

Santosh Kumar and Etc. Vs. State of U.P.

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Court : Allahabad

Decided On : Aug-29-2001

Reported in : 2002CriLJ301

Judge : J.C. Gupta and ;U.S. Tripathi, JJ.

Acts : [Evidence Act, 1872](#) - Sections 6, 32, 32(1), 114A and 134; [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302, 306, 326, 336, 363, 376, 376(2), 427, 452, 504 and 506

Appeal No. : Criminal Appeal Nos. 2731, 2771 and 3006 of 1999

Appellant : Santosh Kumar and Etc.

Respondent : State of U.P.

Advocate for Def. : Shivaji Mishra, Adv. and ;Dy. G.A.

Advocate for Pet/Ap. : A.D. Giri, ;Shashank Shekhar, ;J.S. Sengar and ;D.R. Chaudhary, Adv.

Judgement :

U.S. Tripathi, J.

1. The above three appeals have been preferred against the judgment and order dated 27-10-1999 passed by Sri Indra Bahadur Singh, the learned 3rd Additional

Sessions Judge, Varanasi, in Sessions Trial No. 161 of 1996 convicting the appellants Manoj Kumar Gupta and Santosh Kumar under Sections 376 and 302 read with Section 34, I.P.C. and sentencing them to imprisonment for life under Section 376, I.P.C. and to death penalty under Section 302 read with Section 34, I.P.C. and convicting appellants Kanhaiya Lal and Rajesh alias Raju under Section 302 read with Section 34, I.P.C. and sentencing each of them to imprisonment for life. The learned Additional Sessions Judge has also made references for confirmation of death sentence awarded to the appellants Santosh Kumar and Manoj Kumar Gupta.

2. The prosecution story, briefly stated, was as under:--

Jeo Bodh Lal Srivastava (P.W. 1) was residing in mohalla Rampur, P. S. Ramnagar, district Varanasi along with his wife Smt. Shashi Kala (P.W. 2) daughter Km. Anita alias Pinki deceased aged about 14 years, another daughter Km. Aruna (11) and sons Ashwani Kumar, Akhilesh and Ashish. Jeo Bodh Lal (P.W. 1) was serving in Irrigation Department at Varanasi and used to go to his office daily in the morning from his house. Appellants Santosh Kumar, Rajesh alias Raju and Kanhaiya are real brothers and were also residing in said mohalla. The appellant Manoj Kumar Gupta was also resident of said mohalla. There was a lane in mohalla Rampur passing from north to south. The house of Jeo Bodh Lal (P.W. 1) was situated towards east of the lane while that of Manoj Kumar Gupta was situated towards west of the lane in its southern end. On southern side of the lane there was house of Chamroo Yadav who was doing business of selling milk and was known as Chamaroo Sardar.

3. On the evening of 23-1-1996 at about 6.00 p.m. Smt. Shashi Kala (PW 2) wife of Jeo Bodh Lal (PW 1) as usual had gone to the house of Chamroo Yadav for bringing milk. When she did not return in due time her daughter Km. Anita deceased went to see her. Smt. Shashi Kala (PW 2) returned to her house at about 6.30 and found that her daughter Km. Anita and son Aswani Kumar were not at the house. After 10 minutes Km. Anita came to her house weeping. Smt. Shashi Kala (PW 2) enquired from her as to what happened, then she told that when she (Smt. Shashi Kala) did not return from the house of Chamaroo Sardar

she went to see her and when she reached in front of the house of Murlidhar Gupta (father of appellant Manoj Kumar Gupta), Manoj Kumar Gupta and Santosh Kumar appellants were standing and they dragged her inside a room where they committed rape on her and threatened her that in case she disclosed the incident to any body they would kill her. Telling it she started weeping Smt. Shashi Kala (PW 2) went to the house of appellant Santosh Kumar and thereafter to the house of Manoj and complained about it. After some time of returning her to her house, appellants Santosh Kumar, Rajesh, Kanhaiya and Manoj Kumar came to her house and broke open the boundary wall and made the gate fall down. They entered into the house and damaged ventilator and other household property. When Smt. Shashi Kala (PW 2) objected then they dragged and pushed her into veranda. Km. Anita also came in the courtyard. The appellant Santosh Kumar and Manoj Kumar Gupta caught hold her hand and dragged her inside the room towards east in the courtyard. Inside the said room Kanhaiya Lal sprinkled kerosene oil on Km. Anita and on the exhortation of Manoj Kumar and Santosh Kumar, Rajesh set fire on her with a match stick. When Smt. Shashi Kala (PW 2) tried to save her, she was again dragged by Manoj Kumar Gupta and Santosh Kumar appellants. She raised alarm but none could come to save Km. Anita due to fear of appellants. Thereafter the appellant went away. Smt. Shashi Kala (PW 2) then reached to Km. Anita and found her drying with pain. She tried to extinguish fire with the help of curtain but Km. Anita was completely burnt and was demanding water.

4. While Smt. Shashi Kala (PW 2) was arranging to take Anita deceased to hospital, her husband Jeo Bodh Lal (PW 1) came to his house at about 7.30 p.m. and Km. Anita deceased was taken to Lal Bahadur Shastri Hospital Ramnagar in a tempo where the Doctor advised to take her to SSPG Hospital, Kabir Chaura, Varanasi. She was taken to SSPG Hospital, Kabir Chaura, Varanasi where she was medically examined by Dr. Ved Prakash Jaiswal (PW 7) at 10.20 p.m. who found superficial to 100% deep burns on whole of body. The patient was admitted. Her general condition was very poor and police was informed and Magistrate was called for recording dying declaration. Ultimately Km. Anita died in the Hospital in the same night at 00.30 hrs.

