Sanjay Kumar Vs. State

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Court : Delhi

Decided On : Feb-07-2014

Judge : Kailash Gambhir

Appellant : Sanjay Kumar

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment delivered on: February 07, 2014 + CRL.A. 988/2011 SANJAY KUMAR Through: ..... Appellant Ms. Rakhi Dubey, Advocate Versus STATE Through ..... Respondent Ms. Richa Kapoor, Additional Public Prosecutor for the State CORAM: HON'BLE MR. JUSTICE KAILASH GAMBHIR HON'BLE MS. JUSTICE SUNITA GUPTA

JUDGMENT
KAILASH GAMBHIR, J1 By this appeal filed under Section 374 of the Code of Criminal Procedure 1973 (hereinafter referred to as Cr.P.C), the appellant herein seeks to challenge the impugned judgment and order on sentence dated 25.11.2010 and 7.12.2010, respectively, whereby the learned Additional Sessions Judge convicted the appellant for committing an offence punishable under Section 302 Indian Penal Code, 1860 (hereinafter referred to as IPC) and sentenced him to undergo imprisonment for life together with payment of fine of Rs. 10,000/- and in default thereof to further undergo simple imprisonment for 6 months.

2. The case in hand unfolds one of the most horrific stories wherein a minor girl who had not even seen six summers of her life, became victim of the lustful desire of her neighbour. The deceased went to a vacant plot to play with her friends and brother, where the accused lured the minor girl to accompany him, by offering to get her a samosa. The innocent girl being oblivious of the heinous and lustful intentions of the accused, readily agreed and after informing her brother, went with the accused. It was this vulnerable situation that encouraged the accused, who was already having an evil eye on her, to harm and destroy the innocent life. The accused in order to fulfil his momentary lust raped the innocent soul and the inhumanity of his conduct was further aggravated when in order to hide his sinful act, he brutally murdered her. It is inconceivable that for the gratification of ones carnal desire, a human can turn into a devil, who does not even spare an innocent child of such a tender age. It is upsetting that a human life has zilch value for a few.

3. The facts of the case in brief are as under:

That on 26.10.2007, information was received regarding a dead body lying near Oberoi farm at Police Station Kapashera, Delhi which was recorded as DD No.24/A. SI Munshi was assigned the said DD on which he along with Constable Naresh and constable Prem, proceeded towards the spot and found Bamboo Singh with his son Vikram at the spot. Meanwhile SI A.K Singh and Inspector Amrit Kumar then SHO also arrived at the spot. The dead body was identified by Bamboo Singh as Babli Kumari, his daughter, aged about seven years. Injuries on the body of the victim i.e. forehead, head, face and private parts were visible. Statement of Bamboo Singh was recorded wherein he complained that his daughter went missing since previous evening after she had gone to play with her brother Vikram and other children near his house. He clarified that though he had been searching for the girl at his own level but had also lodged a missing report at PS Kapashera on 26.10.2007. Lastly, he stated that he was informed by his son Vikram that on 25.10.2007 at about 07:00 pm Babli was taken by Sanjay on the pretext of giving her a samosa. On seeing the dead body, Bamboo Kumar expressed suspicion that Babli has been murdered by accused Sanjay.

4. To prove its case the prosecution in all examined 19 witnesses. After the conclusion of the prosecution evidence, the accused was examined under Section 313 Cr.P.C. and in his statement he admitted the fact that he was living in a room, behind the room of the complainant, Bamboo Kumar Singh. He also admitted that Bamboo Kumar Singh use to live in a room in the house of Chetram near Ice Factory, Village Kapashera, New Delhi with his family including his six years old daughter, Babli (deceased). He also admitted that the deceased, Babli was playing with the children including her brother Vikram in a vacant plot behind her house on the evening of 25.10.2007 at about 7.00 p.m. He also admitted that on 26.10.2007 at about 4.15 p.m., some children of the locality informed the father of the deceased that a dead body of one female child was lying in a vacant plot No.8/26/1, near Oberoi Farm, Kapashera, New Delhi.

5. Rest of the incriminating evidence as were put to him, were denied by him. In fact he pleaded his innocence and his false implication by the complainant at the instance of the landlord. He also categorically stated that the entire evidence against him is false and fabricated. He also claimed that in fact he was helping the complainant in searching his daughter the entire night. He also stated that Yograj, son of the landlord of Bamboo Kumar Singh had gone to the said plot and after his return Yograj started beating him. The accused, however, did not adduce any evidence in his defence.

