

**Mohd. Islam Vs. State**

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**SooperKanoon Citation :** [sooperkanoon.com/848750](http://sooperkanoon.com/848750)

**Court :** Delhi

**Decided On :** Apr-30-2010

**Judge :** Pradeep Nandrajog and; Suresh Kait, JJ.

**Acts :** Code of Criminal Procedure (CrPC) - Sections 293 and 313

**Appeal No. :** Crl. Appeal No. 707/2008

**Appellant :** Mohd. Islam

**Respondent :** State

**Advocate for Def. :** Richa Kapoor, A.P.P.

**Advocate for Pet/Ap. :** S.B. Dandapani, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**Pradeep Nandrajog, J.**

1. With reference to the testimony of Kumari Gulnar aged 10 years when she deposed in Court on 24.3.2005 and was aged about 8 1/2 years when the crime took place on 13.10.2003, the learned Trial Judge has held that the same establishes that the deceased Gulfasha aged 12-13 years was in the company of the appellant at around 7:30 PM; with reference to the fact that the ball Ex.P-1

proved to be that of Gulfasha in view of the testimony of her father Ihlal Ahmed PW-1 was recovered from the jhuggi of the appellant the learned Trial Judge has held that the same establishes that Gulfasha was inside the jhuggi of the appellant; with reference to the fact that after he was apprehended the appellant made a disclosure statement Ex.PW-8/A admitting to having raped and then murdered Gulfasha and while doing said act his shirt and lungi got stained with blood which were got recovered by the appellant as entered in the memo Ex.PW-8/C on which, as per FSL report Ex.PW-15/G, only human blood could be detected the learned Trial Judge has held that the said fact was incriminating as it probablized that as the young unfortunate girl bled when she was raped, her blood fell on the lungi of the appellant; lastly with respect to the fact that the appellant absconded from his jhuggi the learned Trial Judge has held that the same evidences a guilty mind. Cumulatively read, all four circumstances have been held to be sufficient circumstances wherefrom the guilt of the appellant could be inferred for the offence of having raped and murdered Gulfasha whose dead body was found in the morning of 14.10.2003 near the dump yard. Proof of the fact that Gulfasha was subjected to a sexual assault is the post-mortem report Ex.PW-7/A, proved at the trial by its author Dr. Anil Shandil PW-7, which show multiple bruises and clear lacerated wounds on the face, lips and neck of the young unfortunate girl. There were finger impression marks with bruises on the neck with corresponding injuries inside the neck in the form of extravasations of blood in the neck muscles with fracture of thyroid, laryngeal and tracheal cartilages. Further, in the genitals of the young unfortunate girl blood clots were noted over labia majora and minora. Vaginal orifice had a visible torn which was contused and lacerated. Hymen was ruptured. Posterior fourchette and wall of vagina was torn and lacerated. Asphyxia caused by manual strangulation was the cause of the death of the young girl. That the appellant was capable of performing sex stands proved by the testimony of Dr. Seema PW-13 who deposed that she was conversant with the writing and signatures of Dr. Vinod Kumar, the author of the MLC Ex.PW-13/A, which records the fact that the appellant was capable of sexual intercourse.

2. During arguments in the appeal, learned Counsel for the appellant conceded to the position that the post-mortem report of the deceased conclusively proves that Gulfasha was raped and thereafter strangled to death. That the offence of rape

and murder was committed was conceded; the only issue raised was whether the evidence is sufficient wherefrom the guilt of the appellant can be sustained.