5. Leaving the dead body of Km. Anita deceased in the hospital, Jeo Bodh Lal,(PW 1) returned to his house. He prepared report Ext. Ka-1 and lodged the same at P.S. Ramnagar at 6.15 a.m. on 24-1-1996. The chik F.I.R. Ext. Kal3 was prepared by Head Constable Nand Kishore Singh (PW 8) who made an endorsement of the same at G.D. report Ext. Ka-14 and registered a case against the appellants under Section 376, 302, 452, 336, 504 and 427, I.P.C.

6. The investigation of the case was previously taken up by Radhey Shyam Upadhyaya (PW 6) who interrogated Jeo Bodh Lal (PW 1) at the Police Station and thereafter, came to the spot where he interrogated Ashwani Kumar and Km. Annu Devi son and daughter of Jeo Bodh Lal (PW 1) and other witnesses. On the basis of the above statements of the witnesses he altered the case under Sections 306, 352, 504, and 427, I.P.C. Thereafter, he came to SSPG Hospital, Kabir Chaura, Varanansi where he conducted inquest of the dead body of Km. Anita deceased and prepared inquest report (Ext, Ka-5) and other relevant papers. He sealed the dead body and sent the same for post mortem through Constable Ram Dular Ram (PW 5) and Ramayan Yadav.

7. The autopsy on the dead body of Km. Anita, deceased was conducted on 25-1-1996 at 4.00 a.m. by Dr. S.K. Rai (PW 4) Body had evidence of blackening on surface with kerosine oil smell. The remnant of semi burnt clothing were found on body at lower half of the body trunk.

8. Following ante mortem injury was found on her person:-- Dermo, epidermal burn all over the body, body surface vericle found charred at most of the places including the charring of scalp hairs. Burn was mostly dermal deep all over body. Cause of death was due to shock and heamorrhage as a result of extensive burn injuries. The Doctor prepared post mortem report Ext. Ka-4.

9. The I.O. Sri Radhey Shyam Upadhyaya (PW 6) apprehended appellant Manoj Kumar Gupta on 25-1-1996 and Rajesh alias Raju and Santosh Kumar on 27-1-1996. He interrogated Smt. Shashi Kala (PW 2) on 28-1-1996 and other witnesses on 8-2-1996. Thereafter, the investigation was transferred to S.I.S. by the order of S.S.P., Varanasi on the complaint made by Jeo Bodh Lal (PW 1).

10. Subsequently, investigation was conducted by Sri Sree Nath Pandey (PW 3), who reached the spot on 17-2-1996 and interrogated Jeo Bodh (PW 1), Smt. Shashi Kala (PW 2), Ashwani Kumar and Km. Annu. He inspected the place of occurrence and prepared site plan Ext. Ka-2. He also interrogated other witnesses and on the basis of evidence collected during investigation altered the case under Sections 376, 302, 452, 336, 504, 506, and 427, I.P.C. He interrogated Rajesh alias Raju, Santosh Kumar, Kanhaiya Lal and Manoj Kumar Gupta on 20-2-1996. On 1-3-1996 he interrogated Chamroo Yadav and on completion of investigation submitted charge sheet under Sections 376, 452, 302, 336, 504, 506 and 427, I.P.C. against all the appellants.

11. Cognizance of case was taken by C.J.M. Varanasi who committed the case to the Court of Session.

12. All the appellants were charged with the offences punishable under Sections 504, 452, 336/34 and 302/34, I.P.C. Manoj Kumar and Santosh Kumar were further charged with the offence punishable under Section 376, I.P.C. They pleaded not guilty and contended that they were falsely implicated in the case. The defence version as it appears from suggestion given to prosecution witnesses and defence evidence was that Km. Anita deceased was aged about 16 years at the time of occurrence, Her brother Aswani Kumar seeing her talking with Santosh Kumar in the lane suspected her character and quarrelled with appellant Santosh Kumar and also indulged in Marpeet with him. He also slapped Anita deceased. Feeling herself disgusted Km. Anita deceased came to her house and committed suicide inside a room by pouring kerosene oil and setting fire to herself.

13. The prosecution in support of its case examined Jeo Bodh Lal (PW 1) and Smt. Shashi Kala (PW 2) as witnessess of facts besides Sree Nath Pandey, I.O. (PW 3), Dr. S. K. Rai (PW 4), Constable Ram Dular (PW 5), S.I. Radhey Shyam Upadhayaya, I.O. (PW 6), Dr. Ved Prakash Jaiswal (PW 7), Nand Kishore Singh, Head Constable (PW 8) and Ram Chandra Ram, peon of Radha Kishori Balika Intermediate College, Varanasi (PW 9).

14. The appellants examined Mahmudul Hasan (DW 1) and Sayed Irtaza Hussain Taz, Hand Writing Expert (DW 2).

15. The learned Additional Sessions Judge on considering the evidence of the prosecution and that of defence held that offences punishable under Sections 376 and 302 read with Section 34, IPC had been fully established against appellants Manoj Kumar Gupta and Santosh Kumar while offence punishable under Section 302 read with Section 34, I.P.C. was established against the appellants Kanhaiya Lal and Rajesh alias Raju. Accordingly, he convicted them under said sections. He further held that the act of appellants Manoj Kumar Gupta and Santosh Kumar falls within the category of rarest of rare cases and therefore, they were liable to extreme penalty of death. With these findings he sentenced the appellants Manoj Kumar Gupta and Santosh Kumar to be sentenced to death under Section 302 read with 34 I.P.C. and imprisonment for life under Section 376, I.P.C. The appellants Kanhaiya Lal and Rajesh have been sentenced to imprisonment for life under Section 302 read with Section 34, I.P.C.

16. Aggrieved with their conviction and sentence the respective appellants preferred these appeals. The learned Additional Sessions Judge also made a reference under Section 363, I.P.C. for confirmation of death sentence.

17. All these appeals and references arose out of same judgment and therefore with consent of parties learned Counsel, all the appeals and references were taken up together for decision.

