



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Cr. Appeal No. 541 of 2010.

Reserved on: August 12, 2016.

Decided on: August 17, 2016.

State of H.P.

Versus

Ravinder Sharma

.....Appellant.

.....Respondent.

Coram

The Hon'ble Mr. Justice Rajiv Sharma, Judge.

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

Whether approved for reporting? ¹ Yes.

For the appellant: Mr. M.A.Khan, Addl. Advocate General.

For the respondent: Mr. J.L.Bhardwaj, Advocate.

Justice Rajiv Sharma, J.

The State has come in appeal against the judgment dated 28.7.2010, rendered by the learned Addl. Sessions Judge, FTC, Kullu, H.P., in Sessions Trial No. 17 of 2010, whereby the respondent-accused (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Sections 376, 306, 341 & 506 IPC has been acquitted.

2. The case of the prosecution, in a nut shell, is that deceased/prosecutrix (name withheld) was the student of 8th class in Government Senior Secondary School, Palach. She went to fetch water at about 9:45 PM on 15.12.2009. When she was returning, accused stopped her on the way, gagged her mouth with the shirt worn by her and raped her. She tried to raise alarm, but could not do so as her mouth was gagged. The accused also threatened to kill the deceased in case she revealed the incident to anyone. When her mother inquired about the

1 ¹ Whether reporters of the local papers may be allowed to see the judgment?

reason for delay, she narrated the incident to her parents and brother. The matter was reported to the police and FIR Ext. PW-1/A was registered in the Police Station. The investigation was conducted by PW-5 ASI Bhupinder Singh, who prepared site plan Ext. PW-12/A. The prosecutrix was medically examined by PW-9 Dr. Neena Lal. According to her, there was physical interference with external genitalia. She handed over the clothes and slides to the police in sealed parcel along with the letter addressed to Director, FSL for the purpose of chemical analysis. She also referred deceased to Radiologist for ascertaining her age. PW-11 Dr. M.L. Bandhu issued report Ext. PW-11/B. According to the report, the prosecutrix was between 14 to 16 years of age. Accused also produced his underwear during the investigation. It was seized vide memo Ext. PW-3/B. The case property was sent to FSL Junga. The birth certificate of the prosecutrix was obtained. The date of birth of the deceased was 3.6.1996. The deceased committed suicide on the intervening night of 2-3.1.2010. The post mortem was got conducted. In the opinion of Dr. Satish Rana, the deceased died due to asphyxia caused by hanging. The post mortem report is Ext. PW-10/A. The matter was investigated and challan was put up before the Court after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as thirteen witnesses. The accused was also examined under Section 313 Cr.P.C. He pleaded innocence. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. M.A. Khan, Addl. Advocate General for the State has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. J.L. Bhardwaj, Advocate, has supported the judgment of the learned trial Court dated 28.7.2010.

5. We have heard the learned counsel for both the sides and have also gone through the judgment and records of the case carefully.

6. PW-1 Roshani Devi testified that the prosecutrix was studying in 8th class in Government High School, Palach. She had gone to fetch water on 15.12.2009 at about 9:30 PM from 'Bauri' near the house. She returned after about half an hour. She was not carrying the bucket when she came back. She told that accused caught her and gagged her mouth with her shirt. She was having grass and soil on her back. When she made inquiry about the source of grass and soil, she initially did not disclose anything. When her husband had gone outside, she narrated the incident to her. When her husband returned and asked from the prosecutrix, she told that she was raped by the accused. The accused had also threatened to kill her in case she revealed the incident to anyone. The matter was reported to the police in the morning of 16th. FIR Ext. PW-1/A was registered. She was also subjected to medical examination. The prosecutrix went to the house of her grandmother and subsequently committed suicide by hanging due to shame.

7. PW-2 Manoj Kumar is the brother of the deceased. According to him also, the prosecutrix was studying in 8th class. His sister had gone to fetch water on 15.12.2009 at about 9:30 PM from Bauri near the

house. She returned after about half an hour. When she returned, his mother enquired as to why she came late. There was grass on her hairs and on the back of her sweater. She revealed that accused had forcibly raped her. She was taken to the Police Station and FIR Ext. PW-1/A was registered.

