(2008) 12 AHC CK 0419

Allahabad High Court (Lucknow Bench)

Case No: None

Sheo Dayal		APPELLANT
	Vs	
State of U.P.		RESPONDENT

Date of Decision: Dec. 1, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 154, 157, 161, 164, 313
- Penal Code, 1860 (IPC) - Section 201, 302, 323, 34, 376

Citation: (2009) CriLJ 3487

Hon'ble Judges: S.C. Chaurasia, J; Alok K. Singh, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Alok K. Singh, J.

Under challenge in this appeal is the judgement and order dated 31.08.2006, passed by Sri Alok Saxena, the then learned Additional Sessions Judge, Court No. 3, Hardoi convicting the appellant u/s 302 I.P.C. and sentencing him with life imprisonment and to pay a fine of Rs. 1000/- & in default of payment of fine, further to undergo imprisonment for one year and also convicting u/s 376 I.P.C. and sentencing him to undergo rigorous imprisonment for ten years'' and to pay a fine of Rs. 1000/- & in default of payment of fine, further to undergo one month rigorous imprisonment. All the sentences have been directed to run concurrently.

2. Briefly stated the facts of the case are that an F.I.R. was lodged by the complainant Ghassu @ Ghan Shyam, son of Nanhey, resident of Kherwa, hamlet of Gauri Dayampur, Police Station-Kasimpur, District-Hardoi on 30.09.2004 at 4.30 at P.S. Kasimpur, District Hardoi, saying that on 29.09.2004, his 16 years old daughter Km. Lekhrani, had gone out for throwing away domestic rubbish and garbage in the field, about half a kilometer away from the house. But, when she did not return in usual time, it caused concern to the complainant and his wife Saraswati Devi. Then,

both of them came out of the house and made a thorough search all around. One Suresh son of Sobaran Lal, resident of the same village told them that one Sheo Prasad, son of Niranjan, resident of Village-Pathrauli, Police Station-Kasimpur had told him about the body of his daughter being lying in a paddy field. He immediately rushed to that place and found the dead body of his daughter lying in the field with numerous injuries. It appeared that somebody has murdered after committing rape upon her. Her Salwar was also found untied and loose. He took out the dead body of his daughter from the field and carried to his house. He suspected that the said incident had been caused by Sheo Prasad @ Shiv Kumar S/o Niranjan Pasi and Sheo Dayal S/o Ranjit R/o Village Munnu Khera H/o Shahpur Chamraha P.S. Kasimpur District Hardoi. On the basis of the said F.I.R., the case was registered against both the accused under Sections 376, 302, 201, 323 I.P.C.

3. The investigation was started by Sri Pratap Bahadur Singh, the then S.O. of the Police Station Kasimpur, who along with other police force immediately proceeded to the complainant''s house. On his directioin, S.I. Sant Bahadur Singh, prepared the inquest report of the dead body of the deceased & after completing the legal formalities, he sealed the same and sent for post mortem.

4. The post mortem of the dead body of the deceased Km. Lekhrani was conducted by Dr. R.K. Kohli of Community Health Centre, Sandila Hardoi on 30.09.2004 at 1.20 P.M.

On external examination, he found that the deceased was a young lady average built and weight. Rigor mortis pass out in upper extremity and present in lower extremity. Saliva mixed with blood from both nostrils on left side of face was present. Abdomen was distended and scalp hair were blocked.

Semen was present on lower part of labia-majora and also in vagina.

The following ante-mortem injuries were found on the body of the deceased:

1) Contusion 16 cm. X 7 cm. on infront of neck in round shape, 3 cm below from mid point of chin.

2) Contusion 4 cm. X 2 cm. on right side face, 2.5 cm. below from right angle of mouth.

3) Contusion 10 cm. X 3 cm. on back side between both scapula at level of C 6.

On internal examination her left side hyoid bone was found fractured and both lungs were also found congested.

Dr. R.K. Kohli, P.W. 5, has opined that the cause of her death was asphyxia, throttling as a result of ante-mortem injuries.