6. Addressing arguments on behalf of the appellant Ms. Rakhi Dubey, Advocate vehemently contended that the appellant has been falsely implicated in the said case without their being any incriminating evidence brought on record to prove his involvement in the commission of the said offence beyond reasonable doubt. Counsel further contended that the name of the appellant was roped in by the prosecution after the dead body of the girl child was recovered from a vacant plot and before that even the complainant never named appellant in the kidnapping of his daughter. Contention raised by the counsel for the appellant was that DD No.24A was recorded by the police at 04.48 p.m., through which the police got information about the dead body of a girl child lying in a vacant plot. The police started investigation at around 5.30 p.m. At 6.15 p.m. the statement of the father of the deceased (PW10) was endorsed for recording an FIR and consequently the

FIR was registered at 6.30 p.m. Counsel for the appellant submitted that the father of the deceased for the first time introduced the name of the appellant in his rukka statement wherein he stated that his son Vikram had informed him on 26.10.2007 at about 4.00 a.m. that the appellant took away the deceased on the pretext of offering her a samosa. Counsel also submitted that no missing report was lodged by the father of the deceased. Counsel further submitted that it is highly unnatural that a father would not ask his son about his missing daughter although he kept searching for her desperately till the said fact was disclosed to him. Counsel further argued that the father of the deceased was informed by his son at 4.00 a.m., however, no steps were taken by him to inform the police about the involvement of the accused Sanjay behind the kidnapping of his daughter. Counsel also argued that the story of PW7 Vikram having fever and going off to sleep, is hard to be believed as no father would wait for his child to wake up, when both the children were playing together sleep when his other child got missing and untraceable.

7. Counsel also argued that the police could easily arrest the appellant from his house and this fact would clearly show that the appellant was easily accessible and had he committed such ghastly crime, then he would have certainly fled away. Counsel also submitted that the police recovered the blood stained shirt, blood stained pant and underwear with white stains from the room of the appellant in pursuance of his disclosure statement, whereas the appellant in his disclosure statement stated that he can get the underwear of the deceased recovered. Counsel also argued that even the disclosure story is not in line with the post-mortem report, as in his disclosure statement the accused stated that he raped the deceased and then murdered her, but as per the post-mortem report the deceased was first murdered and thereafter raped and the vaginal injuries were not ante mortem.

8. Another contention raised by the counsel for the appellant was that as per the post-mortem report, the deceased was badly injured with various lacerated wounds over her body. However, the prosecution failed to prove that the blood, which was found on the recovered clothes of the appellant was that of the deceased, as the blood found on the clothes of the deceased and that of the

appellant, was of blood group B, which is the blood group of the appellant and not of the deceased. Counsel also argued that as per the CFSL report there has no reaction of blood group on the semen found on the underwear and the vaginal swab.

9. Counsel also argued that PW7 Vikram was a child of 11 years and his statement was not recorded before the magistrate, in order to rule out the possibility of any tutoring. Counsel also argued that even at the time of recording of his statement before the Court, the learned Trial Court failed to take any precaution of ascertaining whether the child fully understands the duty of speaking truth before the court of law. Counsel thus submitted that it would be totally unsafe to rely on the testimony of PW7 being a witness for last seen evidence. In support of her argument counsel placed reliance on the judgment of State v. Rahul, reported in 2013 IV AD (Delhi) 745. Another contention raised by the counsel for the appellant was that the abrasion on the penis of the appellant cannot be used against him as an incriminating evidence, as it was not put to the accused for explanation at the time of recording his statement under Section 313 Cr.P.C. Based on these submissions counsel for the appellant strongly pleaded for the acquittal of the appellant.

10. Refuting the said submissions of the counsel for the appellant Ms. Richa Kapoor, learned APP for the State vociferously submitted that the prosecution has fully succeeded to prove the case against the appellant beyond any shadow of doubt and the learned Trial Court has discussed each and every aspect of the case. Counsel also submitted that PW7, Vikram is a witness of last seen evidence, as he had seen the accused taking the deceased on the evening of 25.10.2007 after alluring her to buy her a samosa. Counsel further submitted that the appellant has not taken any defence that there was any kind of motive either on the part of the child Vikram, his father or the landlord PW-2 to falsely implicate the appellant in the said case. Counsel also submitted that the appellant in his statement recorded under Section 313 Cr.P.C. admitted his presence on the spot at the relevant time and, therefore, he cannot take shelter under the bogus plea of false implication. Counsel also argued that the complicity of the appellant is also proved with the help of medical and scientific evidence proved on record by the

prosecution. Counsel also argued that the appellant has failed to offer any explanation of the injury found on his penis, as per the MLC report proved on record as Exhibit PW-8/A and in the absence of any such explanation, there cannot arise any doubt about an involvement of the appellant in the commission of the said deadly crime. Based on these submissions counsel for the respondent strongly urged for upholding the impugned judgment and order on sentence passed by the learned Trial Court.