8. PW-3 Anant Ram testified that Tek Singh called him telephonically on the night of 15.12.2009 at about 12:30-1:00 AM and asked him to bring the vehicle. He reached at the house of the complainant at about 2:00 AM and took Tek Singh, his wife, his son Manoj and prosecutrix to Banjar in his vehicle. The matter was reported to the police. The prosecutrix was medically examined. She produced her clothes.

9. PW-4 Dr. Ramesh Lal Sharma has conducted the medical examination of the accused. According to him, there was nothing to suggest that accused was incapable of sexual intercourse. He issued MLC Ext. PW-4/A.

10. PW-7 Mohan Lal has issued certificates Ext. PW-7/A and PW-7/B.

11. PW-8 Mohar Singh has proved birth certificate of the accused vide Ext. PW-8/A and that of deceased vide Ext. PW-8/B.

12. PW-9 Dr. Neena Lal has medically examined the prosecutrix. She issued MLC Ext. PW-9/A. According to her opinion, there was physical interference with external genitalia and she was habitual of sexual intercourse.

13. PW-10 Dr. Satish Rana has conducted the post mortem examination of the prosecutrix on 3.1.2010 at 2:00 PM. He issued post mortem report Ext. PW-10/A. The probable time that elapsed between injury and death was 2 to 0 hours and between death and post mortem was 10 to 11 hours.

14. PW-11 Dr. M.L. Bandhu has proved report Ext. PW-11/B. According to his opinion, the estimated age of the prosecutrix was between 14 to 16 years.

15. PW-12 ASI Bhupinder Singh has carried out the investigation. He prepared site plan Ext. PW-12/A. He took into possession the clothes of the prosecutrix. He got the prosecutrix medically examined. He also got the post mortem of the deceased conducted in the hospital.

16. The date of birth of the prosecutrix was 3.6.1996. According to Dr. M.L. Bandhu, the estimated age of the prosecutrix was between 14 to 16 years.

17. The prosecutrix had gone to fetch water on 15.12.2009 at night. She was raped by the accused. She came back and narrated the incident to her mother and also to her father. The FIR was registered in the morning of 16.12.2009. According to PW-9 Dr. Neena Lal, there was physical interference with external genitalia of the prosecutrix. She issued MLC Ext. PW-9/A. The prosecutrix went to the house of her grandmother and committed suicide on the intervening night of 2-3.1.2010.

18. PW-1 Roshani Devi has categorically deposed that the prosecutrix went to the house of her grandmother and committed suicide by hanging herself due to shame. PW-2 Manoj Kumar, brother of the deceased, has also deposed that his sister has told her parents that the accused had raped her and subsequently the prosecutrix has committed suicide by hanging herself due to shame. The cause of death of the prosecutrix, as per the post mortem report, in the opinion of Dr. Satish Rana, is asphyxia caused by hanging. He issued post mortem report Ext. PW-10/A. The probable time that elapsed between injury and death was 2 to 0 hours and between death and post mortem was 10 to 11 hours.

19. There is proximate link between the rape of the accused and committing suicide by the prosecutrix within a short span of 16 days. The contents of FIR Ext. PW-1/A have been duly proved by PW-1 Roshani Devi, the manner in which the prosecutrix was raped forcibly by the accused. The accused has also threatened to kill her if she narrated the incident to any person. In FIR Ext. PW-1/A, it could not be visualized that due to shame, the girl might commit suicide within 15-16 days. The incident of rape is dated 15.12.2009 and the date of hanging is intervening night of 2-3.1.2010. It must have been very difficult for the prosecutrix to live with the family after being forcibly raped by the accused and it is, in these circumstances, she went to the house of her grandmother and committed suicide by hanging.

20. The learned trial Court has misread the oral as well as documentary evidence. In the instant case, initially it was a case of rape

and out of shame, the prosecutrix has committed suicide later on. The human blood and semen was detected on Ext. P-7 (salwar of the prosecutrix).

