

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

% *Judgment Reserved on: July 17 , 2014*
Judgment Delivered on: July 24 , 2014

+ **CRL.A. 151/2014**

PAWAN KUMAR Appellant

Represented by: Mr.S.P.Kaushal, Mr.Varun Rai
Sharma, Mr.Rohit Kumar and
Mr.Amit Wahi, Advs.

versus

STATE Respondent

Represented by: Ms.Aashaa Tiwari, APP for State
with Inspector J.P.Meena,
ATO/Mehrauli.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Pawan Kumar has been held guilty for murder of Baby 'A' and destruction of evidence of offence by putting her dead body in a plastic katta and throwing the same in the vacant plot adjoining his house. He has been acquitted of the offences under Section 376/377 IPC. Vide order dated November 29, 2013 he has been sentenced to undergo imprisonment for life for offence under Section 302 IPC with a fine of ₹15,000/-, in default to undergo simple imprisonment for one year. For offence under Section 201 IPC he has been awarded sentence of rigorous imprisonment of 5 years and a fine of ₹10,000/- and in default to undergo further simple imprisonment for

six months. The learned Trial Judge has returned the verdict of guilt on the basis of conduct of Pawan Kumar, as noted by PW-2 Shashi Bala the mother of the deceased and the last seen evidence of PW-3 Om Prakash running a mother diary booth near the house of Pawan Kumar and the deceased.

2. Pawan Kumar questions the judgment dated November 28, 2013 on the plea that nothing adverse could be inferred from his conduct. Since it was his own house he would naturally be there. He is nowhere connected with the offence. Nothing incriminating has been recovered either from him or at his instance. Despite Om Prakash noticing him lastly with the deceased at 3.50 PM in the missing report lodged at 4.15 PM he is not named. The present is a case of no evidence against the appellant. The finding of guilt has been returned contrary to the settled law with regard to circumstantial evidence, as neither the circumstances have been proved beyond reasonable doubt nor the chain of circumstances is so complete to rule out every hypothesis of the appellant's innocence. Despite the fact that the Police seized his clothes, nothing incriminating was found to connect the appellant with the offence alleged.

3. To the incriminating circumstances appearing in evidence put to him under Section 313 of the Cr.P.C., he denied the same and pleaded false implication and to the question "Do you want to say anything else?" he replied:

"At the relevant time, I was running a grocery shop at Fatehpur Beri, Jhanda Colony. My parents had gone to the house of my sister at Bahadurgarh for the purpose of her delivery, and I was alone in house those days. Our tenant – Shashi Bala came to my shop and enquired if I had seen her daughter-Anishka, who was missing. I had not seen her and told her so. I offered to search Anishka with her and took her

on my scooter in the area to search Anishka, but she could not be found. I even took her to her brother's house, which was at main road, but even there, Anishka was not there. Thereafter, we came back to our shop. She called police. Police took me to police station. My signatures and thumb impressions were obtained on blank papers. I was pressurized to confess commission of the offences, which I had not done. My father and my brother were also tortured. Thereafter, I was produced before Court. I am innocent.

4. The case of the prosecution based on the statement of Shashi Bala is that she had two daughters, the younger 'A' being aged 7 years. She along with her family was residing as a tenant at the house of Samunder Singh who had two sons and one daughter. The appellant was eldest son of the landlord running a kiriyana shop in front of the house. On October 16, 2007 at noon time, 'A' left to play after 12.30 PM. Pawan who was all alone in the house was present at the gate of the house keeping an eye on the children. His father had left for the shop in the morning and mother and sister to the hospital to visit someone. At about 1.30 PM Pawan came and told that 'A' was playing outside, upon which she asked him as to what was his concern and let her play. At about 2.15 to 2.30 PM Pawan again came and told her that 'A' was not playing outside. She came out and found her missing. She got nervous and made searches for her. She also made enquiries from other children and came to know that they had left 'A' and Pawan near the gate of the house lastly before leaving the place. She made searches for 'A' at her mother's house and at different places in which Pawan joined her on his scooter. She noticed that hands of Pawan were trembling while driving the scooter. Pawan made searches in the jungle area and came back. Pawan was very frightened. He made a call to his mother

who assured that 'A' will be traced. Pawan made a call to the Police. Police also came and searched. Pawan remained with the Police in the search and finally the dead body of 'A' was found in a white plastic bag in a vacant plot adjacent to their house. Initially, they thought it to be a bag of filth, however on opening dead body of 'A' was recovered. Her statement was recorded vide Ex.PW-2/A. Shashi was confronted with regard to timing of her information and the fact that Pawan's hand were trembling while searching, was not recorded in her statement. Even the factum of Pawan calling his mother was also not noted. Even in cross-examination this witness admitted that Pawan accompanied the Police in the search.

5. Om Prakash, the other witness relied upon by the prosecution deposed that on October 16, 2007 when milk van came at about 1.30 PM he visited the house of Pawan and peeped through the iron gate. He found Pawan on the roof top of the house. He also saw 'A' along with Pawan standing there. From the gate itself he informed Pawan that milk van had arrived and he can take milk from his shop. Pawan replied that he would come and pick up the milk, but he did not come. At about 3.30 PM Shashi came to his shop searching 'A'. She told that 'A' was missing. When he informed her that he had seen 'A' with Pawan at the roof top of their house. Later, 'A' was found murdered. He further stated that Pawan tried to mislead that one Singhadewala took away 'A' and at his instance they all ran in one direction to search Singhadewala, but no such person was found. In cross-examination he has been confronted with his earlier statement Ex.PW-3/DA wherein this fact of Pawan trying to mislead is not noted. Besides these two pieces of evidence i.e. last seen with Pawan and so-called conduct of misleading Shashi and Om Prakash while searching for 'A', there is no

material evidence with the prosecution against Pawan.

