

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ Crl. Appeal No.419/2006
% Date of Decision : 8th of September, 2008
MANISH Appellant
! Through : Mr. Rajesh Mahajan and
Mr. Ajay Raghav, Advs.

versus
\$ THE STATE(NCT of Delhi) Respondent
^ Through : Mr. M.N.Dudeja, APP

* CORAM:
HON'BLE MR.JUSTICE B.N. CHATURVEDI
HON'BLE MR.JUSTICE P.K. BHASIN

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

: **B.N.CHATURVEDI, J.**

1. The appellant was, by impugned judgment dated 24.3.2006, convicted under Sections 363/376/302 IPC and sentenced under different head of charges vide order dated 1.4.2006 as under:

- (i) Under Section 363 IPC - 5 Years RI
- (ii) Under Section 376 IPC - 7 Years RI

(iii) Under Section 302 IPC - Imprisonment for life.

All the above sentences are to run concurrently.

2. The appellant is in appeal against the aforesaid judgment of conviction and order of sentence.

3. The prosecution case unfolds that on the intervening night of 15th and 16th of July, 2000, Jagdish, PW-1 (complainant), his wife and two daughters, namely, Pinki, aged about 17 years and Asha, aged about 5 years, were sleeping outside their Jhuggi situate in the field of one Bhoop Singh at Thokar No.10, Yamuna Khadar, Delhi. The complainant's younger daughter Asha was sleeping on a cot with her mother. Jagdish, PW-1, woke up at about 3/3.30 a.m. when it had started raining. He noticed his daughter Asha missing from her cot. He, as also the mother and elder sister, Pinki, of missing girl, tried to locate her, but failed. Jagdish, PW-1, eventually on 16th July, 2000 at about 1.10 p.m. lodged a missing report in respect of Asha with the police station concerned. Later, on the same day, at about 6.00 p.m., Jagdish, PW-1, came to know that

the dead body of a girl child was lying in a nearby nursery, which turned out to be that of Asha. On an information in that regard, a DD entry No.15-A dated 16.7.2000 was recorded at Police Station Shakar Pur. A copy of that DD report was assigned to SI Suraj Pal for necessary action. Thereupon, SI Suraj Pal, accompanied by Insp.Dharam Pal Singh, SHO and some other police officials reached the place where dead body of Asha was lying. SI Suraj Pal recorded the statement of Jagdish, father of the deceased there and sent the same with his endorsement thereon for registration of an FIR under Sections 302/201/376 IPC as from the condition of dead body she was suspected to have been raped before being done to death. Accordingly, a case FIR No.289 of 2000 under Sections 302/201/371 IPC was registered at Police Station Shakar Pur, Delhi. From the spot, a pair of HAWAI CHAPPAL was taken into possession by the police. The dead body of Asha was found lying naked with her KACHHI placed over her face. In the course of investigation, a number of persons, including the

appellant and his co-accused Suresh were interrogated. The investigation culminated into arrest of the appellant and his friend Suresh on 24th of July, 2000.

4. On postmortem examination on the dead body of Asha, the Doctor concerned opined asphyxia due to ante mortem smothering by other party being the cause of death. Besides, external injuries No.1 & 2, as mentioned in the postmortem report, Ex.PW-3/A, were opined to be fatal being sufficient to cause death in ordinary course of nature. Injuries to anal area as also to external genitalia were, according to the doctor concerned, ante mortem, caused due to forceful penetration thereby damaging the local area.

5. Blood sample, vaginal swab and rectal swab of the deceased were lifted by the doctor concerned and handed over to the police. Prior to their formal arrest, on 17th July, 2000 the appellant and his alleged accomplice, Suresh, were got medically examined by police at SDN Hospital, Shahdara but no mark of recent external injury on external genitalia was found

on the person of either of them. It was at the same time noted by the doctor concerned that there was nothing suggestive of the fact that they could not perform sexual intercourse. The blood sample as also undergarments of the appellant and his alleged accomplice, Suresh, were collected at the time of their medical examination and handed over to the police.

