

* **HIGH COURT OF DELHI : NEW DELHI**

+ **Crl. Appeal No. 394/2001**

% **Judgment reserved on : 09.05.2008
Date of Pronouncement : 22.07.2008**

Ashok Kumar **Appellant**

**Through : Mr. Sumeet Verma,
Advocate**

versus

STATE **Respondent**

Through : Ms. Richa Kapoor, APP

CORAM :

Hon'ble Mr. Justice B N Chaturvedi

Hon'ble Mr. Justice Rajiv Shakdher

1. Whether the Reporters of local papers may be allowed to see the judgment ?
2. To be referred to Reporters or not ?
3. Whether the judgment should be reported in the Digest ?

Rajiv Shakdher, J.

1. This is an Appeal against the judgment dated 22.04.1999 and sentence dated 26.04.1999 passed by Shri Raghubir Singh, Additional Sessions Judge; Delhi in Sessions Case No. 210 of 1996 (hereinafter referred to in short as the 'trial

Court'). By the impugned judgment, the Appellant has been convicted under Sec. 302 of the Indian Penal Code (hereinafter referred in short as the 'IPC') and has been thus sentenced to undergo life imprisonment and also to pay a fine of Rs.500/-, failing which, the Appellant is required to undergo a further rigorous imprisonment for a period of three (3) months. The Appellant, being aggrieved by the impugned judgment, has preferred the present Appeal under Sec. 374 (2) of the Criminal Procedure Code (hereinafter referred to in short as 'Cr P C').

2. In order to deal with the issues raised in the Appeal, it would be important to set out briefly the case of the prosecution in respect of the conviction of the Appellant in the matter. The prosecution's case is as follows :--

3. On 25.04.1996, one Shri Kallan Khan, the father of the deceased child, Shabana, lodged a missing person's complaint with the Mangol Puri, Police Station (in short the said Police Station) with respect to his child, Shabana. A Daily Diary (DD) Entry No. 21A was made out at about 1.45pm, wherein, based on Kallan Khan's statement it was recorded that his daughter, Shabana, aged about seven (7) years, of medium built, wearing salwar suit with red and white print, was missing since 4.00pm on 24.04.1996.

4. The next day i.e. 26.04.1996 at about 2.30pm, the said Police Station received a telephonic information from Shri Kallan Khan that a foul smell was emanating from the adjoining house. Upon receipt of the said information, an entry once again was made in the Daily Dairy being DD No. 22A. Thereupon Sub-Inspector (SI) Sanjay Daral alongwith Head Constable Satpal, Head Constable Balbir Singh, Constable Bijender Singh and Constable Ram Niwas left the Police Station to investigate the matter further. On arrival at the place indicated by Shri Kallan Khan, i.e. House bearing No. F-2/289, Mangol Puri, Delhi (in short the 'said premises') which is a house belonging to one Shri Pancham Singh, who alongwith his three sons viz Ashok Kumar (i.e. the Appellant/accused), Hem Raj and Suresh, resided in the said premises at the relevant point in time, the Police found the house locked. The Police team gained the access to the said premises which comprised of an inner room. Upon a search being carried out of the said premises, the Police team found the body of the deceased child, Shabana, wrapped in a yellow polythene stacked in a white sack on the shelf of the inner room. Soon thereafter, Shri Rajender Bhatia, Additional Station House Officer of Police Station, Mangol Puri, Delhi also arrived at the crime scene and prepared an inquest report. He also recorded the statement of the father of the deceased, Shri Kallan Khan.

Based on the aforesaid events at about 6.30pm, on 26.04.1996, a First Information Report (FIR) was registered. The investigating team after carrying out a search of the said premises took into possession the following articles :- (i) a book containing obscene literature, (ii) blood stained earth, (iii) One blood stained underwear, which Shri Kallan Khan, identified as one belonging to the deceased child. The underwear also found to have pubic hair stuck on it. Based on the material seized, a seizure memo was prepared by Inspector Rajinder Bhatia, Additional Station House Officer, which was witnessed by Shri Kallan Khan, the father of the deceased child.

5. On 27.04.1996, a Post Mortem was conducted by Dr. K. Goyal. After the Post Mortem, the articles were handed over by concerned Doctor to the Police and same were seized, and a seizure memo to the same effect was prepared by SI Sanjay Daral on the very same day i.e. 27.04.1996. The articles taken into possession by SI, Sanjay Daral were a wooden box containing the viscera of the deceased child; a sample bottle containing the vaginal swab of the deceased, one plastic sack containing a salwar, shirt/frock, an underwear, a gunny bag and an envelope containing the sample of the blood of the deceased. All these articles were seized by SI Sanjay Daral with the seal of Dr. B Singh, Civil Hospital, Delhi. The Post Mortem carried out

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by Dr. K Goyal on 27.04.1996, at about 11.30 am, reveals that there were abrasions between the left ear and left eye, cheek, as well as, bruises on the middle of neck. The report opined that all injuries appeared to be ante mortem and were caused by use of blunt force. It further went on to opine that the pressure on the neck structure was sufficient to cause death in the ordinary course of nature. However, it pointedly records that no definitive opinion could be given with respect to whether or not the deceased child had been raped due to protrusion of external genitalia on account of decomposition. The cause of the death was given as asphyxia due to manual strangulation. The time of the death is recorded as three (3) days prior to the date and time of the Post Mortem.

