A STATE, GOVT. OF NCT OF DELHI

v.

SUNIL AND ANOTHER

NOVEMBER 29, 2000

B [K.T. THOMAS AND R.P. SETHI, JJ.]

Criminal Law

Penal Code 1860—Sections 364, 376, 377 and 302 read with Section C *34—Respondents charged for kidnapping, rape and murder of four year old—Sessions Court convicting the Respondents on the basis of autopsy report and evidence of (PWs 8 & 10—High Court acquitting both based on minor discrepancies and Medico Legal Certificate issued by a doctor who examined the deceased before autopsy—Held, minor discrepancies are common* D *features in any trial—Decision of High Court set aside—Conviction upheld.*

Evidence Act—Section 27—Criminal Procedure Code 1973—Sections 100(5), 161—Held, there is no requirement to obtain signatures of independent witnesses while recovering an object pursuant to information supplied by the accused.

E

The Respondents were charged under Sections 364, 376, 377 and 302 read with 34 of the Indian Penal Code for offence of kidnapping, rape and murder of a four year old girl child. The Sessions Court convicted both the Respondents under all the provisions and sentenced R to death and S to F **imprisonment for life and other sentences. The Sessions Court found that prosecution has established the circumstances namely that S had taken the child from the house of PW8 on the day of occurrence, that the child was recovered from the house of S breathless, that the child was lying naked by the side of R who was in deep sleep, that S then said that the child was sent by him to heaven and that the blood-stained nicker of the child was recovered** G **from the house of R on the basis of a statement given to the police. The Sessions Court convicted both the Respondents for murder, rape and unnatural offence while S was additionally convicted for kidnapping. The High Court allowed the appeal by the Respondents, and acquitted both. The High Court disbelieved the prosecution on the ground that there was no need for S to take the clothes and utensils while taking the child, that there was nothing**

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to indicate that PW 10 made any enquiries about them, that PW8 could not explain as to what she understood when S wanted to take away the child with him, that none from the neighbourhood of PW8 was examined to corroborate her, and that her testimony was contradictory to that of PW10. The High Court expressed doubt about the correctness of finding given by PW1, the Doctor who conducted the post-mortem on the ground that the Doctor who first examined the deceased only found multiple bruises all over the body. A B

Allowing the Appeal, the Court

HELD : 1. Though there are discrepancies between the evidence of PWs 8, 10 and 12, there is no discrepancy worth quoting for consideration as they are immaterial. Such discrepancies are common features in the testimony of any two witnesses. It was too much of a strain for the judicial mind to ferret out some minor discrepancies as between the testimony of those three witnesses. Even the other reason advanced by the High Court are *ex-facie* puerile and evidence given on oath by PW10 and her associate PW8 cannot be jettisoned on such insignificant reasons. The High Court ought not to have sidelined the evidence of those witnesses. [152-C-D] C D

2. Recovery of the nicker is evidenced by the seizure memo Ext. PW-10/G. It was signed by PW 10 besides its auther PW17. There is no requirement either under Section 27 of the Evidence Act or under Section 161 of the Code of Criminal Procedure, to obtain signature of independent witnesses on the record in which statement of an accused is written. The legal obligation to call independent and respectable inhabitants of the locality to attend and witness the exercise made by the police is cast on the police officer when searches are made under Chapter VII of the Code. [152-H; 153-C] E

Transport Commissioner, Andhra Pradesh, Hyderabad & Anr. v. *S. Sardar Ali & Ors.*, AIR (1983) SC 1225, referred to. F

3. It is fallacious impression that when recovery is effected pursuant to any statement made by the accused the document prepared by the Investigating Officer contemporaneous with such recovery must necessarily be attested by independent witnesses. Of course, if any such statement leads to recovery of any article it is open to the Investigating Officer to take the signature of any person present at that time, on the document prepared for such recovery. But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the G H

A recovery evidence unreliable. The Court has to consider the evidence of the Investigating Officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth. [154-C-D]

4. The Court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other B way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence, when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise C shown to be unreliable. It is for the accused, through cross- examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But D it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions. The mere absence of independent witness when PW 17 recorded the statement of accused 'R' and the nicker was E recovered pursuant to the said statement, is not a sufficient ground to discard the evidence under Section 27 of the Evidence Act. [154-E-H; 155-A-B]