3. With reference to the testimony of Ms. Sakina PW-4, the grandmother of Gulfasha, learned Counsel for the appellant drew our attention to the fact that she admitted during cross-examination that the appellant knew her for the last 17-18 years and she had never heard a word against the appellant of his indulging in any illegal activity and hence urged that why would the appellant commit such a depraving act. With reference to the testimony of Gulnar PW-3 learned Counsel pointed out that Gulnar stated that the appellant was the Dada (Grand-father) of Gulfasha, meaning thereby everybody treated the appellant as a fatherly figure and said fact, urged learned Counsel, rendered it most improbable that the appellant would commit the depraving crime. Conceding that the appellant was arrested on 16.10.2003, learned Counsel urged that the appellant was lifted from the house of Khalil Ahmed where he had gone on 13.10.2003 because both were painters and had a joint work at hand and not from the place as claimed by the prosecution. Thus, counsel urged that the appellant never absconded. Questioning the recovery of the ball Ex.P-1 from his jhuggi learned Counsel urged that firstly no public person being associated with the recovery the same inspired no confidence and secondly there is no evidence that the ball had a peculiar distinctive feature which rendered the same an object of distinct identity and hence capable of being identified as belonging to the deceased. Explaining the circumstance of human blood being detected on the lungi which was got recovered by the appellant from his jhuggi, learned Counsel urged that being a painter some red coloured paint had fallen on the lungi and this was treated as a blood stain. Lastly, learned Counsel urged that the appellant was a married person having children. His wife and children were in the jhuggi on 13.10.2003 and as admitted during cross-examination by Sakina PW-4, the grandmother of the deceased, the jhuggi of the appellant was 4-5 jhuggis away from the jhuggi of Sakina and it was thus impossible for it not to be noticed that the deceased was first raped and then murdered by the appellant in his jhuggi and the body disposed of near a garbage dump.

4. With reference to the deposition of Gulnar PW-3, it may be stated that she was aged 10 years when she deposed and was aged 8 1/2 years when her friend Gulfasha went missing and suffered the unfortunate fate of being raped and then murdered. Her testimony has to be appreciated keeping in view her immature mind and hence a lack of expression to convey her thoughts. At the forefront would be the question: why would Gulnar tell a lie and that too on 14.10.2003 i.e. on the very day when dead body of Gulfasha was discovered in the morning? Why would she falsely state that she and her friend, the deceased, were playing with a small ball belonging to the deceased and both went to the house of her friend's Dada i.e. the appellant, and why would she falsely state that she i.e. Gulnar left for her house and at that time Gulfasha stayed back in the jhuggi of the appellant? No answer is forthcoming on record and indeed, neither from the cross-examination of Gulnar nor from any other circumstance, could it be brought out that Gulnar was either tutored or had a motive to state a wrong fact. That Gulnar told the investigating officer of what she deposed in Court at the very first instance i.e. on 14.10.2003 lends credence to her truthfulness.

5. A very important and a relevant fact has escaped the notice of the learned Trial Judge, being the post-mortem report Ex.PW-7/A of Gulfasha, proved at the trial by its author Dr. Anil Shandil PW-7, which records that the stomach contents of the deceased were consisting of rice and subji (vegetables). This means that there was undigested rice and vegetables in the stomach of Gulfasha. It is obvious that a meal taken by Gulfasha had yet to be digested. It is obvious that Gulfasha had taken a meal consisting of rice and subji at some point of time not going backward by more than 2 hours when she was murdered. The fact that she took rice and subji further evidences the fact that she was in the company of somebody whom she trusted and from whom she would accept a meal of rice and subji. As deposed to by Gulnar, she and Gulfasha were playing on the street at around 7:30 PM when Gulfasha told her to accompany her to her Dada's house. Ihlal Ahmed PW-1 the father of Gulfasha has not said that his daughter had taken her supper. The greater probability is that Gulfasha took a meal of rice and subji after she left her house while playing with Gulnar. Another very important piece of evidence has escaped the attention of the learned Trial Judge. The same are the contents of the disclosure statement Ex.PW-8/A of the appellant wherein apart from admitting to

have committed the crime, the appellant disclosed that when the young girl with whom Gulfasha had come to his jhuggi had left, he fed rice and vegetable dish consisting of potato and brinjals to Gulfasha and when it became dark he raped Gulfasha during which act his lungi got stained with the blood of Gulfasha and thereafter he strangled Gulfasha and threw her dead body. It has gone unnoticed by the learned Trial Judge that the appellant had told of having fed rice and vegetables to Gulfasha which exactly corresponds to the contents in the stomach of Gulfasha which were detected when post-mortem on her dead body was conducted.