6. After a great amount of effort and incessant search, on 01.05.1996, the Appellant/ accused was apprehended and arrested on being identified by Shri Kallan Khan, the father of the deceased. On the very same day, a medical examination of the Appellant was carried at Deen Dayal Hospital. In the Medical Examination conducted by Dr. Pawan Bhargva, he opined that there was no evidence to suggest that the Appellant was not capable of having sexual intercourse. The semen and under garment of the Appellant were sealed. On 02.05.1996, the Police based on the information supplied by the Appellant,

discovered a metallic trunk at a place known as Village Mukandpur, Delhi. The said box was also seized by the Police in the presence of the victim's father, Shri Kallan Khan. The metallic trunk was, as per the prosecution case, based on the disclosure made by Appellant, attempted to be used by the Appellant to stuff the body of the deceased, so as to enable him to carry away the body of the deceased from the scene of the crime. It transpired that when, the Appellant failed to fit the body in the trunk, he carried the empty trunk and threw the same away at the site at which it was found. The police found blood stains on the inside of the trunk. Consequently, a piece of the trunk with the blood stains was seized by the police. The seized material was sent by the Police to the Forensic Science Laboratory, Malviya Nagar, New Delhi (in short 'FSL'). In all, thirteen (13) parcels were sent for analysis to the FSL which included the Salwar and shirt worn by the deceased child and the blood stained pillow found at the said premises amongst others. The FSL report also confirmed that the blood stains found on the pillow, underwear, ganji, frock/shirt, salwar, gunny bag, metallic piece taken from the trunk, were of human origin of AB Group. The semen stains on the salwar of the deceased and underwear of the Appellant/ accused matched and had an identical blood group which was of AB.

7. In view of the aforesaid material collected by the Police, a report was filed with the Court and accordingly the trial court framed charges against the Appellant on 16.09.1996. The Charges framed against the Appellant were as follows :-

‘... That between 24.04.96 and 26.04.96, at House No. F-289, Mangol Puri, you committed rape on Km. Shabana, aged 7/8 years, and thereby committed an offence punishable under Section 376 IPC.

Secondly, on the aforesaid date and place, you have committed the murder of Km. Shabana by causing her death by strangulation, and thereby committed an offence punishable under Section 302 IPC, and within my cognizance.

And I hereby direct that you be tried by this Court for the above said offences. ‘

8. The Appellant pleaded not guilty and claimed trial. Accordingly, trial was commenced against the Appellant.

9. At the trial, the prosecution examined Sixteen (16) witnesses. The defence did not examine any witness.

10. At this stage, it is important to note that the prosecution had listed brothers of the Appellant who were minors at the relevant point of time namely; Shri Hem Raj (PW1) and Shri Suresh (PW7), as their witness. However, they turned hostile and hence, were cross examined by the Additional Public

Prosecutor.

11. The prosecution in order to prove its case that the Appellant had first raped the deceased and then caused death by manual strangulation, relied upon the testimonies of the following witnesses :--

12. Shri Bharat Chaudhary, (PW2) was examined, who deposed that in January 1996, nearly three months before the occurrence of the crime, an altercation had broken out between the father of the Appellant / Accused and the father of the deceased child, Shri Kallan Khan. The altercation ensued, according to the said witness, on account of an attempt made by the Appellant to molest the deceased child, Shabana. Since the child's interest was involved, the matter was compromised between the warring parties.

13. Head Constable Dharshan Kumar, (PW3) was examined to prove the FIR (Ex.PW3/A) wherein, the information with respect to the crime on receipt of the message from the scene of the crime was recorded at about 6.30pm.

14. Smt. Anwari Devi (PW4) was examined to establish that on 26.04.1996, she identified the body of the deceased child, Shabana, in the said premises belonging to Shri Pancham

Singh, that is, father of the Appellant.

15. Head Constable Ram Niwas (PW5), was examined to establish that on 27.04.1996, the material recovered after Post Mortem was seized and, put into four (4) parcels with the seal of Dr. B Singh, and was handed over to SI Sanjay Daral, who prepared the seizure memo Ex.PW5/A.

16. Head Constable, Mool Chand PW6, was examined to establish that the parcels received from the Inspector Rajender Bhatia on 26.04.1996 and from SI Sanjay Daral on 27.04.1996 and those received on 01.05.1996 from the Inspector Rajender Bhatia were received at the Malkhana of the said Police Station, and duly entered in the Register No. 19 on various dates. The said witness also deposed that on 18.06.1996, the thirteen (13) parcels and (3) three samples were sent to the Central Forensic Scientific Laboratory vide Certificate No. 140/21.