5. The trial court had come to the correct conclusion that the two respondents were the rapists who subjected the deceased to such savagery ravishment. The Division Bunch of the High Court has grossly erred in F interfering with such a correct conclusion made by the trial court as the reasons adopted by the High Court for such interference are very tenuous. In the opinion of PW1 the Doctor, the child died "due to intracranial damage consequent upon surface force impact to the head". The said opinion was made with reference to the subdural haemotoma which resulted in subarachnoid G haemorrage. Such a consequence happened during the course of the violent ravishment committed by either both or by one of the rapists without possibly having any intention or even knowledge that their action would produce any such injury. Even so, the rapists cannot disclaim knowledge that the acts done by them on a little infant of such a tender age were likely to cause its death. Hence they cannot escape conviction from the offence of culpable homicide H not amounting to murder. [155-C-E]

6. The impugned judgment of the High Court is set aside. The conviction passed by the trial court under Sections 376 and 377 read with Section 34 IPC is restored. The trial court awarded the maximum sentence to the respondents under the said counts i.e. imprisonment for life. The fact situation in this case does not justify any reduction of that sentence. The respondents are also convicted under Section 304 Part II, read with Section 34 IPC though it is unnecessary to award any sentence thereunder in view of the sentence of imprisonment for life awarded to the respondents under the other two counts. [155-F-G]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 1119-1120 of 1998.

From the Judgment and Order dated 12.2.98 of the Delhi High Court in M.R. No. 2 of 1997, Crl. A. Nos. 396 and 402 of 1997

T.L.V. Iyer, K.C. Kaushik and D.S. Mehra for the Appellant.

K.V. Sreekumar for the Respondents.

The Judgment of the Court was delivered by

THOMAS, J. Two sex maniacs libidinously ravaged a tiny female tot like wild beasts and finished her off. Police after investigation found that the two respondents herein are those two fiends. A Sessions Court upheld the said police version as correct. He sentenced one of them to death penalty and the other to life imprisonment, but a Division Bench of the High Court of Delhi declined to believe the police version as true and consequently the two respondents were acquitted. This appeal by the State is by special leave.

The little girl was Anuradha and she was aged only four. She was fondly taken away from her mother's house on the forenoon of 5.9.1992. Her dead body was taken up by her mother on the same night from the house of first accused Sunil. When the doctor conducted autopsy on the dead body he described the dimensions of the imprints left in the infantile body reflecting a horrible sexual molestation inflicted on the child. Next day the police arrested the two accused (A1-Sunil and A2-Ramesh) and after completing the investigation charge-sheeted both of them for offences under Sections 364, 376, 377 and 302 read with Section 34 of the Indian Penal Code. After the trial the sessions court convicted both of them under all the aforesaid counts and sentenced A2 Ramesh to death and A1 Sunil to imprisonment for life on the

A charge of murder and awarded lesser sentences for the remaining counts.

Details of the prosecution case are the following:

Anuradha's mother Sharda (PW10) was known to A1 Sunil and his mother (Giano Devi). Sharda had stayed in the house of Giano Devi for a few B days and their acquaintance became closer. Sharda was working in a tube-light manufacturing factory during those days. As she needed a place to live in Giano Devi arranged a small hutment (Jhuggi) with the help of another lady (PW8 Tara) who was residing close-by. On the occurrence day Sharda went to the factory for work leaving her child Anuradha in the custody of PW8-C Tara. At about 11 A.M. Sunil visited them and expressed to PW8-Tara that he would take the child and her clothes as well as some domestic utensils to PW10. Though PW8 suggested that this should be done only if Sharda permits, A1-Sunil took the child and her clothes and the utensils from his house during a short time when PW8-Tara had gone out to fetch milk. When she came home in the night she learnt from PW8-Tara that her child was taken D away by Sunil. So she went to Sunil's house. It was about 9.00 P.M. then. To her dismay she found her little child lying completely nude next to A2-Ramesh, on the second floor of the house, who was then deep in his sleep. Then Sunil, who was found in an inebriated mood, hurled a remark that "I have dispatched Anuradha to heaven." She felt concerned as to what would E have happened to the child. It was then she realised that her child was breathless. PW10- Sharda then took the child to the hospital, but the doctor who examined her pronounced her dead.