5. The investigating officer inspected the place of occurrence and prepared the site plan and also recorded the statements of the witnesses. After completing the

investigation, he submitted the charge sheet under Sections 376, 302, 201 & 323 I.P.C. against the convict/appellant Sheo Dayal and co-accused Shiv Prasad @ Shiv Kumar.

6. After taking cognizance of the offences, the learned Magistrate committed the case relating to accused Sheo Dayal & Shiv Prasad @ Shiv Kumar to the Court of Sessions. The case relating to the co-accused Shiv Prasad @ Shiv Kumar was separated and was sent to Juvenile Justice Board for disposal vide Court''s order dated 26.04.2005. Thus, the accused Sheo Dayal only has faced trial in the Court of Sessions.

7.The accused Sheo Dayal was charged under Sections 376, 302/34 & 201 I.P.C. He denied the charges levelled against him and claimed trial.

8. In order to prove its case, the prosecution examined the following witnesses:

PW 1, Ghassu, Complainant/Informant

PW 2, Bihari Lal son of Maiku

PW 3, Jamuna Prasad son of Ram Charan

PW 4, C/P 241 Surendra Awasthi

PW 5, Dr. R.K. Kohli

PW 6, Station Officer-Pratap Bahadur Singh.

9. The prosecution also proved the chick F.I.R., copy of G.D., Post Mortem Report, Inquest Report and connected papers, Site Plan, Recovery Memo of Clothes of the accused, Charge sheet, Report of the Forensic Laboratory dated 19.02.2005 in respect of clothes of the deceased and the accused, Exts. Ka-1 to Ka-15. The prosecution also proved Gamcha, Baniyan,Underwear belonging to the convict/appellant Sheo Dayal, and Salwar, Kurta, Dupatta, broken bangles, hair band, Silver ear ring, one golden nose ring etc. of the deceased-prosecutrix, which were taken into possession by the Investigating Officer, as Material Exhibits 1 to 13.

10. The convict did not adduce any evidence in defence.

11. After hearing the arguments advanced from both the sides and perusing the evidence on record, the learned court below ultimately reached to the conclusion that the prosecution has succeeded in proving both the charges under Sections 376 I.P.C. and 302 I.P.C. levelled against the convict/zappellant, beyond any shadow of reasonable doubt and therefore, passed the sentences in the aforesaid manner. The learned Trial Court, however, acquitted the accused/appellant u/s 201 I.P.C.

12. We have heard Sri Amit Chaudhari, learned amicus curiae for the appellant, Sri M.K.S. Yadav, learned A.G.A. and perused the entire lower court record.

13. Before we enter into the merits of this appeal, the case laws may be mentioned, which were relied upon by the learned Counsel for the appellant in this appeal:

(i) Marudanal Augusti v. State of Kerala 1980 Supreme Court Cases (Cri.) 985: In this case it was laid down that once the F.I.R. is held to be fabricated, the entire prosecution case would collapse. It was also held that omission to mention the names of the eye witnesses in the F.I.R. and unexplained delay in lodging of the F.I.R. and dispatch of the F.I.R. to the Magistrate, besides other infirmities would certainly throw a serious doubt on the prosecution case.

(ii) Garib Singh and Others Vs. State of Punjab, : In this case reappraisal of evidence was made and it was found that weighing of evidence by the trial court was wrong. In respect of conflicting evidence, duty of the court was reiterated to separate chaff from grain. It was also held that there is no unique method of arriving at correct or at least satisfactory conclusion upon veracity of versions placed before the court, which can be applied to all the cases.

