Delhi High Court
Mohd. Zaffir vs State on 19 January, 2005
Author: R Sodhi
Bench: M Sharma, R Sodhi
JUDGMENT R.S. Sodhi, J.

1. Criminal Appeal No. 21 of 2002 is directed against the judgment and order of the Additional Sessions Judge, Shahdara, Delhi, in Sessions Case No. 52/96 in case arising from FIR No. 565/94, Police Station, Shahdara, under Section 376/302 IPC whereby thelearned Additional Sessions Judge vide his judgment dated 27.3.1998 has held the appellant guilty of offence under Sections 376 and 302 IPC while acquitting him of the charge under Section 363 IPC and further vide his order dated 31.3.1998 sentenced himto life imprisonment on both counts under Sections 376 and 302 IPC together with a fine of Rs.5,000/- on each of the two counts and in default of payment of fine to further undergo rigorous imprisonment for six months.

2. Brief facts of the case, as noted by the learned Additional Sessions Judge, are as follows :

"It was on 27.12.1994 at about 4 p.m. that complainant, Khursid Alam's daughter Rukhsana aged about 8 years went from her house to play with other mohalla children at Ghonda Chowk and she did not return till 9 p.m. that day. The complainant madea search for his missing daughter till the next day and when he was present in the area making announcement on a loud-speaker about his daughter, PCR staff informed him near Theka Sharab, GT Road that a girl resembling the description of the missing chilwas found lying dead in a Kabristan near a vacant DDA Park, Kardampuri where after the complainant was taken to the said spot by the PCR staff where complainant identified the deceased as being his daughter, Rukhsana. A police team had already receivedinformation about the dead-body vide an information recorded in DD 14-A dated 28.12.94 and the local police was found also present at the spot by the complainant. The deceased was found lying in the Kabristan with her 'Salwar' off from her legs and bloohaving come out from her vagina. The dead-body was identified by the complainant's mother also and further investigations were carried out which then led to the arrest of the accused who had been seen with the deceased girl near the said Kabristan on te evening of 27.12.94."

3. Upon completion of investigation pursuant to FIR No. 565/94, Ex. PW-8/A, challan was filed and charges framed under Sections 363, 376 and 302 IPC.

4. The prosecution, in order to bring home its case, examined as many as 21 witnesses. The trial court, relying upon testimony of PWs-5, 6, 7 and 20 as also the recovery of blood stained trouser of the accused and the report of the CFSL, came to the conclusion that the prosecution had proved its case beyond doubt. Counsel for the appellant appearing before us has not, in any manner, assailed the procedural aspect of investigation. He has, however, taken us through the evidence of witnesses and submited that reading of the same does not justify the conclusion arrived at by the trial court. Counsel laid great emphasis on the statement made by father of the deceased, Khurshid Alam Shah, PW-5, before the police on 28.12.1994 which formed the basis of te FIR, Ex. PW-8/A. Counsel submitted that the rukka, Ex.PW-5/A, is the statement of PW-5, recorded by the police which reads

as under :

"Translation of Ex. PW-5/A, a statement(Rukka) dated 28.1.294 made by Shri Khurshid Alam, s/o Shri Abdul Aziz, recorded by Shri Ajab Singh, Sub-Inspector, Police Station Shahdara, Delhi and in charge Police Post Jyoti Nagar, Delhi, together with the transation of Ex.PW-21/A, the endorsement made there under.

Shri Khurshid Alam, s/o Shri Abdul Aziz, aged 36 years, R/o House No. A-10, Gali No. 3, Gamri Road, North Ghonda, near State Bank, Delhi, made the following statement :-