6. The learned trial court adjudged the appellant guilty of committing kidnapping, rape and murder of Asha on the basis of evidence of last seen, recovery of a pair of CHAPPAL from the spot and motive, as emanating from the statement of Pinki, PW-2, the elder sister of the deceased. Even though Pinki, PW-2, affirmed that Suresh was standing at some distance at the relevant time when the appellant had lifted Asha from the cot to take her away, the learned trial court, observing that since no overt act in kidnapping of Asha was attributed to Suresh and as no motive against him in commission of the crimes was established, proceeded to acquit Suresh of all the charges, including that of kidnapping. The

respondent-State is not stated to have preferred any appeal against such acquittal and thus the same has attained finality.

7. Shri Rajesh Majahan, Advocate, appearing for the appellant, advanced extensive oral arguments against impugned conviction and sentence. Besides, he has also filed his written submissions. Shri M.N.Dudeja, Additional Public Prosecutor, representing the State, also made his oral submissions. We have re-appraised the evidence on record in the context of arguments advanced on either side and adverted to the written submissions of learned counsel for the appellant as well.

8. The conviction of the appellant being essentially based on the testimony of Pinki, PW-2, the thrust of argument on behalf of learned counsel for the appellant was, particularly, directed against the creditworthiness of this witness. The learned counsel for the appellant argued that Pinki, PW-2, made the statement in regard to having seen the appellant lifting the deceased from her cot and taking her away, for the

first time, in the court only. He pointed out that no such statement was ever made by her before the police and that she had not told this fact even to her parents at any point of time before her deposition in the court. The learned counsel for the appellant contended that the statement made by Pinki, PW-2, was a material improvement over her previous statement to the police and, therefore, could not have been accepted to record the finding of last seen. In support of his contention reliance was placed by learned counsel for the appellant on a decision of the Supreme Court in “Namdeo Daulata Dhayagude & Others Vs. State of Maharashtra”, AIR 1977 SCC 381 : 1977 CrLJ 238. It was further contended that Pinki, PW-2, named the appellant and his co-accused, Suresh, as having been last seen with the deceased by her. However, as the learned trial court inspite of such evidence acquitted the co-accused, Suresh, the said circumstance of last seen ceased to be incriminating against the appellant also. Sustenance to this argument is sought from a decision of the Supreme Court in “Pohalya Motya Valvi

Vs. State of Maharashtra", 1980 SCC (Cri) 261. It was further argued that as the circumstance of last seen was not at all put by the learned trial court to the appellant in the course of examination under Section 313 Cr.P.C. to elicit his explanation thereto, if any, the evidence in regard to last seen is liable to be excluded from consideration. The decisions of the Apex Court in "Sharad Birdhichand Sarda Vs. State of Maharashtra", AIR 1984 SC 1622, "Kehar Singh and others Vs. State(Delhi Admn.)" , 1988 SCC (Cri.) 711, "Kanahai Mishra Alias Kanhaiya Misar Vs. State of Bihar", 2001 SCC (Cri.)537, and "Lallu Manjhi & Another Vs. State of Jharkhand" , 2003(1) JCC 137 (SC) were referred to by the learned counsel for the appellant to support his aforesaid plea.

9. Another argument was that the prosecution of the appellant, as reflected from the chargesheet, did not proceed on last seen being one of the incriminating circumstances and in the given situation, the learned trial court was not justified in reconstructing that circumstance to convict the appellant. Reliance to

bolster this argument was placed on a decision of the Supreme Court in “Bhagirath Vs. State of Madhya Pradesh”, 1975 SCC (Cri.) 742.