17. Dr. K Goyal (PW8), was examined to prove the Post Mortem Report. Dr. K Goyal proved his Post Mortem Report and deposed inter alia that the injuries referred to in the Post Mortem Report were ante mortem in nature and were caused by blunt force. He further opined that the pressure on the neck structure was sufficient to cause death in the ordinary course of nature. He opined that the cause of the death was manual strangulation

which according to him occurred three (3) days prior to the Post Mortem. As noted hereinabove, Dr. Goyal stated that no definitive opinion could be given as regards the sexual assault as the body had decomposed.

18. Constable Jogender Singh (PW10) was examined to establish that thirteen (13) parcels and three (3) samples were deposited with the Central Forensic Science Laboratory, Malviya Nagar, New Delhi (in short CFSL) vide Certificate No. 140/21.

19. Constable Ramesh Kumar, (PW11) was examined to establish that on 26.04.1996 he was posted at the said Police Station, and that he was handed over special report by the Duty Officer for delivery to the Senior Officers, as well as, the Metropolitan Magistrate Shri Vinod Kumar.

20. Shri Kallan Khan (PW12) being the main witness of the prosecution deposed that on 24.04.1996 at about 4.00 pm, he found that his daughter, Shabana was missing. He further deposed that he, accordingly informed the Police who requested him to carry out the search of his daughter on his own. In his testimony, he says that on 25.04.1996, at about 1pm, he lodged a formal missing person's report with the Police. He further deposed that on 26.04.1996, he discovered that a foul smell was emanating from the said premises being adjoining house

belonging to Shri Pancham Singh. He also stated that he, thereafter went in search of his daughter and when he returned at about 2.30 pm he found many people collected outside the said premises from where the foul smell was emanating. Since the said premises was locked from outside, he sought police help by ringing the helpline number 100. The Police soon reached the spot and broke open the lock of the said premises. On entering the said premises, they found an inner room, the lock of which was also broken. In the inner room of the said premises, they found blood on the floor, and on a further search a sack was discovered on the shelf of the room. Upon the sack being brought down and opened it was found to contain a yellow polythene bag. On opening the said yellow polythene bag, the dead body of the Shabana was discovered and at that point of time, she was wearing a shirt with red and white design; however, the salwar was removed. He further deposed that on a visual examination, it appeared that his daughter had been raped and killed. He further deposed that the sons of Shri Pancham Singh, namely Suresh and Hem Raj were missing since 25.04.1996. In his deposition, he further went on to say that Shri Pancham Singh was away to his native place at Madhya Pradesh for the last 10 – 12 days. He further went on to depose that he suspected the Appellant as the perpetrator of the crime as on an

earlier occasion which took place in January 1996, he attempted to commit the same act with his daughter, Shabana. He accepted having given a statement to the Police (Ex.PW12/A). He also deposed that from the scene of the crime, several articles were seized such as the blood stained pillow vide memo Ex.PW12/B, one book containing obscene literature, blood stained earth, blood stained under wear with pubic hair stuck on it which was sealed in his presence vide seizure memo Ex.PW12/B.

Shri Kallan Khan, (PW12) further went on to state in his deposition that he saw the Appellant being interrogated in the Police Station on 02.05.1996 when in his presence, the Appellant confessed to his guilt that he had raped and killed his daughter and since, he could not fit the body in the metallic trunk, he had stuffed the body in a polythene bag and the trunk with blood stains was thrown away by him. He admitted his signature to the disclosure statement of the Appellant being, Ex.PW12/C. He also deposed that the Appellant took them to village Mukandpur, Delhi where, in his presence, a metallic trunk was recovered. He further deposed that a piece of the trunk with blood stains was cut and seized vide seizure memo Ex.PW12/D, on which he appended his signature at point A. He also identified the metallic piece of the trunk (Ex. P-6), Salwar of the child (Ex. Criminal Appeal No. 394 of 2001

P-7), shirt / frock (Ex. P-8) and polythene bag (Ex. P-9).

In his cross examination, Shri Kallan Khan (PW12) is stated to have said that when he returned after searching for his daughter on 26.04.1996, he found several people including his sister Smt. Anwari Devi and Smt. Madina, his sister in law, outside the said premises. He has stated in his cross examination that the lock of the said premises where the crime took place was not taken into possession by the police in his presence. He stated in his cross examination that sons of Shri Pancham Singh had not left the said premises in his presence. He denied knowledge of the fact as to when the accused/ Appellant was arrested. He further stated in his cross examination that on 02.05.1996, he was in the Police Station between 8.00 to 10.00 am and he remained there for about 1 ½ hours. He further stated in his cross examination that no public person was called when the Appellant / accused was interrogated. In his cross examination, he further states that he could not recollect the exact time when he left the Police Station to go to Mukandpur village, where the trunk was discovered. He denied that any public person gathered at the Mukandpur village. He stated that he went to Mukandpur village in a police vehicle alongwith a number of police personnel. He further states in his cross examination that a metallic piece was taken

from the trunk found at Mukandpur village after procuring a metal cutter from a neighbouring shop. However, he denied any recollection as to who brought the said cutter. He accepted the fact that salwar of the child and the underwear, as well as, blood stained earth and other articles were recovered by the police in his presence. He also admitted that the fact that accused led the police to Mukandpur village to recover the trunk.

