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IN THE HIGH COURT OF DELHI

Judgment reserved on : February 02, 2009

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Judgment delivered on : February 11, 2009

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CRL.A.826/2006

KAMAL KUMAR Appellant
Through: Mr.Rajiv Thukral, Advocate.

versus

STATE Respondent
Through: Mr.Pawan Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE ARUNA SURESH

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

: PRADEEP NANDRAJOG, J.

1. The instant appeal challenges the judgment and order dated 18.08.06 and the order dated 19.08.2006 passed by the learned Additional Sessions Judge, New Delhi, in Sessions Case No.62/2002 arising out of FIR No.119/2002 registered at Police Station, Ambedkar Nagar. By virtue of the impugned judgment and order, the learned Trial Judge has held the appellant guilty of committing offences punishable under Sections 354/363/302 IPC and sentenced him to undergo imprisonment for life and pay a fine of Rs.2000/-, in default to

undergo SI for 2 months for offence punishable under Section 302 IPC; RI for two years and pay a fine of Rs.1,000/-, in default to undergo SI for 1 month for offence punishable under Section 363 IPC; RI for one year and pay a fine of Rs.500/-, in default to undergo SI for 1 month for offence punishable under Section 354 IPC and has further directed that all the sentences awarded to the appellant shall run concurrently.

2. A synoptical resume of the prosecution case is that the police swung into action when pursuant to a wireless information DD No.80B, Ex.PW-11/A, was recorded by Const. Siri Kishan PW-11, at 12.36 A.M. on 19.03.2002 at Police Station Ambedkar Nagar to the effect that a resident of F-200, Dakshin Puri has informed that a girl named Vaishali daughter of Brijesh was missing since morning. ASI Shamsheer Singh PW-15, was handed over a copy of the DD Entry. Accompanied by Const. Jagat Singh PW-10, he reached the place from where said information was sent i.e.F-200, Dakshin Puri, where they learnt that Brijesh had gone searching for his daughter Vaishali. At around 3-3.15 A.M. on 19.03.02 ASI Shamsheer Singh PW-15 recorded the statement Ex.PW-3/A of Brijesh, and made an endorsement Ex.PW-15/B thereon and forwarded the same at 3.30 A.M. through Const. Jagat Singh PW-10 to the police station for registration of a FIR. HC Umed Singh PW-8, registered the FIR, being No.119/02 under Section 363 IPC, Ex.PW-8/A.

Thereafter the matter was handed over to SI Balraj Singh PW-17, for further investigation.

3. In his statement Ex.PW-3/A, Brijesh stated that he is a resident of F-200, Dakshin Puri and is a driver by occupation. That yesterday i.e.18.03.02 since 9.30 P.M., his daughter Vaishali aged about 8 years who was wearing cream colored shirt and yellow and black colored skirt is missing. That some people from the neighbourhood as also his sister-in-law Anita had told him that Vaishali was last seen sitting in the lap of Kamal i.e. the appellant. That he is fully confident that Kamal and his associate Vicky had kidnapped his daughter.

4. Since Brijesh PW-3, had told the police that baby Vaishali was last seen in the company of the appellant, the needle of suspicion pointed towards the appellant. The police went about searching for him and apprehended him on 19.03.02 at about 8.00 A.M.

5. On being arrested and interrogated the appellant made a statement, Ex.PW-2/A, admitting his guilt and disclosed that on 18.03.02 at around 9.30 P.M. he had taken baby Vaishali on the pretext of giving ice-cream to her to the nearby jungle where he tried to commit sexual intercourse with her and had killed her by banging a piece of stone on her head when she had tried to resist him and stated that he could get recovered the dead body of baby Vaishali.

6. Since the appellant had made a disclosure statement and volunteered to get recovered the dead body of baby Vaishali, SI Balraj Singh PW-17, accompanied by ASI Shamsheer Singh PW-15 and Const. Jagat Singh PW-10, also accompanied by Brijesh PW-3 and Joseph PW-2 went along with the appellant to the place wherefrom appellant stated that he could get recovered the dead body. The appellant led the team to Jahanpanah jungle and vide pointing out memo, Ex.PW-2/B, pointed out the place where the dead body of baby Vaishali was lying. The body was recovered.

