

## Hardayal vs State Of U.P. on 23 March, 1976

**Equivalent citations:** AIR1976SC2055, 1976CRILJ1578, (1976)2SCC812

**Author:** R.S. Sarkaria

**Bench:** P.N. Shinghal, R.S. Sarkaria

### JUDGMENT

R.S. Sarkaria, J.

1. The appellant, Har Dayal, aged 26 years, was tried and convicted for the murder of Raiendra, a boy of 10 or 11 years, by the Sessions Judge, Orai and sentenced to death. He was also convicted on the allied counts under Sections 364 and 201, Penal Code, and sentenced to 4 years' and 2 years' rigorous imprisonment, respectively. Hardayal's appeal has been dismissed by the High Court of Allahabad, and the sentence of death awarded to him, has been confirmed. He has now come in appeal before us by special leave under Article 136 of the Constitution.

2. The facts of the prosecution case, as they emerge from the record, are as follows:

Lok Chandra (P.W. 13), is a resident of Karyana, Kuli Bazar, Kanpur. His mother, Muniya Devi (P.W. 4) and father, Budhi Lal, (since deceased) have been residing separately from him in Kakori Mohalla, Kanpur. Smt. Shanti (P.W. 12), the sister of Lok Chand was married to the appellant sometime in June 1970. The appellant was given to wine and gambling. He frequently beat and maltreated Smt. Shanti. Consequently, she started living with her parents at Kanpur. The appellant made several attempts to take her back to Konch where he was residing. Each time the parents refused to send the unwilling wife back to the matrimonial home. The appellant then tried trickery. He sent a letter from Konch that his mother was seriously ill and that his wife should come to Konch immediately. When this letter did not bring any result, he sent a second letter around 24th February 1971 saying that his mother had died on the 18th February 1971 and that his wife should be sent to Konch. These letters were addressed to Kunj Behari, another brother of Smt. Shanti. On this occasion, his in-laws sent Smt. Shanti along with Kunj Behari to Konch. On reaching there they learnt that the appellant's mother was very much alive and the letter was only a ruse. Kunj Behari and his sister stayed for the night at Konch in the house of another relation and returned to Kanpur on the following day and apprised their parents about the falsity of the information sent by the appellant.

3. On March 5, 1971, the appellant came to the house of his parents-in-law at Kakori Mohalla, Kanpur in the evening, and tried to persuade them to send Smt. Shanti with him. Shanti's parents refused saying that she was unwilling to go back to him. Incensed, the appellant went away, uttering a threat that for this refusal they would repent for the whole of their lives.

4. The appellant thereafter, the same evening, went to the house of his brother-in-law, Lok Chand in Kuli Bazar and pressed the latter to persuade his parents to send Shanti with him. Lok Chand expressed his inability to do anything, adding that he had no say whatever in the matter. In anger, the appellant went away, holding out a threat to Lok Chand.

5. On the following morning at 7.30 a. m., the appellant returned to the residence of Lok Chand. The latter had already gone away to the Gun Factory where he was employed. Lok Chand's wife Rajjo Devi, (P.W. 5) was also not present there. She was away to the public latrine for easing herself. Their minor son, Raiendra, aged about 10 or 11 years, was all alone in the house. Rajendra was about to go to the school where he was studying. After ascertaining from Rajendra that his parents were not at home the appellant offered some inducement to the child to go with him. The child, at first expressed reluctance but on being induced further, agreed. The appellant then took away the child with him. This taking away was witnessed by the immediate neighbours, Prayag Raj (P.W. 2), Smt. Bachchi (P.W. 3) and Nihal Chand (P.W. 7).

