

R-80

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

% Date of Decision: 22nd February, 2010

+ **CRL.APPEAL NO.342/2006**

KAILASH CHAND Appellant
Through: Ms.Rakhi Dubey, Advocate

versus

STATE Respondent
Through: Ms.Richa Kapoor, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SURESH KAIT

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. (Oral)

1. After the prosecution closed its evidence, when cross-examined under Section 313 Cr.P.C., the song sung by the appellant was:-

‘I do not know’; ‘It is incorrect’.

2. These are the two answers given by the appellant to each and every incriminating circumstance on which he was questioned save and except the last. To the question what did he have to say? He replied that he was innocent. He never

committed the crime and that he was falsely implicated due to suspicion.

3. The charge against the appellant was of having raped and murdered Kumari 'K' in the intervening night of 18th and 19th June, 2002.

4. With reference to the testimony of Ravi Saran PW-1, a person living in the neighbourhood of the deceased; Mohan Lal PW-2, another person residing in the neighbourhood of the deceased; Kripa Kant PW-3 an ice cream vendor who sells ice cream at a parlour in the colony in which the deceased and PW-1 and PW-2 resided as also the testimony of Raju PW-4, the father of the deceased and Jhabbu Singh PW-6, the younger brother of Raju who also resides in the same building in which Raju resides, the Trial Court has returned a finding that their testimony establishes that Kumari 'K' was seen in the company of the appellant at around 9:30 PM on 18.6.2002. That after he was apprehended and got medically examined, the same revealed injuries on the appellant which were opined to be of the same time as when Kumari 'K' was sexually assaulted, learned Trial Judge has found a second piece of incriminating evidence against the appellant. The third piece of incriminating evidence against the appellant is the report

and Ex.3-B respectively of the deceased, was similar in its physical characteristics as the soil adhering to a trouser and a T-shirt Ex.5-A and Ex.5-B respectively got recovered by the appellant after his arrest and pursuant to his disclosure statement.

5. That Kumari 'K' was raped has been held to be established with reference to the post-mortem report Ex.PW-8/A of the deceased. Needless to state that the appellant was opined to be capable of performing sexual intercourse has been held established with reference to the MLC of the appellant.

6. It is urged by learned counsel for the appellant that the testimony of Raju PW-4 and Jhabbu Singh PW-6, the father and the uncle of Kumari 'K', does not inspire any confidence and is contrary to their contemporaneous conduct which preceded their statements made to the investigating officer and as deposed in Court. With reference to the testimony of Ravi Saran PW-1, Mohan Lal PW-2 and Kripa Kant PW-3, it is urged that their conduct relevant at 9:30 PM on 18.6.2002 is not in conformity with what they claim to have seen.

7. We shall be highlighting the factual basis of the aforementioned two submissions urged by learned counsel for the

appellant. But, for the purposes of appreciating the submissions made by the learned counsel, the backdrop facts in relation whereto said submissions have been made need to be noted.

8. At the midnight of the intervening night of 18th and 19th June 2002; the time being 00:10 hours, DD No.3-A Ex.PW-9/A, was recorded by the duty constable at PS Farsh Bazar on the statement of Raju PW-4 who informed that his daughter Kumari 'K' aged 9 years was missing and in spite of efforts made could not be located. The description of Kumari 'K' and the clothes she was wearing stands recorded in Ex.PW-9/A. Nobody has been named as a suspect and it has not been stated by Raju that somebody told him that he had seen his daughter in the company of somebody at around 8 or 9 PM.

9. The unfortunate girl could not be found. Her dead body was found in an area within the jurisdiction of PS Anand Vihar, information whereof was noted by the duty constable at PS Anand Vihar vide DD No.12-A, Ex.PW-5/C. It stands recorded that the dead body of a girl aged around 7 years has been noted near Nepali Mandir, Vishwas Nagar within the jurisdiction of PS Anand Vihar.

10. Investigation of DD No.12-A, Ex.PW-5/C, was entrusted to SI Dharam Singh who left for the spot along with two police constables. This information was transmitted to Insp.K.C.Sharma PW-16, SHO of PS Anand Vihar as also to SI Madhukar Rakesh, both of whom also proceeded to the spot where the dead body of the young child was noted. All officers reached the said place around the same time.

11. It is obvious that Insp.K.C.Sharma PW-16, being the senior most officer, took charge of the investigation.

12. The news of the dead body of a young girl being found as aforementioned spread in the area and naturally reached the family members of Kumari 'K'.

13. Raju PW-4, the father of Kumari 'K' obviously reached the spot hoping that the dead body of the young girl was not that of his daughter. But, unfortunately for him, truth was otherwise.

