Gagan Kanojia & Anr vs State Of Punjab on 24 November, 2006

Equivalent citations: AIRONLINE 2006 SC 574

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Bench: S.B. Sinha, Markandey Katju

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           CASE NO.:
Appeal (crl.)  561-62 of 2005

PETITIONER:
Gagan Kanojia & Anr.

RESPONDENT:
State of Punjab

DATE OF JUDGMENT: 24/11/2006

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
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J U D G M E N T W I T H CRIMINAL APPEAL NO.563 OF 2005 S.B. SINHA, J :

Appellants herein were prosecuted for commission of an offence under Sections 364/34, 302/34 and 201/34 of the Indian Penal Code for kidnapping and murdering two children, Abhishek and Heena, aged six and eight years respectively, of one Kamal Kishore. They were sentenced to death. A reference was made to the High Court under Section 366 of the Code of Criminal Procedure.

Appeals were preferred by Appellants also before the High Court.

By reason of the impugned judgment, the High Court while upholding the judgment and conviction opined that the case cannot be said to be a rarest of rare one meriting award of death penalty.

The children went to take private tuition in the house of one Pooja. They were supposed to come back by 6.30 p.m. As they did not return, Kamal Kishore went to her house. He was informed that the children had left her house at 6.15 p.m. The children were continued to be searched. He, however, came to know that one scooterist wearing trouser of black colour and shirt of white colour had taken his children on his scooter. A First Information Report was lodged. During investigation, the school bags and dead bodies of the children were recovered. Appellant No. 1 herein is related to the complainant. They belong to the same community. They were

neighbours. They, however, said to be belonging to different unions of their community being that of washermen.

P.W-4 is a child witness. He is nephew of Appellant No.1. They live in the same house. He is said to have seen the children sitting on the scooter of Appellant No.1 herein. Appellant No. 1 was also seen riding the scooter along with the children by PW-15, who was a taxi driver. Both the appellants furthermore went to the house of PW-11, an advocate and the leader of their community and made an extra-judicial confession. Extra judicial confession was also purported to have been made by them before the father of Appellant No.1 herein, who also got his statement recorded before the Magistrate under Section 164 of the Code of Criminal Procedure. He, however, was not examined. Appellant No.1 was arrested on the basis of the said extra-judicial confession. He made disclosure statements leading to recoveries of clothes and tapes wherewith hands and legs of the deceased children were said to have been tied.

The prosecution in proving the charges against the appellants herein, inter alia, relied upon a purported letter received by the said Kamal Kishore wherein ransom was demanded. It was found to be in the handwriting of Appellant No.2.

Mr. Mahabir Singh, the learned Senior Counsel appearing on behalf of the appellants, in support of the appeals would submit :

1) Evidence of PW-4, Sahil, who was a child witness, could not have been believed particularly when : (a) he was examined after 20 days; (b) he identified the accused at the instance of PW-11; and

(c) he purported to have made the statement on the basis of a letter Ex.

D-I.

2) Extra-judicial confession is a weak peace of evidence and the same having not been corroborated in material particulars, no reliance could be placed thereupon.

3) The High Court committed an illegality in relying upon the statement of the father of Appellant No.1 under Section 164 of the Code of Criminal Procedure, which was not admissible in evidence.

4) PW-11, before whom the purported extra-judicial confession was made, having been called to the police station as also being a witness to the recovery should not have been relied upon.

5) Delay having occurred in recording the statement of PW-15, no reliance thereupon could have been placed.

6) Investigating officer having fabricated a part of the records, no reliance could be placed upon the materials found on investigation.