7. SI Kunwar Sahib Singh PW-13, as also Const. Giri Raj PW-14, from the crime team were summoned to the spot where the dead body of baby Vaishali was lying. 37 photographs, Ex.PY/1 to Ex.PY/37; (negatives whereof are Ex.PX/1 to Ex.PX/37) were taken. SI Balraj Singh PW-17, prepared the site plan Ex.PW-17/A; recording therein the place at point 'A' where the dead body of baby Vaishali was found lying. Blood sample earth, sample earth control, one blood stained stone and a pair of slippers lying at the spot were lifted and seized vide memo Ex.PW-2/C. The pant of the appellant which he was wearing at that time was seized vide memo Ex.PW-2/E. Thereafter ASI Chet Ram (Fingerprint expert) PW-16, was called and he lifted the chance fingerprints from the dead body and blood stained stone seized from the spot, but could not develop any print.

8. The body of baby Vaishali was sent to mortuary of AIIMS, where Dr.Sanjeev Lalwani PW-1, conducted the post-mortem on 19.03.2002 and gave his report, Ex.PW-1/A recording the following injuries on the body of the young girl:-

- “1. Froth at mouth and nostril.
2. Rigour mortis seen all over the body.
3. Hair of scalp were blood stained.
4. Post mortem staining was seen on back and dependent parts except pressure areas.
5. Blood stains were seen on right knee. Dorson of right hand, mouth, nostril, left side face, right neck, right shoulder and right upper arm.
6. Eyes and mouth were partially open, nails were blue. No signs of decomposition. Greenish material (Gulal) stucked on right and left leg anteriorily, laterally and medially, both sides of neck, right shoulder and left forearm injuries.
 - a. Linear abrasions on right leg, lower part medially 5 cms in length and reddish brown colour.
 - b. Linear abrasion medial border of right scapula 5 cms in length dried reddish brown in colour.
 - c. Contused abrasion 1 x 1 cms on left side forehead reddish brown in colour.
 - d. Multiple concrete small confused abrasions in an area of £ x 3 cms lateral to left eye brow over left temple reddish brown in colour.
 - e. Multiple concrete small contused abrasion on tip of nose 1 x .5 cms and on left cheek in an area of 9 x 5 cms reddish brown in colour.
 - f. Bluish colour contusion in left perorbital region with swelling and underlying extra vasation of blood.

- g. Linear abrasion 1.5 cms on right leg lower part near ankle reddish brown in colour.
- h. Linear abrasion on left leg .5 cms posteriorily in lower part.
- i. Multiple concrete small abrasion on right and left knee cap.
- j. Multiple concrete small abrasion on left leg lower part anterolaterally.
- k. Bluish colour contusion 4 x 2.5 cms on right leg upper one third anteromedially with underlying extra vasation of blood.
- l. Contusion bluish coloured 1 x 0.5 cms on left leg lower one third, anteromedially with underlying extra vacation of blood.
- m. Abrasion 1 x 0.5 cms medial border of left scapula reddish brown in colour.
- n. Lacerated wound 1.5 x 1 cms on right parieto occipital region 8.5 cms posterior superior to right ear pinna bone deep with bleeding on dissection underlying sub-scalp extra vasation of blood was present. Scull shows depressed fracture 4.3 cms in right parital bone with fissured fracture at right paritotamporal region, extending to right side occipital bone, right frontal bone right temporal bone and floor of middle cranial fossa on right side. Linear fissure fracture in mid line of occipital bone upto foreamen magnum underlying brain congested, oedematous with defused subdural haematoma prominent on right parito temporal region and on inferior aspect on right side. The cut section shows few petechial intracerebral haemorrhage on right side cerebrum."