6. As noted above, both Shashi and Om Prakash have made material improvements in their depositions in Court with regard to alleged conduct of Pawan. The post-mortem of the deceased was conducted by PW-1 Dr.Sushil Sharma who exhibited his report as Ex.PW-1/A and opined the cause of death as asphyxia and craniocerebral damage consequent upon strangulation and blunt force impact to head. All injuries are ante-mortem and fresh in duration. Injury No.1 was produced due to ligature mark. Strangulation and head injury were independently and collective sufficient to cause death in ordinary course of nature. He noted the following injuries:-

- “1. Complete, circular ligature mark present around the neck starting 50 cm below the right mastoid process, going forward and being present 6 cm below the chin over front of neck in midline, then moving to the left side of neck, being present 5 cm below the left mastoid process and then going backward, being present 1 cm below the posterior hairline over the back of neck. The width of the mark varies from 2 cm at back of neck, 2.5 cm at front of neck in midline, 3.5 cm at the level of right mastoid process and 5 cm at the level of left mastoid process. The mark is brownish, parchmented. The knot is present on the left side of the neck.*
- 2. Reddish blue contusion, in patches, present over right side of face in an area 17 X 12 cm.*
- 3. Scratch abrasion 1 X 0.2 cm present over right cheek, 1.5 cm away from angle of mouth.*
- 4. Scratch abrasion 1 X 0.2 cm present over left side of neck, 7.5 cm below the left mastoid process.*
- 5. Reddish blue contusion in an area 5.5 X 1 cm present over front of left side of upper part of chest.*
- 6. Both eyes black.”*

7. At this stage it would be important to note certain other post-mortem findings which led the Court to frame a charge under Section 377/376 IPC against Pawan. Initially, the prosecution suspected that Pawan committed rape of the deceased, thereafter strangled her, put her in a plastic bag and threw her from the house to the adjacent vacant plot, height being about 10 feet. The reason being the post-mortem noted report “anus dilated, funnel shaped, rugosity of anal wall diminished, vaginal wall dilated, old healed tear present in hymen and no fresh injuries seen”. The vaginal swab and the anal swabs were also taken and sent for FSL examination. As per the FSL report Ex.PW-17/H, semen could not be detected on either the vaginal swab or the anal swab or perianal swab or the pajama of the deceased, thus ruling out rape. Even on the underwear of Pawan, no semen was detected. Thus, an analysis of both the post-mortem report and the FSL report shows that no fresh sexual assault was made by Pawan on the deceased, however the deceased, a baby girl of 7 years, was sexually exploited earlier in view of the anal and vaginal dilation and old healed tears. Considering this fact, the learned Trial Court rightly acquitted Pawan for offence under Section 376/377 IPC.

8. This takes us to the question whether the conviction of Pawan for offence under Section 302/201 IPC is justified or not. As noted above, both Shashi and Om Prakash have made material improvements with regard to alleged conduct of Pawan. Further, it is even the case of Shashi that after one hour Pawan informed her that ‘A’ was not playing outside. This conduct of Pawan is incompatible with his guilt. He made call to the Police. He accompanied Shashi Bala and her brother in search of the deceased. Thus, the post-event conduct of Pawan is not in conformity with his guilt.

The prosecution is thus left with the only evidence of having seen Pawan and 'A' at about 1.30 PM. Admittedly, Shashi also states that Pawan had come at 1.30 PM and told her that 'A' was playing outside which time has been confronted to her from Ex.PW-2/A, which was 2.15 PM and not 1.30 PM in Ex.-PW-2/A. The time given in Ex.PW-2/A would be the correct time as the same was given immediately after the incident. After one hour of 2.15 PM i.e. around 3.15 PM Pawan told Shashi that 'A' was not there outside. Considering the time available with Pawan i.e. at 1.30 PM being seen by Om Prakash, at 2.15 again meeting Shashi and at around 3.15 PM telling her that 'A' was not there, it cannot be said that he had sufficient time where he could commit any sexual assault on 'A', thereafter kill her by strangulation and hitting on head with the blunt object and then put her in a gunny bag and throw in the plot adjacent. From the site plan of the house of Pawan where Shashi with her family was also living, it is apparent that the roof top was visible from the road. No incriminating material has been collected from the store room on the roof top to connect that Pawan committed the offence. It is not the case of the prosecution that Pawan brought down the gunny bag containing the dead body and threw her in the adjacent vacant plot or that he threw it from the roof top. However, as per the doctor the injury No.2, 5 & 6 were produced by blunt force and injury No.3&4 by sharp pointed object and they were all ante-mortem injuries. No sharp object has been recovered.

9. Thus, in view of the aforesaid discussion, we can only conclude that the deceased was last seen with the Pawan however his subsequent conduct is not compatible to his guilt. On the basis of this single evidence we cannot uphold his conviction and extend the benefit of doubt to him. The

conviction of the appellant for offence under Section 302/201 IPC is set aside. The order on sentence is also set aside. The appellant is in custody. The Superintendent, Tihar Jail is directed to release the appellant forthwith, if not required in any other case.

10. The appeal is disposed of. TCR be returned. A copy of the order be sent to the Superintendent, Tihar Jail for compliance.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

JULY 24, 2014
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