Research Paper[1] on The State of U.P. Through the C.B.I. v. Rajesh Talwar & Another[2]

SYNOPSIS

Factual matrix

Evidentiary analysis

Media attention

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[2] R.C. No.1(S)/2008/SCR-III/CBI/NEW DELHI

FACTUAL MATRIX

FACTS ACCORDING TO POLICE AND THE JUDGMENT

- On 15.05.2008 at about 9:30 P.M. only Dr. Rajesh Talwar, Dr. Nupur Talwar, Ms. Arushi and Hemraj were last seen in the house by Umesh Sharma (the driver of Dr. Rajesh Talwar) and on the morning of 16.05.2008 Arushi was found dead in her bedroom, which was adjacent to the bedroom of the accused persons and between these bedrooms there was a wooden partition wall.
- Ms. Bharti Mandal who was working as a housemaid for Talwars came to their place on 16.05.2008 at 6:00 am. She knocked the door several times but it was not opened even after repeated calls from her. Finally after acknowledging that Hemraj had locked the door and had gone fetch milk Mrs. Nupur Talwar threw the key from the balcony of their apartment so that Bharti could come in.
- When the maid Ms. Bharti Mandal went in Arushi's room she discovered that Arushi's dead body was lying on the bed covered with a white bed sheet and her throat was slit. She immediately informed the inmates and went to another house to do her job.
- After that Rajesh and Nupur Talwar reached there and called people to come down to their apartment informing them what had happened. By the time police also arrived and investigation was taken up by S.I Data Ram Naunaria, who during the course of investigation proceeded to the scene of crime, inspected the bedroom of the deceased and recorded the statements of Rajesh and Nupur Talwar. He also seized the blood stained pillow, bed sheet and pieces of mattress from the room of Arushi and memo was prepared.
- Mr. Rajesh Talwar filed a report against the domestic help Hemraj on not finding him in the house suspecting him to have committed Arushi's murder.
- On inspection of bedroom of Ms. Arushi Talwar it was found that the dead body was laying on the bed, her throat was slit with a very sharp weapon, her bed and clothes were soaked in blood, but the articles in the room were properly arranged. There were blood splatters on the wall behind the head-rest of the bed.
- Where after, the room of Hemraj was searched and a bottle containing Sula wine, one empty bottle of Kingfisher beer, a plastic bottle of green color were recovered and taken into possession. One scotch bottle containing some liquor was recovered from the table of dining hall. All these articles were also seized and a memo was prepared.

- A site-plan was prepared and statements of Ms. Bharti Mandal and other people were taken. Mr. Naunaria tried to go to the roof of the hose but the door was locked and had blood stains. He asked Mr. Rajesh Talwar to give him the keys of the lock of the terrace but he said that he wasn't having the keys and asked him not waste his time, else Hemraj will manage to flee away.
- Constable Chunni Lal Gautam's services were requisitioned who on 16.05.2008 took the photographs of Arushis room and lobby, took finger prints on the bottle of whisky, plate, glasses, room of Hemraj, two bottles of liquor, one bottle of sprite and the main door at about 8:00 A.M.
- After that her body was sent for post-mortem and Dr. Sunil Kumar Dohare, Medical Officer, In charge of primary health centre, sector 22, and N.O.I.D.A. conducted autopsy on the cadaver of Ms. Arushi between 12.00 till 1:30 P.M. and prepared a report according to which the deceased had died 12-18 hours before due to hypervolemia (decrease in volume of blood).
- On 17.05.2008, the case took a new turn when the Investigator Data Ram Naunaria found the dead body of Hemraj on the terrace after he broke the lock of the door. The body was lying in the pool of blood and was covered with panel of cooler and dragging marks were visible. After taking photographs and finger prints Hemraj's body was sent for post-mortem. This post-mortem was conducted by Dr. Naresh Raj on 17.05.2008 at about 9.00 P.M. as per the order of the district magistrate of Gautam Budh Nagar and it was stated in the report that the deceased had died about 1.5-2 days before and that his whole body was putrefied. On 18.05.2008, photographs of Hemraj's body were taken from the mortuary.
- Investigation was transferred to Mr. Anil Samania; S.H.O. of Police Station Sector 39, N.O.I.D.A. and on 25.05.2008 Mr. Rajesh Talwar was arrested by local police.
- Police alleged that Mr. Talwar had killed his daughter and his servant after finding them in compromising position due to sudden and grave provocation.
- After that, the Government of Uttar Pradesh issued a notification on 29.05.2008 giving consent for transfer of the investigation from police to C.B.I. and accordingly in a subsequent notification from Government of India, the investigation was handed over to C.B.I. on 31.05.2008. Mr.Vijay Kumar took up the investigation.
- He visited the place of occurrence on 1.06.2008 and on 02.06.2008 on his directions possession of the blood stained palm-print on wall of the terrace was taken and memo was prepared.