Mr. D.P. Singh, the learned counsel appearing on behalf of the State, on the other hand, would submit :

> 1) Evidence of PW-4 must be judged keeping in view the fact that he and Appellant No.1 were residing in the same house and as such he must have obliged his family members in making some statements in his favour.
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> 2) The letter Ex.D-1 having been produced by the accused could not have formed the basis of his statement before the police after two years, as was suggested on behalf of the appellants to PW-4.
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> 3) PW-15, Rajindra Kumar, being an independent witness, there is no reason as to why his statement, that he had seen Appellant No.1 in the company of the deceased children, should be disbelieved.
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> 4) Recoveries of tape and clothes and in particular the shirt and trouser belonging to Appellant No.1 point out to his guilt.
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> 5) Finger prints of the appellants were also found on the bottles and glasses which were recovered near the place from where the dead bodies were recovered also corroborates the prosecution case.
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> 6) The letter demanding ransom was in the handwriting of Appellant No.2 which was proved by an handwriting expert, being Deputy Director, Documents, Forensic Science Laboratory, Chandigarh is also a pointer to their involvement.
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> 7) Evidence of Pooja, who examined herself as PW-5, is also corroborative of the fact that she came to know that the victims sat on a scooter of a person whom they called as 'Chachu', which is admissible in evidence under Section 8 of the Indian Evidence Act, 1872.
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> 8) Extra-judicial confession made before PW-11, Rakesh Kumar Kanojia, who was a President of the Dhobi Maha Sabha, cannot be disbelieved, as both the appellants thought that he being an advocate could save them from the criminal case.

The prosecution case is based on circumstantial evidence. Indisputably, charges can be proved on the basis of the circumstantial evidence, when direct evidence is not available. It is well-settled that in a case based on a circumstantial evidence, the prosecution must prove that within all human probabilities, the act must have been done by the accused. It is, however, necessary for the courts to remember that there is a long gap between 'may be true' and 'must be true'. Prosecution case is required to be covered by leading cogent, believable and credible evidence. Whereas the court must

raise a presumption that the accused is innocent and in the event two views are possible, one indicating to his guilt of the accused and the other to his innocence, the defence available to the accused should be accepted, but at the same time, the court must not reject the evidence of the prosecution, proceeding on the basis that they are false, not trustworthy, unreliable and made on flimsy grounds or only on the basis of surmises and conjectures. The prosecution case, thus, must be judged in its entirety having regard to the totality of the circumstances. The approach of the court should be an integrated one and not truncated or isolated. The court should use the yardstick of probability and appreciate the intrinsic value of the evidence brought on records and analyze and assess the same objectively.

We would proceed on the well-known principles in regard to appreciation of the circumstantial evidence which were noticed by the High Court in the following terms :

> "1) There must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.
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> 2) Circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt.
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> 3) There should be no missing links but it is not that everyone of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts.
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> 4) On the availability of two inferences, the one in favour of the accused must be accepted.
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> 5) It cannot be said that prosecution must meet any and every hypothesis put forwarded by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise."

PW-1 is Dr. Balbir Singh. He conducted the post-mortem examination. It may not be necessary for us to deal with his deposition at length; the homicidal nature of death of the victims being not in dispute. PW-2 is a formal witness. PW-3 is Kamal Kishore. The statements made by him in the First Information Report for kidnapping and murder of his children have not been doubted. He proved the letter received by him demanding ransom. As noticed hereinbefore, the same was found to be in the handwriting of Appellant No.2. Sahil Kumar (PW-4), is the child witness, aged about 10 years. He was examined by the learned Trial Judge at some length. He was found to be capable of giving evidence. He deposed that Appellant No.1 was his uncle being his father's elder brother and they reside in the same house. He categorically stated in his evidence that on 08.06.2000 he saw Heena and Abhishek sitting on the scooter which was driven by Appellant No.1. He asserted that he had

seen the scooter and could identify the same. Even he gave the details of the place where the children sat on the scooter of Appellant No.1. He categorically stated that Abhishek was reluctant to sit on the scooter but he saw Heena asking him to do so saying that Gangan was their uncle, whereupon Abhishek also sat thereon. He also stated that Gagan was wearing a helmet. The brother of Kamal Kishore also visited the house of Appellant No.1 with him wherein they found a friend of Gagan to be present. PW-4 left for Ambala on the next day. He came back on 26.06.2000. He accepted that he got his statement recorded before the Magistrate. A document Ex.D-1 was produced by the accused, which was shown to him, which according to him was a letter written by Rakesh Kanojia (PW-11) and was given to him. He alleged that the contents of the said letter was dictated by the investigating officer. In his cross-examination, he reiterated his statement made in the examination in chief as also his statement made under Section 164 of the Code of Criminal Procedure and in no uncertain terms stated that at about 6.15 p.m., he saw Gagan, Abhishek and Heena sitting on the scooter. He, however, stated :

> " The face of the scooter driver was not visible due to the helmet. I had given the name of Gagan as told by Rakesh Kanojia "

He denied the suggestion that he was tutored by the police. He was sought to be cross-examined by the public prosecutor in view of the statement given by him, but for reasons best known to the court, the same was not permitted.