6. On returning to the house, Smt. Rajjo Devi found Rajendra missing. She was informed by the neighbours that the appellant had taken away the child for showing Tazia precession. Smt. Rajjo Devi did not suspect anything wrong in it as the appellant was, after all, a close relation of her husband. But when the child did not return even by 1.30 p. m. she became anxious to know his whereabouts. When after the day's work, Lok Chand returned home, she told him how Rajendra was said to have been taken away by the appellant. Lok Chand also did not then suspect any foul play in the matter. But when the child did not return home even for the night, their suspicions were aroused. On the following morning he searched for his son in Mohalla Kakori where his parents resided. He also went to a few relations but found no trace of the missing child. On March 9, 1971, he set out for Konch in search of the child. Reaching Konch on March 10, 1971 at 10.30 a.m., he went straight to the house of the appellant but found him absent. He looked for the appellant and came across him near Bari Mata. He immediately inquired of the appellant about Raiendra. At first, the appellant denied having brought Raiendra from Kanpur. In helplessness, Lok Chand started crying. His wails attracted persons of the locality. Kazi Saeed Uddin (P.W. 1). Ram Prakash (P.W. 15), and Iqram (P.W. 17) were among those persons. On learning what the matter was, they questioned the appellant about the child. Thereupon, the appellant admitted that he had brought Rajendra but added that he had left the child somewhere at Kanpur. The appellant promised to go with Lok Chand, to that place at Kanpur for restoration of the child there. Lok Chand, Kazi Saeed Uddin and the appellant then proceeded together to Kanpur. When they reached Orai on route to Kanpur, the appellant slipped away saying that he would be returning soon after collecting some money from his brother-in-law for travelling expenses. Lok Chand and Kazi for sometime awaited the return of the appellant. When he did not return, they searched for him at Orai but in vain.

7. Lok Chand then returned to Kanpur and on March 11, 1971 lodged the First Information Report, Ex. ka 8 at Police Station Anwarganj, Kanpur at 6.30 p. m. In this report he stated how on March 6, 1971, when he returned home in the evening, he was informed by P. Ws. 2, 3 and 7 that Rajendra (deceased) had been taken away by the appellant from his house on that day in the morning and how the appellant after admitting that he had taken the boy and would restore him at Kanpur, accompanied the informant and Kazi Saeed Uddin (P.W. 1) upto Orai and thereafter slipped away and disappeared. The motive for kidnapping was also stated. On the basis of this report, a case was registered against the appellant under Section 363, Penal Code. On March 12, 1971, Ram Dass (P.W. 20), brother of the appellant, made a report at Police Station Konch that he had seen a dead body floating in the well of Chaubia Balram Singh at Konch. Thereupon Sub-Inspector Ram Chandra Saxena (P.W. 9) of Konch Police went to the well, got the dead body taken out, and prepared the inquest report. Ex. ka 5. He sent an information to Lok Chand. The latter accompanied by Nihal Chand went to Konch and identified the dead body at the mortuary where it was lying for the post-mortem examination.

8. The autopsy was conducted by P W. 16 Dr. T. D. Singh on March 13, 1971 at 1.30 p.m. The Doctor found the following injuries on the body:

1. Multiple scabbed abrasions in an area of 2" x 1/2 " on the right cheek.
2. Abraded contusion 3/4 " x 1/3 " on the left side of the neck.
3. Contusion 1" x 1/2 " on the right front to lateral aspect of the neck.
4. Crescent shaped 1/3" abrasion on the left neck decomposing. Abrasion scabbed in an area 1/2 " x 1/4 " on the back of the neck.

9. The tongue was found protruding between the teeth, In the opinion of the Doctor, the boy had been throttled to death and there after his dead body was immersed in water.

10. The appellant could not be found despite search by the police till his arrest on October 15, 1971 (?).

11. The circumstances on the basis of which the prosecution sought conviction of the appellant are these:

- (1) That the accused had a re-vengeful motive to commit the crime because his parents-in-laws intransigently refused to send his wife, Smt. Shanti with him, and Lok Chand also declined to help the accused in restoration of his wife. On the evening preceding the day of occurrence, when his parents-in-law refused to send his wife, the accused held out a threat to wreak vengeance upon them in a manner which would make them repent for the rest of their lives. A similar threat was held out to Lok Chand.

