

\$~Part-A (R-46)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRIMINAL APPEAL No.1200/2012**

Date of decision: 8th September, 2015

DEEPAK KUMAR @ BHUPENDER KUMAR @ DEEPU YADAV
..... Appellant
Through Mr. Ajay Verma & Ms. Neha Singh,
Advocates.

versus

STATE (GOVT. OF NCT) OF DELHI Respondent
Through Ms. Aashaa Tiwari, APP along with
Inspector Om Prakash, P.S. Khyala.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.K.GAUBA

SANJIV KHANNA, J. (ORAL):

Deepak Kumar @ Bhupender Kumar by the judgment under challenge dated 19th March, 2010 has been convicted under Sections 302, 363, 376 and 201 of the Indian Penal Code, 1860 (IPC, for short) for having committed offence of kidnapping, rape and murder of an eight year old female child, destroying evidence and giving false information to escape punishment.

2. By order on sentence dated 8th April, 2010, the appellant has been sentenced to imprisonment for life, fine of Rs.1 lac and in default, to undergo rigorous imprisonment for a period of one year for the offence under Section 302 IPC, imprisonment for life, fine of Rs.1 lac and in default, to undergo rigorous imprisonment for one year for the offence under Section 376(f) IPC,

Rigorous imprisonment for seven years, fine of Rs.20,000/- and in default, to undergo Rigorous imprisonment for three months for the offence under Section 363 IPC and rigorous imprisonment for three years, fine of Rs.20,000/- and in default, to undergo rigorous imprisonment for a period of three months for the offence under Section 201 IPC. Against each awarded sentence, it is recorded shall run concurrently even in the event of the fine not being realised. Entire fine realised shall be awarded as compensation to the parents of the deceased/victim under Section 357 of the Code of Criminal Procedure, 1973 (Cr.P.C.). The order on sentence states that life imprisonment would mean imprisonment for the rest of the life, i.e., whole of the remaining period of the appellant.

3. We have heard learned amicus curiae and the counsel for the State and are inclined to affirm the findings recorded by the trial court convicting the appellant for the offences under Sections 363, 376, 302 and 201 IPC for the reasons set out below.

4. The victim has been described as 'N' and it is not disputed that she was about eight years of age as mentioned in the post-mortem report marked Exhibit PW-10/A. Rajeshwari Devi (PW-12), mother of 'N', has testified that her daughter was about eight years old at the time of incident. The appellant and PW12 used to work in the same factory. The appellant would visit PW12's house to help her daughter 'N' in studies by giving her free tuition. On 23rd March, 2009, the appellant came to their house and had taken her

daughter 'N' with him on the pretext that he had brought a rabbit and wanted to gift the rabbit to her as he had to return to his native place on account of death of his brother. PW-12, after initial hesitation, had allowed her daughter 'N' to go with the appellant at about 6-6.30 P.M. When her daughter did not return till about 7 P.M., PW-12's husband had gone out in search of his daughter. Later on, PW-12 learnt that her daughter had died. In her cross-examination, PW-12 has stated that her husband had returned home after night duty (9 P.M. to 9 A.M.) and was sleeping at the time when her daughter 'N' had gone out with the appellant. PW-12 has accepted that she had not gone with her husband but her brother-in-law Kameshwar had gone with her husband looking for her daughter.

5. Almost identical deposition is made by Rajeshwar Ram (PW-13), husband of PW-12 and father of 'N'. PW-13, however, claimed that PW-12 had woken him up to inform that the appellant wanted to take their daughter to see the rabbit and bring her home. PW-13 identified the appellant. PW-13 affirmed having gone looking out for and in search of the appellant with his brother after his daughter 'N' did not return home. At about 11 P.M., they had succeeded in meeting the appellant at the Khyala Bus Stand and had inquired about his daughter 'N'. Appellant had then disseminated ignorance claiming that he had dropped 'N' near her house after handing over the rabbit to her. Agitated, PW-13 had confronted the appellant asserting that his daughter had not reached home. There was an exchange of caustic words and

quarrel ensued. Public gathered and at that time PW-13's brother Kameshwar made a call on number 100. Police reached the said location and had recorded PW-13's statement (Exhibit PW-5/B) resulting in registration of the FIR No. 59/2009. Thereafter, PW-13 along with the appellant-Deepak Kumar and the police officers had proceeded to the police station where the appellant was interrogated.