- On 09.06.2008, psychological tests of Krishna were done in A.I.I.M.S, New Delhi and subsequently on 12.06.2008 other tests such as Brain-mapping, Narco-analysis and polygraph tests were conducted in Forensic Science Laboratory of Bangalore.
- On 13.06.2008, Krishna was arrested and on 14.06.2008 the servant quarter of Krishna was inspected and three articles were seized and taken into possession.
- During investigation, the clothes, shoes and finger palm/foot prints of accused Rajesh Talwar was forwarded/submitted to CFSL, New Delhi for examination and expert opinion. The Scientific examination results could not connect accused Rajesh Talwar with the crime.
- On 11.07.2008 C.B.I. filed report under section 169[3] Cr.P.C. in the court of Learned Special Judicial Magistrate (C.B.I.), Ghaziabad and accordingly Dr. Rajesh Talwar was released from custody.
- The investigation was transferred to Mr. M.S. Phartyal and from him to inspector Richh Pal Singh and from him to Mr. A.G.L. Kaul.
- Mr. Kaul directed Dr. Rajesh Talwar to produce golf-sticks to which he had not given a satisfactory explanation when asked earlier. The golf stick set was sent for examination and it was found that one was missing. It was informed by one Ajay Chaddha on behalf of Dr. Rajesh Talwar that one golf stick was found in the attic opposite to Arushi's room while cleaning of the flat.
- On examination of the sticks it was found that, two of them were cleaner than others. These golf sticks were identified by Umesh Sharma, driver of Dr. Rajesh Talwar, who stated that the said golf sticks were kept by him in the room of Hemraj.
- Dr. Rajesh Talwar had told that the book title 'Three mistakes of my life' was on Arushi's bed at the time of murder and handed over the book and cartoon of mobile set to inspector Arvind Jaitley.
- After investigating the matter, Mr. Kaul came to the conclusion that the twin murders were committed by the accused i.e., Dr. Rajesh Talwar and Dr. Nupur Talwar and not by Krishna, Rajkumar and Vijay Mandal or any other outsider.

[3] Release of the accused when evidence deficient- If upon any investigation under this chapter, it appears to the officer in charge of the police station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a magistrate, such officer shall, if such a person is in custody, release him on his executing bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial.

- On 29.12.2010/01.01.2011, C.B.I. submitted its closure report in the court of Learned Special Judicial Magistrate (C.B.I), Ghaziabad, on receipt of which a notice was issued to Dr. Rajesh Talwar.
- Being aggrieved by and dissatisfied with the said report he filed protest petition seeking impetratory [4](Containing or expressing entreaty) relief to direct C.B.I. for carrying out further investigation but the same was rejected.
- The said closure report as rejected by the Learned Magistrate who took cognizance under section 190(1) (b)[5] of the criminal procedure code and summoned the Talwars to stand the trial. The said decision was challenged in Hon'ble High Court of Allahabad and in Supreme Court as well but didn't succeed and order passed by the Learned Magistrate was approved by the apex court.
- On 10.05.2012, the case was registered in the Court of Sessions, Ghaziabad and both the accused were charged for offences punishable under section 302[6] read with section 34[7] and section 201[8] read with section 34 of I.P.C. Dr. Rajesh Talwar was also charged for offences punishable under section 203[9] I.P.C. Both the accused abjured their guilt and claimed to be tried.
- After closure of the prosecution evidence the Talwars hereinafter mentioned as the accused were examined under section 313 Cr.P.C and their statements were recorded.
- Dr. Rajesh Talwar in his statements admitted that on 15.05.2008 at about 9:00 P.M. his driver Umesh Sharma had dropped him home and at that time he Dr. Nupur Talwar, his daughter Arushi and servant Hemraj were present. He and his wife had gone to sleep at about

