

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

% *Judgment Reserved On: 9th September, 2009*
Judgment Delivered On: 18th September, 2009

+ **CRL.A. 453/2005**

SUNNY @ BHOLA Appellant
Through: Ms. Anu Narula, Advocate

versus

STATE Respondent
Through: Ms. Richa Kapoor, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE INDERMEET KAUR

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

PRADEEP NANDRAJOG, J.

1. Vide impugned judgment and order dated 30.4.2005, the learned Trial Judge has convicted the appellant Sunny @ Bhola for the offence punishable under Section 302 IPC. The victim was a young girl named Pooja.

2. The process of law was set into motion, when at about 1.45/2.00 PM on 30.3.2004, Rakhi daughter of Munshi Lal PW-11, informed Janki Prasad PW-4 that his daughter Pooja was lying unconscious in jhuggi number 480, Kabeer Nagar, Model Town belonging to her father i.e. Munshi Lal and was

bleeding. Immediately, Janki Prasad who was then at his vegetable retail shop, reached the said jhuggi. He found his daughter lying dead, with a white coloured handkerchief tied around her neck. A pillow was lying beside her. He went to the adjoining jhuggi, belonging to Ramesh, and through the telephone installed therein, conveyed the information to the Police Control Room. The Police Control Room transmitted said information to PS Model Town, being the police station within jurisdiction whereof the said jhuggi was situated. At the police station at 2.23 PM, an entry being DD Entry No.9, Ex.PW-15/A, was entered in the daily diary recording said information.

3. SI Pramod Gupta PW-15 was entrusted with the investigation pertaining to said DD. Accompanied by ASI Hari Ram, HC M. Saleem PW-17 and Const.B.A.Rao PW-14, he went to jhuggi No. 480 Kabeer Nagar, Delhi. He found the dead body of a girl therein. He noticed a handkerchief tied around the neck of the girl and a blood stained pillow lying beside her. He met Janki Prasad the father of the deceased and from him learnt that the girl was named Pooja. He recorded statement Ex.PW-4/A of Janki Prasad noting therein that on the day of the incident Janki Prasad with his children was present in his jhuggi. At around 12.30 PM his daughter Pooja left for somewhere. She used to often visit her friend Rakhi during

daytime and assuming that she was going there, Janki Prasad did not enquire from her as to where she was going. At around 1.45 PM, Rakhi, the 12 years old daughter of Munshi Lal, alongwith her brother Sumit aged 6 years, came at his jhuggi and informed that Pooja was lying unconscious in their jhuggi and was bleeding from her mouth. Sumit further informed him that he saw Sunny @ Bhola compress Pooja's face with the help of a pillow. Sunny then took Sumit for an ice cream and threatened him of dire consequences if he told about the incident to anyone.

4. Proceeding further with the investigation, SI Pramod Gupta prepared an endorsement Ex.PW-15/B under said statement of Janki Prasad and sent it for registration of an FIR through Const.B.A.Rao PW-14. HC Laxman Singh PW-1, the duty officer at PS Model Town, at 4.30 PM registered FIR No. 205/04 Ex.PW-1/A under Section 302 IPC. Const.Hemant PW-16 delivered copies of the FIR to the Area Magistrate and the senior police officials.

5. Inspector Hiral Lal PW-19, SHO PS Model Town, who in the meantime reached the spot, was handed over the further investigation. He prepared a rough site plan Ex.PW-19/A of the jhuggi. He summoned a photographer who took six photographs being Ex.PX-1 to Ex.PX-6 of the spot.

6. After filling up the necessary inquest papers, Inspector Hira Lal sent the dead body to the mortuary of Babu Jagjiwan Ram Memorial Hospital through HC Mohd. Saleem PW-17. He arrested the appellant Sunny @ Bholu at 7.20 PM on the same day i.e. 30.3.2004 from a public urinal in the locality i.e. Kabir Nagar, as recorded in arrest memo Ex.PW-15/C and recorded his disclosure statement Ex.PW-15/E. Since nothing was recovered pursuant to the disclosure statement, the contents thereof being irrelevant and inadmissible in evidence are not being noted.