I reside at the aforesaid address along with my family and am the permanent resident of village Lohariya, Police Station Vela, District Sitamadhi, Bihar. I do work of cooking food in my house itself. Yesterday i.e. 27.12.94 at about 04.00 P.M. my daugher namely Rukhsana, aged 8 years, height about 3-1/2 ft, lean body, fair complexion who was wearing a printed red and purple coloured floral designed 'Salwar and Kurti' and was bare-footed, had gone to Ghonda Chowk to play with children. When she did nocome back to the house up to 9 O'clock in the night, we started searching her. Today we searched her at several places on our personal level but we did not come to know anything about her. Today we, after sitting on a rickshaw, were doing announcement trough a loud-speaker about the missing of my aforesaid daughter, Rukhsana. When we were coming from the side of Lal Quila via iron bridge of Ymuna and when we reached the Police Booth, Shastri Park, near the liquor shop at G.T. Road, we saw that a PCR vawas standing there and when we told them (Police) the description of our aforesaid missing daughter, they told us that a girl of the same description was found lying dead near a grave-yard near vacant DDA Park, Kardam Puri. After that, they (Police) bought me at the aforesaid grave-yard near vacant DDA Park, Kardam Puri in their van where I identified the dead-body of my aforesaid missing daughter, Rukhsana. This dead-body is that of my daughter, Rukhsana. The 'Salwar' of my aforesaid daughter, Ruksana, was lying on her feet and blood had oozed out from her vagina. Some unknown person has murdered her after committing rape on her. Legal action may be taken. I have heard the statement and the same is correct", forms the basis of the FIR, Ex. PW-8/A.

5. Counsel for the appellant submitted that the statement on oath of PW-5, is a drastic improvement over his statement, Ex. PW-8/A and should be discarded. Counsel challenges the statement of PW-7, mother of the deceased, on the ground that the information received by her regarding last seen was from PW-6 who, in turn, states that he had supplied this information to PW-5 in the evening itself, yet in the statement of PW-5, recorded as Ex. PW-5/A, this material information of last seen is conspicuously asent. Counsel suggested that the story of last seen has been coined at a later stage to implicate the accused. He also submitted that in the event the last seen information was available with the witnesses, it would have found mention in at least soe contemporary document prepared. He relied upon a judgment of the Supreme Court in Jaharlal Das v. State of Orissa 1991 SCC (Crl.) 527 where the Supreme Court has had the occasion of dealing with such material. Counsel also contended that the only evdence pressed into service to nail the accused is the last seen evidence which, according to him, cannot be the sole criteria of conviction.

6.Counsel for the appellant has attacked the testimony of PW-20, Gulsher, a Special Police Officer, who has deposed that he had seen the accused with the deceased at 8.00 p.m. This witness, according to the counsel, is a chance witness; does not know the accused nor the deceased and also his statement regarding the last seen has not been put to the accused under Section 313 Cr.P.C. Counsel relied upon the judgments of the Supreme Court in Sharad Birdichand Sarda v. State of Maharashtra AIR 1984 SC 162, Kehar Singh and Ors. v. State 1988 SCC (Crl.) 711 and Lallu Manjhi v. State of Jharkhand 2003 (1) JCC 137 and contended that this piece of material has to be excluded from consideration.

7. Counsel for the State, on the other hand, contended that PWs.-5, 6 and 7 have categorically stated that the deceased was in the company of the accused and was seen with him at or about 4.00 p.m. PW-7 categorically states that the child was taken by the accused to the circus. Counsel contended that the testimonies of the aforesaid witnesses have not been shaken in cross-examination and, therefore, have been correctly relied upon by the trial court. Counsel contended that in the absence of any explnation by the accused, who was in the best position to explain the whereabouts of the child, the prosecution has discharged its burden beyond doubt to show that the accused had committed the drastic crime of rape and murder of the deceased.

8. We have heard counsel for the parties and gone through the record of the case with their assistance. There is no gainsaying that the FIR does not name the accused nor states that the child was last seen with the accused. On the other hand, the testimonies of the witnesses, PWs-5, 6 and 7 bring about the factum of the accused being very close to the deceased as they used to play together and also that he had taken the child to see the circus and the deceased was last seen with the accused at or about 4.00 p.m. The absence of the name of the accused in the FIR cannot by itself be said to be fatal to the prosecution inasmuch as the same is not a thesis but a general description of events. However, it is in the statement of PW-7, mother of the decesed, that the accused took the child to see the circus and told her that he would be returning at or around 8.30 in the evening. On his return, she inquired of him as to the whereabouts of the child and learnt that the child had turned back en routthe circus and was not with the accused. None of the witnesses, other than PW-20, say that the child was seen with the accused at the circus at/or between 4.00 p.m. to 9.00 p.m. when the accused returned home. There is no material to show that the acused had not gone to the circus. There is also nothing on record to show that the show concluded earlier or that the child remained with the accused for a longer time than stated by the accused to PW-7. As regards PW-20, Gulsher, we need hardly dwellon his testimony since the very nature of his induction in the case appears to be not worthy of credit. He is a chance witness; was never known to any of the parties; is stated to have made a statement on the spot when the body was recovered in presenceof PW-7 and PW-5 who, in turn, do not make a mention of the presence of PW-20 at the time the body was recovered. Further, his statement regarding last seen has not been put to the accused in his statement made under Section 313 Cr. P.C. Obviouslythe prosecution does not rely upon this piece of evidence.