[4] http://www.encyclo.co.uk/webster/I/20, last retrieved on 23rd February 2014.
[5] Cognizance of offences by magistrates- subject to the provisions in this chapter, any magistrate of the first class, and any magistrate of second class specially empowered in this behalf under sub-section (2) may take cognizance of any offence- (b) upon a police report of such facts.
[6] Punishment for murder-whosoever commits murder shall be punished with death, imprisonment for life, and shall also be liable to fine.
[7] Acts done by several persons in furtherance of common intention- when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.
[8] Causing disappearance of evidence of offence, or giving false information to screen offender- whosoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission to disappear, with the intention of screening the offender from legal punishment, or with the intention gives any information respecting the offence which he knows or believes to be false;
If a capital offence- shall, if the offence which he knows or believes to have committed is punishable with death, be punished with imprisonment of either description of a term which may extend to seven years, and shall also be liable to fine;
[9] Giving false information respecting an offence committed-whosoever knowing or having reason to believe that an offence has been committed, gives any information respecting that offence which he knows or believes to be false, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

11:30 P.M. and the air conditioner of their room was on and he had no ideas as to whether the supply of electricity was disrupted or not in that night. He also admitted that bottle of Scotch whisky was found on the dining table but there was no tumbler. There were no blood stains in their house except in the room of Arushi and that nobody had asked him to give the key of door of the terrace. He did not go to police station to lodge any report and it was dictated by him to the police personnel in his house. The site-plan is not on scale and shaft has been wrongly shown to be part of Hemraj's room. He stated that presence of white discharge in the vaginal cavity of Arushi is a matter of record but the statements of Dr. Dohre that opening of the vaginal cavity was prominent is incorrect in as much as this fact has not been mentioned in the post-mortem report. The evidence that the hymen was old, healed and torn is nothing but an act of calumny and character assassination of his daughter. It is also incorrect that injuries caused to Arushi were from a golf-stick and some sharp surgical weapon. He said those 3-4 months before he had given his car for servicing and he had no idea as to where the golf-sticks and other items lying in the car were kept by the driver. About 8-10 days before this occurrence, painting of cluster had started and then Hemraj had started locking the door of the terrace and the key of that lock remained with him. He denied that S.I. Data Ram Naunaria had enquired of him the identity of the dead body of Hemraj and also stated that it was he who identified his body by his hairs in the presence of other police officers. He admitted that on 15.05.2006, at about 11:00 P.M. his wife had gone to Arushi's room to switch on the internet router and he and his wife had gone to sleep at about 11:30-35 P.M. He denied that no DNA was generated from the pillow and cover recovered from Hemraj's room and the kukri. He also stated that the case property as tampered with and of which he had complained also. He stated that Mr. M.S. Dahiya has given his report on imaginary grounds. He also stated that there was no intimidation to Mr. Kaul from Mr. Ajay Chaddha on his behalf. He said that it was incorrect to say that murders were not committed by an outsider or by Krishna, Raj Kumar and Vijay Mandal and rather by him and his wife.

- Dr. Nupur Talwar in her statements agreed to what his husband had said. She also stated that Mrs. Bharti Mandal had wrongfully stated that she pushed the grill mesh door and it didn't open as she did not present this fact to the investigation officer. Moreover, when he arrived she along with her husband was weeping. She also admitted that there were blood splatters on the back wall of the bed but not on the outer side of the door. She said that when she saw Arushi, her body was covered with flannel blanket but the status of her clothes worn

by here were not such as deposed to by Mahesh Kumar Mishra, who had not talked to Dr. Rajesh Talwar and neither had asked him to provide the key to terrace. She admitted that in the post mortem reports white discharge has been shown in the vaginal cavity of Arushi. She stated that the report was replaced and the original conclusively established the involvement of Krishna. She also stated that the C.B.I. had tampered with the case property. She went on to say that Mr. Kaul had full evidence against Krishna, Raj Kumar and Vijay Mandal but he concealed it to mislead the court.

