etc. and would afford a complete immunity to the guilty from being punished and would escape even when the offence of murder is proved. What, therefore, is required to base a conviction for an offence of murder is that there should be reliable and acceptable evidence that the offence of murder, like any other factum of death was committed and it must be proved by direct or circumstantial evidence, although the dead body may not be traced…"

A 11. ***Sattatiya*** (supra) is completely distinguishable on its own facts as there was no credible evidence with regard to the last seen theory. The recovery of the weapon of the offence was disbelieved as no disclosure statement under Section 27 of the Evidence Act was brought on record and the recoveries were effected from an open place. Likewise in ***Lohit Kaushal*** (supra) the appellant was made an accused on confession of a co-accused. But the vehicle allegedly recovered from the appellant was found not to be involved in the kidnapping. There was no evidence with regard to the appellant having been involved in the kidnapping and taking away of the child. In ***Iqbal*** (supra) it was held that identification parade was not substantive evidence and apart from the same there was no other incriminating evidence like recovery of articles from the appellant.

12. We therefore find no merit in this appeal. The appeal is dismissed.

Devika Gujral Appeal dismissed.