21. Their lordships of the Hon'ble Supreme Court in the case of ***Sharad Birdhichand Sarda vs. State of Maharashtra***, reported in ***(1984) 4 SCC 116***, have held that [Section 32](#) is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to death. Section 32 is not confined to homicide alone but includes suicide also. All the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide. Their lordships have further held that where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. It has been held as under:

“11. The leading decision on this question, which has been endorsed by this Court, is the case of [Pakala Narayana Swami v. Emperor](#) where Lord Atkin has laid down the following tests:

"It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the "circumstances" can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to

anticipate being killed. The circumstances must be circumstances of the transaction: general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. "Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae". Circumstances must have some proximate relation to the actual occurrence.

-----It will be observed that "the circumstances are of the transaction which resulted in the death of the declarant."

These principles were followed and fully endorsed by a decision of this Court in *Shiv Kumar & Ors v. The State of Uttar Pradesh* where the following observations were made:

"It is clear that if the statement of the deceased is to be admissible under this section it must be a statement relating to the circumstances of the transaction resulting in his death. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed,-----

---A necessary condition of admissibility under the section is that the circumstance must have some proximate relation to the actual occurrence-----

---- The phrase "circumstances of the transaction" is a phrase that no doubt conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae"

The aforesaid principles have been followed by a long catena of authorities of almost all the courts which have been noticed in this case. To mention only a few important once, in [Manoher Lal & ors. v. The State of Punjab](#), the Division Bench of the Punjab & Haryana High Court observed thus:

"The torture administered sometimes manifests itself in various forms. To begin with, it might be mental torture and then it may assume the form of physical torture. The physical harm done to the victim might be increased from stage to stage to have the desired effect. The fatal assault might be made after a considerable interval of time, but if the circumstances of the torture appearing in the writings of the deceased come into existence after the initiation of the torture the same would be held to be relevant as laid down in [Section 32\(1\)](#) of the Evidence Act."

12. We fully agree with the above observations made by the learned Judges. In *Protima Dutta & Anr. v. The State* while relying on Hanumant's case (supra) the Calcutta High Court has clearly pointed out the nature and limits of the doctrine of proximity and has observed that in some cases where there is a sustained cruelty, the proximity may extend even to a period of three years. In this connection, the High Court observed thus:

"The 'transaction' in this case is systematic ill treatment for years since the marriage of Sumana with incitement to end her life. Circumstances of the transaction include evidence of cruelty which produces a state of mind favourable to suicide. Although that would not by itself be sufficient unless there was evidence of incitement to end her life it would be relevant as evidence."

This observation taken as a whole would, in my view, imply that the time factor is not always a criterion in determining whether the piece of evidence is properly included within "circumstances of transaction." "-----" In that case the allegation was that there was sustained cruelty extending over a period of three years interspersed with exhortation to the victim to end her life." His Lordship further observed and held that the evidence of cruelty was one continuous chain, several links of which were touched up by the exhortations to die. "Thus evidence of cruelty, ill treatment and exhortation to end her life adduced in the case must be held admissible, together with the statement of Nilima (who committed suicide) in that regard which related to the circumstances terminating in suicide."

15. In *Chinnavalayan v. State of Madras* two eminent Judges of the Madras High Court while dealing with the connotation of the word 'circumstances' observed thus:

"The special circumstance permitted to transgress the time factor is, for example, a case of prolonged poisoning, while the special circumstance permitted to transgress the distance factor is, for example, a case of decoying with intent to murder. This is because the natural meaning of the words, according to their Lordships, do not convey any of the limitations such as that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the circumstances can only include acts done when and where the death was caused. But the circumstances must be circumstances of the transaction and they must have some proximate relation to the actual occurrence."

18. Before closing this chapter we might state that the Indian law on the question of the nature and scope of dying declaration has

made a distinct departure from the English law where only the statements which directly relate to the cause of death are admissible. The second part of cl.(1) of 32, viz. "the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question" is not to be found in the English law. This distinction has been clearly pointed out in the case of *Rajindera Kumar v. The State* where the following observations were made:

"Clause (1) of s. 32 of the Indian Evidence Act provides that statements, written or verbal, of relevant facts made by a person who is dead,-----are themselves relevant facts when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in case, in which the cause of that person's death comes into question.----- It is well settled by now that there is difference between the Indian Rule and the English Rule with regard to the necessity of the declaration having been made under expectation of death.