- Mr. Tanvir Ahmad Mir in his submission to the court on behalf of Talwars said that Dr. Dohre in the post-mortem report did not state that there was any sexual activity was indulged in by the accused and the theory of grave and sudden provocation as propounded by Mr. M.S. Dahiya in his report is falsified. Moreover, Mr. Kaul has himself mentioned in the closure report that no blood stains of Hemraj were found in Arushi's room which completely nullifies the contention that they both were found in Arushi's room at the time of murder. In his cross-examination Mr. Dohre admitted that no spermatozoa was detected in the slides and thus the subjective finding of Dr. Dohre is inadmissible as evidence and no reliance can be placed on it. Same is the case with Dr. Naresh Raj because his statement that swelling of Hemraj's penis was due to interruption in his sexual activity or just before he was about to indulge in it is based on his personal experience from his marriage. Both of them were part of the expert committee constituted by the investigating agency and after all the examinations a report was prepared in which it was mentioned that no finding indicative of sexual intercourse is mentioned in the post mortem report and both the deceased have been murdered with a heavy weapon like kukri. Moreover, it was mentioned that swelling of penis of Hemraj's body was due to putrefaction and not due to any sexual intercourse.
- It was argued by the prosecution that the post-mortem reports were tampered with and the doctors were asked not to include the facts of sexual intercourse in the reports by the Talwars.
- On hearing submissions from both the sides the learned judge concluded by holding the accused liable for the twin murders stating that Bharti Mandal is totally illiterate and bucolic lady from a lower-strata of the society and hails from Malda district of West Bengal who came N.O.I.D.A. to perform menial job to sustain herself and her family and therefore, if she has stated that she has given her statement on the basis of tutoring, her evidence cannot be disregarded or rejected. Moreover, if Dr. Dohre has not mentioned about facts related to the white discharge from the vaginal cavity of the deceased in the post-mortem report then that

doesn’t mean that they cannot be relied upon. Since questions regarding the condition of vagina were not asked specifically by the investigating officers, there were no occasions to tell about them. Mere absence of spermatozoa in the vaginal swab cannot rule out possibility of sexual intercourse. The judge went on to say that since both the accused were doctors and it wasn’t difficult for them to destroy the evidences of sexual intercourse.

- He ordered the accused to be convicted under sections 302 r/w section 34 and section 201 r/w sections 34 of I.P.C. Dr. Rajesh Talwar to be convicted under section 203 I.P.C. also. Both the accused were sentenced to rigorous imprisonment for life with fine.

ALTERNATIVE FACT THEORY

This theory seeks to look at the case from a different perspective, wherein considering the botched up nature of investigation that has taken place in the case. In the initial portion of the judgment the Judge expresses that the parties are *ad idem* that the case is based on circumstantial evidence.[10] This meant that there was no hard documentary evidence for the prosecution to nail the murderers, and that this lead to a formulation of en number of theories by a number of people, media and also the investigative agencies. There was a lack of professionalism by the U.P Police when they did not bother to seal the scene of crime and allowed any number of people to roam around freely in the house. This led to a destruction of any evidence that could be found to assist the investigative agencies.[11] Eventually a significant portion of people attached to the case, along with educated intelligentsia who had been following the case along with a large amount of the legal fraternity were of the opinion that the investigation was highly flawed and conviction of parents for their daughter's murder that to based on circumstantial evidence did not make any sense. The families of both Rajesh and Nupur Talwar came out in public and heavily criticized the judgment and the treatment meted out at the Parents. Also the close friends of Aarushi as well as colleagues and patients did not leave the side of Aarushi's parents.