18. We have heard Sri A.D. Giri, learned Senior Advocate assisted by Sri D.R. Chaudhary appearing for the appellants, learned A.G.A. for the State of U.P. and Sri Shivaji Mishra for complainant and have perused the record.

19. Sri A.D. Giri learned Counsel for the appellants contended that the prosecution had not been able to prove the guilt of the appellants for offences punishable under Sections 376 and 302 read with Section 34, I.P.C. That from the evidence on record and facts and circumstances of the case it is clear that Km. Anita deceased was aged about 16 years on the date of occurrence and she had illicit connection with the appellant Santosh Kumar. That Ashwani Kumar brother of Km. Anita deceased had seen her talking with Santosh Kumar and quarrelled with him and Rajesh alias Raju and also slapped Anita. On account of it Rajesh alias Raju warned Ashwani Kumar to take care of his sister. The quarrel between them was,

however settled by the intervention of mahalla people. Thereafter Ashwani Kumar scolded off Km. Anita deceased and also beat her . On it she committed suicide inside her house by pouring kerosine oil on her. Mahalla people rushed and threw water from ventilator and broke open the door. By that time. Km. Anita deceased was badly burnt. That since she committed suicide she was not immediately taken to the hospital as her mother, father and brother were apprehending that she might tell the truth. She was taken to hospital much later and the appellants were falsely implicated in this case. He further contended that Smt. Shashi Kala (PW 2) had also given affidavit to this effect and previous. I.O. had also come to said conclusion, but thereafter, investigation was got transferred and second I.O. concocted a false case.

20. According to prosecution Km. Anita deceased sustained burn injuries on the evening of 23-1-1996 at about 7.00 a.m. and died due to above burn injuries. The appellants have not disputed death and cause of death of Km. Anita deceased. According to evidence of Dr. Ved Prakash (PW 7) he medically examined Km. Anita deceased on 23-1-1996 at 10-20 p.m. SSPG Hospital, Kabir-chauraha, Varanasi and found following injuries on her person :--

A superficial to deep burn on whole of body about 100% burn'.

Patient admitted. General condition was very poor, Police was informed and Magistrate was called for dying declaration.

21. Admittedly Km. Anita died in the Hospital on the same night at 00.30 hrs. Dr. S.K. Rai (PW 4) who conducted autopsy on the dead body of Km. Anita deceased found following ante mortem injuries on her person :--

Derma, eipdermal burn all over the body. Body surface vericle found charred at most of the places including the charring of scalp hairs. Burn was mostly dermal deep all over the body.

22. Internal examination showed that brain was congested, larynx trachea and brenchi were congested with deposition of carbon soots. Both lungs and pericardium were congested. Stomack contained semi digested rice and pulses.

Digested food was present in small intestine and in large intestine faecal matters and gasses were present Pancreas spleen and both kidneys were congested. Hymen had old tear scars and allowing two fingers. Uterus was normal. Causes of death was due to shocks as a result of extensive burn injuries.

23. There is no challenge of above medical evidence and the defence of the appellants also shows that Km. Anita deceased committed suicide and died due to burn injuries. As such the prosecution has fully established that Km. Anita deceased died due to burn injuries which she sustained on the evening of 23-1-1996 at about 6.30 a.m.

24. The case of the prosecution was that on the evening of occurrence at about 6.30 p.m. when Km. Anita deceased was going to see her mother at the house of Chamroo Yadav, where she had gone to bring milk and reached in front of the house of appellant Manoj Kumar Gupta, Manoj Kumar and Santosh Kumar caught hold of her and dragged her inside the house where both Manoj Kumar and Santosh Kumar committed rape on her and when she narrated the story to her mother she went to the house of appellant Manoj Kumar and Santosh Kumar to complain. Thereafter, all the appellants raided the house of Km. Anita deceased, damaged her house, boundary wall gate and household property and dragged Km. Anita deceased from courtyard to a room towards east and there Kanhiya Lal sprinkled kerosene oil on her and on exhortation of Manoj Kumar and Santosh Kumar, Rajesh set fire on her with a match stick. Learned Counsel for the appellants contended that there is no evidence on record to show that rape was committed on Km. Anita deceased. Km. Anita was aged about 16 years which was the initial case of the prosecution and in case sexual intercourse was done on her it was with her consent and subsequently the prosecution deliberately and purposely minimised her age as 14 years. That Km. Anita herself committed suicide when she was scolded by her brother Aswani Kumar regarding her illicit connection with Santosh Kumar. Therefore it is to be considered whether Km. Anita deceased was subjected to rape by Santosh Kumar and Manoj Kumar Gupta and subsequently she was burnt by Santosh Kumar, Manoj Kumar Gupta, Rajesh and Kanhiya Lal appellants inside her house due to which she died subsequently.

25. To prove its case, the prosecution relied on the sole testimony of Smt. Shashi Kala (PW 2) as Jeo Bodh Lal (PW 1) had not seen the occurrence and came to his house subsequently. The law regarding value of the evidence of single witness is well settled. The Apex Court held in the case of *Vadivelu Thevar v. State of Madras* AIR 1957 SC 614 that the Indian Legislature has not insisted on laying down any such exceptions to the general rule recognised in Section 134 of Indian Evidence Act, which by laying down that no particular number of witnesses shall, in any case, be required for the proof of any fact' has enshrined the well recognised maxim that 'evidence has to be weighed and not counted'. It is not solemn that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding Judge comes into play. The matter thus must depend upon the circumstances of the case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the Court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution.

26. It was further held in the said case that generally speaking oral testimony in this context may be classified into three categories, namely :

1. Wholly reliable;
2. Wholly unreliable;
3. Neither wholly reliable to nor wholly unreliable.

27. In the first category of proof, the Court should have no difficulty in coming to its conclusion either way it may convict or may acquit on the testimony of single

witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subordination. In the second category, the Court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.