6. Rajeshwar Ram (PW-13) has deposed that on sustained interrogation, the appellant broke down and took the police team to a jungle near Chokhandi behind Park Hospital. Over there, dead body of his daughter 'N' was recovered on the pointing out of the appellant. He identified the site plan Exhibit PW-13/A which bears the thumb impression at point 'A', seizure memo of underwear of 'N', her slippers, polythene of mustard oil, brick etc., which were seized vide seizure memo Exhibit PW-13/B. PW-13 proved the disclosure statement made by the appellant marked Exhibit PW-13/D on which PW-13 had put his thumb impressions at points 'A' and 'B'. Nine photographs taken at the spot were identified by PW-13 and marked Exhibit PW-2/1 to 9. The said photographs were taken by Constable Raj Kumar (PW-2), who had also proved the positives as Exhibit PW-2/1 to 9 and the negatives as PW-2/10 to 18.

7. SI Ram Singh (PW-5) has deposed as being on emergency duty in the Police Station Khyala on 23rd March, 2009 from 8 P.M. to 8 A.M. DD entry No. 76B (Exhibit PW-5/A) regarding quarrel in front of Park Hospital was

marked to SI Ram Singh (PW-5). On reaching the Khyala Bus Stand, PW-5 had seen a crowd and had met the appellant and Rajeshwar Ram (PW-13). PW-5 had proceeded to record the statement of Rajeshwar Ram (PW-13) marked Exhibit PW-5/B, made endorsement marked Exhibit PW-5/C and the FIR in question was registered. In his cross-examination, PW-5 has averred that the appellant was wearing a pant and T-shirt and brother of Rajeshwar Ram (PW-13) was also present. Subsequently, other police officers had come to the spot. Some public persons were present but they did not join the investigation and had left the spot.

8. Constable Mahesh Kumar (PW-8) has testified that he was posted in Police Station Khyala in the intervening night of 23rd and 24th March, 2009 and being on night patrol duty, he had reached the spot near Park Hospital. Over there, he was handed over the *tehrir* and had proceeded to the police station to register the FIR. Rajeshwar Ram (PW-13) and an uncle of the victim and the appellant were present there and they had subsequently come to the police station. At this stage, we may record that the FIR No. 59/2009 was recorded at about 1.05 A.M. on 24th March, 2009 in the Police Station Khyala.

9. ASI Azad Singh (PW-9) was in-charge of the Mobile Crime Team, West District and had along with Constable Raj Kumar and HC Udham Singh, visited the jungle behind the Park Hospital from where the dead body was recovered. He had prepared an inspection report and handed over the

same to the IO. The crime scene report Exhibit PW-9/A affirms recovery of the dead body of the girl 'N' and the seizure memo of material/evidence found at the said spot.

10. On the question of the disclosure statement and recovery being admissible under Section 27 of the Evidence Act, we also have the testimony of Constable Sukhbir (PW-15). The said witness has deposed about his presence at the Khyala Bus Stand where the appellant was apprehended. PW-15 also deposed that Rajeshwar Ram (PW-13) and his brother Kameshwar were also present. All of them, including the appellant, came to the police station where the appellant was subjected to interrogation and disclosure statement (Exhibit PW-13/D) was recorded and signed by PW-15 at point 'C'. Thereafter, the appellant had taken the police team and PW-13 to Chokhandi behind Park Hospital where the dead body of 'N' was recovered. The dead body was identified by Rajeshwar Ram (PW-13) and Kameshwar. Crime team was called to the spot and photographs were taken. The appellant had identified the half brick which was used to give blows and injury to the victim. The half brick (Exhibit P-1) was seized with the seal of AKC and kept in a plastic bag. Underwear and slippers of the victim were seized and sealed with the seal of AKC. One big blood-stained stone was found, sealed and seized. Blood-stained earth and earth control samples were lifted from the spot vide seizure memo Exhibit PW-13/B. PW-15 had identified the said case properties in the court. In his cross-examination, PW-15 has stated that

they had reached at Chokhandi jungle at 6 A.M. and earlier, they had reached the bus stand at 2 A.M. We agree that there may be some variation and discrepancy with regard to the time but this is natural and normal and does not in any way negate the core and fundamental factual assertion and facts proved against the appellant.