(2) On March 6, 1971, at about 7.30 a. m., the appellant was seen inducing and taking away the deceased child from the house of Lok Chand;

(3) On March 6, 1971, the appellant and Rajendra were seen together at about 8 a. m. near Police Station Sisamau by Om Prakash, P. W.11, a balloon-seller. The appellant obtained one balloon from the witness and handed it over to the child.

(4)(a) On March 10, 1971, at about Noon, at Konch, the appellant confessed before P. Ws. 1, 13, 15, 17 among others that he had brought the child Rajendra . and that he would restore him to Lok Chand at Kanpur:

(b) After making this confession and promise for restoration of the child, the appellant accompanied Lok Chand and Kazi Sayeed Uddin en route to Kanpur but on reaching Orai, he slipped away and disappeared on the false excuse of bringing money for travelling expenses.

(5) On March 12, 1971, the dead body of a boy was found floating in a well in the town of Konch. The body and the clothes and shoes on it were later identified by P. Ws. Lok Chand and Nihal Chand to be that of Rajendra, deceased.

(6) According to the medical officer who conducted the autopsy on March 13, 1971, the body was of a boy, aged 11 years, who had been throttled to death four or five days earlier, and thereafter his dead body was immersed in water.

12. The courts below have concurrently found that all these circumstances (excepting No. 3) had been fully established.

13. Mrs. Urmila Sirur, appearing as amicus curiae disputes the correctness of these findings.

14. As regards the motive, her submission is that the appellant would have no conceivable grievance against Lok Chand merely because the latter expressed his inability to persuade his parents to send Shanti with the appellant. It is urged that the letters, Exs. P-5 and P-6 which are alleged to have been sent by the appellant, were never duly proved; Kunj Behari Lal to whom these letters purport to have been addressed, was not examined. There was no evidence to show as to who had written these letters. It is argued that the appellant must have known that Lok Chand was separate from his parents in residence and mess etc., and consequently, was not in a position to offer his good offices to his parents for restoration of Smt. Shanti to the Appellant. It is maintained that these letters might have been manoeuvred by one Parsuram who according to the defence, had illicit relations with Smt. Shanti.

15. It is true that no evidence was led to prove as to who was the scribe of these letters Exts. P-5 and P-6. But the receipt of these letters by the in-laws of the appellant stood established from the testimony of Shanti Devi and her mother, Muniya Devi. It was further established that after the receipt of the second letter, Ext. P-6 the postal stamps on which shows that it was posted at Konch

on Feb. 24, 1971 and received at Kanpur on February 25, 1971-Smt. Shanti, accompanied by her brother did go to Konch, and returned when they discovered that the reported death of the appellant's mother on February 18, 1971 was a ruse. The fact remains that despite repeated efforts made by the appellant to regain the society of his wife, his in-laws refused to send her with him. While disowning responsibility for sending the letters Exts. P-5 and P-6, the appellant himself, during his examination under Section 342, Cr.P.C. admitted that "the people of my Susral (in-laws) bear enmity with me". In answer to question No. 19, he stated that "the witnesses of Konch and Kanpur (meaning P. Ws. 1, 15 and 17) who belong to Konch, and P. Ws. 4, 5, 13 etc. who hail from Kanpur, want that I should leave my wife." It is to be noted that the appellant himself, included Lok Chand in the category of those persons who as he says, wanted to force the appellant to repudiate his wife. In his eyes, Lok Chand was as much responsible for wrecking his matrimonial home as his parents. It is in the evidence of Muniya Devi, that her daughter, Shanti Devi, generally used to live at Kanpur at the place of her brother, Lok Chand, and she was very fond of her nephew, Rajendra, whom she used to take with her to show pictures, to melas, to her relatives and other places.

16. Viewed against this back ground, it cannot be said that the courts below were not justified in holding that the appellant had a motive to commit the crimes in question.

17. The courts below have further believed the evidence of P. Ws. Muniya Devi, Shanti Devi and Lok Chand about the threats held out by the appellant on the evening of March 5, 1971, when they declined to send or help him in sending his wife with him. No reason has been shown why we should take a different view of the evidence on this point.