9. He recorded presence of blood stains in upper part inner side of right labia with congestion of fourchette in labia. The hymen was found intact. He opined that the child died due

to coma resulting from the head injuries which could be caused by blunt force and were sufficient to cause death in the ordinary course. He opined that the possibility to commit sexual intercourse could not be ruled out.

10. The clothes of the young girl, vaginal swabs and a gauze containing the blood of the young girl were handed over to the police vide memo Ex.PW-9/A.

11. On 20.03.2002 at around 2 P.M. Const. Rakesh PW-12, took the appellant to the AIIMS, where Dr.Chittaranjan Behera PW-6, conducted his medical examination. The MLC of the appellant, Ex.PW-6/A, dated 20.03.2002, records that no fresh external injury was found on the person of the appellant; smegma was absent and that there is nothing to suggest that the appellant was not capable of performing sexual act. The blood sample of the appellant was handed over to the police which was seized vide seizure memo Ex.PW-12/A.

12. On 26.03.2002 the investigation of the case was entrusted to Inspector Jagdish Yadav PW-18, who at the relevant time was posted as Additional SHO at Police Station Ambedkar Nagar. PW-18 got prepared the scaled site plan of the place of the recovery of dead body, being Ex.PW-5/A, from SI Mahesh Kumar PW-5, and sent the seized materials to the Forensic Science Laboratory for scientific examination. Vide FSL reports Ex.PX and Ex.PY it was opined that human blood of group 'B'

was detected on skirt and top of the deceased which she was wearing at the time of the commission of the offence; human blood was detected on stone piece and blood sample earth seized from the spot; human blood was detected on the pant of the appellant (group thereof could not be ascertained) which was seized at the time when he pointed out the dead body of baby Vaishali; semen could not be detected on the vaginal swab of the deceased.

13. Needless to state, the appellant was sent for trial. Charges were framed against the appellant for having committed offences punishable under Section 363/376/302 IPC.

14. At the trial, apart from examining the police officers associated with the registration of the FIR and the investigation as also the doctor who recorded the MLC of the appellant and the doctor who conducted the post-mortem of the deceased; Joseph, uncle of the deceased was examined as PW-2. Brijesh, father of the deceased was examined as PW-3; Anita, aunt of the deceased was examined as PW-4. Sunita, mother of the deceased was examined as PW-5.

15. Joseph PW-2, the brother-in-law of the father of the deceased deposed that Vaishali was missing from her house on 18.3.2002. Everybody searched for her but could not be traced. That Anita had informed having seen Vaishali with the appellant at around 9.30 PM. He deposed that the appellant was

apprehended in his presence and his disclosure statement Ex.PW-2/A was recorded by the police in which he admitted having killed Vaishali. He took the police to Jahanpanah forest and pointed out the spot where his niece was killed. That the police seized a stone stained with blood, earth control, blood-stained earth and a pair of chappals from the spot vide seizure memo Ex.PW-2/C. The dead body of Vaishali was seized as per seizure memo Ex.PW-2/D. That the pant of the appellant was seized as recorded in seizure memo Ex.PW-2/E. He was cross-examined and in cross-examination stated that Brijesh contacted him at around 10.15 PM to search for Vaishali. He joined Brijesh to search Vaishali and went to the house of his sister Anita PW-4 hoping that she could give some information and that Anita told them that she had seen the appellant with Vaishali. That thereafter they reached the house of the appellant around 12.30 midnight but he was not present. That thereafter the police was informed of baby Vaishali being untraceable.

16. Brijesh PW-3, father of the deceased deposed that his daughter was missing after around 9.30 PM and when they were searching for her Anita told him that his daughter was seen by her with the appellant at about 9.30 PM. He deposed of having informed the police and his statement Ex.PW-3/A being recorded. He deposed the facts as deposed to by Joseph

pertaining to the apprehension of the appellant and his making a disclosure statement and recovery of the dead body of his daughter. In cross-examination he stated that when Anita told him that she had seen his daughter in the lap of the appellant everybody went to the house of the appellant who was not present in his house and that he was apprehended by the police after a few hours.