PW1 - Dr. Basant Lal conducted the autopsy on the dead body of the child at 12.00 noon on 7.9.1992. In his opinion the child would have died F about 36 to 48 hours prior to the autopsy. He gave full details in his post-mortem report about the features noticed by him on the dead body. The corpse was full of abrasions and contusions. The prominent among them were counted by the doctor as 25 in number and he described the situs and dimensions of all of them. Among them, oval fashioned multiple abrasions on G the left cheek appeared to him as marks of biting. Both the upper and lower lips of the child were bruised violently. Marks of violent handling of both the thighs, lower abdomen and pubic region are also described by the doctor. The vaginal orifice is described by the doctor in his report as follows:

"Labia majora and minora swollen and reddish blue in colour. Vaginal H orifice dilated and blood is coming out of it. Right labia minora showing

tears 1.6 x 0.1 cm. and on left side labia minora showing tear in an area of 1.5 x 0.2 cm in vertical plane. Labia majora showing contusion on both sides in an area of 3 x 2 cm each." A

About hymen the doctor described thus:

"Hymen -showing tear at 5 and 6 O'clock position which was going upto the vaginal wall and triangular in shape in an area of 1.5 x 1 x 1 cm. There were tears on the sides and back of urethra opening upto hymen in an area of 1.4 x 1.2 cm. in triangular fashion." B

About the anus the doctor described as follows:

"Dilated and blood was coming out of it. The diameter was 1.5 cm. The area around the orifice was showing swelling with reddish contusion in an area of 2 cm." C

Dr. Basant Lal (PW-1) further noted that the vaginal orifice was so badly mutilated that one middle finger could be easily admitted into it. Even the tongue was not spared in that violence as the doctor found its position like this: D

"The tongue was showing abrasion 0.5 x 0.5 cm. on its front right outer aspect with contusion around. Reddish bluish in colour - Bite mark." E

During examination of the head of the body PW1 noticed thick layered bluish-reddish effusion of blood on the right temporal parietal region. Though there was no fracture of the skull the durameter on the left side looked bluish, and there was thick subdural haemotoma in an area of 20x10x0.8 cm. and one fist full clotted blood, and patchy subarachnoid haemorrage all over the brain which were also noticed by the doctor. F

From the woeful and eerie features described by the doctor no court could possibly escape from the conclusion that the little child was violently molested, ravished, raped and sodomised besides penile penetration having been made into her mouth. The remnants of extensive mangling of the tender body of the child would reflect the possibility of more than one rapist subjecting the child to such beasty ravishment. G

Though the Sessions Court acted on the above medical report as reliable it is unfortunate that the Division Bench of the High Court expressed H

misgivings about it. The only basis for entertaining doubt about the correctness of the findings recorded by PW1 - Dr. Basant Lal was that when the deceased was first examined by one Dr. Gajrat Singh at 11.40 P.M. on 5.9.1992 he noted only "multiple bruises all over the body" in Ext.PW11/1 MLC(Medico Legal Certificate). It was the said doctor who pronounced the girl dead. He made the above entry in the MLC. It must be noted that Dr. Gajrat Singh was not examined as a witness in the court. Apparently that doctor was not disposed to conduct a detailed examination on the dead body either because he was pretty sure that the body would be subjected to a detailed autopsy or because the doctor himself was in a great hurry. Whatever be the reason, no court could afford to ignore the report of the doctor who conducted the autopsy with meticulous precision about all the features noticed, merely on the strength of what another doctor had scribbled in the MLC at the initial stage.

Learned Judges of the High Court should have noticed that the evidence of PW1 - Dr. Basant Lal was not even controverted by the defence as no question was put to him in cross-examination by the defence counsel. His testimony ought to have been given due probative value particularly when nothing was shown to doubt the evidence of that medical practitioner. Learned counsel for the respondents was not able to pick out even a single answer from his evidence which could at least throw a modicum of doubt about the correctness of his evidence. Hence we have to proceed on the premise that whatever PW1 - Dr. Basant Lal - found on the dead body were the actual position noticed by him during autopsy. The Sessions Judge has rightly accepted that evidence and no exception can be taken thereto. Thus, it is beyond doubt that the little girl was raped and sodomised and that death was due to the injuries sustained in that exercise.

When the above premise is so certain the task of the court is narrowed down to the limited area i.e., were the two respondents the rapists or is there any reasonable scope to think that somebody else would have done those acts.

The trial court came to the conclusion that the culprits are the two respondents and none else. The Sessions Judge found that prosecution has established the following circumstances: (1) Sunil (1st accused) had taken the child from the house of PW8 - Tara by about noon on 5.9.1992. (2) The child was recovered from the house of A1 - Sunil and she was then found breathless. (3) That child was lying naked by the side of A2 - Ramesh who was in deep

sleep when the mother of the child lifted her up. (4) A1 -Sunil, who was then in inebriated condition, blurted out that Anuradha was sent to heaven. (5) The blood-stained nicker of Anuradha was later recovered from the house of A2-Ramesh on the basis of a statement given to the police.