10. In regard to the other incriminating circumstance in the nature of recovery of the pair of CHAPPALS, which Pinki, PW-2, claimed to have had identified at the time of recovery thereof as belonging to the appellant, Shri Mahajan contended that the affirmation of Pinki, PW-2 in this respect remains uncorroborated. Further, Shri Mahajan pointed out that though Pinki, PW-2, stated that she had on 24th July, 2000 identified the pair of CHAPPALS as belonging to the appellant, Malkhana register as well as the statement of Moharrir Malkhana reveal that the same were never taken out of Malkhana on 24.7.2000 to facilitate identification thereof by Pinki, PW-2. Shri Mahajan contended that the fact that Pinki, PW-2, inspite of her claiming that she had identified the pair of CHAPPALS being that of the appellant on the very day of recovery thereof, did not tell this fact to the police until 23rd July, 2000 adversely impacts her

creditability in this respect. Learned counsel argued that the pair of CHAPPALS were neither put into a parcel nor sealed before deposit thereof in the Malkhana and, therefore, no sanctity could be attached to such a seizure. The pair of CHAPPALS, argued the learned counsel, were not put to a proper test identification parade and in the absence of any distinctive feature on the HAWAI CHAPPALS, the same could not be linked to the appellant on mere statement of Pinki, PW-2. The learned counsel was critical of omission on the part of investigating officer in collecting any scientific evidence to link the CHAPPALS in question to the appellant.

11. In regard to the motive, the learned counsel for the appellant submitted that Pinki, PW-2, whose statement constitutes the sole basis on this score, being not a reliable witness, her testimony could not have been accepted by the learned trial court in the absence of corroboration. Moreover, argued the learned counsel, by relying on a decision of the Supreme Court in “Girja Shankar Misra Vs. State of

UP”, AIR 1993 SC 2618, a mere presence of motive is not a proof for the commission of the offence, Shri Mahajan contended that, in any case, it does not inspire confidence that the appellant would have killed her deceased sister even if he had some grudge against Pinki PW-2. It was lastly argued that the scientific and medical evidence are rather in favour of the appellant and the same render the involvement of the appellant in commission of the crime highly improbable. The present case, according to the learned counsel, does not satisfy the various conditions for recording conviction on the basis of circumstantial evidence, as set out in Sharad Birdhichand Sarda(supra), Hanumant Govind Nargundkar & Another Vs. State of Madhya Pradesh, AIR 1952 SC 343, Dharam Das Wadhvani Vs. The State of Uttar Pradesh, 1974 SCC (Cri.) 429 and State of Haryana Vs. Jagvir Singh & Another, 2004 SCC (Cri) 126. He accordingly, pleaded for acquittal of the appellant on all the charges.

12. Shri Dudeja, learned Additional Public Prosecutor, representing the State, on the other hand,

pleaded that though the conviction of the appellant is based primarily on the statement of Pinki, PW-2, her unimpeached solitary affirmation provides a safe basis to sustain the impugned conviction. He sought to draw sustenance to his plea by stressing on the proposition of law that where the statement of a witness is found to be reliable and creditworthy, the same would be sufficient to convict a person even in the absence of any corroborative evidence. Shri Dudeja felt that the incriminating circumstances of last seen, recovery of the pair of CHAPPALS belonging to the appellant and motive on his part for commission of the crimes in question stand firmly established. He contended that the same being of a conclusive nature and tendency excluding every hypothesis but the ones for which the appellant was charged and tried and the chain of circumstances being so complete that the same is consistent only with the hypothesis of his guilt, the impugned conviction and sentence are well founded and warrant no interference.

13. One must experience no difficulty in

acknowledging the proposition of law that the statement of even a solitary witness, if reliable and creditworthy, can constitute a good basis to record conviction even in the absence of any corroboration. As noticed earlier, the learned trial court came to record its finding of conviction against the appellant primarily on the strength of testimony of Pinki, PW-2. It was, therefore, no wonder that the testimony of Pinki, PW-2, came to occupy a focal point in opposite stances as exhibited in rival contentions. In her deposition before the Court, Pinki, PW-2, admitted that inspite of having seen the appellant picking up the deceased from her cot and taking her away, she did not raise any hue and cry, rather kept quiet. According to Jagdish, PW-1, he as well as his family members consisting of his wife, two daughters, namely, Pinki PW-2 and the deceased, went to bed outside their JHUGGI around 11.00 p.m. on the intervening night of 15/16th July, 2000. Their sleep was disturbed at about 3/3.30 a.m. as it started raining. On their getting up, they found the deceased