(iii) Rahim Beg and Anr. v. State of U.P. reported in 1972 SCC (Cri.) 827: In this case the death sentence was imposed by the court below. The Hon''ble Apex Court found that there was ex facie infirmities in the evidence. Further, it was found that u/s 313 Cr.P.C. the accused was not questioned about the presence of blood on his clothes. It was, therefore, held that no inference can be drawn on that account against the accused. Further, in respect of the circumstantial evidence of human blood on the bush shirt of the accused Mahadev and stains of semen on the Langot of Rahim Beg, it was observed that so far as the blood stains on the bush shirt of Mahadeo are concerned, it may be stated that no question was put to Mahadeo during the course of his statement u/s 342(313) of the Code of Criminal Procedure that his bush shirt was stained with blood. Mahadeo not having been asked to furnish an explanation regarding the stain of human blood on his bush shirt, no inference can be drawn against Mahadeo on that account it was held. As regards the stain of semen on the Langot of Rahim Beg, it was observed that Rahim Beg is a young man of 22. The Langot in question was dirty at the time it was taken into possession. It cannot be said as to how old was the semen stain on the Langot. The semen stain on the Langot of a young man can exist because of a variety of reasons and would not necessarily connect him with the offence of rape.

(iv) Sattatiya @ Satish Rajanna Kartalla v. State of Maharashtra (2008) 1 SCC 733: It was a case of circumstantial evidence wherein blood mark/stains and blood stains were found. The Hon''ble Apex Court observed that there was need to establish link with blood of deceased. At the same time it was also held that in the case of circumstantial evidence court can draw an inference of guilt when all incriminating facts and circumstances are found to be totally incompatiable with the innocence of the accused.

(vi) Subhash Chand v. State of Rajasthan 2002 SCC 256 (Full Bench): According to the facts of this case of murder and rape there was a recovery of underwear in which Group B bloodstain and semen were found but the same were not produced and exhibited in the court and there was nothing to show that the same were the blood stains of the blood of accused. Therefore, it was held that the recovery of stained underwear was not an incriminating circumstance. Further there was no material available to fix the place and the likely time at which the rape was committed.

14. On the other hand the following case laws were relied upon by the learned A.G.A.

(i) State of Punjab v. Hakam Singh reported in 2005 SCC 1679: In this case it was about an eye witness who happen to be a rustic lady. It was observed that the court should keep in mind the rural background of such witness and scenario in which the incident had happened and should not appreciate her evidence from rational angle and discredit her otherwise truthful version on technical ground. According to the fact of this case the accused persons were fired from their respective fire arms and it was, therefore, observed that the court should not expect from her a minute description of the whole thing which had happened in a few minutes.

(ii) State of M.P. v. Man Singh and Ors. reported in (2007) 2 SCC 390: Besides making observations in respect of Sections 164, 154, 157 Cr.P.C., in respect of non-mention of name of a witness in F.I.R., it was observed that that there is no hard and fast rule that the names of all the witnesses, more particularly eye witness should be indicated in the F.I.R. In the case before the Hon''ble Apex Court, on the basis of facts it was found that non mention of name of PW 8 in the F.I.R. was a natural consequence of the events.

(iii) Surendra Pal Shiv Balak Pal v. State of Gujarat reported in 2005 SCC 653: In this case clothes of the deceased were recovered with blood stains and lacerated wound found on private parts with hymen completely ruptured. Doctor opined the cause of death as asphyxiation. The clothes worn by the appellant at the time of incident were also recovered with blood stains thereon and the underwear recovered was also having semen stains. No rational explanation could be given by the appellant for the presence of the stains on the said clothes. It was a case of circumstantial evidence wherein the appellant was seen near time of alleged abduction of deceased. Stating all the facts and circumstances of the case, Hon''ble Apex Court converted the death sentence to life imprisonment. But dismissed the appeal.

(iv) Shaik Mastan Vali v. State of U.P. reported in (2007) 3 SCC 486: It was a case of circumstantial evidence wherein the deceased was having illicit relations with accused. The accused found the deceased in another''s place watching T.V. There after, he dragged her to her house. Next morning, deceased was found dead in her hut. Finally, the conviction u/s 302 I.P.C. was upheld and the appeal was dismissed.