Ordinarily, we would not have accepted the statement of PW-4, but his statement that he had deposed on the basis of Ex.D-1 cannot be believed. If Ex.D-1 was a document which was prepared by the investigating officer, how it was produced by the accused counsel in cross-examination is beyond all comprehensions. The learned Trial Judge made a comparison between the statements contained in Ex.D-1 and those made under Section 164 of the Code of Criminal Procedure so as to find a large number of discrepancies therein, as would appear from paragraphs 105 and 106 of his judgment. It is not contended that the same was not correct. Thus, Ex. D-1 cannot be a document which was prepared by Nirmal Singh at the instance of PW-11, as suggested on behalf of the Appellants or otherwise. How the said letter could be produced by the defence after two years is again beyond all comprehensions. Even if we discard that part of the statement made by PW- 4, there is no reason as to why a part of his statement, namely, he was present when the children were taken by Gagan on his scooter, should be disbelieved or at least should not be taken into consideration for the purpose of corroboration.

He merely made a little retraction in his cross-examination. His evidence, if read as a whole, inspires confidence.

It is well known that for certain purpose, the statement of even a hostile witness can be believed. [See State of U.P. v. Ramesh Prasad Misra and Another (1996) 10 SCC 360].

We have, therefore, no hesitation in opining that Ex. D-1 was not and could not have been written by Rajender Kumar Kanojia at the dictation of the investigating officer or otherwise. To the aforementioned extent, we find force in Mr. Singh's contention.

PW-15, Rajinder Kumar, is another witness who also last saw the victims sitting on the scooter of Appellant No.1. On 08.06.2000, he had gone to the house of his partner Paramjit Singh, which is just near the place of occurrence, and had seen three children coming on foot after getting tuition. He saw two children, namely Heena and Abhishek boarding the scooter of Appellant No.1, who drove the scooter towards Cine Payal Cinema. He was undoubtedly examined on 12.06.2000. He, however, disclosed the reason therefore. He categorically stated that he had left for Delhi on the same night and on his return he came to know that the police had been visiting his house. It is not unlikely that the police might have come to know that he was also present at the relevant time. It is important to note that Appellant No.1 even had not been arrested at that point of time. There was, thus, no reason for him to implicate Appellant No.1 as he had no animosity with him. He gave a very vivid and detailed description of the place from where the children came boarded the scooter. According to him the children were standing about 5-7 feet away from him on the street from where they boarded the scooter. He did not notice Sahil (PW-4). He also accepted that he did not know Sarita. There was no reason for him to know her. There is, thus, no reason as to why we should disbelieve his evidence.

PW-5, Pooja, is a tutor. She merely stated that she had gone to the residence of other student, Sarita, having been informed that Abhishek and Heena did not return to their house. Sarita told her that Heena had called some person wearing helmet, white shirt, black pant, as 'Chacha' and then Abhishek and Heena sat on the scooter.

Sarita having not been examined, we do not intend to place any reliance on her statement. We also do not accept the contention of Mr. D.P. Singh that her statement is admissible under Section 8 of the Evidence Act. Section 8, inter alia, speaks about the conduct of an accused. The statements made by Sarita before Pooja vis-`-vis the conduct of the victims did not form part of the same transaction. Unless any fact or statement forms part of the same transaction, it will not be admissible in evidence. Sarita had not identified the accused. Sarita had not been examined and, therefore, the hearsay evidence of Pooja could not have been relied upon being based upon the purported statement of Sarita. As regards conduct of the victims vis-`-vis the person about whom she was informed and whose identity was not known, cannot be said to be admissible in terms of Section 8 of the Evidence Act.