missing from her cot. If the statement of Jagdish, PW-1, is to be accepted, the kidnapping of Asha would appear to have taken place sometime between 11.00 p.m and 3.30 a.m. on the intervening night of 15/16th July, 2000. At the outset of her statement, even Pinki, PW-2, affirmed that she as well as her parents had found the deceased missing at about 3/3.30 a.m. only. However, in later part of her examination-in-chief, she also stated that she had noticed the appellant and Suresh being present near her house and saw the appellant lifting her sister Asha(deceased) and taking her away. She would, thus, appear to have made self contradictory statements in her examination-in-chief. If her statement at the very beginning is accepted, it would necessarily bely her later statement of having seen the appellant picking up her deceased sister and moving away with her. Before lodging missing report with the police at about 1.10 p.m. on 16th July, 2000, Jagdish, PW-1, is stated to have went around looking for his missing child Asha. Pinki, PW-2, at no point of time told her father or mother about having seen the

appellant picking up the deceased from the cot and taking her away. She kept quiet in this regard even after the dead body of Asha was recovered from the nearby nursery. The explanation offered by Pinki, PW-2, for keeping mum all the way until her deposition before the Court on 4th of September, 2001 was that she was scared of and could not muster enough courage to name the appellant being the person who had picked up and taken away her deceased sister Asha. Her conduct in keeping quiet although in spite of her having seen the appellant kidnapping the deceased within her sight would appear to be extremely unnatural. There was really no reason for her to be scared in view of immediate presence of her parents and she being not alone. Further, even if she got frightened due to the presence of the appellant and his alleged accomplice, Suresh, at the relevant point of time during night, there was no reason for her to have continued in the same state of mind even after the appellant and his alleged accomplice had left the place along with Asha. She could have very well

disclosed the names of the appellant and his accomplice to her parents. She however did not do so. She omitted to inform the police also in this regard. Given the nature of testimony of Pinki, PW-2 on last seen, it is difficult to attach any credibility to this part of her statement. Otherwise also, last seen evidence emerging out of her deposition could not have been taken into consideration as an incriminating circumstance since the court on its own cannot make out a new case for the prosecution to convict an accused on that basis. It was never the case of the prosecution that the appellant and his alleged accomplice were seen by Pinki, PW-2, near her JHUGGI on the intervening night of 15/16th July, 2000, and that the appellant was seen by her lifting the deceased from her cot and carrying her away. The learned trial court was, thus, clearly in error in convicting the appellant by accepting the testimony of Pinki, PW-2, on last seen as one of the incriminating circumstances.

14. Next incriminating circumstance used to

connect the appellant to the commission of crimes was recovery of a pair of HAWAI CHAPPALS from the scene of crime. Again, it is Pinki, PW-2, alone whose testimony is pressed into service to connect the HAWAI CHAPPALS, so recovered, to the appellant. Pinki, PW-2, claimed that at the time of recovery itself of such HAWAI CHAPPALS from the spot, she was able to identify the same as belonging to the appellant though she did not tell this fact to anybody, including her parents and the police. HAWAI CHAPPALS after being picked up from the spot were not packed and sealed before deposit thereof in the Malkhana of the police station concerned. From the seizure memo, Ex.PW-1/B, one would find that apart from mentioning the colour and make thereof, no distinctive mark of identification thereon, if any, was noted by the police officer concerned. According to the prosecution case, it was on 24th July, 2000 that the pair of HAWAI CHAPPALS recovered from the spot came to be shown to Pinki, PW-2 when she visited the police station and identified the same to be that of the appellant. Like