15. Learned amicus curiae submitted that the entire prosecution case is based on circumstantial evidence which does not constitute a complete chain. He further submitted that the prosecution evidence mainly consists of the evidence of PW 2, Bihari Lal and PW 3, Jamuna Prasad, but, no reliance can be placed upon them because firstly they are not named in the F.I.R. and secondly their conduct belies their presence near the spot. Because even after allegedly having lastly seen the accused persons dragging/taking the victim into the paddy field they neither tried to save the girl nor informed the complainant immediately, though they were related to the complainant. The learned amicus curiae also explained that the accused being a married man there was nothing unusual having semen stains or sperm on his underwear, as reported in the forensic report. He further submitted that the first information report of this case is fabricated and post timed. He also made few other submissions which would be discussed hereinafter.

16. The aforesaid arguments entail discussion in the following manner:

As regards not naming of Biharai Lal PW 2 and Jamuna Prasad PW 3 in the F.I.R., there is no hard and fast rule that names of all the witnesses more particularly eye witnesses should be indicated in the F.I.R. If non mention of name of any witness in the F.I.R. is found to be in the natural sequence of events or there is some other explanation, the same will have to be considered by the court concerned as has been laid down in the case of State of M.P. v. Man Singh and Ors. (Supra). In the case in hand when the complainant was confronted on this point, he categorically stated to have told the names of both these eye witnesses for being mentioned in his report which was written by one Jagdish. The complainant of this case happens to be an illiterate person who has appended only thumb impressions on the F.I.R. as also on each page of his substantive statement given in the court below. The scribe Jagdish might have not mentioned the names of both the witnesses due to inadvertence. The complainant happened to be a rustic and illiterate villager who was in a great shock due to rape and murder of his daughter. Even if he forgot to tell names of these witnesses, his testimony cannot be totally ruled out merely on this account. The complainant also claimed to had told the names of these witnesses to the investigating officer when he visited the spot and the investigating officer had immediately called both these witnesses, who admitted before him to had seen the occurrence and offered themselves as witnesses of fact. The evidence of both these witnesses has also been assailed on the ground that they are said to be distantly related to the complainant but even after having lastly seen the accused persons dragging/taking the girl into the paddy field they neither tried to save her nor informed the complainant immediately. Both the witnesses have explained that initially due to fear they did not inform the complainant Ghassu but subsequently they told him. It is true that neither of them also tried to save the girl or raised any alarm. But merely on account of that reason their evidence which appears to be otherwise cogent and reliable cannot be disbelieved. The texture of the character of each individual differs from another. Some persons may be courageous enough and

they may react sharply even if they are not related to the victim. On the other hand there may be a person of cowardice nature who may be related to the victim but out of fear may not muster courage to either raise alarm or to intervene. Human behaviour varies from man to man as different people behave and react differently in different situation. While witnessing some heinous crime some witnesses become speechless while some become stunned and stand rooted to the spot. Some become hysteric and start wailing while some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others run to the rescue of the victim even going to the extent of making counter attacking the assailants. Thus, everyone reacts in its own way and there cannot be any such rule of natural reaction. As far as the testimony of both these witnesses is concerned, they have given out each and every detail and there is no material contradiction in their statements. There may be few minor contradiction such as to whether after the incident they eased out or returned to their home without easing out. These minor contradictions are not material. It is also worthwhile to mention that the statements of both the witnesses were recorded u/s 161 Cr.P.C. by the investigating officer on the day the investigating officer visited the village immediately after registration of the F.I.R. i.e. on 30.09.2004. The body was also inquested upon on the same day and the post mortem was also performed on 30.09.2004 itself. As far as fear alleged by witnesses is concerned even if a person is of cowardice nature it would be quite natural for him to get over the fear in the presence of police officer and that is how both these witnesses came forward to tell about what they had witnessed.

17. Learned amicus curiae also submitted that both these witnesses did not tell about having witnessed the alleged dragging of the deceased by the convict at the time of inquest. Again there is no such requirement of law to record the statement of the witnesses in the inquest memo. The only requirement of the relevant provision is that the police officer is supposed to record the apparent cause of death describing the wounds/injuries as may be found on the body and also weapon or instrument, if any, by which the injuries were caused/inflicted. This provision nowhere requires that the manner in which the incident took place or the names of the accused should be mentioned. The main object of inquest report is to ascertain as to whether the death was suicidal, homicidal or accidental. Therefore, we do not find any substance in this argument also.

