



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

% Judgment delivered on 19.07.2011

+ **CRL. A. 362/1997**

SALIM KHAN ... Appellant

- versus -

STATE ... Respondent

AND

+ **CRL. A. 153/1998**

ANIL ... Appellant

- versus -

STATE ... Respondent

Advocates who appeared in this case:

For the Appellants : Mr Sumeet Verma, *Amicus Curiae*

For the Respondent/State : Mr Sanjay Lao

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MS. JUSTICE VEENA BIRBAL

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| 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 Digest? | Yes |



BADAR DURREZ AHMED (ORAL)

1. These appeals arise out of the common judgment dated 04.08.1997 and the order on sentence dated 05.08.1997 delivered / passed by the learned Additional Sessions Judge, Shahdara, Delhi in Sessions Case No. 82/1996 arising out of FIR No.36/1995 registered at Police Station Gokal Puri under Sections 302/363/364-A/34 IPC. Hence, the two appeals were heard together and are being disposed of by this common judgment.

2. By virtue of the impugned judgment dated 04.08.1997, the appellants Salim Khan and Anil have been held guilty for the offences punishable under Section 363/34 IPC, 364-A/34IPC and 302/34 IPC. By virtue of the impugned order on sentence dated 05.08.1997, both the appellants were sentenced to undergo rigorous imprisonment for life and to pay a fine of ₹ 4000/- each in respect of the offence punishable under Section 302/34 IPC. In default of payment of fine, they were to further undergo rigorous imprisonment for three months each. Insofar as the offence under Section 363/34 IPC is concerned, the appellants were sentenced to undergo rigorous imprisonment for 5 years each and to pay a fine of ₹ 1000/- each and, in default thereof, to further undergo rigorous



imprisonment for one month each. With regard to the offence punishable under Section 364-A/34 IPC, the appellants were sentenced to undergo rigorous imprisonment for life and to pay a sum of ₹ 5000/- by way of fine each and, in default thereof, to further undergo rigorous imprisonment for four months. All the sentences were directed to run concurrently.

3. Mr Sumeet Verma, the learned *amicus curiae*, appearing on behalf of both the appellants, submitted that the prosecution case suffered from various infirmities. First of all, he submitted that this was, in any event, a case of circumstantial evidence in which the prosecution has to establish each of the circumstances beyond reasonable doubt and the circumstances so established must form a complete chain so as to lead only to the conclusion that it is the accused who have committed the crime and none other. He submitted that the only evidence, insofar as the appellant Anil is concerned, is the recovery of a tiffin box (Exhibit P-1), wrist watch (Exhibit P-2) and a school bag (Exhibit P-3), which is alleged to have been made at the instance of the appellant Anil from his *jhuggi* after he had surrendered before court on 04.02.1995. It was contended by the learned counsel that the alleged recovery was made after two weeks of the incident



which allegedly took place on 20.01.1995. He also submitted that during this period, the *jhuggi* belonging to Anil had already been searched by the police on 22.01.1995 itself and, therefore, the question of the alleged recovery having been made on 04.02.1995 at the instance of the appellant Anil is not free from doubt.

4. With regard to the appellant Anil, the learned *amicus curiae* further submitted that the other piece of evidence which is sought to be used against Anil was the testimony of PW-13 (Rajesh Goel) who stated that he recognized the voice of the caller making the two telephone calls on 21.01.1995 to be that of the appellant Anil. The learned counsel submitted that as per PW-13 (Rajesh Goel), he could recognize that it was the voice of the appellant Anil when he heard him (Anil) making his disclosure statement before the police on 04.02.1995. However, the learned counsel submitted that the fact that PW-13 (Rajesh Goel) had recognized the voice of Anil, had not been disclosed to the police on 04.02.1995 or on any date prior to his deposition before court on 10.10.1996, which was recorded more than a year and nine months after the incident. Consequently, he submitted that this part of the testimony also cannot be believed. Apart



from the recovery and the alleged voice recognition at the instance of PW-13 (Rajesh Goel), there is nothing to connect the appellant Anil with the alleged offence.