her statement on last seen, the affirmation of Pinki, PW-2, on this count also lacks credibility in the absence of corroboration. In terms of her statement, Pinki, PW-2, had the occasion to see the pair of HAWAI CHAPPAS, Ex.P-1, firstly on the day of recovery thereof from the spot and thereafter on 24th July, 2000 at the police station and she was able to identify the same as belonging to the appellant on both the occasions. It is the prosecution case, as reflected from the statement of Moharrir Malkhana, HC Hari Singh, PW-16, that the pair of HAWAI CHAPPALS, Ex.P-1, at the time of being deposited in the Malkhana were not contained in any parcel nor sealed. However, Pinki, PW-2, would like one to believe that the HAWAI CHAPPALS, Ex.P-1, were put into a parcel and sealed at the spot. Her statement in this regard being contradictory to the factual position as emerging from the statement of HC HAWAI CHAPPALS, PW-16, would tend to put a question mark on her claim that the HAWAI CHAPPALS, Ex.P-1, were lifted from the spot in her presence and she was able to identify the same as

belonging to the appellant. The seizure memo, Ex.PW-1/B shows that the recovery of HAWAI CHAPPALS, Ex.P-1, was effected in the presence of Jagdish, PW-1, and SI Suraj Pal, PW-18. Pinki, PW-2, is not an attesting witness to the seizure memo, Ex.PW-1/B. According to SI Suraj Pal, PW-18, Pinki, PW-2, was present at her JHUGGI situated near the spot at the relevant time when the proceedings, including seizure of CHAPPALS, Ex.P-1, were carried out. ACP Dharam Pal Singh, PW-19, who effected the seizure of the CHAPPALS, Ex.P-1, of course, affirmed that when the police had reached the spot, Pinki, PW-2, was found present there, which implies that she would have had the occasion of having a good look at the pair of CHAPPALS, Ex.P-1, at the spot before seizure thereof by the police. As a matter of fact even if, Pinki, PW-2 is found to have had seen the pair of CHAPPALS, Ex.P-1 lying at the scene of crime that in itself would be of no avail unless it is established that she was able to identify there and then on seeing the same. Evidently, her credibility stands shaken to a great extent in view

of her omission to tell her parents or the police or anybody else for a week that the CHAPPALS, Ex.P-1, belonged to the appellant. As far as her identification of CHAPPALS, Ex.P-1, at the police station on 24th July, 2000 is concerned, the same is difficult to accept as once she had already omitted to identify the same at the time of seizure thereof at the spot, there was really no occasion for showing her the same very CHAPPALS again on 24th July, 2000 at the police station. Though Pinki, PW-2, states that at the time of identification of CHAPPALS, Ex.P-1, at the police station on 24th July, 2000, the same had been mixed with other pairs of CHAPPALS, there is no corroboration in this regard from ACP Dharam Pal, PW-19 and SI Suraj Pal, PW-18. SI Suraj Pal, PW-18, testified that the pair of CHAPPALS, Ex.P-1, were taken out of the Malkhana on 24th July, 2000 which stands clearly contradicted by Moharrir Malkhana, HC Hari Singh, PW-16. This apart, such an identification of CHAPPALS, Ex.P-1, as deposed by Pinki, PW-2, is hard to accept as no proper identification proceedings

in regard thereto was ever got carried out by the investigating officer. Being not put in a sealed cover after seizure from the spot, the possibility of tampering with the pair of CHAPPALS which were actually picked up from the spot, cannot be ruled out. This is particularly so in view of the fact that the appellant and his alleged accomplice were already being treated as suspects by the police as they had not only been called to the police station for interrogation on 17th July, 2000, they were even got medically examined on that date. Vide appellant's MLC, Ex.PW-6/A, no mark of recent external injury on the appellant's body, including external genitalia was found. Absence of any injury on external genitalia of the appellant assumes significance in view of statement of Dr. Sarvesh Tandon, PW-3, who conducted postmortem examination on the dead body of Kumari Asha that in the present case the possibility of the rapist sustaining injuries on his private parts was more likely. He made this statement in his cross-examination keeping in view the nature of injuries noticed by him on private

parts of the deceased during postmortem examination.

