

**Vijay Kumar Vs. State**

**Vijay Kumar Vs. State**

**SooperKanoon Citation :** [sooperkanoon.com/689243](http://sooperkanoon.com/689243)

**Court :** Delhi

**Decided On :** Mar-09-1981

**Reported in :** 20(1981)DLT62; ILR1981Delhi449a

**Judge :** R.N. Aggarwal and; D.R. Khanna, JJ.

**Acts :** [Indian Penal code, 1860](#) - Sections 302; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 164

**Appeal No. :** Criminal Appeal No. 165 of 1978

**Appellant :** Vijay Kumar

**Respondent :** State

**Advocate for Pet/Ap. :** S.K. Agarwal and; D.C. Mathur, Advs

**Judgement :**

**D.R. Khanna, J.**

(1) Vijay Kumar of A-36, Naraina has moved this appeal against his conviction! on 11-8-1978 by Shri R. L. Gupta, Additional Sessions Judge, Delhi under section 302 of the Indian Penal Code for having committed the murder of one Hakim Rai, age 60 years, on the night between 14th and 15th September, 1977, at A-29j2, Industrial Area, Naraina, New Delhi. He was sentenced to undergo imprisonment for life.

(2) Briefly stated the prosecution case was that Kanta daughter of Hakim Rai deceased, was married to Darshan Lal and they lived together for about a year. Kanta's mother in the meanwhile developed insanity, and, therefore, she wanted to keep her younger sister Shanta aged about 4 years, with her. Daishan Lal was not agreeable to the same, and as such Kanfa parted company with him and came to reside at her parents house. There was no formal divorce between them, but the marriage almost ended in a sort of private arrangement and Darshan Lal effected another marriage. This took place about three years before the murder of Hakim Rai

(3) Kanta after leaving her husband, joined some service in a factory at A-36, Naraina. Vijay Kumar appellant also used to work there. Both developed intimacy three-four months prior to that murder. On 4-6-1977, Vijay Kumar got an affidavit attested from a Notary Public to the effect that he and Kanta had entered into wedlock according to Hindu rites and customs, and both had started living together.

(4) Kanta, however, does not admit any such marriage, though stated that she was, in fact, taken by Vijay Kumar to the court and her signatures 'obtained on some marriage documents and affidavit. She did so happily as they were then in love with each other. Vijay Kumar, however, did not keep her with him, and on that account she felt bad. She continued to reside with her father. In the meanwhile, because of the relationship developed between Kanta and the appellant, the factory owner terminated ]her services. She then .installed a khoka for selling tea in front of that factory along with her father. Vijay Kumar. however, started visiting the khoka with undesirable boys to which her father objected. Vijay Kumar then threatened him that he would kill both the father and the daughter while brandishing a knife, and further warned her not to disclose that to any body. This was about a day or two prior to the murder of her father.

(5) Hakim Rai used to sleep in that khoka. He, however, used to send Kanta to his house because of Vijay Kumar's bringing undesirable boys there. Shanta child, however, slept with Hakim Rai in the khoka.

(6) On the night between 14th and 15th September, 1977, according to Shanta child, when she was sleeping in the khoka with her father, Vijay Kumar appellant came there and murdered her father with a knife. He thereafter ran away. On the next morning, Shanta met Mohd. Saleem (P.W. 23) outside the khoka at about 11 or 12 noon, and apprised him of the murder of her father. She asked him to take her to her house. He took her there to Kanta, who then on learning the murder of her father, came with him in a three-wheeler scooter to Naraina. Kishan Lal (P.W. 8) had also accompanied her in the scooter. There they found the dead body of Hakim Rai in a pool of blood.

(7) Kanta then went to police post Naraina and gave her statement Ex. Public Witness 21A to Raj Bahadur S.I. (Public Witness 20). The same constitutes the first information report in the present case, and was forwarded to the police station Delhi Cantt turn registration of a case at 2.10 p.m. The case under section 302 Indian Penal Code , was registered at 2.30 p.m. at the police station. In this statement, she mentioned that Shanta had come with Bhura (Saleem) aged about 11-12 years, and told her that Vijay had during that night killed her father, whom she used to call Lala. Shanta mentioned of knife blows given by Vijay Kumar to Lala, and also threatened her. She as such got frightened and kept lying near Lala. It was in the morning that Shanta with Bhura came to her.