6. The argument of learned Counsel for the appellant that as per Gulnar, Gulfasha used to call the appellant as her Dada i.e. grandfather and even Sakina PW-4, the grandmother of Gulfasha stated that the appellant was a man of repute and hence it was unbelievable that the appellant did the crime, is neither here nor there for the reason, when would the devil within overpower the good in a man is very difficult to comment upon. The most pious men are found to be indulging in the most nefarious activities. Every day, a controversy on the issue of sexual abuse of young boys by priests is to be read in the newspaper pertaining to the visit of the Pope to United Kingdom. Only day before yesterday i.e. on 27.4.2010 it was reported in the papers that a Cardinal, a person of a fairly high standing in the Church, admitted to sexually abusing young boys. What we want to convey is that the cloak of a stature cannot be used as a cover, if otherwise there is good and credible evidence pointing towards the guilt of a person. A court of law is concerned with evidence brought before it and save and except in such cases where character becomes relevant, the same has to be eschewed.

7. The submission that the appellant never absconded and he went to the house of Khalil Ahmed and stayed with him as both were painters is a mere submission without any factual basis, for the reason when examined under Section 313 Cr.P.C. and while responding to the incriminating circumstance of his absconding, the appellant only said that he was picked up from the house of Khalil Ahmed and not apprehended as claimed by the prosecution, without further stating that from 13.10.2003 till he was arrested on 16.10.2003 he stayed with Khalil Ahmed, his friend. We further note that only a suggestion has been given to the investigating

officer that the appellant was apprehended from the house of Khalil Ahmed and not as claimed by the investigating officer; a fact which was denied by the investigating officer.

8. The argument that the stain of paint on the lungi of the appellant has been treated as blood as opined in the FSL Report Ex.PW-15/G, has to be rejected for the simple reason no such case was projected during trial. The author of the report Ex.PW-15/G is an officer to whom Section 293 Cr.P.C. applies. The report was tendered in evidence by the investigating officer. The appellant never exercised his right to summon the author of the report for cross-examination.

9. Merely because no public person was associated with the recovery of the ball Ex.P-1 would not make the recovery doubtful for the reason, as held by the learned Trial Judge, the police witnesses Const. Ashok Tyagi PW-10, HC Hansroop PW-8 and SI Dinesh Pal PW-14 who participated in the recovery of the ball have duly supported the version of the prosecution. No doubt it has not come in evidence that the ball had any distinctive features, but parents do have an uncanny eye to recognize the toys of their children. Gulfasha's father Ihlal Ahmed PW-1 identified the ball Ex.P-1 as that of his daughter. He was not subjected to any cross-examination on the issue as to how come he could identify the said ball as that of his daughter. Had he been examined on the issue, he would have given some answers and then the matter could be debated upon.

10. The last submission that the wife and children of the appellant were residing with the appellant in his jhuggi and thus it was impossible for the appellant to lure Gulfasha to his jhuggi and first feed her, then rape her, then murder her and finally disposed away her body is predicated as if there is evidence on record that the wife and children of the appellant were in the jhuggi of the appellant on 13.10.2003. No suggestion has been given to the investigating officer or to any other witness that the wife and children of the appellant were in the jhuggi of the appellant in the late evening and the night of 13.10.2003. The appellant has not even said so when he was examined under Section 313 Cr.P.C. The wife or the children of the appellant have not been examined in defence to prove their presence in the jhuggi. Thus, the submission is rejected, being found to be without

any fact proved or even suggested to the witness of the prosecution during trial.

11. We concur with the reasoning of the learned Trial Judge and hence dismiss the appeal.

12. Since the appellant is in jail we direct that a copy of this decision be sent to the Superintendent Central Jail Tihar to be made available to the appellant.

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