14. Raju met the police officers who reached the spot and Insp.K.C.Sharma PW-16 recorded his statement Ex.PW-4/A as per which Raju simply stated that he resided in House No.8/31, Sahdev Gali, Vishwas Nagar and that his daughter was missing since last night i.e. the night of 18.6.2002 and that today morning he received information from somebody

that a dead body of a girl was noted near Nepali Mandir. He reached the said spot and found his daughter lying dead.

15. It may be noted that even in the statement Ex.PW-4/A which obviously has been recorded sometimes after 12:00 in the noon, Raju has not expressed his doubt on anybody being the assailant of his daughter. He has not stated that anyone told him that he had seen his daughter in the company of some person.

16. A pair of chappal identified by the father of Kumari 'K' as those which Kumari 'K' was wearing when she left her house, a coin in sum of Rs.2/-, earth control and a hair clip which were seized vide memos Ex.PW-4/B, Ex.PW-4/C and Ex.PW-4/D. The dead body of the girl was taken into possession and sent to the mortuary for post-mortem.

17. Dr.K.Goyal PW-8 working in the mortuary of Subzi Mandi conducted the post-mortem of the deceased on 20.6.2002. But, before that something of importance transpired.

18. Though not on record as to in what sequence did the various public persons meet the investigating officer and give their statements to him; but the case diary shows that on 19.6.2002 the investigating officer first recorded the

statements of Ravi Saran PW-1, Mohan Lal PW-2 and Kripa Kant PW-3 under Section 161 Cr.P.C. Ravi Saran and Mohan Lal told the investigating officer that at 8:30 PM on 18.6.2002 they were together outside the house of Ravi Saran which was in Sahdev Gali, Vishwas Nagar i.e. adjoining house of Kumari 'K' and that they heard barking of a dog. Kumari 'K' aged 9 years fell down due to fear of barking of dog. Appellant, a relative of Raju picked up the girl in his lap and took her away. Next day they learnt that Kumari 'K' was missing and was found dead. Kripa Kant PW-3, a person who sell ice cream at a parlour in the locality informed the investigating officer that around 9:00 PM, the appellant had come with a girl and purchased ice cream. He later on learnt that the name of the girl was Kumari 'K'.

19. It is apparent that the needle of suspicion pointed towards the appellant who was apprehended on 19.6.2002. He made a confessional-cum-disclosure statement and got recovered a pant and a T-shirt which were taken into possession by the investigating officer. The appellant was sent for medical examination to Swami Dayanand Hospital on 20.6.2002 where he was examined at 1:50 AM by Dr.B.Nayak PW-7 working as a CMO at the hospital.

20. In the MLC Ex.PW-7/A, apart from recording that the appellant was a healthy male and was capable of performing sexual intercourse, it is recorded that there were 6 injury marks over the body of the appellant being as under:-

- “1. There was a linear scratch mark of 3 cm long over suprasternal area of neck.
2. There was a linear scratch mark over right side of posterior aspect of the neck.
3. An abrasion of 2 cm x 1 cm over posterior aspect of lower right forearm.
4. There was an abrasion of .5 cm over ulnar border of right wrist.
5. An abrasion of 1 cm over ulnar border of left wrist.
6. An abrasion of ½ cm 2 inches below over posterior aspect of left elbow.”

21. After the appellant was arrested on 19.6.2002, the investigating officer recorded the statement of Raju PW-4 and the statement of Jhabbu Singh PW-6 under Section 161 Cr.P.C. Jhabbu Singh told the investigating officer that when he was returning home at 9:30 PM on 18.6.2002 he saw Kailash with the daughter of his brother Raju. He recognized Kailash as he used to work as mason in the house of his sister. His niece Kumari 'K' was eating ice cream. He was not feeling well. When he returned home he learnt that Kumari 'K' was missing. He tried to find out her whereabouts from the appellant, but the appellant was not available. He went to sleep. In the

morning he tried to find out the appellant but could not meet him. They all went to search for Kumari 'K' and found her dead body near Nepali Mandir.

22. The aforesaid sequences in which the statements have been recorded by the investigating officer have been noted by us with reference to the case diary which is available with learned counsel for the respondent.

23. The post-mortem of Kumari 'K' conducted by Dr.K.Goyal PW-8 and as reflected in the post-mortem report Ex.PW-8/A records 6 external injuries as under:-

"1. Diffuse contused abraded area over and around apple of adam extending on the right side neck upto 4 cm below right ear and on the left side upto 3 cm left to mid line in total area of 12 x 3.5 c m transversely and obliquely in diffused manner. There were 4-5 small contused areas of varying sizes between $\frac{1}{2}$ x $\frac{1}{2}$ cm to 1 x .75 cms over left side neck scattered obliquely over upper part of neck and blow the left mandible.