5. Insofar as the appellant Salim Khan is concerned, the learned counsel submitted that the allegation on the part of the prosecution is that the deceased was last seen alive in the company of Salim by PW-3 (Ram Avtar) around 11.30 a.m. on 20.01.1995. According to the learned counsel, the telephone calls were made, as alleged by the prosecution, at about 12.10 p.m. and 3 p.m. on 21.01.1995. He submitted that, according to the prosecution evidence and, that too, the testimony of PW-7 (Dr. N.K. Agarwal), the time since death was about two days which would fix the time of death to be around 12.30 p.m on 20.01.1995. Thus, it was suggested by the learned counsel for the appellant that the story of the telephone calls and, in particular, the ransom call cannot be believed because by that time, as per the medical evidence on record, Sandeep had already been killed. He further submitted that it is the case of the prosecution that the deceased Sandeep used to leave for his school at around 11.30 a.m. for the second shift which was between 12.30 p.m. and



06.30 p.m. and used to return home about around 07.30 p.m. According to the learned counsel, although the time of death has been given as around 12.30 p.m. on 20.01.1995, this is only an approximation and the death could have occurred 3 or 4 hours later which would mean that the time gap between Sandeep being last seen alive at about 11.30 a.m. and the time of his death, say around 3 or 4 hours, at around 3.30 p.m. or 04.00 p.m. would be sufficient enough to enable other intervening circumstances, thereby indicating that it is not at all necessary that it was Salim Khan who definitely caused the death of Sandeep. According to the learned counsel for the appellant, even the recovery of the dead body is to be doubted inasmuch as no independent public witness from the locality from where the body was discovered has been associated. Apart from the police witnesses, the other witnesses are PW-2 (Sita Ram), who is the father of the deceased Sandeep and PW-13 (Rajesh Goel), who is the uncle (mama) of the deceased Sandeep and PW-3 (Ram Avtar), who is a neighbour. He submitted that the *ganda nalah* from where the dead body was recovered is surrounded by houses, but no public person from that area was joined for the recovery proceedings.



6. For these reasons, the learned counsel for the appellants submitted that the impugned judgment was liable to be set aside and the appellants were entitled to be set at liberty.

7. Mr Lao, the learned counsel appearing on behalf of the State, supported the impugned judgment and order on sentence and stated that the case of the prosecution was fool-proof against both the appellants. Insofar as the appellant Salim Khan is concerned, he stated that there is the “last seen evidence” of PW-3 (Ram Avtar) coupled with the recovery of the dead body of Sandeep at the instance of the Salim. Insofar as the appellant Anil is concerned, Mr Lao submitted that the recovery of the watch, tiffin box and school bag belonging to the deceased Sandeep, which had been identified by the PW-2 Sita Ram (Sandeep’s father), is clinching evidence of the fact that Anil was also involved in the crime. He further submitted that the recovery of these articles was not merely from the *jhuggi* of Anil, but after the same had been dug out by Anil from the ground beneath the *jhuggi*. He, therefore, contended that the fact that the police had already search the *jhuggi* would have no meaning in as much as



it would not have been known to the police that the said articles had been hidden by keeping them under the soil of the *jhuggi*.

8. Mr Lao also submitted that the testimony of PW-13 (Rajesh Goel) also clinches the case against Anil inasmuch as PW-13 (Rajesh Goel) has clearly identified the voice of the person who made the telephone calls on 21.01.1995 as that of the appellant Anil.

9. At this juncture, we may point out that the learned counsel for the appellants had also raised the issue as to whether the question, which was put by the learned APP with regard to the identification of the voice of the person who had made the telephone call and demanded the ransom, was at all admissible in law in view of Sections 141 and 142 of the Indian Evidence Act, 1872. According to the learned counsel for the appellants, that question was a leading question and was, therefore, not admissible because it had been objected to by the learned defence counsel at the stage of trial and no permission has been sought for the same from the court.

10. The prosecution case was that Sandeep, who is the son of PW-2 (Sita Ram), used to go to school (Ramjas School, Darya Ganj) to attend the



second shift. He used to leave the house at around 11.30 a.m. and his shift was from 12.30 p.m. to 06.30 p.m. As usual, on 20.01.1995, Sandeep left the house at that time. He, however, did not return home at 7.30 p.m. (which was his usual time of return). Since he did not return till 08.30 p.m., PW-2 (Sita Ram) informed his brother-in-law PW-13 (Rajesh Goel), about the fact that Sandeep had not returned from school. Both of them, that is, PW-2 (Sita Ram) and PW-13 (Rajesh Goel) searched for Sandeep at their own level. They could not locate him on 20.01.1995. Nor could they locate him in the early hours on 21.01.1995. It is then the case of the prosecution that at about 12.10 p.m. on 21.01.1995, when PW-13 (Rajesh Goel) had gone to the shop of PW-2 (Sita Ram), i.e., Shop No. 7, Kartar Singh Market, Sherpur Chowk, Kabul Nagar Road, Delhi, he received a phone call. The caller made an enquiry as to whether PW-13 (Rajesh Goel) knew about the whereabouts of Sandeep. On his answering that he did not know where Sandeep was, the caller is alleged to have stated that Sandeep was with them and that they would call again after an hour. It is then the case of the prosecution that PW-13 (Rajesh Goel) informed the police about the said call after suspecting that Sandeep had been kidnapped. The police arrived at the said shop and the statement (Exhibit