11. Inspector Anil Kumar Chauhan's (PW-16) deposition is almost identical on the factum of his proceeding to the bus stand near Khyala after the FIR was registered and meeting Rajeshwar Ram (PW-13) and his brother Kameshwar and the appellant. SI Ram Singh (PW-5) had handed over custody of the appellant to Inspector Anil Kumar Chauhan (PW-15). The appellant was brought to the police station with Rajeshwar Ram (PW-13) and others. The appellant was arrested vide memo Exhibit PW-13/F which records the time of arrest as 5.15 A.M. on 24th March, 2009. The appellant was thoroughly interrogated. PW-16 had recorded the disclosure statement of the appellant marked Exhibit PW-13/D and thereafter, at the behest and instance of the appellant, dead body of the victim 'N' was recovered from Chokhandi jungle near Sant Nagar Extension. Rajeshwar Ram (PW-13) and Kameshwar had identified the said dead body as that of 'N'. Crime team was also called to the spot for investigation which took photographs of the spot. He identified the photographs marked Exhibit PW-2/1 to 9, articles and the evidence collected from the spot in the form of blood-stained half brick, mustard oil, underwear of the victim, one pair of *chappal* of the victim, one

big size blood-stained stone, earth control, etc. Inquest papers were presented to the autopsy surgeon for post-mortem. Dr. B.N. Mishra (PW-10), the autopsy doctor, had handed over to PW-16, four sealed parcels having clothes of the victim, vaginal swab, ligature material and blood in a gauze piece, which were seized vide seizure memo Exhibit PW-15/B. The appellant also was taken for medical examination. The doctor after examination had handed over a sealed parcel containing the pant, shirt, underwear, vest, blood samples, semen sample of the appellant along with sample seal, which were seized vide seizure memo Exhibit PW-15/A. The said samples were shown to PW-16 and identified by him in the court. In his cross-examination, PW-16 has accepted that he had reached the bus stand at about 2 P.M. and had made inquiries. They left for the police station after 20-30 minutes. The appellant and Rajeshwar Ram (PW-13) had remained at the police station between 3 A.M. to 5.15 P.M. and thereafter, they had left for the Chokhandi jungle where the dead body of 'N' was found.

12. The post-mortem on the dead body of the deceased, as noticed above, was conducted by Dr. B.N. Mishra (PW-10) and the post-mortem report Exhibit PW-10/A records that the eyes and mouth of the deceased were partly open and ENT bleeding was present. The face and the scalp hair were stained with blood and dirt. One lacerated wound 1.2x1 cm deep bone was present on the left side of the forehead, another lacerated wound 3 cm x 2 cm deep bone was present at the lateral angle of the left eye with crushed margins. There

were wounds on the upper and lower lips also with multiple indentation of teeth with reddish bruises. Ligature mark was present around the neck at the level of thyroid cartilage with horizontal placement measuring 24 cm in length and 0.2 cm in width. Other bruises with multiple haemorrhagic spot on the soft tissue were noticed. Left ear pinna was bruised and reddish brown in colour. On internal examination, it was observed that the deceased had suffered fractures on left parietal and temporal bone of the skull. There was massive extra-dural and sub-dural haemorrhage on the frontal left parietal temporal, vertex and occipital region of the brain. The cause of death, it was opined to be the combined effect of asphyxia and coma caused by strangulation and head injury by a blunt object. On the question of sexual assault prior to death, it was noticed that hymen was ruptured and blood clots were found to be present in the vaginal canal. Exhibit PW-10/A records that posterior forchette was ruptured upto anus. Vaginal mucosa was present, congested lacerated hymen was ruptured. The said doctor also prepared a vaginal swab for forensic examination. As per the FSL report marked Exhibits PW-17/A, 17/B and 14/A, human semen was detected on the vaginal swab Exhibit P-15. However, the blood group could not be ascertained as there was no reaction. The FSL report, therefore, confirms that the deceased 'N' had been subjected to forceful sexual assault. The report also proves blood was found on several exhibits, including the brick, slipper, stone piece, etc. Blood was also detected on the underwear and the vest which the

appellant was wearing. Noticeably, the appellant was also medically examined by Dr. Alok Kumar (PW-11) vide MLC Exhibit PW-11/A at about 1.40 P.M. on 24th March, 2009. The said MLC records presence of superficial injuries and bruises, which were present on the body of the appellant.

13. At this stage, we would like to also refer to the statement of the appellant under Section 313 Cr.P.C. and notice the answers given:-

“Q.1. It is in further evidence against you that you were working in a factory where Rajeshwari was working. N* was weak in studies. You told Rajeshwari that you are 10th pass and you can teach N* and you also told Rajeshwari that you can teach N* without fees. Thereafter you started visiting the house as tutor of N*. What you have to say?