The learned Trial Judge relied upon Section 6 of the Evidence Act which, in our opinion, has no application.

P.W. 10 is Rakesh Kumar, brother of Kamal Kishore. He deposed that he had also searched for the missing children. He was also a witness to the recoveries of the school bags and dead bodies. He proved that it was Sahil who had informed him that Gagan was seen with the children. Contention of Mr. Mahabir Singh, if that was so, Gagan should have been named in the F.I.R., but it is not denied that on the basis of the said statement, Kamal Kishore and the witness had gone to his house, but he was not found there. As they were merely searching for the children, they might not have thought at that time that Gagan had kidnapped the children. Ordinarily a near relation would not be suspected. He categorically stated till that time, it was not known who was the accused when the dead bodies were recovered. We do not see any reason to disbelieve his evidence.

PW-11 is Rakesh Kumar Kanojia. He was the President of the Dhobi Maha Sabha, Punjab. Appellant No.1 was also a member thereof. He knew the family of Appellant No.1. He was also an advocate. According to the said witness, on 13.06.2000, Gagan together with another person, Rajinder Kumar, came to his residence and disclosed about a plan they had hatched to kidnap the children for ransom. Each and every detail of the mode and manner in which the plan was to be implemented was disclosed by them.

Extra-judicial confessions made by the appellants separately have been stated by the said witness in sufficient details. He was extensively cross-examined, but his statement made in examination in chief remained unshattered. He denied and disputed that Ex. D-1 was in his handwriting. The only comment made by Mr. Mahabir Singh in regard to his evidence was that he was called to the police station on 16.06.2000 by the investigating officer. He accepted the same. We do not see any reason as to why he would not visit the police station if called upon to do so by the investigating officer. He did not deny or dispute that he was also a witness to the recoveries. He had no other option but to go to the police station as was asked by the investigating officer. Even no suggestion has been given that he was inimically disposed towards Gagan or there was any animosity between the two families.

Mr. Mahabir Singh relied upon a decision of this Court in State of U.P. v. Arun Kumar Gupta [(2003) 2 SCC 202], wherein the evidence of a witness was not believed, as he was taking extra-ordinary interest in the investigation and was present at practically every important place and time in the course of investigation. The said decision cannot be said to have any application in the instant case. PW-11 was examined by the prosecution to prove extra-judicial confession made before him by the appellants We do not see any reason as to why he would be disbelieved. The learned Trial Judge as also the High Court rightly relied upon his statement.

Extra-judicial confession, as is well-known, can form the basis of a conviction. By way of abundant caution, however, the court may look for some corroboration. Extra-judicial confession cannot ipso facto be termed to be tainted. An extra-judicial confession, if made voluntarily and proved can be relied upon by the courts. [See Sukhwant Singh @ Balwinder Singh v. State through CBI - AIR 2003 SC 3362].

Extra-judicial confession, however, purported to have been made by Appellant No.1 before his father, which was recorded in his statement before the Magistrate under Section 164 of the Code of Criminal Procedure, was not admissible in evidence. [See State of Delhi v. Shri Ram Lohia - AIR 1960 SC 490 para 13; and George and Others v. State of Kerala and Another (1998) 4 SCC 605 para 36]. He was not examined by the prosecution. He might not have been examined for good reasons. At one point of time, he might have been sure about the involvement of his son, but at a later stage, he would have thought not to depose against him.

In a case of this nature, it was also not expected that the family members of Appellant No.1 would depose against him, as regards recovery of clothes which were recovered from his own house. The prosecution furthermore has brought on record the recovery of trouser and shirt of the accused. The colour of the said garments is not in dispute. The fact that the same were not belonging to him has also not been canvassed before us. Place of kidnapping has also not been disputed before us. Apart

from PW-4, PW-11 is also a witness to the said fact Recoveries of school bags of the deceased children and their dead bodies have also been proved, which have neither been denied nor disputed before us.