28. It has further been held by the Apex Court in the case of State of Haryana v. Mano Kumar (1994) 31 All Cri C 34 : AIR 1994 SC 147 that a conviction can be based and the verdict of the Court can rest even on the testimony of a sole witness, if the Court is fully satisfied that such witness is a truthful witness and his presence at the time of occurrence has been proved beyond reasonable doubt.

29. Considering the other cases decided by the Apex Court it was held in the case of Kartik Malhar v. State of Bihar 1996 Cri LJ 889 : 1996 AIR SCW 4540 that on a conspectus of decisions (cited in the said judgment in foregoing paragraph), it clearly comes out that there has been no departure from the principles laid down in Vadivelu Thevar v. The State of Madras AIR 1957 SC 614 and, therefore, conviction can be recorded on the basis of the statement of single eye witness provided his credibility is not shaken by any adverse circumstance appearing on the record against him and the Court, at the same time, is convinced that he is a truthful witness. The Court will not then insist on corroboration by any eye witness particularly as the incident might have occurred at a time or place when there was no possibility of any other eye witness being present. Indeed the Courts insist on the quality and not on the quantity of evidence.

30. In the light of above principle, we have to consider whether Smt. Shashi Kala (PW 2) is wholly reliable, wholly unreliable and neither wholly reliable nor wholly unreliable.

31. Smt. Shashi Kala (PW 2) stated that on 23-1-1996 at about 6.00 p.m. she had gone to the house of Chamaroo Sardar for bringing milk. At that time all her children (3 sons and 2 daughters) were at the house. At about 6.30 p.m. when she returned after taking milk her elder daughter Anita deceased and elder son Ashwani Kumar were not present at the house. After 10 minutes Ashwani Kumar came to the house and she enquired from him as to where Anita was. He told that

she had gone to see her and when there was delay in her return he also went to search about her. He further told that whereabouts of Anita deceased were not known. That after about 10 minutes Anita came to the house and was weeping. Observing her weeping she asked as to what happened. She told 'Mummy, when it was late in your return I went to see you and when I reached in the lane in front of house of Murlidhar Gupta, Manoj Kumar and Santosh Kumar appellants were standing there. They caught hold of my hand and dragged me inside the room and Manoj Kumar and Santosh Kumar both committed rape on me and threatened that in case I uttered any thing about above incident to any one they would kill me. Mummy, I have been ruined.' Saying it she started weeping. The witness further stated that then she went to the house of Santosh Kumar to complain about the incident and thereafter to the house of Manoj Kumar and came back to her house. After some time Manoj Kumar, Santosh Kumar, Rajesh and Kanhaiya Lal appellants came to her house and they damaged boundary wall made the gate fall down and entered into her house. They were having brickbats in their hands. They damaged ventilator and other articles. When she tried to object them they caught hold of her hand and dragged out in veranda. Anita also came out of the room and was in the courtyard. Santosh Kumar and Manoj Kumar dragged her inside the room. All the four appellants entered into said room where kerosene oil was kept. Kanhaiya Lal sprinkled kerosene oil on Anita deceased. Manoj Kumar and Santosh Kumar exhorted and Rajesh set fire on Anita deceased with a match stick. When she (witness) was going to save her (Anita deceased) Manoj Kumar and Santosh Kumar dragged her out of the house. In the course of dragging her, saree was torn and she sustained injuries on various parts of her body. She raised alarm but none dared to come out of fear of appellants. After burning Anita deceased all the four appellants ran away. Thereafter, she went to Anita deceased who was crying with pain. She tried to extinguish fire with the help of curtains. Anita deceased was demanding water. Her husband came to house at about 7.30 p.m. and she related the incident to him. He arranged a temp to and took Anita deceased to Ramnagar Hospital. The Doctor referred her to Kabir Chaura Hospital. She was taken there and died in the said hospital at about 12.30 a.m.

32. In her cross-examination she was shown affidavit allegedly filed by her in the Court in connection with the opposition of bail application. After seeing the affidavit

she stated that she used to sign as 'Shashi Kala Srivastava', but on the affidavit only 'Shashi Kala' was mentioned. Therefore, she was doubting whether the above affidavit contained her signature. She was also not remembering whether she had signed on that affidavit or not. It was wrongly written in the said affidavit that she had gone to take milk at 7.00 p.m. and Anita deceased was aged about 16 years at the time of occurrence. When the appellants left the spot the condition of Anita deceased was serious. Her husband, son and one or two persons of the locality had taken Anita deceased to Hospital. She reached Ramnagar Hospital at about 8.00 p.m. It was wrongly written in the affidavit that appellants came to her house at about 8.00 p.m. It was also wrongly written in the affidavit that all the appellants sprinkled kerosene oil and all the four appellants set fire on Anita deceased. There was no kerosene oil in the room in which the appellants had dragged her daughter Anita deceased was burnt in the room which was used as kitchen. The deceased was taken to Kabir Chaura Hospital in a tempo. She was not remembering whether the deceased was taken to Kabir Chaura Hospital through pantoon bridge or Rajghat. bridge. From the hospital she was sent to Machhodari, her Sasural and she returned from there to her house at Ramnagar after 25 days, she had not returned to her house at Ramnagar along with Ashwani on 24-1-1996. She was interrogated by the Investigating Officer after 24-25 days of the occurrence. She had seen the appellants throwing brickbats but none had sustained any injury. No door of the house was broken by brickbats but it was scraped. She had not shown her scraped door to the second Investigating Officer, she had also not shown to the second Investigating Officer any article which was damaged. The room in which Anita deceased was burnt was bedroom. Ventilator was made of cement and it was also scraped by the brickbats thrown by the appellants. She had shown the scrapped ventilator to the I.O. The appellants had not damaged any article. She had not told before the I.O. that the appellants after entering into her house broke out ventilator and several articles. She had told before the I.O. that kerosene oil was kept in the same room where Anita deceased was burnt. She could not explain about the omission of above fact. She had also told before the I.O. that by dragging her. saree was torn and she sustained injury on several parts of her body.