11. We have heard learned counsel for the parties at considerable length and given our thoughtful consideration to the arguments advanced by the counsel for the parties. We have also perused the records of the learned Trial Court.

12. The case in hand is based on circumstantial evidence and the principles to base a conviction of an accused on circumstantial evidence are well settled. In the matter of Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC116 the Honble Supreme Court has laid down five tests to be satisfied in a case based on circumstantial evidence:

13. (1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. (2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, other hypothesis except that the accused is guilty. (3) The circumstances should be of a conclusive nature and tendency. (4) They should exclude every possible hypothesis except the one to be proved, and (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

In the present case, a girl child of 6 years went missing on the evening of 25th October, 2007. She had gone to play with other children alongwith her brother Vikram to a vacant plot at the back of her house. The girl did not return till 09:00 p.m. and the father of the deceased, Bamboo Kumar (PW-10) desperately started searching for her. As per PW-10 he lodged a missing report of his daughter, with the local Police Station on 26th October 2014. At 04:15 pm when PW-10 was at his house, some children informed him that the dead body of a girl was lying at a

vacant plot near Oberoi Farm, Kapashera, Delhi. On hearing such shocking news, he reached at the said plot and found his daughter lying dead with several injuries on her face, forehead and head with blood spread all over. He immediately revealed this fact to his landlord Yograj @ Kalu who in turn informed the police. PW-10 in his statement categorically stated that during the day hours he was informed by his son, Vikram that on the last evening he was told by his sister, Babli that she was leaving with accused Sanjay to eat samosa and thereafter, Vikram had himself seen Sanjay accompanying Babli. In his very first statement, PW-10 raised a suspicion on the accused Sanjay behind such brutal murder of his daughter. On the said statement of complainant - Bamboo Kumar (PW-10), FIR was registered. The spot was inspected by the crime team, one brick, one shirt and some garbage; all stained with blood were found and seized by the police. The police also found that the blood was oozing out of the private part of the deceased girl, which suggested that the deceased girl was even raped. The accused was arrested on the same night while he was coming out from his house. In his disclosure statement, he got recovered a shirt, a pant and an underwear worn by him at the time of commission of the crime. The body of the deceased was sent to Deen Dayal Upadhyay Hospital for post mortem while the accused was medically examined at Safdarjang Hospital.

14. As per the post mortem report proved on record as Ex.PW-11/A, the cause of the death of the deceased as opined by the doctor was due to combined effect of throttling (manual), smothering and head injury caused by a forceful, blunt impact using weapon like brick or stones etc. As per the MLC, the manner of death was homicidal and the intercourse was performed after the death of the deceased, causing lacerations, bruises on vaginal wall, collection of haematoma in vaginal canal and rupturing of cervix of uterus. The time of death opined in the post mortem report was 40-42 hours since death. As per the MLC of the appellant proved on record as Ex.PW-8/A and PW-10/DA, there was nothing to suggest that the accused was not capable of performing sexual intercourse. On local examination of external genitalia of the accused at his glance penis, abrasion of 0.6 x 0.4 cm was found.

15. As per the biological and serological analysis of the brick, shirt, garbage material, blood stained clothes of both the accused and deceased and blood samples of both the accused and the deceased, the expert concluded that the blood present on the shirt, pant of the accused, frock, inner of the deceased and on the shirt found on the spot was of blood group B. Semen stains were also detected on the underwear of the accused as well as on the vaginal swab of the deceased.

16. As already stated above, there is no direct evidence as to who committed the said barbaric and horrendous crime. The only question which is most fundamental one is whether the prosecution succeeded in proving with cogent and clinching evidence of all the links in the chain of circumstantial evidence, to drive home the guilt of the accused totally inconsistent with the plea of his innocence.

17. Dealing with the first contention raised by the counsel for the appellant that the father of the deceased in his court statement stated that his son Vikram informed him at about 4.00 a.m. on 26.10.2007 that the appellant took away the deceased on the pretext of offering her a samosa, then why no steps were taken by him to inform the police about the involvement of the accused Sanjay behind the kidnapping of his daughter. Counsel also argued that the story of PW-7, Vikram having fever and going off to sleep, is hard to be believed, as no father would wait for his one child to sleep when his other child was missing and untraceable. Crl.A. No.988/2011 Page 13 of 23 Counsel argued that no missing report was lodged by the father of the complainant and it is also highly unnatural that a father would not ask his son about his missing daughter although he kept searching for her desperately till he was informed about the said incident.