21. SI Sanjay Daral (PW13) was examined by the prosecution to establish that upon receipt of information by the Police Station he received a copy of DD No. 22A (Ex. 13A). He stated in his deposition that upon reaching the crime scene it was found that a foul smell was emanating from the said premises and also that the door was locked from the outside. He is stated to have deposed that the lock of the said premises was opened with the help of a key, however, he did not recollect from where the said key was procured. He deposed that the body of the deceased was found in a sack on a shelf of the inner room of the said premises and that the body of said child, Shabana was identified by her father Shri Kallan Khan. He further deposed that the place was photographed and blood stained earth was taken and sealed. He also deposed that the red coloured under wear of the girl child was found and was seized alongwith a blood stained pillow and book containing Criminal Appeal No. 394 of 2001

obscene literature vide seizure memo Ex.PW12/B which bears his signature at point B.

In his cross examination, SI Sanjay Daral (PW13) stated that the information as regards foul smell was received at the Police Station at about 4.20pm, whereupon he alongwith the Constables left for the location indicated. The time span between the receipt of information and their arrival at the spot was given as 8-10 minutes. He further deposed in the cross examination that the Additional Station House Officer, Inspector Rajinder Bhatia reached the place between 4.30 to 5.00 pm. He further deposed in his cross examination that information for registration of the case was sent after two hours. He also deposed that both the body and underwear were found in the sack. He reiterated in his deposition that the articles were seized from the scene of the crime.

22. Lady Constable Somna PW14, was examined to establish that on 25.04.1996 she was working as Duty Officer at the Police Station when Shri Kallan Khan, father of the deceased child had come to record a missing person's report about his daughter. She deposed that she had recorded the same and made requisite entry against DD No. 21A. She further deposed that on 26.04.1996 a telephonic message was received at the Police Station that a foul smell was emanating from the said Criminal Appeal No. 394 of 2001

premises. The said information was recorded vide DD No. 22A (Ex.PW13/A).

23. Inspector Rajinder Bhatia (PW15), was also examined, who deposed that on 26.04.1996 he was posted as the Additional Station House Officer at the said Police Station, and that at about 4.20pm an information was received from Shri Kallan Khan that a foul smell was emanating from the adjoining house at F-289, Mangol Puri. He further deposed that the said information was recorded in DD No. 22A which was marked to SI Sanjay Daral and on receiving the said information, he reached the indicated place where he found Shri Kallan Khan and other persons at the spot. On reaching the indicated place he found that the door of the said premises was closed and hence, consequently, the same was opened. He reiterated the facts which have been stated by the other witnesses about the discovery of the body of the child on the shelf of the inner room of the house. He further deposed that a private photographer was commissioned and that, after preparing the brief facts of the case (Ex.PW15/B), he also prepared the inquest report. He further deposed that he recorded statement of Shri Kallan Khan and Smt. Anwari Devi (PW4) who identified the body of the deceased Ex. PW15/D. He proved the statement of Smt. Anwari Devi (Ex.PW4/A). He deposed that he seized the articles

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referred to him and prepared the seizure memo (Ex.PW12/B) and that the parcels were marked and sealed with the seal of RB and were handed over to SI Sanjay Daral. He also deposed that he prepared the site plan (Ex.PW15/F). He further deposed that on 27.04.1996 SI Sanjay Daral got the Post Mortem conducted and that he deposited the exhibits received from the Hospital in the Malkhana. Shri Rajinder Bhatia, (PW15) further deposed that after searching for the Appellant / Accused at several places including Muraini and other parts of UP, he received a information that the Appellant was in Delhi and finally apprehended the Appellant at the New Delhi Railway Station near the tonga stand. He deposed that a personal search was conducted (Ex.PW15/G) and accused was arrested on 01.05.1996. He further deposed that on 2.05.1996 the Appellant was interrogated in the presence of Head Constable Om Parkash and Shri Kallan Khan when his disclosure statement (Ex.PW12/C) was recorded. He further deposed that based on the information supplied by the Appellant, a metallic trunk was recovered from the field in Mukandpur village vide memo Ex.PW12/B. On recovery of the trunk, it was found discovered that inside of the trunk was stained with blood and that a small piece of the trunk was seized vide seizure memo Ex.PW12/D. He further deposed that all the exhibits were sent to the CFSL and that, the

Appellant/ accused was medically examined on 01.05.1996 when his semen, blood samples and pubic hair were preserved and sent to CFSL.