2. Both lips were bruised all over with multiple scratch abraded area with contusions in between scattered around the mouth and right cheek.

3. Abrasion 1 x 1 cm near left lateral cantus multiple tiny abrasions scattered vertically over right forearm dorsally and also over dorsum of right hand 2.5 x 2 cm over front of right knee.

4. Pattern bruises small in size 1.25 x 1 cm two in numbers about 1 cm apart each other over outer part of left arm at middle.

5. Upper and middle half of medial sides of both thighs were showing redness with few scratch marks at places.

6. Both labia majora were bruised. Internally vaginal walls were showing bruising in its initial part all around."

24. On internal examination the injuries and the condition of muscle tissues around the neck were recorded as under:-

"On reflexion of skin of neck there was subcutaneous and platysmal bruising seen all over front and sides of neck. Deeper neck muscles were also bruised with effusion of blood. Both greater cornua of hyoid bone were found loose with massive bruising and clots around. Blood clots around thyroid cartilage and side of trachea were also present. Epiglottis and larynx were bruised. Soft tissues of neck also showed signs of early decomposition. Small amount of serosanguinous discharge present in trachea. Both lungs were oedematous, congested and frothy with early decomposition changes."

25. It was opined that cause of death was asphyxia given upon pressure over neck structures consistently by human grip i.e. manual strangulation.

26. As deposed to by Dr.K.Goyal after the post-mortem he handed over the clothes of Kumari 'K' to the investigating officer.

27. While deposing in Court Ravi Saran PW-1 and Kailash Chand PW-2 deposed that they were sitting outside the house of Ravi Saran and heard barking of a dog. Kumari 'K'

daughter of Raju aged about 9 years fell down due to fear. Appellant a relative of Raju took the girl in his lap and walk towards Nakul Gali. The next day they learnt that Kumari 'K' had died.

28. Kripa Kant PW-3 deposed that he sells ice cream from a parlour which is situated on the 60 feet road near Nakul Gali and that at 9:00 PM on 18.6.2002 the appellant came with a girl and purchased ice cream.

29. Raju PW-4 deposed that his daughter was missing since 8:00 PM on 18.6.2002 and she could not be traced. He went to PS Farsh Bazar and lodged the complaint Mark PW-4/A around 12:00 midnight. He learnt at around 11/11:30 AM on 19.6.2002 that a dead body of a girl was found near Nepali Mandir. He went there and found his daughter lying dead. He deposed that his statement Ex.PW-4/A was recorded by some police officer. He deposed that the various seizure memos i.e. Ex.PW-4/B, Ex.PW-4/C and Ex.PW-4/D were drawn in his presence and the exhibits shown as seized from the spot were lifted from the spot in his presence.

30. He further deposed that during investigation his neighbours Mohan Lal and Ravi Saran told that the appellant had removed his daughter. He went on to deposed of being a

witness to the arrest and the disclosure statement of the appellant and recovery of a T-shirt and a pant at the instance of the appellant.

31. Jhabbu Singh PW-6 deposed the facts as noted hereinabove by us which stand mentioned in his statement under Section 161 Cr.P.C. recorded by the investigating officer.

32. With reference to the testimony of Jhabbu Singh PW-6, it is urged by learned counsel for the appellant that he is a strange uncle of Kumari 'K'. As per him he saw Kumari 'K' in the company of the appellant at 9:30 PM. It is a fairly unearthly hour for a young girl to be in the company of a stranger. As per Jhabbu Singh, the appellant was a mason. Counsel urges that it is strange that Jhabbu Singh did not enquire from the appellant as to where he was taking his niece. Further, learned counsel draws attention to the testimony of Jhabbu Singh as per which when he came home he learnt that Kumari 'K' was missing. As per him he returned home around 9:30 PM. As per him he tried to find out from the appellant but could not meet him. Counsel further urges that on being cross-examined Jhabbu Singh stated that when he reached home wife of Raju was present and even from her he learnt about Kumari 'K' being missing. Counsel urges that Jhabbu Singh, who claimed to be unwell, would naturally be