(8) The post-mortem on the body of Hakim Rai was performed by Dr. L. T. Ramani(P.W. 12) of the police hospital, He had found five incised wounds and two contused wounds on different parts of the face of the deceased resulting in multiple depressed fractures. The injuries were found to be sufficient to cause death in the ordinary course of nature. The contused wounds were opined by him as capable of being caused by iron rod Ex. P. 6 which was shown to him. The others, he stated could be caused by sharp edged weapon.

(9) The appellant surrendered himself in court of Shri Manjit Singh Sabharwal, Metropolitan Magistrate on 19-9-1977. Two days later, he made a disclosure statement Ex. Public Witness 41. before Inspector Raj Bahadur Singh (P.W. 20) who investigated this case. The other persons then present were Net Ram head constable (P.W. 21) and Sudhar Singh (P.W. 4). In this he mentioned that he could

get recovered the sariya, his pant and the knife. He then took the police party to A-36, Naraina, Industrial Area, and got sariya Ex. P. 6 recovered from the grass of the plot there. His pant Ex. P. 7 was got recovered from a pit. The pant was sealed and sent to Central Forensic Science Laboratory. No human blood was found on the same and it was reported that the material had disintegrated. The rod was not sent there as it had no blood on it. The knife which was said to have been thrown in a nalla was not recovered.

(10) Another piece of evidence which the prosecution claimed to rely, was what Vijay Kumar had disclosed to Hira Lal (P:W. 10) who also ran a hotel in a khoka in front A-36, Naraina. Vijay Kumar had thereby made extra-judicial confession before him of having killed Hakim Rai. Hira Lal's' statement was recorded under section 164 of the Code of Criminal Procedure before Shri Kuldip Singh (P.W. 16), Metropolitan Magistrate, Delhi on 11-11-1977. In this he had stated that vijay and Kanta had developed illicit relations, and after some time when Kanta's services were terminated, she started' a tea-stall with her father at 2912, Naraina. Vijay Kumar along with three-four gunda type boys used to visit her. On 13-9-77, at about 9.30 a.m. Vijay Kumar was standing perplexed at the gate of A-36, Naraina, and on his- enquiry, told him. that-he had committed a blunder on that day and had killed Kanta's old father. He wanted some way out fo be suggested to him. Hira Lal showed his helplessness. Vijay Kumar then told him' not to disclose that to anybody, and went away.

(11) This Hira Lal, however, when examined in court as P.W. 10 was declared hostile as he did not remember whether he had stated before the Magistrate that Vijay had made the said extra judicial confession. He was confronted with that statement, but he still could not remember. According to him, many bad characters used to visit the girl as she was of loose character, and, thereforee, he had stopped her from coming to his hotel. Vijay, he admitted, had met him and told him that the old man had died but did not say anything further. Hira Lal denied that Vijay had quarrelled with Kanta and Hakim Rai two days prior to the occurrence.

(12) The prosecution examined Shanta, the daughter of the deceased as Public Witness 3. She gave her age as 4 years, and stated that she was sleeping with

her father in the shop when Vijay came there at night time and murdered her father with a knife. He also threatened her. As such she became frightened. She informed that to her sister when she went to her accompanied by one langra whose name was pagla- According to the prosecution, she thereby referred to Mohd. Saleem (P.W. 13). However, this was not got clarified from her or from any other witness. In cross-examination. Shanta stated that she had come to the court in the company of her sister Kanta and the latter had explained to her that she would be enquired, as to who had killed her father, and she should name the appellant. She had also been told that if she was enquired as to where she slept, she should say that she slept with her father.

(13) MOHD. Saleem (P.W. 13) gave his age as 12 years. and stated that 'at about 12 noon, 'Shanta child met him and told 'him 'brother niy father had been murdered by some unknown person.' Please take me home'. He then took her to her house in Paharganj, where they met Kanta while coming out of her house. He brought Kanta and Shanta in three-wheeler scooter to their shop and himself proceeded to his own shop.

(14) Kanta (P.W. 2) deposed how a day prior to the occurrence, the appellant had threatened her father that he would kill him and her with a knife. This happened when he objected to bringing undesirable boys at the khoka. Her father had, therefore, asked her to go home and remain there. On the next morning, her sister along with Bhura came and told her that the appellant had stabbed her father that night. No clarification was obtained by the prosecution at this stage also as to who this Bhura was. She then came in a three-wheeler scooter with a neighbour of her, Krishan Lal, to her khoka and found her father lying dead in a pool of blood. She then lodged report with the police. In cross-examination she stated that no report was lodged with the police when the appellant had started bringing undesirable persons at her khoka or when he threatened her father on the preceding day. She could not say if the clothes of Shanta had become blood stained. She mentioned the distance between her house and the khoka about 7 or 8 miles. According to her, she had seen the appellant at the police post on the next date. By then he had got his beard and moustache shaven.