In his cross examination, the witness Shri Rajinder Bhatia (PW15), stated that when he reached the scene of the crime, Smt. Anwari Devi was present. He has further deposed that he did not recollect whether the door was locked or not from outside. He stated that he did not take into possession any lock. He denied the suggestion that the body was not discovered from the said premises, that is, F 289, the house of Shri Pancham Singh, the father of the Appellant/ accused who reportedly was away to his native place, while other two younger brothers had gone to attend to their respective jobs and were hence, not present at that point in time. He stated that when the Appellant was arrested, no person from the general public except Shri Kallan Khan was joined, and it was the same position even when the Appellant was interrogated. He stated that no public person collected at the time of the recovery of the metallic trunk at village Mukandpur. He stated in his cross examination that the residential houses were at a distance of three kilometers from the place where the metallic trunk was discovered. He further deposed that on 01.05.1996 he seized semen and one sample blood vide memo Ex.PW15/J. He also reiterated that on

02.05.1996 he had prepared the site plan (Ex.PW15/H) of the place from where the metallic trunk was recovered.

24. HC Somna, PW16 was examined to establish that Shri Kallan Khan had lodged a missing person's complaint on 25.04.1996 which was recorded vide DD no. 21A and also to prove DD no. 22A (Ex.PW16/B).

25. The accused/Appellant in his statement under Section 313 Cr P C denied the case of the prosecution including the knowledge of recovery of body from his house or the recovery of the articles seized from the scene of the crime. He also denied making of any disclosure statement to the police and in fact stated that his signatures were taken on blank sheets of paper. He however accepted the fact that his medical examination (Ex.PW9/A) was conducted.

26. Learned Counsel for the Appellant in the background of the evidence sought to be placed by the prosecution has impugned the judgment of trial Court broadly on following grounds:--

(i) that the conviction is based solely on the circumstantial evidence which, if closely scrutinised, leaves scope for various hypothesis and does not, as required by law unerringly point to the guilt of the Appellant / Accused.

27. To buttress, the aforesaid general submission, learned counsel for Appellant attempted to pick holes in the prosecution's case by referring to the following :-

(i) the police while investigating the case had not associated the members of public as witness both when the body was recovered, as well as, when the metallic trunk was recovered at Mukandpur village, Delhi. It was also contended that with respect the recovery of body from a closed premises, the procedure prescribed under Section 100 Cr P C was applicable and being mandatory involvement of independent public witnesses was a must. In support of said submission, learned counsel for the Appellant has relied upon the judgment of Supreme Court in the case of **State of Haryana v/s Jagbir Singh'** reported in **2003(8) Scale 221** at page 225.

(ii) the learned counsel for Appellant submitted that in this case, it is evident that the body was planted in the house of the Appellant. According to him, two alternative hypothesis as to the persons apart from the Appellant who could have committed the crime, were available for examination in the present case; one in the form of a possibility of the person who had the key to the house and second, perhaps even the brothers of the Appellant.

(iii) the apparent contradictions in the depositions of Shri Kallan Khan (PW12) wherein he has stated that the lock of the house of the Appellant from which the foul smell was emanating was broken, as against the testimony of SI Sanjay Daral (PW13), who stated that the entry was gained by opening the lock with the help of key; the fact that they key and lock were not

recovered is not disputed by the prosecution;

(iv) the deposition of the (PW15) seems to indicate that the Appellant was arrested at 2.00pm on 01.05.1996 from a tonga stand at New Delhi Railway Station after receipt of information that he was in Delhi on being spotted and identified by Shri Kallan Khan. As against this Shri Kallan Khan, (PW12) in his deposition has stated that on 02.05.1996 he had visited the Police Station to inquire about the case, it was then that he saw the Appellant being interrogated by the police, and further in his cross examination he denied the knowledge of the fact as to when the Appellant was arrested;

(v) and lastly, according to the Post Mortem Report the time of the death is stated to be three days prior to date and time of the Post Mortem. Thus, according to the information contained in the Post Mortem Report, the approximate time of death is 11.30am on 24.04.1996 in view of the fact that Post Mortem was conducted on 27.04.1996 at about 11.30am. This according to the learned counsel for the Appellant, clearly contradicts the deposition of Shri Kallan Khan, (PW12) who has stated in his deposition that the deceased child, Shabana went missing at about 4.00pm on 24.04.1996.

28. As against this, the Learned Additional Public Prosecutor (APP) for the State relied upon the trial court judgment to support the case of the prosecution. It was the submission of the learned APP that looking at the totality of circumstances, it is clear that the case of the prosecution is

proved beyond all reasonable doubt, in as much as:- (i) first, the fact that the Appellant had an evil eye on the child, Shabana is established by the testimony of Shri Bharat Chaudhary, (PW2) who deposed that the Appellant had attempted to molest the child in January 1996; (ii) second, the fact that the body of the deceased child, Shabana was recovered from the house of the Appellant, coupled with the fact that the recoveries were made from the said premises, that is, the house of the Appellant which included amongst others, the under wear of the child which had blood stains of blood group of AB, as well as, the semen stains on the salwar of the deceased child recovered from the said premises were identical to the blood group of the Appellant and; (iii) lastly, given the fact that the metallic trunk with the blood group of the deceased was recovered at the behest of the Appellant.