33. The second I.O. Sri Shree Nath Pandey (P.W. 3), who took investigation of the case under the orders of S.S.P. admitted in his cross-examination that he had not found any broken ventilator or door nor was there any scratch mark on the ventilator or the door. There was also no sign of throwing brick- bats on outer or inner portion of the house of the deceased Smt. Shashi Kala (P.W. 2) had stated before him that appellants had broken and damaged several articles of her house. Smt. Shashi Kala had not said before him that her saree was torn and she sustained injury on several parts of her body due to dragging.

34. Perusal of statement of Smt. Shashi Kala (P.W. 2) shows that she had contradicted her own statement on several material points mentioned above. It also shows that she gave exaggerated version of occurrence. She went on stating that appellants damaged her boundary wall, gate and ventilator and threw brickbats. That they also damaged several articles of her house. But the I.O. did not find any broken boundary wall, door, ventilator or any article. Thereafter in her cross-examination she twisted her above version. There were also some discrepancies on material points in earlier affidavit given by the witness. She could not dare to say that she had not given any affidavit, but she gave evasive reply that she did not know whether she had filed affidavit or the affidavit shown to her contained her signature or not. The circumstances which may corroborate her testimony were also contradicted by her. From a careful scrutiny of the evidence (examination-in-chief as well as cross-examination) of the witness as well as statement of the second I.O. Sri Shree Nath Pandey (P.W. 3) we are of the view that Smt. Shashi Kala (P.W. 2) is not a wholly reliable witness. At the same time we find that the evidence of the witness is not such that she can be termed as wholly unreliable witness as Km. Anita deceased was her unmarried daughter and she would have been the last person to set up a false story of rape on her own daughter. The incident of burning of the deceased which is not disputed by the appellants, had taken place in her house in her presence. In these circumstances we are of the view that Smt. Shashi Kala (P.W. 2) is neither wholly reliable nor wholly unreliable witness and her testimony cannot be totally discarded. That part of testimony which finds corroboration from other circumstances can be relied upon as the principle of 'falsus in uno, falsus in omni bus' is not applicable in India nor has this maxim come to occupy the status of rule of law. The duty of the Court

is to find out grain of truth from the chaff of falsehood.

35. The occurrence, according to prosecution, took place in two parts. Firstly, Km. Anita deceased was dragged by appellants Manoj Kumar and Santosh Kumar inside a room of the house of Manoj Kumar Gupta where both the them committed rape on her and she told this fact to her mother just after the said occurrence and the second incident was the burning of Km. Anita deceased inside her room.

36. Regarding rape on Km. Anita deceased by appellants Manoj Kumar and Santosh Kumar, there is statement of Km. Anita deceased herself to her mother just after the occurrence. Smt. Shashi Kala (P.W. 2) the mother of Km. Anita deceased stated that on her return to her house after, taking milk Anita came to her house weeping. Observing her weeping she enquired as to why she was weeping. Then she related to her as below :--

(Vernacular text omitted)

37. The question which arises before us is whether the above statement of the deceased related to her mother just after the occurrence is admissible in evidence.

38. Sri A. D. Giri learned senior counsel for the appellants contended that the above statement of the deceased to her mother is not in respect of cause of her death and therefore, it is not admissible under Section 32(1) of the Indian Evidence Act as her dying declaration and since Smt. Shashi Kala (P.W. 2) is not a reliable witness, the above statement is also not admissible as resgestae under Section 6 of the Indian Evidence Act.

39. Having duly considered the above submission of the learned Counsel for the appellants we find no force in the above contention.

40. The Apex Court in the case of Ratan Singh v. State of Himachal Pradesh, (1997) 4 SCC 161 : AIR 1997 SC 768, held as below :--

One of the most important items of evidence in this case is what the deceased had uttered immediately before she was fired at. When her mother-in-law sensed that somebody had intruded in the courtyard during the odd hours, the deceased (near

whom the intruder was standing then) spoke out that appellant was standing nearby with a gun. In a split second the sound of firearm shot was heard and in a trice the life of Kanta Devi was snuffed off.

41. If the said statement had been made when the deceased was under expectation of death it becomes dying declaration in evidence after his death. Nonetheless, even if she was nowhere near expectation of death, still the statement would become admissible under Section 32(1) of the Evidence Act, though not as dying declaration as such, provided it satisfies one of the two conditions set forth in the sub-section. This is probably the one distinction between English law and the law in India on dying declaration. In English law, unless the declarant is under expectation of death his statement cannot acquire the passport of admissibility, (*Sharad Birdhi Chand Sarda v. State of Maharashtra* (1984) 4 SCC 116 : AIR 1984 SC 1622, *Tehal Singh v. State of Punjab* AIR 1979 SC 1347.

42. Section 32(1) of the Evidence Act renders a statement relevant which was made by a person who is dead in cases in which cause of his death comes into question, but its admissibility depends upon one of the two conditions; Either such statement should relate to the cause of his death or it should relate to any of the circumstances of transaction which resulted in his death.

43. Three aspects have to be considered pertaining to the above item of evidence. First is whether the said statement of the deceased would fall within Section 32(1) of the Evidence Act so as to become admissible in evidence. Second is whether what the witnesses have testified in Court regarding the utterance of the deceased can be believed to be true. If the above two aspects are found in the affirmative, the third aspect to be considered is whether the deceased would have correctly identified the assailant

44. When Kanta Devi (deceased) made the statement that appellant was standing with a gun she might or might not have been under the expectation of death. But that does not matter. The fact spoken by the deceased has subsequently turned out to be a circumstance which intimately related to the transaction which resulted in her death. The collection of the words in Section 32(1) 'circumstances of the transaction which resulted in his death' is apparently of wider amplitude than

saying 'circumstances which caused his death'. There need not necessarily be a direct nexus between 'circumstances' and death. It is enough if the words spoken by the deceased have reference to any circumstance which has connection with any of the transactions which ended up in the death of the deceased. Such statement would also fall within the purview of Section 32(1) of the Evidence Act. In other words, it is not necessary that such circumstances should be proximate, for, even distant circumstances can also become admissible under the subsection, provided it has nexus with the transaction which resulted in the death. In Sharad Birdhi Chand Sarda's case (AIR 1984 SC 1622) (supra) this Court has stated the above principle in the following words :

The test of proximity cannot be too literally construed and practically reduced to a cut and dried formula of universal application so as to be confined in a strait-jacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death.