18. Learned amicus curiae then tried to explain the incriminating circumstance of stains of semen and sperm on the undergarment of convict and submitted that the accused being a married man there was nothing unusual having semen stains or sperm on his underwear as reported in the forensic report. In support of his contention he placed reliance on the case law of Rahim Beg (Supra), Sattatiya @ Satish Rajanna Kartalla (Supra) and Subhash Chand (Supra). The facts of all the three cases were different and therefore, the appellant cannot be given any benefit. In the case of Rahim Beg (Supra), it was found that u/s 313 Cr.P.C. the accused was not questioned about the presence of blood stains on his clothes. As regards stain of

semen on the Langot of convict Rahim Beg it was observed that he is a young man of 22 and the Langot in question was dirty at the time it was taken into possession and therefore, it cannot be said that how old was the semen stains on the Langot. Further in that case ex facie infirmities were also found in the evidence. In the present case there are no such infirmities. Similarly, in the case of Sattatiya @ Satish Rajanna Kartalla (Supra), it was laid down that when the blood stains/marks were found there was a need to establish a link with the blood of the deceased. At the same time it was also observed that in the case of circumstantial evidence (as in the present case) the court can draw an inference of guilt when all incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. In the case of Subhash Chand (Supra) also there was a recovery of underwear in which blood stains and semen were found. But clothe was not produced and exhibited in the court. In the case in hand, however, the clothes were produced in the court and also duly exhibited. Moreover, in that case there was no material available to fix the place and likely time at which the rape was committed. In the present case, there are no such facts and circumstances. In the case before us the forensic report clearly shows that human semen and sperm were found on the undergarments of both the accused including the appellant. These undergarments were taken by the police on the very next day i.e. 30.09.2004 itself at the time of their arrest and the memo has been duly proved. Specific question was also asked regarding this during the examination of the appellant u/s 313 Cr.P.C. The appellant may be a married man and possibility of his underwear getting stains of semen and sperm cannot be ruled out while having slept with his wife. But this argument would have force, had the accused offer some plausible explanation as to how his underwear got stained with semen and sperm. Therefore, undoubtedly it is a very strong incriminating circumstance against the convict about which no rationale explanation could be given by him. Therefore, we regret for not accepting the above submission, made by the learned amicus curiae. It would also be too much to believe that for the same reasons similar stains were also found on the undergarment of his companion (co-accused) who was separately tried on the ground of his being juvenile. Moreover it is not claimed that juvenile was also a married man. Even if his juvenile companion was also a married person, it would be too much to believe that by chance both of them had stains of semen and sperm on their undergarments. Besides Salwar, Kurta and Duppata of the victim also contained stains of human blood whereas Salwar had also stains of human semen and sperm and the measurement of longest stain on the Kurta of the victim was 10 cm. Not only this in the post mortem report semen was found present on lower part of labia majora and also in the vagina of the victim. Three ante-mortem contusions were also found measuring 16 cm.X 7 cm. in front of neck, another contusion measuring 4 cm. X 2 cm. on the right side of the face and yet another contusion measuring 10 cm. X 3 cm. on the back side between both scapula at the level of C6 on the body of the victim. Further left side hyoid bone was found fractured and both lungs were found congested. As per opinion of the Doctor, who performed the post

mortem, the cause of her death was asphyxia, throttling as a result of ante mortem injuries and the time of her death could have been in between noon and 3.00-4.00 p.m., on 29.09.2004, as alleged by prosecution. Thus, the medical evidence is also in consonance with the substantive evidence on record and the appellant has failed to explain aforesaid strong and substantial incriminating circumstances against him.

19. In a case of circumstantial evidence the theory of last seen comes into play when the time taken is so small that possibility of any person other than the convict being the author of the crime becomes impossible. In the present case also the gap was not long because the body was recovered only after few hours on the same day as mentioned hereinbefore. Both the aforesaid witnesses had lastly seen the victim in the forenoon being dragged by the convict and his companion at the alleged place i.e. field of Arhar of Kheman which was near the paddy field of complainant. In the after noon the body was traced out by the complainant. Therefore, there was no possibility of any other person coming in between. The learned court below has rightly come to the conclusion that the appellant was the real perpetrator of the crime of rape and murder of the victim.