18. The second circumstance is important. To substantiate it, the prosecution examined Prayag Raj, P.W. 2, Smt. Bachchi P.W. 3, and Nihal Chand P.W. 7. The evidence of these three witnesses was to the effect that on March 6, 1971, at about 7.30 a. m., the appellant came to the house of Lok Chand, and after offering an inducement, took away the child Rajendra with him. The houses of these witnesses are located in the immediate neighbourhood of Lok Chand. Their presence at their houses at that time was highly natural and probable. While they are agreed that the appellant came and took away the child with him from the house of Lok Chand, after offering him some inducement, they differ in regard to the precise inducement offered by the appellant to the child. Prayag Raj (P.W. 2) stated that the appellant had said to Rajendra:

Let us go I will show you Moharram whereupon the boy said that he was going to school, but, after that he went away taking the boy with him.

19. According to Smt. Bachchi. the appellant called out the boy and said:

Let us go I will show you mela.

20. Nihal Chand (P.W. 7) deposed that the appellant had called out and taken away Rajendra with him with the representation that he would show him the Moharram fair and thereafter leave him back at the house.

21. Mrs. Sirur contends that the last day of the Moharram on which the tazia procession would be taken out was the 8th of March and not the 6th of March, and consequently, an offer to show Tazia procession on the 6th March would be too preposterous to make to a boy of 11 years, particularly within the hearing of neighbours.

22. Doubtless there is some variance or discrepancy on this point in the evidence of these witnesses. May be, this discrepancy crept in because they overheard what was said by the appellant from varying distances. It may also be due to the natural differences in their powers of perception, hearing and memorisation of details. One of them, P.W. 2, Prayag Raj was, according to Smt. Bachchi, hard of hearing.

23. Moreover, the discrepancy is minor. The calendar tells us that the 6th of March would be the 8th day of Moharram and the 8th of March would be the 10th day of Moharram, that is, the last day on which the tazias are taken out in procession. But on the 8th of Moharram corresponding to the 6th of March, there was Mehendi ceremony. On that day, in the evening the tazias are decorated and are exhibited. Moharram lasts ten days.

24. In these circumstances it could not be said that an inducement offered to the child to show him something related to the Moharram would not have worked and passed muster with the over-hearing witnesses who were all Hindus and were not expected to be intimately acquainted with the various ceremonies, rituals and processions connected with the Moharram. Might be, the precise inducement offered was that the appellant would show the child tazia procession which was to be taken out on the 2nd day thereafter. Be that as it may, the witnesses were unanimous in their evidence that they had seen the appellant taking away the boy with him. All these three were independent witnesses. They had no axe of their own to grind against the appellant. The courts below were therefore right, in placing reliance on their testimony with regard to the vital fact of taking away of the child by the appellant.

25. This circumstance indubitably establishes that it was the appellant who had kidnapped the boy on the morning of the 6th from the lawful guardianship of his parents. It further unerringly connects the appellant with the subsequent murder of the child and the disposal of his dead body.

26. No less important was the circumstance that on March 10, 1971, at Konch, the appellant confessed before P. Ws. 1, 13, 15 and 17 that he had brought the child Rajendra. This circumstance is further coupled with the conduct of the accused in pretending to go with Lok Chand and P.W. 1 to Kanpur for restoration of the child and his parting company and disappearance at Orai on the false pretext of bringing money for travelling expenses. The courts below found the testimony of P. Ws. 1, 13 and 15 with regard to this fact entirely trustworthy. P. Ws. 1 and 15 are independent witnesses of Konch. They have no animus against the appellant whatever. P.W. 15 was a businessman. He was a kacha arhatiya. In this connection, it may be observed that in his examination at the trial, the appellant while denying that he had promised to hand over the boy at Kanpur, admitted that he had parted company with P.W. Lok Chand, Kazi Saeed Uddin and Iqramat Orai and run away. However, he stated that he had done so because Lok Chand had said that he would lodge a report with the police at Orai.