In the English Law the declaration should have been made under the sense of impending death whereas under the Indian Law it is not necessary for the admissibility of a dying declaration that the deceased at the time of making it should have been under the expectation of death.

21. Thus, from a review of the authorities mentioned above and the clear language of s.32(1) of the *Evidence Act*, the following propositions emerge:-

(1) *Section 32* is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to death. In this respect, as indicated above, the *Indian Evidence Act*, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of s.32 to avoid injustice. (2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the

distance of time is not spread over more than 3-4 months the statement may be admissible under s.32.

(3) The second part of cl.1 of s.32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross-examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring. (4) It may be important to note that s.32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of s.32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant.

215. I would, however, like to state here that this approach should be taken with great deal of caution and care and though I respectfully agree with Fazal Ali, J. that the test of proximity cannot and should not be too literally construed and be reduced practically to a cut-and-dried formula of universal application but it must be emphasised that whenever it is extended beyond the immediate, it should be the exception and must be done with very great caution and care. As a general proposition, it cannot be laid down for all purposes that for instance where a death takes place within a short time of marriage and the distance of time is not spread over three or four months, the statement would be admissible under [section 32](#) of the Evidence Act. This is always not so and cannot be so. In very exceptional circumstances like the circumstances in the present case such statements may be admissible and that too not for proving the positive fact but as an indication of a negative fact, namely raising some doubt about the guilt of the accused as in this case.”

22. Their lordships of the Hon'ble Supreme Court in the case of ***Nathuni Yadav and others vs. State of Bihar and another***, reported in ***AIR 1997 SC 1808***, have held that when inmates of neighbouring house reached the spot stating that victims mentioned names of accused as assailants, such evidence may not be substantive evidence but has

utility at the trial as it would fall under Section 157 of the Evidence Act.

It has been held as under:

“12. The words "at or about the time" in [Section 157](#) of the evidence Act are the crucial words to judge the time when the statement was made. Whether the statement was made at or about the time of the incident can be decided on the facts of each case. No hard and fast rule can be laid down for it. However, those words "at or about the time" in [Section 157](#) must receive a pragmatic and liberal construction. The principle is that the time interval between the incident and the utterance of the statement should not be such as to afford occasion for reflection or even contemplation. If the time interval was so short as between the two that the mind of the witness who made the statement was well connected with the incident without anything more seeping into, such statement has a credence, and hence can be used, though not as substantive evidence, as corroborating evidence, on the principle adumbrated in [Section 157](#) of the Evidence Act.

13. Vivian Bose J. has observed in [Rameshwar v. State of Rajasthan](#), AIR (1952) SC 54 that "there can be no hard and fast rule about" at or about condition in [section 157](#). The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for listening and concoction". We respectfully follow the aforesaid observation.”

23. Their lordships of the Hon'ble Supreme Court in the case of ***Rattan Singh vs. State of Himachal Pradesh***, reported in ***AIR 1997 SC 768***, have held that the collocation of the words in [Section 32\(1\)](#) "Circumstances of the transaction which resulted in his death" is apparently of wider amplitude than saying "circumstances which caused

his death". There need not necessarily be a direct nexus between "circumstances" and "death". It is enough if the words spoken by the deceased have reference to any circumstance which has connection with any of the transactions which ended up in the death of the deceased. Such statement would also fall within the purview of [Section 32\(1\)](#) of the Evidence Act. In other words, it is not necessary that such circumstance should be proximate, for, even distant circumstances can also become admissible under the sub-section, provided it has nexus with the transaction which resulted in the death. It has been held as under:

“12. If the said statement had been made when the deceased was under expectation of death it becomes dying declaration in evidence after his death. Nonetheless, even if she was nowhere near expectation of death, still the statement would become admissible under [Section 32\(1\)](#) of the Evidence Act, though not as dying declaration as such, provided it satisfies one of the two conditions set forth in the sub-section. This is probably the one distinction between English law and the law in India on dying declaration. In English law, unless the declarant is under expectation of death his (Shared Birdhichand Ser vs. State of Maharashtra: AIR 1984 SC 1622: [Tehal Singh and ors vs. State of Punjab](#) AIR 1979 SC 1347).