The Talwar's vehemently kept on denying any accusations made against them by the media, people or the investigative agencies. Nupur Talwar defiantly stated, "They (people) want a soap-opera situation, I can't stop anyone's mouth. They're free to think what they wish to think. But that doesn't change the truth."[12]

"It cannot get worse than this. It's not like losing your parents. Even if you lose your parents early, it is something you can accept. This is something I will not accept till I die." Said Rajesh Talwar.[13]

Even a large portion of the activist media then were suspicious of the motives of the CBI, and denied the theory of Aarushi's affair with Hemraj or the parents being involved in a wife-swapping racket. They criticized the Police for Character Assassination of a young girl and also that of her parents.

[10] The State of U.P. Through the C.B.I. vs. Rajesh Talwar & Another

[11] Supra

[12] Ibid

[13] Ibid

Sex. Illicit affairs. Murder. Indian media, which combines British tabloid sensibility with U.S. cable's cutthroat competitiveness, snapped it up and fed it to a gossip-hungry audience, catapulting the crime to the top of the news cycle and making Aarushi a household name." India's Jon Benet Ramsey case? " asked a Time magazine headline.[14]

Why are the courts and police and media so eager to hunt down the Talwars? Because in the khap panchayat mentality of our law enforcement agencies, the Talwars and Aarushi have become symbols of the so-called value-less society which we crave and condemn by turn. An unassuming hard-working dentist couple, who after long hours of work, slept like logs through that hot May night like so many exhausted professionals do, living in a small flat in the suburbs have become symbols of an "upscale" "elitist" society dominated by alcohol, sex, and "wife swapping"" lifestyles. Anyone who defends the Talwars, in the eyes of the police, instantly become identified as members of a society where "posh", "influential" people run homes of dark depravity, where scantily- clad daughters prance about with domestic help, where a frivolous "party circuit" seeks to protect each other through expensive lawyers and well-connected friends. Dominated by crime serials and Bollywood images, today investigative agencies are liable to see even a bottle of whisky in a house as nothing less than a mark of a House Of Sin![15]

At the heart of the CBI's case in the Aarushi Talwar-Hemraj Banjade double murder is a perverted patriarchal fantasy. The CBI and Noida police are convinced that 14-year-old Aarushi was having an "affair" with 45-year-old domestic help, Hemraj. It was, after all, because of this "affair" that father Rajesh in a fit of rage, on seeing Aarushi and Hemraj in an "objectionable intimate position," killed them both due to grave provocation. Ah, the lurid fantasies of the porn-suffused brain! The deadly mix of lascivious prejudice and moral analyzing that grips our mind when we think of "young women" these days. The automatic suspicion of endless orgies and extravagant nudity with which a brutally patriarchal society gazes at a "modern" young woman's bare arms, clothes and lifestyle is incredulous How excitingly value-less these young are, whisper the puritan-pornographers in vicarious glee.[16] How have the police reached this conclusion of an "affair" between Aarushi and Hemraj? After all this is THE fulcrum of the case, this is the fundamental pivot on which

[14]http://www.thestar.com/news/world/2013/01/26/aarushi_talwar_murder_a_look_at_one_of_indias_most_notorious_cases.html last accessed on 1st February , 2014 at 16:45.

[15] Aarushi-Hemraj case: Time to switch off the camera, Sagarika Ghose , ibnlive.com , **May 09, 2012**

[16] Why the Aarushi Talwar case is a rape of justice , Sagarika Ghose , http://www.firstpost.com , Nov 26, 2013

the entire case turns. Is there any evidence of this fundamentally important "affair"? None whatsoever. Has the CBI in these last five years been able to produce any analyzing, friend, family, observer, and local domestic to help corroborate their story of this so-called affair? No. Do the local chowkidars or maids say Aarushi was having this "affair"? No. Do any of Aarushi's friends believe she was having this "affair"? No. Has any local help caught a glimpse of this "affair"? No.[17]

Let's examine the other stereotypes that the Aarushi-Hemraj case has thrown up. Most middle class Indians suffer from guilt about "servants". Pinning culpability on a "servant" for a crime and allowing rich well connected employers to get off scot-free is a well-established Indian morality play. "Bechaara servant par dosh daal diya", is a syndrome that has undoubtedly often been a reality. Yet is there not some amount of middle class hypocrisy at work here? We insist on the innocence of the "servants" because they are the poor underdog, yet why is it that in the same breath we are prepared to believe the worst of Hemraj, that he actually had an alleged "relationship" with 14 year old Aarushi?