7. At around 11.40 AM on 31.3.2004, Dr. Anil Sandilya PW-3 conducted the post-mortem and prepared his report Ex.PW-3/A. He opined that the cause of death was asphyxia resulting from external compression of neck by ligature and obstruction of the air passage of the nose and mouth by a pillow. He opined the time since death to be 22-24 hours. He handed over the vaginal swab, the blood sample of the deceased, the handkerchief tied around her neck and the clothes of the deceased to HC Mohd. Saleem who handed over the same to Inspector Hira Lal. Inspector Hira Lal seized them as recorded in memos Ex.PW-15/F and Ex.PW-15/G. He also collected blood sample of appellant Sunny @ Bholu and seized it as recorded in memo Ex.PW-19/B.

8. The articles seized during the investigation were sent to FSL for forensic examination. As recorded in FSL Report Ex.PW-19/H1 blood was detected on the vaginal swab of deceased, the pillow cover and the handkerchief. As recorded in Serological report Ex.PW-19/H2 blood sample of deceased was found to be of group 'B'. Human blood of group 'B' was detected on the pillow and handkerchief. No opinion could be given regarding the blood sample of the appellant as the sample was putrefied.

9. On 20.5.2004, SI Manohar Lal PW-10 prepared a site plan to scale Ex.PW-10/A at the instance of Janki Prasad.

10. On 18.6.2004, the SHO Inspector Hira Lal recorded the statements of Munshi Lal PW-11 and his wife Laxmi PW-12 under section 161 Cr.P.C. being the owners of the jhuggi wherein the dead body was found.

11. Since appellant Sunny @ Bhola was an accused in the case, on basis of the statement of Janki Prasad to the effect that Sumit aged 6 years informed him of having seen Sunny murder Pooja by compressing her face with a pillow, the success of the prosecution case clearly depended on the evidence of Sumit as the eye-witness. Sumit was therefore taken to Sh.Paramjit Singh PW-18, learned MM for recording his statement under Section 164 Cr.P.C. However, as recorded

in the report Ex.PW-18/B, in light of the answers to a number of questions put to Sumit to ascertain whether he understands the nature of the proceedings, the learned MM was of the view that Sumit was not in a position to make a statement.

12. Sunny @ Bhola was put to trial. The prosecution examined 19 witnesses. Relevant amongst those are Nand Kishore PW-5 who is alleged to have last seen the accused with the deceased, Ram Babu PW-7 who allegedly saw the accused with Sumit soon after the incident, Janki Prasad PW-4, Munshi Lal PW-11 and Laxmi PW-12 to whom, as alleged by the prosecution, Sumit informed of having witnessed the incident.

13. Nand Kishore PW-5 deposed that in the morning of 30.3.2004, Laxmi PW-12 had asked him to deliver spices at their house. To deliver the same, he went to her jhuggi at about 1.30 PM and on finding the front door half open he asked if there was anyone inside. The accused Sunny @ Bhola came out from the jhuggi and gestured him that nobody was there inside. He peeped inside the jhuggi and saw Pooja present therein. He returned to his house and at about 4.30 PM learnt that Pooja was murdered in the jhuggi of Munshi Ram.

14. Ram Babu PW-7 deposed that at about 2.00 PM on 30.3.2004, while he was going to sell vegetables, he saw accused Sunny and Sumit running near the railway track, looking perplexed. He continued with his work and it was only at about 7.00 PM that he learnt about the death of Pooja.

15. Janki Prasad PW-4 deposed that at about 1.45 or 2.00 PM on 30.3.2004, when he was at his vegetable selling shop, Rakhi daughter of Munshi Ram informed him about Pooja lying unconscious in their jhuggi. He immediately rushed there and found his daughter lying dead. He went to a neighbouring jhuggi and telephoned the police control room. When he returned to Munshi Ram's jhuggi, Sumit disclosed that accused Sunny had visited their jhuggi and he i.e. Sumit saw Sunny compress the face of Pooja with a pillow and thereafter sit on her thereby causing her death. He also disclosed that Sunny took him along, bought him an ice-cream and threatened him not to disclose the incident to anyone otherwise he would also be killed.