13. [Section 32\(1\)](#) of the Evidence Act renders a statement relevant which was made by a person who is dead in cases in which cause of his death comes into question, but its admissibility depends upon one of the two conditions: Either such statement should relate to the cause of his death or it should relate to any of the circumstances of transaction which resulted in his death.

15. When Kanta Devi (deceased) made the statement that appellant was standing with a gun she might or might not have been under the expectation of death. But that does not matter. The fact spoken by the deceased has subsequently turned out to be a circumstance which intimately related to the transaction which resulted in her death. The collocation of the words in [Section 32\(1\)](#) "Circumstances of the transaction which resulted in his death" is apparently of wider amplitude than saying "circumstances which caused his death". There need not necessarily be a direct nexus between "circumstances" and death. It is enough if the words spoken by the deceased have reference to any circumstance which has

connection with any of the transactions which ended up in the death of the deceased. Such statement would also fall within the purview of [Section 32\(1\)](#) of the Evidence Act. In other words, it is not necessary that such circumstance should be proximate, for, even distant circumstances can also become admissible under the subsection, provided it has nexus with the transaction which resulted in the death. In *Sharad Birdhi Chand Sarada's case* (cited supra) this Court has stated the above principle in the following words :

"The test of proximity cannot be too literally construed and practically reduced to a cut and dried formula of universal application so as to be confined in a strait-jacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death."

16. Even apart from [section 32\(1\)](#) of the Evidence Act, the aforesaid statement of Kanta Devi can be admitted under [section 6](#) of the Evidence Act on account of its proximity of time to the act of murder. Illustration 'A' to [section 6](#) makes it clear. It reads thus:-

"A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by standers at the beating or so shortly before or after as to form part of the transaction is a relevant fact."

Here the act of the assailant intruding into the courtyard during dead of the night, victim's identification of the assailant, her pronouncement that appellant was standing with a gun and his firing the gun at her, are all circumstances so intertwined with each other by proximity of time and space that the statement of the deceased became part of the same transaction. Hence it is admissible under [Section 6](#) of the Evidence Act."

24. In the present case also, as noticed hereinabove, the FIR was registered at the instance of the prosecutrix promptly stating therein that she was raped by the accused on 15.12.2009. She committed suicide after 16 days. The FIR had direct nexus with her death due to shame.

The prosecutrix was medically examined by PW-9 Dr. Neena Lal. The learned trial Court has not even discussed the medical evidence, statement of PW-9 Dr. Neena Lal, whereby she has categorically testified that there was physical interference with external genitalia of the prosecutrix.

25. There are series of circumstances which led to the death of the prosecutrix. The rape committed by the accused upon the prosecutrix and thereafter her going to the house of grandmother and committing suicide due to shame. Thus, the judgment relied upon by the learned trial Court in the case of **Sudhakar vs. State**, reported in **2000 (6) SCC 671**, is distinguishable.

26. The learned trial Court has misread the provisions of Sections 6 & 8 of the Indian Evidence Act. Merely that DNA profile was not developed by the scraping from nails and smegma would not dent the case of the prosecution in view of the overwhelming evidence of the mother of the prosecutrix PW-1 Roshani Devi and brother PW-2 Manoj Kumar, the manner in which the prosecutrix was raped. The statements are also duly supported by medical evidence. The prosecution has duly proved that accused had raped the deceased on 15.12.2009. He also abetted and instigated the suicide by the prosecutrix by hanging on the intervening night of 2-3.1.2010. The accused has illegally confined the prosecutrix and has also criminally intimidated her. Thus, accused has committed offences punishable under Sections 376, 306, 341 & 506 IPC.

27. Accordingly, the appeal is allowed. The judgment of acquittal rendered by the learned trial Court in Sessions Trial No. 17/2010 dated 28.7.2010 is set aside. Accused is convicted under Sections 376, 306, 341 & 506 IPC. The accused be produced for hearing on quantum of sentence on 26.8.2016. Production warrant be prepared accordingly and sent to the quarter concerned for execution, forthwith.

(Rajiv Sharma),
Judge.

August 17, 2016,
(karan)

(Vivek Singh Thakur),
Judge.

High Court