17. Anita PW-4, the sister-in-law of the father of the deceased, deposed that on 18.03.2002 at about 9.30 P.M. she had seen the deceased in the lap of the appellant in the outskirts of the street when she had gone out for a walk with her family. On being cross-examined she stated that around 12 midnight when she learnt that father of Vaishali was searching for her she disclosed said fact to Vaishali's father.

18. Sunita PW-7, the mother of the deceased, deposed that her daughter had gone out to play in the street while she was wearing chappals and did not come back.

19. In his statement recorded under Section 313 Cr.P.C. the appellant denied everything. He stated that the police had arrested him from his house in the evening of 19.03.2002 at around 5.00 P.M. and therefore, there was no question of leading the police to the place from where the dead body of the deceased was recovered at his instance.

20. As already noted herein above, holding that the prosecution has been able to establish the chain of circumstances which inevitably connect the appellant to the crime of kidnapping the deceased, attempting to outrage her modesty and murdering her, the learned Trial Judge has convicted the appellant of committing offences punishable under Sections 363/354/302 IPC. Insofar as the defence of the appellant predicated upon the time of his arrest by the police is concerned, learned Trial Judge has held that the testimonies of Brijesh PW-3 and Joseph PW-2, various memos prepared by the police, recordings in the post-mortem report of the deceased Ex.PW-1/A to the effect that inquest papers were received on 19.03.2002 at 2.45 P.M. and that autopsy on the dead body of the deceased was conducted on 19.03.2002 at 3.15 P.M. and the fact that no witness was examined by the appellant to establish that the police had arrested him from his house at around 5.00 P.M. on 19.03.2002 corroborate the version of the prosecution that the appellant was arrested in the morning hours of 19.03.2002 and that the dead body of the deceased was recovered at his instance. However, holding that the prosecution has not been able to establish beyond reasonable doubt that the appellant had raped the deceased before murdering her, the learned Trial Judge acquitted him of the charge of having committed an offence punishable under Section 376 IPC.

21. From a perusal of the decision the circumstances held established by the prosecution, evidencing the guilt of the accused and other attendant circumstances of the case pointing towards the guilt of the appellant can be enumerated as under:-

- I The deceased was last seen in the company of the appellant at around 9.30 PM on 18.03.2002.
- II The deceased went missing since 9.30 PM on 18.03.2002.
- III The appellant was not present in his house or otherwise traceable when the family members of the deceased as also people from the neighborhood were looking for him to know the whereabouts of the deceased.
- IV The appellant made a disclosure statement admitting his guilt in the presence of Brijesh PW-3 and Joseph PW-2.
- V The dead body of the deceased was recovered at the instance of the appellant in the presence of Brijesh PW-3 and Joseph PW-2.
- VI The appellant admitted to have killed the deceased by banging a piece of stone on her head and human blood was detected on a piece of stone found lying at the place of recovery of the dead body.

VI Human blood was detected on the pant of the appellant which he was wearing at the time of the recovery of the dead body.

VII No witness was examined by the appellant in support of his defence that the police had arrested him from his house in the evening of 19.03.2002 or to prove his presence at some other place at the time when prosecution claimed to have recovered the dead body of the deceased at his instance.

22. At the hearing of the appeal, under-noted 5 submissions were advanced by the learned counsel for the appellant to break the chain of evidence as found established by the learned Trial Judge:-

A First submission was that there is a material variation regarding the time of disappearance of the deceased between the initial version stated by Brijesh PW-3, father of the deceased, based whereon DD Entry No.80-B Ex.PW-11/A was recorded by the police and the subsequent versions stated by him at various stages.

B As a limb to the first submission, the counsel next urged that there is an apparent contradiction between the initial version stated by Brijesh PW-3, father of the deceased, based whereon DD Entry

No.80-B Ex.PW-11/A was recorded by the police and the evidence adduced by the prosecution.