16. Munshi Ram PW-11 deposed that at about 7.30 PM on 30.3.2004 when he returned to his jhuggi and was removing the vegetables from his hand cart, his wife informed him that Pooja was murdered in their jhuggi by accused Sunny. Then his son Sumit told him that he saw Sunny commit murder

of Pooja by compressing her face with a pillow. Sumit also told him that Sunny took him out and bought him a kulfi and threatened him not to disclose the incident to anyone, else he would also be murdered. On being cross-examined he stated that his daughter Rakhi and son Sumit used to go to school at about 8.00 AM and return home by 12.30 PM.

17. Laxmi PW-12 deposed that at about 5 or 5.30 PM on 30.3.2004, when she returned home from work, her daughter Rakhi told her that Pooja had been murdered on the bed in their jhuggi. Her son Sumit also informed her that Sunny murdered Pooja by compressing her face with the help of a pillow and thereafter took him across the railway line for an ice-cream and threatened to kill him if he disclosed about the incident to anyone.

18. Vide impugned judgment and order dated 30.4.2005, the learned Trial Judge convicted the appellant. The circumstantial evidence relied upon include the evidence of last seen by PW-5. The learned Trial Judge held that the presence of PW-5 being well explained, as he used to sell spices and had gone to Munshi Lal's jhuggi to deliver the same on the request of Laxmi to do so, he was a reliable witness. The Trial Court relied upon the evidence of PW-4, PW-11 and PW-12 and held that besides the three deposing unanimously

about Sumit disclosing to them that he witnessed the crime, their testimonies also find corroboration from the post-mortem report Ex.PW-3/A and the evidence of PW-7. The post-mortem report records the cause of death to be asphyxia due to blockage of air passage through nose and mouth, which fact lends assurance to the truthfulness of PW-4, PW-11 and PW-12 insomuch as they deposed that Sumit informed them of having seen Sunny place a pillow on Pooja's face and throttle her by placing his body weight thereon. PW-7 deposed of seeing appellant Sunny with Sumit near the railway track, looking perplexed which corroborates with the deposition of PW-4, PW-11 and PW-12 to the effect of Sumit having disclosed to them that after murdering Pooja, Sunny took him near the railway tracks for an ice-cream.

19. During argument in the appeal the blemish shown in the testimony of the witnesses pertained to the testimony of Janki Prasad PW-4. In his statement Ex.PW-4/A he informed the police that Rakhi and Sumit came to his jhuggi and informed that Pooja was lying unconscious in their jhuggi and was bleeding from her mouth. Further, Sumit told him that he saw Sunny compress Pooja's face with the help of a pillow and that thereafter Sunny took him for an ice-cream and threatened him with dire consequences if Sumit told said fact

to anybody. While deposing in Court, Munshi Lal gave a changed version by deposing that Rakhi informed him of his daughter Pooja lying in an unconscious condition in their jhuggi and he went to the jhuggi of Rakhi. On seeing his daughter lying dead he started weeping and went to the adjoining jhuggi of Ramesh and requested him to inform the police. On returning from the jhuggi of Ramesh he met Sumit who told him that they have not committed any offence and one Sunny had smothered to death his daughter by putting a pillow on her mouth.