expected to tell his sister-in-law, if he had indeed seen the appellant with Kumari 'K', as deposed to by him. With reference to the missing person's complaint Mark PW-4/A, which we note has been exhibited as Ex.PW-9/A when ASI Ombir PW-9 the scribe thereof appeared as a witness, learned counsel urges that it is not believable that past 12:00 in the midnight, Raju would not have known said fact. Further, counsel urges that in any case this fact could not have been not in the knowledge of Raju around 12:00 noon the next day by which time the dead body of Kumari 'K' was noted and Raju's statement Ex.PW-4/A was recorded by Insp.K.C.Sharma PW-16. Counsel urges that aforesaid features totally discredit the testimony of Jhabbu Singh PW-6 and renders untrustworthy the testimony of PW-1 to PW-3. With respect to the testimony of PW-1 and PW-2, counsel urges that even their conduct is suspect. Had they seen the daughter of their neighbour fall down due to fear of barking dog, they would not have allowed the appellant, who was no more than a stranger to the house of Raju (being a mason) as deposed to by Jhabbu Singh PW-6, to walk away with Raju's minor daughter.

33. There is logic in the criticism of the testimony of Jhabbu Singh PW-6. Indeed, what he claims to have seen is nothing but a bundle of lies. His contemporaneous conduct

and that of his brother clearly show that Jhabbu Singh saw nothing of the kind which he claims to have seen at 9:30 PM on 18.6.2002, for had he seen Kumari 'K' with the appellant said fact would be in the knowledge of Raju and was too important for him not to tell the police.

34. It is apparent that the Jhabbu Singh is over stating a case. But that does not mean that the Investigating Officer has planted Jhabbu Singh.

35. As noted above, with reference to the case diary maintained by Investigating Officer, we have noted that the statements of the public witnesses were recorded in the priority of the Kripa Kant being recorded first, followed by statement of Ravi Saran, Mohan Lal and thereafter Jhabbu Singh and the father of the girl on 19.06.2002. Further, the statement of Kripa Kant, Ravi Saran, Mohan Lal was recorded much before the time when the appellant was apprehended.

36. There is a probability that Jhabbu Singh, who is the real paternal uncle of Kumari 'K'. with anger and revenge picked up what was stated to the Investigating Officer by Kripa Kant, Ravi Saran and Mohan Lal and told lies.

37. We thus have to eschew reference to the testimony of Jhabbu Singh PW-6 as the same lacks credibility.

38. The submission of learned counsel for the appellant

that Ravi Saran and Mohan Lal have to be disbelieved on account of the fact that they would not have let it pass when the appellant took Kumari 'K' towards Nakul Gali at 8:30 PM as claimed by them for the reason it was an unearthly hour for a stranger to walk away with a girl in the neighbourhood ignores the testimony of Ravi Saran and Mohan Lal to the effect that the appellant was a relative of Raju.

39. Now, learned counsel for the appellant urges that as per the Jhabbu Singh PW-6 the appellant was mere acquaintance of Raju as the appellant was mason and had worked in the house of Jhabbu's sister and used to visit them.

40. It does happen that people in neighbourhood feel that a frequent visitor to a house in the neighbourhood is a relative. Indians are known for being un-officious about everything. They do things un-officiously. They believe things un-officiously. Thus, it is possible that Ravi Saran and Mohan Lal, on the belief that the appellant was relative of Raju, allowed him to pass by and their eyebrows never got raised when they saw Kumari 'K' being taken in his lap by the appellant towards Nakul Gali.

41. Here comes the relevance of the post-mortem report Ex. PW-8/A of Kumari 'K'.

42. We have noted in para 23 above the five external

injuries noted on her person by Dr.K.Goyal.

43. Highlighting injury Nos.3 and 4, it is apparent that there was an abrasion on the left lateral cantus i.e. the left, corner side, of the left eye. As part of injury No.3, it has been recorded that there were multiple tiny abrasions scattered vertically over right forearm dorsally, meaning thereby, behind the back of the right forearm. The third set of abrasion noted under the injury No.3 is over dorsum of right hand i.e. the back of the right palm. The fourth injury as part of injury at serial No. 3 are abrasions on the front right knee. Injury No.4 are pattern bruises over outer party of the left arm at middle.

44. Are the said set of injuries not in sync with injuries which a child would receive when he falls while running? A person in movement, on tripping, would fall forward. The hands would automatically outstretch to prevent the fall. While tripping the knee may come into contact with the surface when the person falls. The aforesaid injuries are leaning in the said directions.

45. The post-mortem of Kumari 'K' as deposed by Dr.K. Goyal PW-8, was conducted on 20.06.2002. PW-1 and PW-2 had disclosed the fact to the Investigating Officer on 19.06.2002 that Kumari 'K' had fallen when a dog had barked. The dead body of the girl has corroborated the said fact that

Kumari 'K' suffered a fall. That apart, the nature of the fall injuries are in further reinforcement of what has been stated by PW-1 and PW-2. The said two witness had not seen Kumari 'K' from close quarters so as to notice the exact injuries sustained by Kumari 'K'. Thus, a very material part of the testimony of PW-1 and PW-2 finds corroboration from the post-mortem report of Kumari 'K'.