18. In the present case, PW-10 testified in his court deposition that the accused was going with the deceased on the evening of 25th October 2007 as was told to him by his son Vikram and the said testimony of PW-10 remained unchallenged and unrebutted. PW-10 in his cross-examination clarified as to why he did not wake up his son because his son Vikram was suffering from fever and he went to sleep when he returned home, after playing at the vacant plot along with other children. The time of 4.00 a.m. for giving such information by his son Vikram has

been rightly held to be due to typographical error by the learned Trial Court and possibly this time could be 4.00 p.m. or some other time on 26th October 2007. Nevertheless, the time, as to when he was told by Vikram, about the said fact of accused in the company of deceased is not of much significance as PW-10, in his very first statement, disclosed to the police that it was during day hours that his son told him that appellant was accompanying the deceased, Babli for offering her samosa. We therefore do not find any force in the contention raised by the counsel for the appellant with regard to the said time of 4.00 a.m., stated by PW-10 in his cross-examination. Further as per the prosecution, at 04:15 p.m., PW-10 was informed by some children of their locality that the dead body of a girl was lying in Oberoi Farms, Kapashera and thereafter PW-10 immediately informed about the said incident to the police and thus DD No.24A was recorded at 04:48 p.m. Moreover we also cannot lose sight of the fact that the defence has not attributed any motive against PW-10 to falsely implicate him in the said case. It is an undeniable fact that there was no enmity or any kind of hostility between the accused and the complainant, as both of them were tenants under the common landlord and were residing as neighbours.

19. The next contention raised by the counsel for the petitioner was that the police could easily arrest the appellant from his house and this fact would clearly show that the appellant was easily accessible and had he committed such ghastly crime then he would have certainly fled away. In the matter of Baboo and others vs. State of Madhya Pradesh reported in AIR 1994 SC171, the Honble Supreme Court held that the circumstance that the accused did not abscond cannot be stretched to the extent of rejecting the evidence of other witnesses. Thus we are not persuaded by this contention of the counsel for the appellant, as merely because the accused got apprehended from his house, the evidence indicating his guilt cannot be put into cold storage and it cannot be concluded that the accused has not committed the said offence.

20. The next contention raised by the counsel for the appellant was that the police recovered the blood stained shirt, blood stained pant and underwear with white stains from the room of the appellant in pursuance of his disclosure statement, whereas the appellant in his disclosure statement stated that he can get the

underwear of the deceased recovered. This argument of the counsel is worth outright rejection as it is clearly stated by the accused in his disclosure statement that he could get the recovery of his underwear as well as the underwear of the deceased done. Thus merely because the underwear of the deceased could not be recovered, it cannot be said that the recovery of the underwear of accused is not upon his information.

21. The next contention raised by the counsel for the appellant was that when the police found a shirt from the place of incident then how another male shirt could be recovered from the room of the accused. Although the shirt which was recovered from the spot was also found to be carrying the same blood group B, but on perusal of the endorsement of the police on the rukka statement, there is reference to the presence of many torn off clothes near the garbage, out of which one blood stained shirt was also found. We therefore cannot attach any significance to the recovery of a blood stained shirt from the spot, it being a part of many other torn old clothes, to raise suspicion on the prosecution case, which otherwise finds corroboration from all other corners.

22. We also find no force in the contention raised by the counsel for the appellant, that in the disclosure statement made by the appellant, he confirmed, that he first raped the victim and then murdered her whereas the post mortem report states that the deceased was murdered first and thereafter raped. In the present case no charge was framed against the appellant under Section 376 IPC and therefore, no evidence to this effect was led by the parties and in this background, the question whether the deceased was raped first or raped thereafter becomes totally irrelevant.

23. The next contention raised by the counsel for the appellant was that the blood, as on the clothes of the deceased and that of the appellant t was of B group, i.e. the blood group of appellant and not of the deceased although the deceased had suffered grievous injuries. As per the FSL report, the blood found on the frock and the inner of the deceased i.e. Exhibit 8a and 8b was blood group B and also the blood found on the shirt and trouser of the accused i.e. Exhibit 4a and 4b was of blood group B. Further the injuries were substantially suffered by the deceased

only and the blood on all these exhibits was certainly of deceased and not of appellant. Thus it appears that the blood group of the deceased was also of B group and therefore the appellant cannot be allowed to take advantage of this fact by contending that the blood found on all these exhibits is of accused and not deceased. We therefore do not find any merit in the argument of the counsel for the appellant.