20. Though appearing to be apparently innocuous, learned counsel urged that the witness has been made to depose differently vis-à-vis his statement made to the police for the reason if the witness stood by his first statement i.e. the statement recorded by the police, there would be no scope for the prosecution to introduce Ram Babu PW-7 who deposed that at around 2:00 PM on 30.3.2004 he saw the accused in the company of Sumit near the railway track and the accused was in a perplexed condition. Counsel urged that as per Janki Prasad he had received the information of his daughter's death at about 1:45 or 2:00 PM. DD No.9 Ex.PW-15/A records the time at 2:23 PM when information of Pooja's death was noted at the police station. Counsel urged that if Sumit was enticed

away with the lure of ice-cream then Sumit could not be present at the spot at around 2:00 PM. To account for Sumit being seen at the railway line and also being met by Janki Prasad, the latter changed his version by deposing that he met Sumit when he returned to the jhuggi after visiting the jhuggi of Ramesh and making a call to the police.

21. With reference to the testimony of Nand Kishore PW-5 learned counsel urged that as per his testimony he saw the appellant in the jhuggi with Pooja. Counsel urged that as per Nand Kishore he went to sell spices to Laxmi, the mother of Rakhi. Counsel urged that Nand Kishore has been introduced/planted as a witness to depose falsely and to justify his presence at the spot he claimed to be selling spices. Firstly, counsel urged that there is no proof given by Nand Kishore of being engaged in the business of selling spices. Secondly, counsel urged that from the testimony of Nand Kishore, if he deposed truthfully, it was apparent that he was supplying spices to Laxmi at her jhuggi, and if this be so, it is strange that he did not know the number of children born to Laxmi. Counsel urged that the prosecution has not examined Laxmi who would be the best person to prove whether she had been purchasing spices from Nand Kishore.

22. Learned counsel urged that Rakhi aged 12 years was a vital witness because as per Janki Prasad; in both his statements i.e. the one made to the police and the one made in Court, Rakhi had informed him of Pooja lying unconscious in their jhuggi. Counsel submitted that since Sumit aged 6 years was found to be not capable of understanding the questions evidenced by Ex.PW-18/B, the record of the proceedings held by Shri Paramjit Singh PW-18, the learned Metropolitan Magistrate before whom Sumit was produced on 25.6.2004 for statement to be recorded under Section 164 Cr.P.C., it was all the more important to examine Rakhi. Counsel submitted that since a material witness was withheld by the prosecution a benefit of doubt needs to be extended to the appellant.

23. Lastly, counsel urged that what Sumit stated as deposed to by Janki Prasad was hearsay evidence and the alleged statement of Sumit was not admissible under Section 6 of the Evidence Act as it went beyond the rule of res gestae.

24. We take up for consideration, the last plea urged for the reason if what was told by Sumit to Janki Prasad is not part of res gestae, then testimony of Janki Prasad that Sumit told him that the appellant smothered to death Pooja would be hearsay evidence and hence inadmissible.

25. The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of *res gestae* recognized in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue 'as to form part of the same transaction' that it becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of *res gestae*. See Gentela Vijayavardhan Rao vs. State of A.P. 1996 (6) SCC 241.

26. In the decision reported as AIR 1999 SC 3883 Sukhar vs. State of Uttar Pradesh Section 6 of the Evidence Act was discussed as under:-

“Section 6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of Section 6, what is

required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of *res gestae*, must have been made contemporaneously with the acts or immediately thereafter. The aforesaid rule as it is stated in Wigmore's Evidence Act reads thus:

"Under the present Exception [to hearsay] an utterance is by hypothesis, offered as an assertion to evidence the fact asserted (for example that a car-brake was set or not set), and the only condition is that it shall have been made spontaneously, i.e. as the natural effusion of a state of excitement. Now this state of excitement may well continue to exist after the existing fact has ended. The declaration, therefore, may be admissible even though subsequent to the occurrence, provided it is near enough in time to allow the assumption that the exciting influence continued.""

27. The principles relatable to the rule of *res gestae* are four in number:-

- "1. The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto unless such facts are part of a transaction which is continuous.
2. The declarations must be substantially contemporaneous with the fact and not merely the narrative of a past.
3. The declaration and the act may be by the same person, or they may be by different persons, e.g., the declarations of the victim, assailant and by-standers. In conspiracy, riot and the declarations of all concerned in the common object are admissible.
4. Though admissible to explain or corroborate or to understand the significance of the act, declarations are not evidence of the truth of the matters stated."