(15) Krishan Lal was examined as Public Witness 8, and he stated that at about 11.15 a.m he found Shanta and Kanta going together weeping. On enquiry they told him that their father had been murdered by somebody. They did not tell him the name of murderer. Kanta sought his help. He then hired a threewheeler scooter, and they all went to Naraina to the khoka of the deceased and found his dead body lying in a pool of blood. From there they went to police post Naraina where Kanta lodged a report. He was cross-examined by the prosecution and was put questions as to whether Kanta had said that Vijay had stabbed her father with a knife. He denied the same. It was after going to the spot that Kanta had told him that Vijay had murdered ' her father.

(16) The appellant in his statement under section 313 Criminal Procedure Code . admitted that he had developed friendship .with Kanta when they were working in a factory, and that by then a divorce between Kanta and Darshan Lal had already taken place. He also admitted that he had got some marriage papers signed from her, and that she had set up a tea khoka in front of the factory along with her father after the termination of her services by the factory owner. The rest of the allegations were denied by him and he could not say why the case was brought against him. He admitted that he was arrested on 19-9-1977 when he surrendered in the court of Shri Manjit Singh Sabharwal, Metropolitan Magistrate, Delhi.

(17) The learned Additional Sessions Judge after considering the above evidence, held that the charge of murdering Halom Rai had been proved against ViJay Kumar. He was, therefore, convicted and sentenced as aforesaid. It is in these circumstances, that the appellant feeling aggrieved has moved the present appeal before us.

(18) We have heard the parties and given our utmost consideration to all the circumstances. The learned trial court has observed that if the statement of Shanta had been the only evidence in the present case, the conviction on her sole testimony could not be made. However, he found corroboration to her testimony from other circumstances. One was the statement of HiraLal recorded under section 164 Criminal Procedure Code . in which he had made reference to the extra Judicial confession made by ViJay Kumar of having murdered Hakim Rai. It

was noted that he had admitted that he had signed that statement after admitting that as correct. As regards Shanta, it was mentioned that the answers given by her in cross-examination were to questions put in a leading form. It was further noted that there were blood stains on -the pant Ex. P. 7 recovered at the instance of the appellant. The appellant, however, has assailed this latter finding, and in our view rightly as no such human blood was found to exist on the pant as per report of the Chemical Examiner of the Central Forensic Science 'Laboratory vide Ex. Public Witness 20/G.

(19) From the evidence on record following circumstances have emerged :

(L)Kanta, daughter of the deceased, had separated from her husband, and thereafter during the course of her service in a factory at Naraina, she had developed relations with the appellant. In the course of the name some documents were got written in which it was purported to be stated that they had married according to Hindu rites, and further that she had started living with the appellant. The appellant it seems, did not keep her with him and instead wanted to exploit her for immoral purposes amongst his friends as well. Kanta had, on that score, felt bad and continued to live with her father. The latter made her to sleep in his house in Paharganj which was fairly far off from that khoka in order to avoid intrusions by the appellant and his associates.

(II)It appears that after the development of this relationship with the appellant, Kanta's character somewhat came under cloud and her employer dispensed with her services. It is difficult to say as deposed by Hira Lal if she had actually become a girl of loose character, as this Hira Lal does not appear to be much a dependable person. He had in his statement under section 164 Criminal Procedure Code . before a Metropolitan Magistrate narrated about the extra-judicial confession which the appellant had made before him. In court, however, he made it convenient to state that he did not remember that.

(III)One or two days before the murder of Hakim Rai, the appellant had threatened that he would kin him and his daughter when hakim Rai had objected to his bringing undesirable boys there.

(IV) THERE; the testimony of Shanta child aged about 4-years, who stated that she was sleeping with Hakim wai when the appellant pane and Jailed him with a knife. The child is of very tender age, and her statement has to be very carefully scrutinised. It was what she narrated to Kanta which finds mention in the first information report lodged by the latter about the complicity of the appellant in the Crime.

(V) The disclosure statement and the recovery of the sariya and the pant at the instance of the appellant. They, however, did not bring out any incriminating material as none of them was found to be stained with human blood, much less of the group belonging to the deceased. The knife which was another instrument of assault, could not be traced as it was said to have been thrown in a nalla.