27. Even an extra-judicial confession, if cogently proved to have been made truly and voluntarily, is an efficacious proof of guilt. The confession or admission made by the appellant before these witnesses with regard to the act of kidnapping the boy is not of a type which is generally introduced as a padding to bolster up a weak prosecution case. We cannot overlook the fact that the appellant was none other than the husband of the sister of Lok Chand. while P.W. 1. P.W. 15 and P. W 17, were independent witnesses of Konch who attracted by the wails of Lok Chand had questioned the appellant only out of human sympathy. There was absolutely no reason to doubt the veracity of these witnesses.

28. Mrs. Sirur pointed out that there was delay on the part of Lok Chand in going to Konch in search of the boy and this delay cast a doubt on the entire prosecution story. We are not impressed by this argument. We have to see how the mind of Lok Chand would be working in the circumstances of the case. Even if there was estrangement in the relations of the appellant and his in-laws, the rupture was not beyond repair. This is clear from the fact that on receiving the second letter Ex. P-6, falsely reporting the death of the appellant's mother, the in-laws did send Shanti to Konch. There is thus substance in the version of Lok Chand and his wife Rajjo Devi that when on March 6, 1971, they learnt from the neighbours that Rajendra had been taken away by the appellant, they did not immediately suspect anything wrong in the matter. At worst, they might have thought that the appellant was keeping the boy as a hostage for bringing pressure on them to restore his wife. They could never have thought that the appellant would go to the length of murdering the boy. That explains why Lok Chand did not promptly lodge the report with the police before the 11th of March. It was only from the confession made by the appellant at Konch and his conduct in slipping away that he was convinced of foul play on the part of the appellant.

29. Mrs. Sirur addressed some argument with regard to the identification of the dead body. She contended that the body was in an advanced stage of decomposition and was not identifiable. The best person to throw light on this aspect of the matter was the medical officer who conducted the autopsy. But no question was put to him on this point. The very fact that the medical officer found marks of injuries from which he could definitely opine about the cause of death shows that the decomposition was not so advanced as to defy identification. Furthermore, the clothes and the shoes which were found on the dead body were identified by Lok Chand and Nihal Chand as the same which the deceased was wearing on the day of his disappearance. We therefore, do not find any merit in this contention.

30. For the foregoing reasons, we are of opinion, that all the tell tale circumstances established by the prosecution, had made the chain so complete that there was no escape from the conclusion that within all human probability, the deceased was kidnapped, murdered and his dead body thrown into the well by none other but the appellant.

31. There remains the question of sentence. The appellant was convicted and sentenced to death by the Sessions Judge on June 30, 1973. Now we are in 1976. The death sentence has been hanging over the appellant's head for the last 21 months. By itself, it is not a circumstance which can mitigate the sentence. Nevertheless, taken in conjunction with the other circumstances of the case, it impels the court to opt for life rather than extinguishing it. According to Dr. T. D. Singh, who conducted the

autopsy on the 13th March, 1971, the death of the child had taken place about four days earlier, that is, about the 10th. This shows that initially while kidnapping the child from the keeping of his parents, the appellant had possibly no intention to murder him. He might have originally kidnapped and detained the boy as a hostage to put pressure on his in-laws to send his wife back to him. When for the first two or three days of the kidnapping no one from his in-laws contacted him or made any move to cause restoration of his conjugal rights, the appellant worked himself to such a frenzy that he decided to murder the child. The precise moment or circumstance that impelled him to take that irreversible decision has not been unravelled. We cannot also lose sight of the fact that under the new CrPC, 1973, which came into force on April 1, 1974, life imprisonment for murder is the rule and capital sentence, an exception (see Section 354(3)). Taking into consideration all the circumstances of the case, therefore, we would, while maintaining the conviction of the appellant under Section 302. Penal Code for the murder of Rajendra, commute his death sentence to that of imprisonment for life. Excepting this modification, the appeal is dismissed.