The trial court concluded on the strength of those circumstances that both the respondents are liable to be convicted for murder, rape and unnatural offence, while A1-Sunil is additionally liable for kidnapping the child for murder. Accordingly the trial court convicted both the respondents and sentenced them as aforesaid.

Regarding the first circumstance that it was A1 -Sunil who took the child from the care of PW8-Tara, prosecution has examined PW8 - Tara and her neighbour PW12-Dariba besides the evidence of PW10 - Sharda. PW8 - Tara said that she knew both the accused since they used to stay in the house of Sharda for some days earlier. According to PW8-Tara, the child and her mother had stayed in her Jhuggi for a few days and on the date of occurrence A1-Sunil visited the Jhuggi at 11 A.M. and requested her to let the child Anuradha be taken with him along with some utensils and clothes. The suggestion was that he had to take the child to the factory where Sharda was working. It appears that PW8-Tara was reluctant to allow him to take the child presumably because she did not know whether Sharda herself wanted the child then. But during the short interval when she went out of the house for purchasing milk A1-Sunil had taken away the child. As she did not know where Sharda was working and as the child was taken away by A1-Sunil who was familiar to Sharda no immediate step was taken by PW8-Tara and she chose to wait till Sharda returned.

The above evidence of PW8-Tara is to be appreciated in the light of what PW10-Sharda herself had said. PW10 deposed that she was quite familiar with A1-Sunil and she and the child had stayed at Sunil's house for a few days sometime back. PW10 has stated that on the date of occurrence when she returned to Tara's house she was told that Sunil had taken the child away by saying that PW10 would take the child back in the evening. She further deposed that she went to A1's house at 9.30 P.M. along with PW8-Tara and PW12-Dariba and collected the child from that house and the child was then lying next to A2-Ramesh who too was then sleeping. As the child was found breathless and in view of the comment blurted out by A1-Sunil, she rushed the child to the hospital.

A The Division Bench of the High Court expressed difficulty to believe the said version of the prosecution i.e. A1 Sunil had taken away the child from the Jhuggi of PW8 Tara. The reasons of the High Court for it are: (1) There was no need for A1 Sunil to take the clothes and utensils even if he wanted to take the child to its mother Sharda. (2) There is nothing to indicate that PW10 Sharda made any enquiry about the clothes and utensils. (3) PW8 Tara B could not explain as to what she understood when A1 Sunil wanted to take away the child with him. (4) Nobody from the neighbourhood of Tara was examined to corroborate her evidence. (5) The testimony of PW8 Tara was contradictory with the evidence of PW10 Sharda.

C We perused the evidence of PW8-Tara, PW10-Sharda and their neighbour PW12-Dariba. True, there are discrepancies between the evidence of those three witnesses, but we have not come across any discrepancy worth quoting for consideration as they are immaterial. Such discrepancies are common features in the testimony of any two witnesses. It was too much of a strain for the judicial mind to ferret out some minor discrepancies as between the D testimony of those three witnesses. Even the other reasons advanced by the Division Bench of the High Court are *ex facie* puerile and evidence given on oath by the bereaved mother PW10-Sharda and her other associate PW8-Tara, cannot be jettisoned on such insignificant reasons. In our view the High Court ought not to have sidelined the evidence of those three witnesses.

E The circumstance relating to the recovery of the bloodstained nicker is a formidable one. But the Division Bench did not attach any importance to it solely on the ground that the seizure memo was not attested by any independent witness. Here the circumstance is that when A2-Ramesh was interrogated by PW17-Investigating Officer he said: "Her underwear is in my F house and I can point out the place where it is." Pursuant to the said information the police recovered the nicker from the house of A2-Ramesh. It was identified by PW10-Sharda as her child's nicker. When the nicker was subjected to chemical test it was revealed that the under-cloth of the child was stained with blood of O group (same is the blood group of Anuradha). G The said statement of A2-Ramesh would fall within the purview of Section 27 of the Evidence Act as the fact discovered was that the nicker of the deceased was in the house of A2-Ramesh. The presumption which can be drawn therefrom is that it was A2 who removed the nicker and kept it in his house. A2 had no explanation to be offered about that circumstance.

H Recovery of the nicker is evidenced by the seizure memo Ext.PW-10/G.