We may notice now that the recovery had also been made of empty bottles and glasses. The said recovery has been proved by Sub Inspector Baldev Singh, PW-17. PW-10, Rakesh Kumar, stated in his evidence that Deep Public School from whose 'Ahata' the empty bottle and glasses had been recovered was at a distance of 100 yards from the place wherefrom the dead bodies of the children were recovered. PW-20, Inspector Nirmal Singh, recovered empty bottle of liquor containing a few drops thereof as also two glasses. PW-16, Sub Inspector Hardeep Singh, found the traces of finger prints on those articles. He developed the finger prints on the glasses, which were comparable. They were sent to the Finger Print Bureau, Phillaur and the report, which was marked as Ex.PHHH, revealed that the thumb impression lifted from the glasses by PW-16 and thumb impression obtained from the appellants herein tallied with each other.

A letter was received by PW-3, Kamal Kishore, on 09.06.2000 wherein a sum of Rs.10 lakhs was demanded by way of ransom. It also bore a postal stamp. PW-3 was asked to tie a cloth of red colour on the roof of his house, which would be an indication to show that he was ready to pay the amount. The said letter was marked as Ex.PT. Thereafter specimen signature of the handwriting of both the accused were obtained under the order of Shri H.S. Grewal, Judicial Magistrate, First Class, who examined himself as PW-12; and the same was sent to an handwriting expert Shri Balwinder Singh Bhandal, who examined himself as PW-21. He submitted a report which was marked as Ex. PJJ, stating that the said letter was in the handwriting of Appellant No.2.

Another important circumstance which weighed with the learned Trial Judge as also the High Court was the recovery of a camera from the bed-box of Appellant No. 1 as also remaining part of the dirty white cloth with which the arms of both the children were tied had been kept concealed therein. He furthermore disclosed that the deck with two speakers were also kept concealed in the same room on the Angeethi and the said house was locked by him and he had kept concealed the keys of the said house near the outer gate underneath the same bricks. His disclosure statement was recorded and thereafter recoveries were made, which was proved by the investigating officer, Inspector Nirmal Singh, PW-20. His statement were corroborated by ASI Mohinder Singh. A cello tape was also recovered which was used by the accused for pasting on the mouth and nose of both the victims and for tying the plastic envelopes which were put on the faces of both the children.

Recoveries of the said articles were made pursuant to the information given by Appellant No. 1. The information given by Appellant No.1 led to discovery of some facts. Discovery of some facts on the information furnished by Appellant No.1 is a relevant fact within the meaning of Section 27 of the Indian Penal Code. It is, therefore, admissible in evidence and the same could have been taken into consideration as a corroborative piece of evidence to establish general trend of corroboration to the extra-judicial confession made by the appellants.

It was urged that the investigation was tainted. We do not find any reason to hold so. Section 302 of the Indian Penal Code might have been mentioned in some of the documents by the investigating

officer, although no case thereunder was made out till the recovery of the dead bodies. But we do not find that the same was made designedly. One of the cautions which is required to be applied is to see that actual culprit does not end up getting acquitted. Reliance, in this behalf, has been placed by Mr. Mahabir Singh on Kishore Chand v. State of Himachal Pradesh [(1991) 1 SCC 286]. In that case none of the circumstantial evidence could be proved. Therein indulgence of the investigating officer in free fabrication of the record was established which was deplored by this Court.

Keeping in view the circumstantial evidences, which have been brought on records, we are satisfied that all links in the chain are complete and the evidences led by the prosecution point out only to one conclusion, that is, the guilt of the appellants herein. They have rightly been convicted of the offences charged against them by the learned Trial Judge.

An appeal had also been preferred by the complainant for enhancing the sentence.

Mr. D.K. Garg, the learned counsel appearing on behalf of the complainant, would appeal to us for enhancement of the sentence. We, do not think that the High Court has committed any error in opining that the case is not one of the rarest of rare cases.

It is also not a case where we should exercise our extra-ordinary jurisdiction in converting the penalty of rigorous imprisonment for life to one of imposition of death sentence. We decline to do so.

For the reasons aforementioned, both the appeals are dismissed.