The first investigation team of the CBI listed Krishna (Talwar's compounder) as a suspect. The first team of the CBI collected the forensic report which established that the blood of Hemraj was on the pillow cover recovered from Krishna's room, but did not actually file a report, or come to any conclusion, because they were inexplicably changed midway through their investigation. The second team has now produced a certificate that this evidence was the result of a mix up.

Krishna may well be innocent. But only a court can pronounce that judgment on the basis of evidence. As a society we cannot decide on innocence or guilt based on social class. Sure, the rich routinely manipulate the law, but as a reflex action of political correctness, if the middle class is always guilty and the poor are always innocent then the law will always founder on a class war.

The CBI court's order denying bail to Nupur Talwar reads: "The legal history is replete with instances of matricide and fratricide. Everything is possible in these days of modern era where moral values are fast declining and one can stoop to the lowest level". Is the Aarushi-Hemraj case about matricide, fratricide and the decline of moral values in the modern era? Or is it about evidence on record and trial based on evidence?

[17] Ibid

The camera is often needed to prod a comatose system. But today after four years of merciless coverage, if we want to safeguard the rule of law, its time to switch off the cameras in the Aarushi-Hemraj case and let the dignity of the laws take over.[18]

Then came the factual fallacies that were also a part of the case, the fact that the compounder of the Hauz Khas clinic Krishna along with his two accomplices Rajkumar and Vijay had confessed to the crime during the Narco analysis tests.[19] According to the Talwars, the idea of Aarushi and Hemraj having a relationship and that of Rajesh's extra-marital affair was planted by Krishna Thadarai, an assistant at the Talwars' dental clinic. Rajesh stated that two days before the murders, he had reprimanded Krishna for making an incorrect dental cast. This claim was supported by Anita Duran. Rajesh's driver Umesh Sharma stated that he had heard Krishna and Hemraj talking loudly in Nepali in the car. When he inquired, Krishna told him that he would "deal with Rajesh". Hemraj's phone was present in the Jalvayu Vihar apartment complex on the morning of 16 May, and Krishna (along with the Talwars) lived in the same area.[20]

The CBI team searched his house and found a pillow cover, along with a bloodstained kukri and trousers. He was subjected to polygraph test twice at Central Forensic Science Laboratory (CFSL), Delhi. On 9 June, he appeared for a psychological assessment test at AIIMS, New Delhi.[21] On 12 June, he was administered a polygraph test and Narco Analysis test at the Bowring Hospital, Bangalore under the supervision of an expert team from the Forensic Science Laboratory (FSL), led by assistant director Dr. S Malini and anesthetist Dr. Srikanta Murthy.[22] He was arrested on 13 June. Meanwhile, lie detection tests conducted on Rajesh and Nupur Talwar; both turned out to be inconclusive. A second set of tests did not find any evidence of deception on their part.[23]

In his Narco test, Krishna talked of a second murderer, which led to arrest of his friend Rajkumar and also Vijay Mandal.

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[18] Ibid

[19] Vicky Nanjappa (2008-06-13). "Aarushi case: Krishna talks of second murderer in narco test". rediff.com.

[20] "THE HOUSE WE blew down". *Tehelka* **8** (7). 19th February 2012.

[21] "Timeline: Aarushi-Hemraj double murder case".*Hindustan Times*. 2011-02-09.

[22] "Krishna undergoes narco test". *Hindustan Times*. 2008-06-12.

[23] "Talwar gets bail in Aarushi case". *The Hindu*. 2008-07-12.

Different Versions of events were determined following the tests of the accused then, i.e. Krishna, Rajkumar and Vijay, Rajesh Talwar was given a clean chit by then by the CBI.