PW-13/A) of PW-13 (Rajesh Goel) was recorded. On the basis of the said statement, the *ruqqa* was sent and FIR No. 36/1995 (Exhibit PW-10/A) was registered under Section 363 IPC at police station Gokal Puri.

11. Thereafter, at about 3 p.m., another call was received by PW-13 (Rajesh Goel), whereupon a demand for ransom of ₹ 30,000/- was made. Directions were given to PW-13 (Rajesh Goel) to bring the cash amount of ₹ 30,000/- at 4.30 p.m. at the bus stand near Loni Fly Over and to place the said cash in the bus which was to go towards Baghat. The said amount was to be placed where the luggage was normally kept inside the bus. It was stated that it is from there that the said amount would be collected by the persons who made the ransom call and that Sandeep would be returned on the next day. PW-13 (Rajesh Goel) was also warned not to inform the police, otherwise Sandeep would be killed. He was also told that there would be no further talk and the phone was disconnected.

12. After this phone call was allegedly received by PW-13 (Rajesh Goel), his supplementary statement was recorded whereupon the offence under Section 364-A IPC was added in the FIR.



13. In the course of investigation, in the same day, suspicion had arisen with regard to the appellant Salim Khan who was a teacher of Martial Arts at the said Ramjas School and Sandeep was also one of the students. The suspicion had arisen because PW-3 (Ram Avtar) had, later in the evening on 20.01.1995, informed that he had seen Sandeep going away in a rickshaw with a tall boy at about 11.30 p.m. He also stated that when Sandeep passed by him in the rickshaw, he told PW-3 (Ram Avtar) that he was going to school with *Masterji*. From this statement, suspicion arose with regard to the appellant Salim Khan. Thereupon, since Salim Khan was known to PW-2 (Sita Ram), as he had visited their home and shop on prior occasions, the police party, along with PW-2 (Sita Ram), PW-13 (Rajesh Goel) and PW-3 Ram Avtar, went to the house of Salim Khan where he was found inside and on seeing the police, according to the prosecution, he was startled. On interrogation, he disclosed that he could get the dead body of Sandeep recovered from the *ganda nalah* at Mustafabad (near Bhagirath Water Pump). Thereafter, the police party, along with the said witnesses and the appellant Salim Khan, went to the *ganda nalah*, the place where the dead body of Sandeep was said to be lying, which was pointed out by Salim Khan, from where the dead body of



Sandeep was recovered and the same was identified by his father PW-2 (Sita Ram).

14. In his disclosure statement, in the course of investigation, the appellant Salim Khan had also taken the name of Anil and, therefore, the police party went to Anil's *jhuggi* and conducted a search on 22.01.1995. Nothing was, of course, found at that time. Anil was also not available. As pointed out above, Anil surrendered in court on 04.02.1995, that is, 14 days after the said incident and immediately thereafter he allegedly made a disclosure statement pursuant to which, according to the prosecution, a watch, tiffin box and school bag belonging to Sandeep were recovered from his *jhuggi* after the soil underneath the same was dug up and a plastic bag was taken out.

15. Upon examining the evidence on record and considering the arguments advanced by the counsel for the parties, we find that insofar as the appellant Anil is concerned, it is only the alleged recovery of the watch, tiffin box and school bag and the alleged recognition of his voice by PW-13 (Rajesh Goel), which has transpired in evidence against him. Insofar as the recovery of the watch, tiffin box and school bag is



concerned, we find that the same is not free from doubt. This is so because, first of all, the recovery was made after 14 days and, that too, after the appellant Anil himself surrendered before court. It is unlikely that the person who is about to surrender himself to the judicial process and who knows that he has been involved in a particular crime, would not wipe out all the evidence connecting him to the said crime. It is unlikely, therefore, that the appellant Anil would have kept the watch, tiffin box and the school bag within his own *jhuggi*. Apart from this, we are also not certain that the watch, tiffin box and the school bag actually belonged to Sandeep because these items were of a generic nature. Although PW-2 (Sita Ram) had identified the same as belonging to Sandeep, there still remains a doubt in our minds as to whether these were actually articles belonging to Sandeep.