29. Having perused the evidence on record, and after hearing submissions made by the learned counsel for Appellant, as well as, the Learned APP, this Court has come to the conclusion that the prosecution has been able to establish beyond reasonable doubt, though based on circumstantial evidence, that the Appellant is guilty of murder of the deceased child, Shabana. In arriving at this conclusion, the following

material aspects are noted :--

30. A perusal of the testimony of Shri Bharat Chaudhary, (PW2) clearly establishes that in January 1996, the Appellant had attempted to molest the deceased child, Shabana. On account of this, an altercation had broken out between the father of the deceased Shri Kallan Khan, (PW12) and the father of the Appellant, Shri Pancham Singh. In view of the fact that the interest of the child was involved, the matter was amicably settled between the feuding parties. It is to be noted that the said witness, Bharat Chaudhary (PW2) vehemently denied the suggestion made to him in the cross examination that no such settlement had taken place or that the Appellant and his father had not begged pardon of Shri Kallan Khan (PW12). Thus, a reading of PW2 testimony clearly establishes that the Appellant did not have honourable intentions towards the child Shabana. What requires to be examined from hereon is, whether the Appellant took this incident further and committed the crime he is accused of. The first link in the chain is the prosecution's evidence with regard to the discovery of the body of the deceased child in the said premises, that is, the house of the Appellant. In this regard, prosecution placed reliance on the evidence of Smt. Anwari Devi (PW4), who is the sister of Shri Kallan Khan, (PW12), that is, aunt of the deceased. In her Criminal Appeal No. 394 of 2001

deposition, Smt. Anwari Devi, (PW4) clearly stated that on 26.04.1996 she identified the body of the deceased child, Shabana in the said premises, that is, the house of Shri Pancham, who is father of the Appellant where admittedly the Appellant resided at the relevant point in time. Smt. Anwari Devi (PW4) identified her signatures on the identification memo Ex.PW4/A. In the cross examination, the testimony of Smt. Anwari Devi (PW4) remained unshaken. There was no suggestion made to her with respect to discovery of the body of the child in the said premises. The testimony of Smt. Anwari Devi (PW4) has a ring of truth in it. Her testimony with respect to recovery of the body of the child from the said premises has to be accepted.

31. The next link in the chain after having established that the body of the deceased was found in the house of the Appellant, is whether the Appellant could be linked to the dastardly crime. With respect to the same, the prosecution relied upon the scientific evidence to show that amongst other articles seized from the scene of the crime on 26.04.1996 and those seized on 27.04.1996, were the clothes of the deceased child, which included the shirt, salwar and under wear of the deceased child. Seizure memo being Ex.PW6/A dated 26.04.1996 was proved by Shri Rajinder Bhatia, Additional Station House Officer, (PW15); and after, the Post Mortem was conducted on Criminal Appeal No. 394 of 2001

27.04.1996; articles received from the Hospital which included the viscera of the deceased Shabana, one sample bottle containing vaginal swab, one plastic sack containing the clothes of the deceased, which included salwar, shirt, baniyan, one envelope containing the blood on the cloth were put in their respective parcels which were sealed with the seal of the concerned doctor; were proved by SI Sanjay Daral, (PW13). The medical examination of the Appellant was conducted on 01.05.1996 when in point of fact, his semen sample was collected; a fact which the Appellant has accepted as correct in an answer to the question made in his statement under Section 313 Cr P C. The forensic report which is Ex. A & B, its dispatch and receipt was proved through deposition of Shri Rajinder Bhatia (PW15), HC Mool Chand (PW6), and Constable Jogender Singh, (PW10). The report of CFSL clearly indicates that the semen samples found on the salwar of the child which was seized on 27.04.1996 and the semen of the Appellant which was taken on 01.05.1996 was found to be of same group i.e. AB group. There is no denial that the semen of the Appellant does have the same blood group i.e. AB. This when linked with the recovery of trunk, which had blood stains of human origin with blood group AB as per the CFSL report, the guilt of the Appellant is squarely established. The recovery of the said trunk was made

at the behest of and pursuant to the disclosure statement of the Appellant. It is well settled that a recovery made pursuant to the disclosure statement is admissible under Section 27 of the Indian Evidence Act. See Palukuri Kotayya v. Emperor, **AIR 1947 PC 67**, Delhi Administration v. BalKrishan **AIR 1972 SC 3** and Mohammad Inayatullah v. State of Maharashtra, **AIR 1976 SC 483**.

The recovery of the trunk and the metallic piece of the trunk with blood stains (Ex. PW12/D) is proved by the father of the deceased child, Shri Kallan Khan (PW12); and Inspector Rajender Bhatia PW(15), who specifically refers to the fact that trunk was recovered from the fields in Mukundpur village which is approximately 3 Kms away from the nearest residential premises. Both the father Shri Kallan (PW12) and Inspector Rajender Bhatia (PW15) stated in their deposition that at the relevant time no person from the public collected at the site where the metallic trunk was found. We find that their testimony has a ring of truth in it. There is no animus alleged or established with respect to these witnesses. The testimony of these witnesses has to be accepted.