A. It is correct.

Q.2. It is in evidence against you that on N* aged 8 yrs. was the daughter of Smt. Rajeshwari Devi w/o Rajeshwar Ram R/o RZ 123, Khayala. What you have to say?

A. It is correct that N* was the daughter of Ms. Rajeshwari Devi but I do not know her age.

Q-3. It is in further evidence against you that on 23.03.2009 you have reached at the house of Rajeshwari Devi. You told Rajeshwari that you have brought a rabbit from village and you also told that you wish to give rabbit to N* and you have told this version to N*. You had also told to Rajeshwari you had to go to village (native place) as your brother had expired. You also submitted that due to this reason you want to give the rabbit to N*. You repeatedly requested Rajeshwari to send Neha with you but Rajeshwari was not agreed. You told Rajeshwari that you will take N* with you and you will also come back with ‘N’. Rajeshwari allowed N* to go with you. It was around 6.00-6.30pm. What you have to say?

A. It is correct that I had told Rajeshwari that I had rabbit for N*. Rest of the incriminating evidence is wrong as I had not told that my brother had expired or that I had to go to my native place nor had requested Rajeshwari to send her daughter with me. N* had not gone with me on my request. N* had accompanied me on her own, without my request and without her mother sending her with me.

Q-4. It is in further evidence against you that thereafter Rajeshwari Devi waited for N* but N* did not return. At the time when N* left house his father was in the house but he was sleeping. At about 7.00pm Rajeshwari Devi informed her husband about going of 'N' with you. Rajeshwar Ram father of N* left house in the search of N* after informing her wife that he is going in the search of N*. What you have to say?

A. I do not know. I had left N* at Shani Bazar during the day time on 23.03.09. I do not know about the rest.

XXXXXX

Q-8. It is in further evidence against you that in the night time you lead the police party in the jungle situated near Chokhandi behind Park Hospital and dead body of N* was recovered on your pointing out. Police had prepared the site plan Ex.PW13/A. Photographer was called at the spot. One polythene of mustard oil, stone/brick was also recovered on your pointing out. Same were converted into sealed pulenda and seized vide seizure memo Ex.pw13/B. Seizure memo of dead body is Ex.pw13/C. A kachhi of N*, slipper of N*, a dori (which was using in the commission of offence) were also recovered by the police and same were also converted into sealed pulenda and seized. What you have to say?

A. It is correct that I was taken to the spot from where the body of N* was recovered but I did not take the police to the spot as I have neither raped nor murdered 'N'. I do not about the documents."

(N* is the deceased victim, name withheld)

14. Appellant has also accepted that he was arrested vide arrest memo Exhibit PW-13/F and he was personally searched vide memo Exhibit PW-13/G. He affirmed as correct that he was medically examined to ascertain his age. In response to question No. 28, the appellant had stated as under:-

“Q. 28. Do you want to say anything else?

A. I have not committed any offence. I have neither raped nor murdered N*. I am not aware about any of the documents which have been prepared during investigation against me. I am innocent and have been falsely implicated in this case by the police. Hence, I may be acquitted.”

(N* is the deceased victim, name withheld)

15. With the aforesaid discussion and after thoroughly examining the records, we are of the view that there is no error in the impugned judgment convicting the appellant for the aforesaid offences.

16. On the question of punishment/sentence also, we do not find any reason to substantially interfere with the order of sentence noticing the nature of the offence and the relationship between the appellant and the victim. However, it is pointed out to us that the appellant was about 20 years of age and in fact, had moved an application claiming that he was a juvenile, but the said plea stands rejected by order dated 14th December, 2012. Keeping in view the aforesaid facts, it is directed that the prayer for remission would not be considered unless the appellant has suffered actual incarceration for a period of 25 years. We are making this observation in view of the finding of the trial

court in paragraph 27 of the order on sentence dated 8th April, 2010 recording that transportation for life would be treated as transportation for imprisonment for the whole of the remaining period of the convicted persons' natural life. We also direct the State/authorities to consider payment of compensation in terms of the scheme and as per statutory mandate of Section 357A Cr.P.C. The compensation will be paid to the mother of the victim.

In terms of the order passed above, criminal appeal is disposed of.

(SANJIV KHANNA)
JUDGE

(R.K. GAUBA)
JUDGE

SEPTEMBER 08, 2015
VKR