16. With regard to the voice being recognized by PW-13 (Rajesh Goel), apart from the question of admissibility and the fact that the information was elicited on an alleged leading question, we find that the testimony of PW-13 (Rajesh Goel) on this aspect is not credible. This is so because had he recognized Anil's voice when Anil was allegedly making his disclosure



statement on 04.02.1995, he would have told the police then and there. He never disclosed this fact either to the police or to PW-2 (Sita Ram) or PW-3 (Ram Avtar) or to nobody else. He made this statement for the first time on 10.10.1996, that is, more than one year and nine months later. Apart from this, the voice of a person being heard over the telephone and the voice heard when he is present in the same room tend to be different. Recognising the voice in such a manner after such a brief conversation would be difficult. In any event, even if PW-13 (Rajesh Goel) were to be believed that he did hear Anil making his disclosure statement, we must not be unmindful of the fact that the disclosure statement of Anil was recorded 14 days after the incident and there is all likelihood that he could have forgotten the exact voice pattern and manner of speech of the person who made the telephone call.

17. There is also doubt with regard to the receipt of the second call, i.e., the call in which the demand for ransom was made. According to PW-2 (Sita Ram), there was only one call which was made. According to PW-13 (Rajesh Goel), when the second call was received, none of the police persons were present, whereas, according to PW-18 (S.I. Ishwar Singh), he



was present in the shop when PW-13 (Rajesh Goel) received the second call. There is, therefore, considerable amount of doubt with regard to the receipt of the second call in which the actual demand for ransom was made.

18. For all these reasons, we are of the view that the case against Anil is not free from doubt and, therefore, giving him the benefit of doubt, the conviction and sentence, insofar as appellant Anil is concerned, is set aside.

19. Coming to the case of the appellant Salim Khan, we find that it would be difficult for him to get out from the evidence that is pointing in his direction. The first and most important piece of evidence is the testimony of PW-3 (Ram Avtar), who had last seen Sandeep alive in the company of Salim Khan when they both were leaving the bus stand area in a rickshaw and when Sandeep had told PW-3 (Ram Avtar) that he was going to his school with *Masterji*. The other important piece of evidence, which has come against the appellant Salim Khan, is the recovery of the dead body of Sandeep at his instance. Neither the testimony of PW-3 (Ram Avtar) has been shaken with regard to his “last seen evidence” nor



with regard to the recovery of the dead body at the instance the appellant Salim Khan. The other witnesses to the recovery of the dead body are PW-2 (Sita Ram) and PW-13 (Rajesh Goel). They have both stood firm in their testimonies with regard to the recovery of the dead body at the instance of the appellant Salim Khan. Therefore, it must be taken as established that the dead body of Sandeep was recovered at the instance of the appellant Salim Khan. When this fact is coupled with the testimony of PW-3 (Ram Avtar), who last saw Sandeep alive in the company of Salim Khan, there could be no manner of doubt that it was Salim Khan who was responsible for the death of Sandeep. There is also no explanation provided by the appellant Salim Khan in the course of his examination under Section 313 Cr.P.C. Consequently, the appellant Salim Khan has been rightly convicted for the offences punishable under Section 302 IPC as well as under Section 363 IPC. However, his conviction under Section 364-A IPC is set aside. So also his sentence with regard to that offence.

20. Consequently, the appeal filed by Anil is allowed. His conviction and sentence are set aside and his bail bond is cancelled and his surety stands discharged. Insofar as the appeal filed by Salim Khan is concerned,



the same is partly allowed inasmuch as his conviction under Section 364-A/34 IPC is set aside. However, his conviction under Sections 302 and 363 IPC are upheld and his sentences in respect thereof are also upheld. The appellant Salim Khan be taken into custody to serve out the remainder of his sentence. A copy of this order be sent to the learned trial court to take up proceedings in accordance with law inasmuch as the appellant Salim Khan has been absconding after he was released on bail. The appeals stand disposed of accordingly.

BADAR DURREZ AHMED, J

VEENA BIRBAL, J

JULY 19, 2011

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