32. The submissions of the learned counsel for Appellant that under Section 100 (4) Cr P C, it was mandatory on the part of the police to involve public witness both at the time of Criminal Appeal No. 394 of 2001

recovery and identification of the body, in our view, is untenable. A bare reading of the provision would show that the submission is clearly fallacious. However, we intend to deal with this submission in a greater detail since it effects investigations conducted on a every day basis.

33. According to us, a clear distinction has to be drawn between what the legislature intends as being mandatory as against that which is desirable or directory. The settled principle of interpretation is that the intendment of the legislature is to be derived from the language used and the setting in which the provision finds place in the statute.

34. For this purpose, we intend to examine the scheme of the chapter in which Section 100 (4) Cr P C finds mention. The said provision, that is, sub Section (4) of Section 100 Cr P C finds mention in Chapter II of Cr PC. The said Chapter commences with Section 91 which provides that whenever a Court or officer in charge of the Police Station considers that the production of any document or a thing is necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding before such court or officer, then the concerned person may approach the court for issue of summons for production of such document or thing. In this context under Section 92 power is

given in the Court to recover letter, telegrams or parcels from postal and telegraph authorities in the manner prescribed. Under Section 93 of the said Chapter where the Court has reasons to believe that a person served with the summons or orders will not comply with the same, it is empowered to issue search warrant general or specific with respect to place of which search or inspection is to be carried out. Section 94 deals with a specific situation where search warrant is required in respect of a place where the stolen property is deposited or where such articles are deposited, sold or produced thereof. Similarly, Section 95 deals with the search warrant and forfeiture with respect to the publications of such newspaper, books or any other documents containing matter which is punishable under Section 124A, 153A, or 153B or Section 292 or 293 or 295A of the IPC. Section 96 deals with the right of a person aggrieved by forfeiture under Section 95 of the Cr P C to approach the High Court for setting aside a declaration of forfeiture made under Section 95 of Cr PC. Section 97 & 98 deal with warrants of search issued with respect to the unlawful confinement of persons. While Section 98, however, specifically deals with unlawful abduction or detention of a woman or child under the age of 18 years.

It is in this setting and scheme of the chapter II of the

Cr.P.C that, under the heading general provisions relating to searches one finds the placement of Section 100 Cr P C. A literal reading of the provisions of Section 100 (4) Cr P C would show that it applies to a situation when in the process of execution of a warrant (emphasis added), the police is required to gain ingress into a closed place. In a closed place while searching the place under sub Section (4) of Section 100 Cr P C, it is required to obtain two or more independent and respectable persons to witness the search. A bare reading of the provision shows that this does not oust the general power of a Police Officer to enter any premises without a search warrant. Consider a situation where a police is in hot pursuit of a criminal, who gains entry into a closed premises or the police receives information or a tip off as regards a closed premises which is being used for criminal activities or has information with it which points to commission of a crime in premises located at place which is not inhabited by persons in close vicinity. Could it then be said in such like a situation that the police cannot gain entry till it complies with provisions of Section 100 (4) of the Cr P C. To our mind, in such like situation and there could be myriad possibilities, it would be tying up the police hand and foot, if we were to hold that the police can gain entry to a closed premises only with the aid of a search warrant and after it has gathered

two (2) independent public witnesses. To our mind, the answer to this poser has to be an emphatic no. It is quite often seen that speed and alacrity are essentials of a successful criminal investigation. There is thus, according to us, no mandatory requirement under Section 100 (4) Cr P C to involve two (2) independent public witnesses every time access is sought to be gained with respect to a closed premises, especially when, it is not in pursuance of an execution of a warrant.

35. A division bench of Madhya Pradesh High Court in the case of **Madiya Chinna Obigadu v. State** reported in **AIR (32) 1945 Madras 523** dealing with a similar situation dealt with the provisions of the Code prevailing at that point in time. Briefly, the facts were that the Appellant / Accused had attacked and killed the victim, however, the accused was chased by a persons, who at the relevant time were sleeping next to the victim. Accused was given hot chase which resulted in his entering his own house. The police arrived at the scene and apprehended the accused. In defence, his answer to the charges framed against him, was that; the whole case was false; the blood stains on the clothes were his own blood; and the dagger found on his person was smeared with the blood by the head constable and; lastly that all the evidence adduced by the prosecution was placed on before the trial court due to enmity. Importantly in the cross Criminal Appeal No. 394 of 2001

examination conducted of a prosecution witness before the trial judge it was noted as follows:-

‘.. It has been elicited in his cross examination that he did not meticulously observe all the provisions of house searched in this case and that he did not search himself or the panchayatdars before going in.’