It was signed by PW10-Sharda besides its author PW17-Investigating Officer. The Division Bench of the High Court declined to place any weight on the said circumstance purely on the ground that no other independent witness had signed the memo but it was signed only by "highly interested persons". The observation of the Division Bench in that regard is extracted below:

> "It need hardly be said that in order to lend assurance that the investigation has been proceeding in fair and honest manner, it would be necessary for the Investigating Officer to take independent witnesses to the discovery under Section 27 of the Indian Evidence Act; and without taking independent witnesses and taking highly interested persons and the police officers as the witnesses to the discovery would render the discovery, at least, not free from doubt."

In this context we may point out that there is no requirement either under Section 27 of the Evidence Act or under Section 161 of the Code of Criminal Procedure, to obtain signature of independent witnesses on the record in which statement of an accused is written. The legal obligation to call independent and respectable inhabitants of the locality to attend and witness the exercise made by the police is cast on the police officer when searches are made under Chapter VII of the Code. Section 100(5) of the Code requires that such search shall be made in their presence and a list of all things seized in the course of such search and of the places in which they are respectively found, shall be prepared by such officer or other person "and signed by such witnesses". It must be remembered that search is made to find out a thing or document which the searching officer has no prior idea where the thing or document is kept. He prowls for it either on reasonable suspicion or on some guess work that it could possibly be ferreted out in such prowling. It is a stark reality that during searches the team which conducts search would have to meddle with lots of other articles and documents also and in such process many such articles or documents are likely to be displaced or even strewn helter-skelter. The legislative idea in insisting on such searches to be made in the presence of two independent inhabitants of the locality is to ensure the safety of all such articles meddled with and to protect the rights of the persons entitled thereto. But recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code. This Court has indicated the difference between the two processes in the *Transport Commissioner, Andhra Pradesh, Hyderabad & Anr.* v. *S. Sardar Ali & Ors.*, (1983) SC 1225. Following observations of Chinnappa Reddy, J. can be used to support the said legal proposition:

A "Section 100 of the Criminal Procedure Code to which reference was made by the counsel deals with searches and not seizures. In the very nature of things when property is seized and not recovered during a search, it is not possible to comply with the provisions of sub-section (4) and (5) of section 100 of the Criminal Procedure Code. In the case of a seizure [under the Motor Vehicles Act], there is no provision for B preparing a list of the things seized in the course of the seizure for the obvious reason that all those things are seized not separately but as part of the vehicle itself."

Hence it is a fallacious impression that when recovery is effected pursuant to any statement made by the accused the document prepared by the C Investigating Officer contemporaneous with such recovery must necessarily be attested by independent witnesses. Of course, if any such statement leads to recovery of any article it is open to the Investigating Officer to take the signature of any person present at that time, on the document prepared for such recovery. But if no witness was present or if no person had agreed to D affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the Investigating Officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth.

E We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during British period and policemen also knew about it. Its hang over persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that F the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made G by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take H into account the fact that no other independent person was present at the

time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions. A

In this case, the mere absence of independent witness when PW17 recorded the statement of A2-Ramesh and the nicker was recovered pursuant to the said statement, is not a sufficient ground to discard the evidence under Section 27 of the Evidence Act. B

Thus on consideration of the entire evidence in this case we have no doubt that the trial court had come to the correct conclusion that the two respondents were the rapists who subjected Anuradha to such savagery ravishment. The Division Bench of the High Court has grossly erred in interfering with such a correct conclusion made by the trial court as the reasons adopted by the High Court for such interference are very tenuous. Nonetheless it is difficult to enter upon a finding that the respondents are equally guilty of murder of Anuradha. In the opinion of PW1 doctor the child died "due to intracranial damage consequent upon surface force impact to the head". The said opinion was made with reference to the subdural haemotoma which resulted in subarachnoid haemorrage. Such a consequence happened during the course of the violent ravishment committed by either both or by one of the rapists without possibly having any intention or even knowledge that their action would produce any such injury. Even so, the rapists cannot disclaim knowledge that the acts done by them on a little infant of such a tender age were likely to cause its death. Hence they cannot escape conviction from the offence of culpable homicide not amounting to murder. C D E

In the result, we set aside the impugned judgment of the High Court. We restore the conviction passed by the trial court under Section 376 and 377 read with Section 34 of the IPC. The trial court awarded the maximum sentence to the respondents under the said counts i.e. imprisonment for life. The fact situation in this case does not justify any reduction of that sentence. We also convict the respondents under Section 304 Part II, read with Section 34 of the IPC though it is unnecessary to award any sentence thereunder in view of the sentence of imprisonment for life awarded to the respondents under the other two counts. F G

This appeal is disposed of accordingly.

V.M. Appeal disposed of. H