15. Until 23rd July, 2000, the investigating officer appears to have had no evidence of any sort to raise suspicion against the appellant and his alleged accomplice of their involvement in kidnapping, rape and murder of Kumari Asha. Going by the statement of Pinki, PW-2, it would appear that the appellant and his alleged accomplice continued to be kept in illegal detention at the police station by the investigating officer from 16th July, 2000 to 24th July, 2000 when her second statement came to be recorded at the police station wherein she, for the first time, sought to attribute motive on the part of the appellant and his alleged accomplice and is also claimed to have identified the pair of CHAPPALS, Ex.P-1, being that of the appellant. The medical examination of the appellant, as noticed earlier, did not yield any incriminating material suggesting his possible involvement in the commission of rape and murder of the deceased. In the given circumstances, identification of the HAWAI CHAPPAL, Ex.P-1, at police

station on 24th July, 2000 by Pinki, PW-2, was, argued the learned counsel, nothing but a crude attempt on the part of investigating officer to create some evidence in order to falsely implicate the appellant in the case. On 24th July, 2000, though Pinki, PW-2, was being accompanied by her father Jagdish, PW-1, at the police station, he(PW Jagdish) did not make any mention in his statement of HAWAI CHAPPAL, Ex.P-1, being identified by Pinki, PW-2. No scientific evidence to connect the HAWAI CHAPPAL, Ex.P-1, to the appellant was collected to support the statement of Pinki, PW-2, that the same actually belonged to the appellant and none else. In view of the above, one would find that it was a case of virtually no evidence and the uncorroborated affirmation of Pinki, PW-2, did not supply a good basis to find that the HAWAI CHAPPAL, Ex.P-1, belonged to the appellant. The learned trial court thus again went wrong in recording the finding of HAWAI CHAPPAL, Ex.P-1, being that of the appellant and in treating this as another incriminating circumstance to hold complicity of the

appellant in the commission of the crimes.

16. On motive, the prosecution had again to fall back upon the testimony of Pinki, PW-2. She stated that the appellant had an evil eye on her and had been making advances in the past which were repelled by her and on one of the occasions she even slapped him which had made him infuriated and he in an ireful manifestation threatened to ruin her family. Notably, PW-2 came out with these facts only on 24th July, 2000 and not before that. There is absolutely no corroboration to this part of her statement from her father Jagdish, PW-1 even though, according to Pinki, PW-2, she had kept him posted with the appellant being a source of harassment to her on the said count. Given the nature of statement of Pinki, PW-2, in the absence of any corroboration it sounds highly unsafe to accept her testimony in this regard. Moreover, it was rightly argued by the learned counsel for the appellant that even if it be accepted that the appellant was nursing a grudge, as deposed by Pinki, PW-2, it was most unlikely that the appellant would have gone

to the extent of kidnapping the five-year-old Asha to commit rape on her and murder her. Further, even assuming that the appellant did have a motive to commit the crimes in question, this fact by itself, in the absence of any other incriminating circumstance proving his complicity, as ruled by the Supreme Court in the case of Girja Shankar Misra (supra), cannot justify the finding of impugned conviction.

17. The case on hand presents a glaring instance of a sloppy investigation. This aspect should not have gone unnoticed by a discerning judicial mind. Unfortunately, however, this did not happen. We, on re-appraisal of the testimonies of material witnesses, particularly that of Pinki, PW-2, find the same falling far short of proving the charges of kidnapping, rape and murder, against the appellant, beyond reasonable doubt. The impugned conviction and sentence are in the circumstances liable to be reversed and set aside. The appeal is thus allowed and the judgment of conviction dated 24.3.2006 and order of sentence dated 1.4.2006 are set aside. The appellant is

acquitted of the charges under Sections 363, 376 & 302 IPC and directed to be set at liberty forthwith, if not required to be detained in connection with any other matter.

(B.N.CHATURVEDI)
JUDGE

September 8, 2008
RS

(P.K.BHASIN)
JUDGE