(20) So far as the evidence of Shanta child is concerned, she has, no doubt, stated that it was the appellant who had knifed her father to death. She was extremely of tender age, and it has not been shown that her clothes in any manner had become blood stained. Caution has to be taken about evidence of witnesses of such tender age in order to ensure that they have not been tutored, or are not indulging into fanciful assumptions or notoriety. The Punjab and Haryana High Court has thus observed in the case of Ram Singh v. State, 1973 Chandigarh Law Reporter 482, that though no precise criteria for appraising the evidence of a child witness can be laid down, yet one broad test is whether there was possibility of any tutoring. If this test is found in the positive the Court will not, as a rule of prudence-, convict the accused on a murder charge on the basis of child evidence unless it is corroborated to material extent in material particulars, directly connecting the accused with the crime.

(21) At the same time, if otherwise the testimony of a child witness is not shown to be tainted with any such infirmities, it calls for due crudence. A child in the innocent purity of its mind and unsophistication is more likely to come-forth with version which is unbiased, unsoiled, natural and forthright. It is less prone to manipulatioa, motivation and spirit of vendetta. It can as well be spontaneous and unsparing, once the child is cniabledto overcome the initial shock and awe, and ensured protection, security, compassion, and given confidence to come out with

what was seen. It must be said much water has flowed since the observations of Dr. Kenny, Downing Professor of Laws of England, Cambridge University in which he termed the 'children' as a most untrustworthy class of witnesses. Some of the children are fairly intelligent, truthful and straightforward, and we do not see any reason to start with a presumption of untrustworthiness in the assessment of their evidence. The merit of evidence has to be judged on the touchstone of its own inherent intrinsic worth. Courts should also, while permitting full scope for cross-examination of such witnesses, be careful to see that they are not subjected to unnecessary confusion, harassment or unduly made conscious of the awe of formal Court atmosphere and the public gaze.

(22) Now what casts a doubt over the testimony of Shanta in the present case is that she in her cross-examination stated that she had been told by her sister Kanta that she should state in the court that she had slept with her father that fateful night, and that the appellant came and killed him with a knife. This has brought in some element of tutoring, although it does not absolve independent assessment whether Kanta was out to falsely implicate the appellant in the present case.

(23) Another circumstances is that Mohd. Saleem (P.W. 13) stated that when Shanta met him at about 12 noon, she told him that an unknown person had murdered her father. The name of the appellant was not mentioned. It was not got clarified by the prosecution if she at all knew the name of the appellant or just recognised him by his face as having been associated with her elder sister. That could explain her mention to Mohd. Saleem that someone had killed her father. The prosecution also failed in deposition. was none else but Mohd. Saleem. to get clarified that langra and pagla whom she was mentioni'ng

(24) Krishan Lal (P.W. 80 who had brought both Kanta and Shanta from their house to the khoka, too deposed that they did not tell him the name of the murderer, and it was only after going to the spot. that Kanta told him that Vijay had murdered her father.

(25) It also was somewhat unusual that it was not till 11 or 12 noon that Shanta came out of the khoka and did not cry out what had befallen her father in her presence that night.

(26) All these circumstances thus do cast a doubt on the testimony of Shanta child, and we are in agreement with the learned trial court when it observed that it was unsafe to entirely rely upon her sole evidence.

(27) Then there remains the statement of Hira Lal given under section 164 Criminal Procedure Code . about the extra judicial confession made by the appellant. There is no gain-saying in this regard that such statement does not constitute substantive evidence, and can only be referred for the purpose of contradicting or corroborating the witness when he appears in the Court Now in the present case, Hira Lal has chosen to come out with a very convenient memory and stated that he did not remember if that extra judicial confession was, in fact, made. With this state of his testimony, his evidence that he had signed the earlier statement after admitting that as correct, could not be referred to or relied upon as the same could not be treated as substantive evidence.

(28) Lastly, we advert to the threat which the appellant had extended one or two days before the murder of Hakim' Rai. This circumstance alone does not necessarily lead to the conclusion that he actually murdered him.

(29) With this state of evidence on record, we are constrained to allow this appeal and acquit the appellant. Hakim Rai was murdered in a most brutal manner as the photographs and the medical evidence in the present case show that he was ruthlessly attacked on his face by a sharp-edged and a blunt weapon resulting in multiple fractures. It is unfortunate that this dastardly crime against an old man whose wife developed unsoundness erf mind and who was the father of two ' helpless daughters, one of whom was sought to be immorally exploited by unscrupulous appellant, has gone unpunished. However, in the state of evidence as existing on record, it is difficult .to bold beyond reasonable doubt that the charge of murder is brought home to the appellant.