While dealing with the aforesaid provision, the division bench, observed that nothing was shown from the Code which required that in case of emergency when the Police is not going for search of any specified object, that it is required to search for respectable citizens or have themselves searched before conducting the search. The observations of Justice Mockett being apposite are quoted below with profit:--

‘ That observation is founded on an answer given in cross examination by the constable:

“I did not observe the precautions laid down in the Code of Criminal Procedure for the search of the house. I did not search myself or the three other persons before we went into the house.”

Neither learned counsel before us are able to tell us clearly to what provisions of the Code this question was directed and Mr. Ethiraj can only suggest that must refer to Sec 102, Sub-S (3). Section 102, of course, relates to search warrants issued under S. 96 or 98, that is to say formal searches. We are not aware, in an emergency of this sort when the police are not going in for the purpose of a search for any specified object but for a general investigation, there is any provision of the Code which imposes on them the duty of searching respectable citizens or themselves before the public. Whether as a matter of convention

these things may be done in order to remove any cause for subsequent criticism is another matter. But it would seem the learned Judge was misled by the question of counsel and the answer of the witness in supposing that the constable had neglected some actual provision of the Code. In the circumstances of this case, it would not be very surprising that with a man recently apprehended under very clear circumstances for murder the constable should at once go in and see what were the contents of his house.'

36. The judgment cited by the appellant, i.e, **State of Haryana vs. Jagbir Singh & Anr.** reported in **2003(8) SCALE 221** does not deal with the provisions of Section 100 of Cr P C or a situation analogous thereto and hence has no relevance.

37. We may, however, add here that it may be desirable for the police to involve independent public witnesses in searches conducted by them even in situations not covered by Section 100 of the Cr P C but as stated above, we cannot bring ourselves to agree that there is a mandatory requirement of law to the same effect.

38. The other aspect of the matter is what is evidentiary value of recoveries made in such like situations. To our mind, the evidentiary value of the material will have to be weighed which would be specific to the facts and circumstances obtaining in a particular case. It cannot be held as, contended by the

learned counsel for the Appellant, that recoveries made in such situations are inadmissible. It is one thing to say that court will have to closely determine what weight is to be given to the recoveries made, it is another matter to ascribe illegality/irregularity to the proceedings.

39. Now, in the light of the aforesaid discussions, let us examine the recoveries made in the present case. The factum of recovery of dead body and other articles pertaining to the child is proved from the testimony of the official witnesses, as well as, by the father (PW12) and Smt Anwari Devi (PW4) the aunt of the deceased child. Their testimonies have a ring of truth in them which remained substantially unshaken in respect of the core aspects during their cross examinations. The witnesses cannot be disbelieved simply because they are related. There is no such principle of law. See observations of Supreme Court in the case of **Dalip Singh v. State of Punjab** reported in **AIR 1953 SC 364**, and **Masalti v. State of Uttar Pradesh** reported in **1965 SC 202**.

40. Furthermore, the fact that the semen of the blood group 'AB' which was found on the salwar of the deceased child and the recovery of the blood stained trunk was made pursuant to the disclosure statement of the Appellant / accused excludes

the possibility of any other person being involved when juxtaposed with the other connected circumstances. What the prosecution requires to prove is that a cumulative effect of circumstances proved is so complete that it excludes the possibility of the every other hypothesis and points unequivocally to the guilt of the accused; though each circumstance by itself may not be conclusive. This statement of law has been enunciated by the Supreme Court in the case of **C K Raveendran v. State of Kerala** reported in **2001 (1) SCC 225**, at page 228, Paragraph 4.

41. With regard to the contradictions in the statement of Shri Kallan Khan PW12 and SI Sanjay Daral PW13, as regards the manner in which the access was gained to the said premises, that is, the house of Shri Pancham. This apparent contradiction has no relevance according to us if otherwise as demonstrateable after putting together the evidence collected in the case, the guilt of the Appellant / accused is established.

42. As regards the submission of the learned counsel for the Appellant, with regard to the time of death being fixed by virtue of Post Mortem Report as 11.30am on 24.04.1996, when according to the testimony of Shri Kallan Khan (PW12) the child was still alive as she went missing as per the testimony of PW12

only at about 4.00pm on 24.04.1996 has to be rejected since the time of death in the Post Mortem report is an approximation and hence, a margin of error of five to six hours will have to be factored in. In these circumstances, we see no contradiction in the testimony of Shri Kallan Khan (PW12).

43. As regards the submission of the learned counsel for the Appellant that there is contradictions in the testimony of PW15 & PW12 as to whether the Appellant was arrested on 01.05.1996 or 02.05.1996 is again according to us of not much relevance as according to us the factum of the Appellant arrested is not disputed. This is proved by Inspector Rajender Bhatia PW15. We have no reason to doubt his testimony.

44. In view of the above discussion above, we find no merit in the appeal and hence, the same is dismissed. The conviction of the Appellant by the trial court is sustained.

RAJIV SHAKDHER, J

B N CHATURVEDI, J

July 22, 2008
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