28. It is thus very important, while applying Section 6 of the Evidence Act, that by virtue of Section 6 of the Evidence Act declarations cannot be equated as evidence of the truth of the matters stated.

29. Tested on the aforesaid anvil of law, as deposed to by PW-4 in the Court, Sumit never met him in the jhuggi where his daughter was murdered when PW-4 went to the jhuggi for the first time. Sumit met him in the jhuggi when he returned to the jhuggi after visiting the jhuggi of Ramesh. Thus, it is apparent that Sumit was not at the place of the crime when PW-4 went to the said place at the first instance. Thus, spontaneity and immediate proximity as also continuity, the sine qua non for applicability of principle of res gestae has been snapped. To put it differently the statement of Sumit cannot be the natural effusion of a state of excitement and hence would not be admissible under Section 6 of the Evidence Act.

30. The learned Trial Judge has principally held against the appellant, believing and accepting as truthful Sumit's statement allegedly made to Janki Prasad PW-4. We note that same facts were deposed to by PW-11 and PW-12 and their testimony that Sumit told them that the appellant murdered Pooja suffers from the same fate as the testimony of Janki

Prasad because Laxmi claims to have been informed by her son at 5:00 or 5:30 PM and Munshi Ram claims to have been so informed by his son at 7:30 PM. It is in this connection that withholding Rakhi aged 12 years as a witness assumes significance. Had she been examined as a witness much light would have been thrown as to how Pooja, Rakhi's friend came to her jhuggi and stayed back, to be unfortunately done to death.

31. The deposition of Ram Babu PW-7 has to be seen in the context of the testimony of Janki Prasad PW-4. We find merit in the submission urged by learned counsel for the appellant that the possibility of PW-7 being introduced as a link witness to fill up the gaps in the testimony of Janki Prasad and explain Sumit's absence at the jhuggi and being lured with ice-cream and returning to the jhuggi. We are of the opinion that in a grave offence of murder where serious consequences flow against an accused, the lurking doubt in our mind for the reason afore-noted, compels the judicial mind to doubt the testimony of Ram Babu. Even if we accept the testimony of Ram Babu the same would establish that the appellant was in a perplexed mind and was seen near the railway line. The presence of the appellant near the railway line is natural for even the appellant resided in the same slum cluster where the

crime took place. It is not a case where the appellant was not expected to be seen near the slum cluster.

32. There is merit in the contentions urged by learned counsel for the appellant with respect to the testimony of Nand Kishore PW-5 for the reason there is no proof of Nand Kishore being engaged in the sale of spices. Laxmi not being examined assumes significance as her testimony would have thrown light whether at all Nand Kishore was selling spices to her. The fact that Nand Kishore could not even disclose the number of children born to Laxmi is an indication that he was not a regular visitor to Laxmi's house. Had he been selling spices to Laxmi he would certainly have remembered, if not the names, at least the number of children born to Laxmi and Munshi Ram.

33. Before bringing the curtains down we may note that the law pertaining to circumstantial evidence requires each and every incriminating circumstance to be proved and further requires that the chain of incriminating circumstances has to be complete wherefrom the inference of guilt can be inferred against the accused and innocence ruled out. Though not required to be proved and if not proved, not fatal to the case of the prosecution, we note that the prosecution has not proved any motive for the crime. There is no evidence of

Pooja being sexually assaulted or even an attempt made to sexually assault her. There is no evidence of the appellant having enmity with Pooja or her family members. In the peculiar facts and circumstances of the instant case, lack of any motive being proved is a factor which has weighed with us.

34. The appeal is accordingly allowed. We give the benefit of doubt to the appellant. The impugned judgment and order dated 30.4.2005 is set aside. The appellant is acquitted of the charge framed against him.

(PRADEEP NANDRAJOG)
JUDGE

(INDERMEET KAUR)
JUDGE

September 18, 2009
mm / Dharmender