46. Let us now revisit the injuries on the appellant as noted by Dr. B. Nayak PW-7 author of the MLC Ex.PW-7/A of the appellant.

47. The injuries Nos.1 to 5 are clearly result of the victim repelling the use of force. Injury No.6 i.e. an abrasion over the posterior aspect of left elbow evidences either the blunt force inflicted on the left elbow or the left elbow placed on the ground in a crouching position and the body weight transferred on the left elbow. This would be the position of the appellant who would be on top of Kumari 'K' when he was performing the dirty act of sexual intercourse on the helpless victim. The linear scratch mark on the suprasternal area of neck and posterior aspect of the neck suggests a victim trying to grab the neck and push it away. Abrasions over the lower right forearm, ulnar border of right wrist and ulnar border of left wrist are the possible result of the victim, who is being

throttled, catching the hands of the assailant to loosen the grip on the neck of the victim.

48. Each and every injury on the appellant was opined to be 25-26 hours old; appellant being examined at 1:50 AM on 20.06.2002; relate back the injuries to the time when the young girl was assaulted.

49. When examined under Section 313 Cr.P.C. and it being put to him that after he was arrested he was produced before Dr.B.Nayak, who examined him and prepared the MLC Ex.PW-7/A, the appellant sang the line "I don't know".

50. Question Nos. 28 and 29 and the answers thereof read as under:-

"Q.28 It is in evidence against you that Dr.B.Naik had examined you and prepared the MLC which is Ex.PW-7/A. What have you to say ?

Ans. I do not know.

Q.29 It is in evidence against you that all the injuries were appeared to be between 25 to 36 hours. What have you to say ?

Ans. I do not know "

51. We have already drawn the conclusions which flow from the injuries upon the appellant as recorded in Ex.PW-7/A and have highlighted the manner in which the said injuries are suggestive of being caused by a victim who is being raped and throttled.

52. In this backdrop, we find credibility in the testimony of PW-1 to PW-3. Ignoring the testimony of PW-6, it has been established that Kumari 'K' was seen being taken by the appellant towards Nakul Gali. Before PW-1 and PW-2 saw this, they had seen Kumari 'K', aged 9 years fall down due to fear of a barking dog. They thought that the appellant who was a relative of Kumari 'K' would be probably taking her for some medical treatment and for said reason their eyebrows were not raised.

53. The evidence of the appellant being last seen with Kumari 'K' at around 8:30-9:00 PM; the dead body of the girl being recovered next day and the unexplained injuries on the person of the appellant, and as noted and reasoned above, are sufficient evidence wherefrom the guilt of the appellant can be inferred.

54. Even ignoring the fact that the shirt and pant got recovered by the appellant were detected with mud having same physical characteristic as was detected on the skirt and blouse of the unfortunate victim, the said two incriminating pieces of evidence are sufficient wherefrom the guilt of the appellant can be inferred.

55. That Kumari 'K' was raped is apparent from injury No.6 as also from injury Nos.2 and 5 on her person.

56. The conviction of the appellant for the offence of rape is, therefore, fully justified and sustainable.

57. It is urged by learned counsel for the appellant that the possibility of the appellant trying to muffle the voice of his victim and thereby causing her death due to asphyxia cannot be ruled out and under the circumstances the conviction for the offence of murder cannot be sustained needs to be noted and rejected for the reason the post-mortem report does not merely stop at the fact that unfortunate victim was deprived of oxygen into her lungs. Asphyxia has been opined to be the consequence of manual strangulation. Both greater cornua of hyoid bones were found loose with massive bruises and clots. The fact that the young child was throttled for a fairly long duration is evidenced by the corresponding injuries on the wrists of the appellant and on his neck,++ suggestive of resistance offered by the victim.

58. We see no scope for an argument that the possibility was of the appellant trying to muffle the cries of his victim and not to do away with the victim cannot be ruled out.

59. In this connection it assumes importance that there is evidence that the appellant was a regular visitor to the house of the victim. The appellant was aware that if he leaves the victim alive he would be leaving a potential witness. This

was his motive to kill the unfortunate victim.

60. Thus the conviction of the appellant for the offence of having murdered Kumari 'K' is fully justified.

61. We find no merit in the appeal which is dismissed.

62. Since the appellant is in jail we direct a copy of this order to be sent to the Superintendent Central Jail, Tihar to be made available to the appellant.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

February 22, 2010
mm/mr