24. Dealing with the next contention raised by the Counsel for the appellant that PW-7Vikram was a child below 11 years of age, therefore the learned magistrate was required to take due precaution to test his level of understanding the entire situation and speaking of truth, before the court and also to rule out all the possibilities of his being a tutored child. This contention raised by the counsel for the appellant had some force and therefore it is essential for this court to examine the credibility of this witness properly. It is a settled legal position under section 118 Indian Evidence Act, 1872, the evidence of a minor cannot be rejected solely on the ground that he is a minor and a minor as also a competent witness like any other witness if he understands the nature of question put to him and is in a position to give rational answers to it. In the matter of Dattu Ramrao Sakhare v. State of Maharashtra reported in (1997) 5 SCC341it was held as follows :

A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.

25. In the present case, PW-7 at time of his court deposition clearly stated that he had personally seen his sister Babli going with the accused person Sanjay to eat samosa at 7 p.m. He further deposed that he disclosed this fact to his father on the next day in the morning. PW-7 was thus a witness of last seen evidence. The

defence did not put any question to him to dispute the presence of the accused with Babli on the said evening of 25th October 2007, thus the statement of this witness remained uncontroverted. Further the accused in his statement recorded under Section 313 of Cr. P.C. admitted the fact that the deceased Babli was playing with other children including her brother Vikram in a vacant plot behind his plot. The cross-examination of PW-7 if read in conjunction with the statement recorded under Section 313 of Cr. P.C., unequivocally suggests that not only the accused was aware of the fact that the deceased Babli was playing at the vacant plot behind his house alongwith her brother Vikram but he was also present in the said vacant plot. The evidence of this witness also find corroboration from the Post mortem report of the deceased according to which the death of the deceased would have occurred at around 6:00 to 8:00 p.m. on 25.10.2007 i.e. around the time when this witness saw the accused accompanying the deceased.

26. In this background, even though the magistrate did not record his opinion that if the child understands the duty of speaking truth, yet considering the fact that there is nothing on record to suggest that at any stage the said child witness had shown any kind of nervousness or hesitation in giving evidence before the court of law and that his evidence is fully supported by other evidences, the statement of PW-7 cannot be discarded as a whole.

27. We further do not find any force in the contention raised by the learned counsel for the appellant that the evidence of abrasion found on the penis of the accused was not put to the appellant while recording his statement under Section 313 of Cr. P.C. as both the said MLCs Ex.PW8/A and Forensic ReportEx.PW-10/DA were put to him through question No.16 and in response, the accused admitted the same to be correct.

28. In view of all these circumstances, we have no manner of doubt that the prosecution has satisfactorily and firmly established the following evidence on record:I. The evidence of the accused being last seen with the deceased, given by PW-7 well corroborated by the testimony of PW-10 as well as the post mortem report as stated above. II. The recoveries made at the instance of accused supported by the evidence of Yograj (PW-2) who was a witness to the recovery of

pant, shirt and underwear from the room of the appellant. III. The FSL report proved on record as Ex.PW-18/A fully establishing the fact that the blood found on the shirt and pant of the accused match with the blood detected on the clothes of the deceased, i.e. baby frock and inner wear and also that the human semen were also detected both on the underwear as well as the vaginal swab of the deceased. IV. The MLC of the accused clearly showing that the glance penis of the accused was found reddened under surface and there was a presence of abrasion of 0.6 x 0.4 cm. V. The failure of the accused during his examination under section 313 Cr.P.C. to give any explanation of all these injuries. With this local injury on the glance penis of the appellant of which no explanation came forth from the accused either in his defence or while recording his statement under Section 313 of Cr. P.C., there can arise no doubt on the complicity of the appellant in the commission of the said brutal crime.

29. Having succeeded to prove all the aforesaid circumstances, there does not remain even an iota of the doubt that the present accused was involved in the murder of minor girl of six years.

30. In the light of the above discussion, we find ourself in complete agreement with the well reasoned judgment passed by the learned Trial Court, thereby convicting the appellant for committing an offence punishable under Section 302 IPC. We accordingly upheld the impugned judgment and order on sentence dated 25th November 2010 and 7th December 2010, respectively passed by the learned Trial Court.

31. Finding no merit in the appeal filed by the appellant, the same is accordingly dismissed.

32. A copy of this order be sent to Jail Superintendant for information. KAILASH GAMBHIR, J.

SUNITA GUPTA, J.

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