Even apart from Section 32(1) of the Evidence Act, the aforesaid statement of Kanta Devi can be admitted under Section 6 of the Evidence Act on account of its proximity of time to the act of murder. Illustration A to Section 6 makes it clear. It reads thus :--

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating or so shortly before or after it as to form part of the transaction is a relevant fact.

Here the Act of the assailant intruding into the courtyard during dead of the night victim's identification of the assailant, her pronouncement that appellant was standing with a gun and his firing the gun at her, are all circumstances so intertwined with each other by proximity of time and space that the statement of

the deceased became part of the same transaction. Hence it is admissible under Section 6 of the Evidence Act.

In either case, whether it is admissible under Section 32(1) or under Section 6 of the Evidence Act, it is substantive evidence which can be acted upon with or without corroboration in finding guilt of the accused.

45. In the case of *Kans Raj v. State of Punjab* (2000) 41 All Cri C 3 : AIR 2000 SC 2324, the Apex Court while discussing about the admissibility of statement of deceased observed as below: -

Before closing this chapter we might state that the Indian law on the question of the nature and scope of dying declaration has made a distinct departure from the English Law where only the statements which directly relate to the cause of death are admissible. The second part of Clause (1) of Section 32, viz., 'the circumstances of the transaction which resulted in his death, in case in which the cause of that person's death comes into question' is not to be found in the English Law. This distinction has been clearly pointed out in the case of *Rajindra Kumar v. State* AIR 1960 Punjab 310. where the following observations were made :

Clause (1) of Section 32 of the Indian Evidence Act provides that statements, written or verbal, of relevant facts made by a person who is dead,...are themselves relevant facts when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death in case in which the cause of that person's death comes into question....It is well settled by now that there is difference between the Indian Rule and English Rule with regard to the necessity of the declaration having, been made under expectation of death.

In the English Law the declaration should have been made under the sense of impending death whereas under the Indian Law it is not necessary for the admissibility of dying declaration that the deceased at the time of making it should have been under the expectation of death.

Thus, from a review of the authorities mentioned above and the clear language of Section 32(1) of the Evidence Act, the following propositions emerge:

(1) Section 32 is an exception of the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.

(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a strait-jacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements, come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

(3) The second part of Clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross examined by the accused, would be valueless because the place of cross examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to

prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a telltale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant.

46. The principles laid down in Ratan Singh's case (AIR 1997 SC 768) (supra) were confirmed and relied on.

47. We, therefore, have to consider whether Km. Anita gave any statement to her mother Smt. Shashi Kala (P.W.2) before her death and if so what value it shall carry.

48. The case of the prosecution is that Km. Anita deceased was murdered by the appellants as they dragged her inside the room, sprinkled kerosene oil on her body and set fire with a match-stick. She sustained burn injuries on her body and died. The contention of the learned Counsel for the appellants as per arguments and suggestions given to the prosecution witnesses was that Km. Anita deceased committed suicide by burning herself. If the prosecution story is accepted then the death of Km. Anita deceased was homicidal and in case the defence version is considered the death of Km. Anita deceased was suicidal. In either case the statement given by the deceased to her mother just before her sustaining burn injuries will be admissible under Section 32(1) Indian Evidence Act. Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide as quoted in the case of Kans Raj (AIR 2000 SC 2324) (supra). Death of Km. Anita deceased due to burn injuries is admitted and assuming that it was suicide the admissibility of her statement under Section 32(1) is attracted.

49. It is also not disputed that death of Km. Anita deceased took place within a short time of her making the above statement to her mother as according to the prosecution on telling of Km. Anita deceased to her mother she went to the house

of appellants Santosh Kumar and Manoj Kumar to complain about it and thereafter, the appellants came to house of deceased within 10 minutes of the return of Smt. Shashi Kala (P.W.2) from the house of appellants Santosh Kumar and Manoj Kumar and the deceased was set at fire. On the other hand the case of appellant was that Ashwani Kumar the brother of the deceased transacted a quarrel with the appellants Santosh Kumar and Manoj Kumar and he also slapped Anita deceased due to which she committed suicide. Thus, admittedly there was no distance of time in between the statement made by the deceased to her mother and her death. In the instant case the death of deceased is logical culmination of a continuous drama.

50. There is nothing on record to show that the statement given by Anita deceased to her mother was secured either by prompting or tutoring as she was not expected to set up a false story of rape by the two appellants. In case she committed suicide on account of disgust, she would have committed suicide directly without disclosing the factum of rape on her by appellants Santosh Kumar and Manoj Kumar. No doubt it was contended that Km. Anita deceased was actually above 16 years of age and she had illicit connection with appellant Manoj Kumar and when this fact came to the knowledge of her brother Ashwani he abused and beat her and therefore, she committed suicide out of disgust. But there is no evidence on record in support of this suggestion. Moreover, if she had any sort of connection with one of the appellants, she would not be having illicit connection with two persons and would not have been a consenting party for sexual intercourse by two persons. In fact if she had any connection she would have tried to conceal this fact and would have not disclosed to her mother.