C Third submission urged was that the learned Trial Judge while appreciating the ocular evidence led by the prosecution did not attach due importance to the fact that all the witnesses examined by the prosecution to prove circumstances connecting the appellant with the commission of the offence, namely, time of missing of the deceased, the deceased last seen in the company of the appellant, the alleged confession of the crime by the appellant and discovery of dead body of the deceased at the instance of the appellant were 'interested' witnesses.

D Fourth submission urged was that the fact that the appellant is not visible in even a single photograph out of 37 photographs taken by the police at the time when allegedly dead body of the deceased was recovered at his instance strongly probablizes the defence of the appellant that the dead body was not recovered at his instance and that he was arrested by the police only after the recovery of the dead body.

E Last submission urged was that the photographs Exhibits PY/1 to PY/37 taken by the police evidence

that big rocks were lying on the ground from where the dead body of the deceased was recovered therefore the appellant ought to have sustained some injury if he had committed or attempted to commit forcible sexual act with the deceased at the said area whereas the MLC of the appellant Ex.PW-6/A records that no external injury was found on the person of the appellant.

23. With respect to the first submission, the learned counsel for the appellant drew attention of this Court to the depositions of Brijesh PW-3, and Joseph PW-2 to the effect that Brijesh PW-3, had given initial information to the police on 19.03.2002 at around 12.30 A.M. about the disappearance of the deceased as also to the DD Entry No.80B Ex.PW-11/A wherein it is recorded that an information has been received that the deceased is missing since morning of 18.03.2002. The learned counsel further submitted that the depositions of the said two witnesses prove that the DD Entry No.80B Ex.PW-11/A was recorded on the basis of the information given by Brijesh PW-3. The learned counsel sought to impress upon this court that the fact that Brijesh PW-3, father of the deceased, had initially stated that the deceased was missing since morning hours of 18.03.2002 and that he had changed his subsequent versions namely statement given to the police under Section 161 Cr.P.C.

Ex.PW-3/A and testimony before the court to state that the deceased was missing since 9.30 P.M. on 18.03.2002 strongly probablizes that the said change was incorporated by PW-3 to bring his version in line with the account of Anita PW-4, that she had seen the deceased in the company of the appellant at 9.30 PM on 18.03.2002 and therefore, the appellant was falsely implicated by the family of the deceased.

24. The second submission advanced by the learned counsel was also predicated upon a recording contained in the DD Entry No.80B Ex.PW-11/A to the effect that the deceased was wearing shoes at the time of her disappearance. The counsel argued that the fact that a pair of slippers was recovered from the place of recovery of the dead body of the deceased which were attributed to the deceased establishes that Brijesh PW-3, was not a truthful witness and that the appellant was falsely implicated by him and his family members.

25. In dealing with the afore-noted two submissions, it would be most relevant to note the cross-examination of Brijesh PW-3. In his cross-examination, neither any suggestion was given to PW-3 that he had initially stated to the police that the deceased is missing since morning and that she was wearing shoes at the time of her disappearance nor any question pertaining to recording of said statements in DD Entry 80B Ex.PW-11/A was put to the said witness. Had he been cross-

examined, we would have had the benefit of his explanation on said discrepancies. However, we are of the opinion that the same are not fatal. The reason is obvious, Brijesh is a driver and as deposed by him used to leave the house early morning. The same would have happened on the unfortunate day i.e. 18.3.2002 and therefore he may have told the police that his daughter was wearing shoes when she left the house and that she had left the house in the morning. His disturbed mental condition at 12.30 PM when his young daughter could not be located has to be kept in mind. It is quite possible that on returning home from work PW-3 Brijesh was informed by his wife that their daughter is missing and he just assumed that their daughter did not return to the home from the school and is missing since morning and must be wearing shoes at the time of her disappearance as she had disappeared while going or coming back from school and on basis of said assumption he informed the police without ascertaining correct/complete facts regarding disappearance of their daughter from his wife. It is equally possible that mother of the deceased being in a perplexed state because of disappearance of her daughter was not able to narrate complete/correct facts pertaining to the disappearance of the deceased to her husband.