20. The learned amicus curiae also submitted that according to the F.I.R. one Suresh had told him that Shiv Prasad (co-accused) was telling about the body of the victim lying in the paddy field but Suresh had not been produced before the court below. It is always the prerogative of the prosecution to produce or not to produce a particular witness but mere non production of a particular witness would not justify rejection of the entire prosecution evidence on the basis of which prosecution case is otherwise proved, beyond shadow of reasonable odoubt.

21. The learned amicus curiae also submitted that the first informant at one place has said that the victim had gone to throw the garbage in the evening around 6-7 P.M. while the dead body was found in the after noon and on the next day the report was lodged in the police station and from these details it appears that the F.I.R. was fabricated. We are not inclined to accept this submission also. In the hand written F.I.R., about the date and time of occurrence, it is clearly mentioned that on 29.09.2004 the complainant''s daughter, aged about 16 years had gone to throw garbage in the field meant for the purpose at a distance of about half kilometre towards north east of the village and when she did not come back for quite some time, then in the noon, he and his wife came out of their house to search her. But they could not succeed and came back to the village. Then one Suresh of the same village told that one Shiv Prasad son of Niranjan Pasi had told him that the complainant''s daughter is lying in the paddy field. Then the complainant went there and found her daughter lying dead. Thereafter, with the help of family members, he lifted the body and came to his house. The distance of the police station is about 20 Kms. He lodged the report on the next date i.e. 30.09.2008 at about 4:30. In the chick F.I.R. A.M. or P.M. was not mentioned. But in the inquest report the time of lodging of the F.I.R. is clearly mentioned as 4:30 A.M. Keeping in view the distance of

the police station and also the mental agony of the complainant there does not appear to be any delay in lodging the F.I.R. In the examination-in-chief, the complainant has told that "Meri ladki ghar se kuda dalne sayam ko 6-7 baje gayi thi usi din suraj chipne ke bad gaon ke Suresh son of Sobran Lal ne bataya ki....." Firstly, the word "Sayam" is not clearly written. Secondly, it is possible that the reader of the court who recorded the statement mentioned this word inadvertently. Nevertheless, if we read both the above sentences conjointly along with the F.I.R. then it clearly comes out that the victim had gone in the morning at about 6-7 A.M. and on the same day, in the afternoon, the complainant was told about the location of the body of her daughter. Then, with the help of his family members he brought the body to his house lying at the distance of about half kilometer and then after getting the report scribed he lodged the report at the police station at about 4:30 A.M., after covering a distance of about 20 Kms. The learned amicus curiae also drew the attention towards certain portion of his cross examination about the timing of finding the dead body etc. which according to him is not in consonance with the timing of the prosecution case. It appears that under some confusion the complainant could not give the exact timing but any part of his statement cannot be read in isolation. It has to be read along with the evidence of both the above witnesses as also the documentary evidence on record. Therefore, we do not find any substance in this argument also.

22. No other point was argued on behalf of the convict/appellant.

23. Thus, no significant infirmity could be shown in the judgment in question. On judicial appraisal of evidence on record and attending circumstances, the learned court below has rightly reached to the conclusion and convicted the appellant in the aforesaid manner. From an overall analysis of the circumstances that have been discussed and held to have been proved beyond doubt by impeachable evidence, we are of the view that those circumstances form a chain so complete that we reach to the only conclusion that the victim was raped by the appellant and then she was murdered on the alleged date, time and place.

24. In the result, while dismissing the appeal we uphold the conviction and sentence of appellant recorded by the court below under Sections 302 & 376 I.P.C.

25. The appellant is in jail. He shall serve out the remaining sentence awarded to him. The lower court record be sent back within two weeks with a certified copy of the judgement for necessary compliance, through Registrar of this Court.