51. It was also not expected from Smt. Shashi Kala (P.W.2) the mother of Km. Anita deceased, to set up a false story about the statement given to her by her daughter Km. Anita deceased as it would have cast a stigma and tobooo to her family and even after the death of Km. Anita deceased it would have adversely affected the marriage prospects of her other daughter Km. Aruna who was aged about 11 years at the time of occurrence.

52. The learned Counsel for the appellants further contended that the age of Km. Anita deceased at the time of occurrence was 16 years as this fact was specifically mentioned in the affidavit of Smt. Shashi Kala (P.W.2) given in connection with opposition of bail application, inquest report and post mortem report. That subsequently on some legal advice the prosecution developed a story that age of Km. Anita deceased, at the time of occurrence, was only 14 years with a view to make consent of Km. Anita deceased regarding sexual intercourse immaterial. It is true that in the affidavit relied on by defence Smt. Shashi Kala (P.W.2) had mentioned that Anita deceased was aged about 16 years and in post mortem report and other connected papers her probable age was also given as 16 years. But Ram Chandra Ram (P.W.9) the peon of Radhe Kishori Balika Inter College, Varanasi proved Transfer Certificate relating to deceased issued by the Principal of said college (Ext. Ka-13). According to it the date of birth of Km. Anita Srivastava daughter of Jeo Bodh Lal Srivastava, R/o Rampur, Ramanagar, Varanasi was 10th March, 1982. In this way on the date of occurrence i.e. 23-1-1996 she was below 14 years of age. Even if it is assumed for the sake of argument that geneally guardians mention lesser age of their wards in school register and the age of Anita deceased at the time of occurrence was about 16 years, there can be no question of her consent to sexual intercourse because according to statement of Km. Anita given to her mother just after the rape, the two appellants Manoj Kumar and Santosh Kumar (two persons) committed sexual intercourse with her against her will. The Act of above two appellants, thus, comes within the definition of 'gang rape' as defined under Section 376(2) I.P.C. and the presumption under Section 114A Indian Evidence Act shall be drawn in this case. Since Km. Anita deceased had denied her consent it can be presumed that there was no consent. Therefore, we hold that sexual intercourse by Manoj Kumar and Santosh Kumar with Km. Anita deceased was not with the consent of the deceased.

53. The learned Counsel for the appellants further contended that the medical evidence does not support the factum of rape.

54. It is true that no sign of rape was found by the Doctor conducting post mortem of the deceased. But the statement of Km. Anita deceased given to her mother

shows that she was forcibly dragged inside a room by two accused persons and they also committed rape on her. The manner in which rape was committed on her there could be no apparent sign of rape. However, Dr. S.K. Rai (P.W.4), who conducted postmortem on the dead body of the deceased has mentioned that hymen had old tear scars and vagina allowed 2 fingers. Dr. Rai has clarified in his cross examination that admitting of two fingers into vagina and tearing of hymen would have been for other reasons such as illness or use of in section of pad etc. Post mortem report indicates that on account of burn injuries and the condition in which the body was produced before the Doctor it was not possible to detect apparent signs of rape.

55. The learned Counsel for the appellants further contended that the statement of Km. Anita deceased given to her mother regarding rape also appears improbable because she did not raise any alarm when she was dragged inside the house and dragging was impossible as the house of Murlidhar Gupta was in the lane and within the visibility of several persons of mohalla. This argument has no force as Km. Anita deceased was not in a position to raise alarm when she was being forcibly dragged by two persons. Moreover, the above occurrence took place at about 6.30 P.M. in the month of January when it is dark and there is no evidence on record to indicate whether persons of the locality were present in the lane. We thus find no force in this submission.

56. In view of the above discussion, we are of the view that the factum of rape by appellants Manoj Kumar and Santosh Kumar on Km. Anita deceased on the date, time and place alleged by the prosecution is fully established.

57. We have now to consider whether the prosecution has successfully proved that the appellants committed murder of Km. Anita deceased in the manner alleged by the prosecution. On this point there is the sole testimony of Smt. Shashi Kala (P.W.2). No doubt Jeo Bodh Lal (P.W.1) and Smt. Shashi Kala (P.W.2) have stated that Km. Anita deceased told before them that she was burnt and she demanded water, but this fact is not mentioned in the F.I.R. Moreover, she had not named the persons who set her on fire. Therefore, her above statement does not implicate the appellants.

58. Smt. Shashi Kala (P.W.2) the mother of the deceased stated that Santosh Kumar and Manoj Kumar dragged Anita deceased inside a room of her house. Kerosene oil was kept in the said room. Kanhaya Lal sprinkled kerosene oil on Km. Anita deceased. Manoj Kumar and Santosh Kumar exhorted and Rajesh set fire with a match stick. But in her cross examination she stated that there was no kerosene oil in the room in which the appellants dragged her daughter.

59. If the act of dragging the deceased inside the room, sprinkling kerosene oil and setting fire was being done in the presence of Smt. Shashi Kala (P.W.2) she must have resisted and tried to save the deceased. If she could not collect courage to do so, admittedly when her three sons Ashwani, Akhilesh and Ashish were also present and they could have foiled the attempt of the appellants and would have saved Km. Anita deceased from being burnt in the manner stated by Smt. Shashi Kala (P.W.2) specially when none of the appellants, had any lethal weapon with them and in case they were unsuccessful in saving the life of deceased they must have sustained some sort of injury or burn injury in process of intervention. But surprisingly enough no sort of injury was sustained either by Smt. Shashi Kala (P.W.2) or any other member of her family.

60. According to evidence of Smt. Shashi Kala (P.W.2) the incident of burning took place at about 7.00 P.M. and the condition of Km. Anita deceased was precarious, yet the deceased was not taken to the hospital which is only at a distance of one furlong in Kasba Ramnagar itself and she was taken to hospital after the arrival of Jeo Bodh Lal (P.W.I) father of the deceased at 7.30 P.M. Admittedly Ashwani elder son of Smt. Shashi Kala (P.W.2) was present in the house and mohalla people had also assembled but no attempt was made by Smt. Shashi Kala (P.W.I) to save the life of the deceased by immediately taking her to hospital.