26. Be that as it may, it is settled law that mere congruity or consistency is not the sole test of truth of the depositions.

Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. (See the decision of the Hon'ble Supreme Court reported as State of Himachal Pradesh v Lekh Raj & Anr 1999 (9) Supreme Today 155).

27. With reference to the third submission advanced by the learned counsel for the appellant that the material witnesses of the prosecution were 'interested' witnesses it would be apposite to note the following dictum of law laid down by the Hon'ble Supreme Court in the decision reported as State of Rajasthan v Smt. Kalki & Anr (1981) 2 SCC 752.

“As mentioned above the High Court has declined to rely on the evidence of P.W.1 on two grounds : (1) she was a “highly interested” witness because “she is the wife of the deceased”, and (2) there were discrepancies in her evidence. With respect, in our opinion, both the grounds are invalid. For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True, she is the wife of the deceased; but she cannot be called an 'interested' witness. She is related to the deceased. 'Related' is not equivalent to 'interested'. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one is the possible eye witness in the circumstances of a case cannot be said to be 'interested'. In the instant case P.W.1 had no interest in protecting the real culprit, and falsely implicating the respondents.” (Emphasis supplied)

28. It is relevant to note that the witnesses have supported each other in material particulars. It is further relevant to note that the said witnesses were cross-examined at length but nothing tangible could be extracted to create a shadow of doubt on their respective testimonies. No motive has been imputed by the appellant on the said witnesses for falsely implicating him.

29. In such circumstances, particularly in the view of the law laid down by the Hon'ble Supreme Court in Kalki's case (supra), mere relationship with the deceased cannot be a ground for discarding the testimonies of the said witnesses.

30. With reference to the fourth submission advanced by the learned counsel for the appellant regarding the non-visibility of the accused in the photographs taken by the police at the time of recovery of the dead body of the deceased, suffice would it be to state that the perusal of the said 37 photographs shows that the same have been taken with a view to capture the positioning of the dead body and the surroundings of the area and not to ascertain the presence of the people present at the said time. Invariably, photographs of certain police officials who were conducting the investigation have also appeared. The fact that there is no photograph of any public witness or that of the appellant do not create a dent in the version of the prosecution that the dead body of the deceased was recovered

at the instance of the appellant when otherwise the evidence led by the prosecution particularly the testimonies of Brijesh PW-3 and Joseph PW-2 and other circumstances of the case enumerated herein above point towards the said fact.

31. Insofar as the last submission of the learned counsel is concerned that had the appellant committed or attempted to commit forcible sexual act with the deceased at the area where her dead body was recovered then in such situation he ought to have sustained some injury whereas no external injury was noted on his person as per his medical examination begs the question whether the appellant had committed or attempted to commit forcible sexual act with the deceased at the place where her dead body was found. It is quite possible that the appellant had committed or attempted to commit forcible sexual act with the deceased at some other place and had subsequently brought the deceased to the place of the recovery of the dead body for the purposes of only killing her as big rocks were present at the said place which could have facilitated the appellant in killing her.

32. We note that the appellant has not examined any family member to prove that he was picked up from the house at 5.00 PM on 19.3.2002. The appellant has not explained as to how blood of human origin came on his pant. We note that smegma was absent on the sex organ of the appellant. We note

that as per the post-mortem report the possibility of an attempt to commit rape cannot be ruled out. We note that the prosecution has established that the appellant was absconding from his house till late night and in fact was apprehended at around 8.00 AM in the morning of 19.3.2002. He has not explained as to under what circumstances he was not in his house in the night; he was expected to be in his house in the night. We find that Anita has established that the appellant was last seen by her with the deceased in his lap at around 9.30 PM. We note that Anita had disclosed said fact to the father of the deceased when the crime had not even been detected. We find that Anita has no motive to falsely implicate the appellant.

33. We find no merits in the appeal. The appeal is dismissed.

(PRADEEP NANDRAJOG)
JUDGE

(ARUNA SURESH)
JUDGE

February 11, 2009
Dharmender