9. We also find that the trial court has pressed into service the recovery of trouser of the accused which is allegedly blood stained to corroborate, the last seen evidence to hold the accused guilty of the offence charged. On a reappraisal of the CFSL report as also the recovery memo connected with the trouser, we find that the CFSL report clearly states that there is no connection between the

trouser sent in, Ex. PW-5/D, and the other recoveries made, namely, Salwar, blood etc. No human blood wasdetected on the trouser. There is a categoric finding of the CFSL that Ex.-3, namely, the trouser, has no co-relation with other Exs-1, 2, 4, 5, 6 and 7. From this it cannot be said that the so-called blood stained trouser, which the accused was wearinand which was recovered from the accused two days after the incident, could corroborate, muchless establish the factum of charge. What we are left with is the plain depositions of PWs-5, 6 and 7 who, even if believed, can only lead to the inference tht the child was last seen with the accused at around 4.00 p.m. The explanation of the accused also finds mention in the aforesaid deposition of PW-7. PWs-6 and 7 had informed PW-5 that the child was last seen with the accused, yet PW-5 and the accusewent searching for the child throughout the night. On the following day, PW-5 took the matter to the police whereupon the investigation is put into motion. There is nothing on record to show that the accused was absconding. The accused, since his chidhood, had lived with PW-5 and had been a play-mate of the deceased; there was no motive for him to have committed this ghastly crime.

10. Looking at the totality of the circumstance, the last seen evidence, if believed, cannot itself be a clincher in the absence of the explanation given by the accused to PW-7 having been shown as false by positive evidence. The gap between the lastseen and the body recovered cannot be said to be of close proximity so as to discard the possibility of any other person, other than the accused, having committed the crime. Reference may be had to State of Maharashtra v. Annappa Bandu Kavatage 1980 SC(Crl.) 155, Bodh Raj @ Bodha v. State of JandK and Tahir v. State 2001 RCR (Crl.) 31. The solitary circumstance of last seen is innocuous and has no meaning in the facts and circumstances of this case. Reference may be had to Inderjit Singh and Anr. v. State of Punjab 1991 Crl.L.J. 2191 (SC), Shera Singh v. State of Punjab, 1996 SCC (Crl) 1271, Lakhan Pal v. State of M.P. AIR 1979 SC 1620 and Gambhir v. State of Maharashtra 1982 SCC (Crl.) 431. Yet another piece of circumstance whih was pointed out by counsel for the State and that needs to be dealt with, are the injuries found on the accused at the time of his arrest. Counsel states that the aforesaid injuries are in the nature of scratches which must have come about in a strugle during the incident.

11. On a careful examination of the material on record, we find that there is no opinion given by the Doctor that the aforesaid injuries were as a result of scratches attributed to finger nails. There is also nothing on record to show that the deceasedshowed any signs of having scratched the assailant or cracked nail or flesh in the nails. For that matter, there is nothing to connect the incident with the injuries. We are not inclined to connect the accused with the crime on mere suspicion. Thecircumstances brought out in this case by the prosecution are not sufficient nor clinching enough to bring about a hypothesis of guilt of the accused. Reference may be had to Jaharlal Das v. State of Orissa 1991 SCC (Crl) 527 and Shankarlal Gyarasilalixit v. State of Maharashtra 1981 SCC (Crl) 315. Although the offence is gruesome and revolting, we do not find it safe to convict the accused only on the evidence of last seen. The evidence and chain of circumstances that have been forged do not rulout the possibility of any other reasonable hypothesis except the guilt of the accused.

12. In this view of the matter, we set aside the impugned judgment and order dated 27.3.1998 and 31.3.1998 of the Additional Sessions Judge. Criminal Appeal 21 of 2002 is allowed and the appellant is acquitted of all charges. The appellant, who is in custody, shall be released forthwith, if not

wanted in any other case.