61. Smt. Shashi Kala (P.W.2) stated that her husband came to the house at about 7.30 P.M. and then he arranged a tempo and took the deceased to Ramnagar Hospital where the Doctor referred for Kabir Chaura Hospital and the deceased was taken in the same tempo to Kabir Chaura Hospital. The evidence of Dr. Ved Prakash Jaiswal (P.W.7) and the injury report (Ext. Ka-10) show that Km. Anita deceased was brought to Kabir Chaura Hospital at 10.15 P.M. on 23-1-1996 and

her medical examination was done at 10.20 P.M. There is no document or evidence to prove that Km. Anita deceased was taken to Ramnagar Hospital. No Doctor or person of Ramnagar hospital which is also a Government hospital has been examined to prove that Km. Anita was brought to the said hospital at about 8.00 P.M. Jeo Bodh Lal (P.W. 1) stated in his cross examination that it took about 11/2 hours in reaching Kabir Chaura Hospital from Lal Bahadur Shastri Hospital, Ramnagar. It shows that he started from Ramnagar hospital at about 8.30 P.M. or 8.45 P.M. The time of arrival of the deceased at Kabir Chaura hospital was 10.15 P.M. which indicates that she was taken to the hospital with some delay. Km. Anita deceased had sustained severe burn injury and if she was set on fire by the appellants in the presence of her own mother, brother, sister it does not sound to reason that no attempt would have been made to remove her to some hospital for immediate medical help for saving her life as they were no strangers to Km. Anita. This abnormal conduct of Smt. Shashi Kala and other family members leads to a reasonable inference that Km. Anita sustained burn injury in a manner other than as alleged by the prosecution. From the circumstances appearing in the evidence of Jeo Bodh Lal (P.W. 1) and Smt. Shashi Kala (P.W.2), the possibility that she herself committed suicide cannot be easily ruled out as the delay in taking her to hospital itself indicates that Smt. Shashi Kala (P.W.2) and other members of her family were apprehending that if she was taken to hospital she might have disclosed as to how she got burn injury which could not be favourable to the prosecution and therefore she was deliberately taken to hospital with a great delay.

62. In her examination-in-chief Smt. Shashi Kala (P.W.2) had stated that the appellants broke her boundary wall, made the gate fall down and dragged her. In the course of dragging her saree was torn and she herself sustained injuries but there is no corroboration of this part of her statement. She also stated that the appellants damaged the articles of her house but later on she resiled from her above statement and stated in her cross-examination that no article of her house was damaged. The I.O. did not find any sign of breaking of boundary wall and damage to the house. This shows that she gave exaggerated version in order to show high-handedness of the appellants but she did not stick to her above statement in her cross-examination.

63. Smt. Shashi Kala (P.W.2) further stated that when the accused/appellants left her house she went to Km. Anita deceased and tried to extinguish fire with the help of curtain. But she did not sustain any burn injury. She had also not told this fact before the I.O. and this fact appears to have been subsequently developed.

64. The occurrence took place on 23-1-1996 at about 7.00 P.M. but the report of the occurrence was lodged on next day at 6.15 A.M. Assuming that Smt. Shashi Kala (P.W.2) was waiting for her husband to lodge report, her husband Jeo Bodh Lal Srivastava (P.W.I) came to his house at 7.30 P.M. and also took Km. Anita deceased to Lal Bahadur Shashtri Hospital, Ramnagar which is situated in front of police station Ramnagar. But no report was lodged at that time, Assuming that Jeo Bodh Lal (P.W.I) and other members of his family were in hurry to take deceased to Kabir Chaura Hospital, no report was lodged in any of the police station of Varanasi city soon after the death of the deceased which took place at about 00.30 hours. This delay in lodging the report suggests that the informant Jeo Bodh Lal (P.W. 1) father of the deceased was thinking to give a shape to the incident, which suited to him.

65. All the circumstances, which we have narrated above land support to the defence case that there was a great probability of Km. Anita deceased committing suicide and there is a great deal of doubt that she was set at fire by the appellants in the manner alleged by the prosecution. Therefore, we are feeling ourselves unable to sustain conviction of appellants under Section 302 read with Section 34 I.P.C.

66. In the result Criminal Appeal No. 2731 of 1999, preferred by appellants Santosh Kumar and Criminal Appeal No. 2771 of 1999, preferred by appellant Manoj Kumar Gupta, partly succeeded relating to their conviction and sentence under Section 302 read with Section 34, I.P.C. and Criminal appeal No. 3006 of 1999, preferred by appellants Kanhaya Lal and Rajesh alias Raju succeeded.

66A. Accordingly, we partly allow Criminal Appeal Nos. 2731 of 1999 and 2771 of 1999 preferred by appellants Santosh Kumar and Manoj Kumar Gupta respectively and set aside their conviction and sentence under Section 302 read with Section 34, I.P.C. and they are acquitted under Section 302/34, I.P.C.

References made by the Sessions Judge are rejected. However, their conviction Under Section 376, I.P.C. is confirmed, but sentence of life imprisonment under said section is reduced to a sentence of R.I. for a period of ten years each. With this modification in sentence their appeals are partly dismissed.

67. Appellants Santosh Kumar and Manoj Kumar are in jail and will serve out sentence accordingly.

68. We also allow Criminal Appeal No. 3006 of 1999 preferred by Kanhaiya Lal and Rajesh alias Raju and set aside their conviction under Section 302 read with Section 34 I.P.C. and sentence of life imprisonment under said section. They are, accordingly, acquitted under said section. They are in jail. They shall be released down with unless wanted to be detained in some other case.

69. Office is directed to send a copy of this judgment of C.J.M., Varanasi for necessary action.

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