Possible sequence of events according to CBI Joint Director Arun Kumar based on the suspects' narco tests:

i. Hemraj invited Krishna, Rajkumar and Shambhu to his servant quarters at the Talwars' apartment. The three men reached the Talwars residence around midnight.[24] According to Rajkumar's narco test, Shambhu was a domestic help working for Talwars' neighbors, but he had no role to play in the murders. [25]

ii. The four men started drinking beer. Krishna spoke of his humiliation by Rajesh Talwar, and expressed his desire to take revenge.[26]

iii. Aarushi's room was surprisingly unlocked that day. What happened exactly after that differs according to different narco tests and media reports:

iv. *Rajkumar's version*:[27]

- Aarushi threatened to expose what the suspects said about her father, so Krishna took out his Kukri and killed her.
- The suspects planned to flee, but Hemraj developed cold feet and threatened to expose them.
- Krishna and Rajkumar dragged Hemraj to terrace and killed him.
- The mobile phones of Aarushi and Hemraj were destroyed.

v. *Krishna's version 1*:[28]

- Rajkumar and Krishna entered Aarushi's room, and Rajkumar tried to sexually assault her.
- When Aarushi resisted, Krishna drew out a kukri and kill her.
- Then the two men dragged Hemraj to the terrace and killed him for being a witness.

vi. *Krishna's version 2*[29]

- Rajkumar and Shambhu entered Aarushi's room and tried to rape her.

[24] "'Rajkumar killed Aarushi'". India Today. 2008-06-19

[25] Vicky Nanjappa (2008-06-26). "How and why Aarushi & Hemraj were murdered". rediff.com.

[26] Ibid

[27] Supra

[28] Supra

[29] Supra

- When Aarushi resisted, Shambhu hit her on the head and Rajkumar then killed her with a kukri
- The murder weapon was cleaned with a tissue paper and flushed down in Aarushi's washroom.
- Krishna, Rajkumar and Shambhu then took Hemraj to the terrace and killed him.
- The three men "escaped from the roof of the building after locking the terrace door".

vii. *Krishna's version 3*[30]

- Rajkumar walked towards Aarushi's room. Krishna and Shambhu followed him.
- Rajkumar tried to sexually assault Aarushi.
- When she resisted, Krishna took out his kukri and slit her throat: the blow was so hard that her neck ripped open and she fell dead.
- Hemraj got scared and threatened to tell Aarushi's parents about the incident. So, the other men took him to the terrace and killed him.

Krishna, Shambhu and Rajkumar tried entering Talwars' room but found it locked.

Rajesh Talwar was released later in the day, for lack of evidence, after having spent 50 days in prison. Rajesh and Nupur relocated to their parents' home after his release. The three other suspects were arrested, but the drug-induced confession was not enough to charge them. Considering the legal precedents of the Salve case[31] and Kathi Kalu Oghad case.[32]

Thus it can surely be witnessed that the investigation in the case was highly botched up and as a matter of fact highly biased too, taking into consideration the Principles of natural justice as well as Equity, there is a possibility of Injustice being meted out to Talwars in the given case.

[30] Supra

[31] Selvi & Ors. v. State Of Karnataka & Anr. on 5 May, 2010

[32] The State Of Bombay vs Kathi Kalu Oghad And Others on 4 August, 1961

DISPUTED FACTS

Between the Post mortem report submitted during the trial and the original post mortem report.

The medical examiner gave statements to the CBI that adds radical new facts not present in the original postmortem report.[33]

1. Vaginal Examination:

Original Post Mortem Report:[34] Presence of whitish discharge Anus, Urethra, Vagina, Orifice, Breasts, Back, Mouth: NAD

Post Mortem Report Submitted in trial:[35] Vaginal Opening found prominently wide, Vaginal Cavity and Cervix visible, Vagina is extraordinarily dilated, No matting of pubic hair, Hymen was ruptured and healed (old), presence of a whitish discharge near the Vagina. No presence of NADs.

Hence it can be inferred that either the original post mortem report is wrong or the one submitted for trial is erroneous but as a matter of fact both come from the same people and investigative agencies. Incredibly, the CBI claims both the original postmortem report and the postmortem doctors' later statements are somehow correct and consistent with each other. Despite the glaring dissimilarities between both the postmortem reports. Dr. Sunil Dohare upon questioning that why were the observation of private parts of Aarushi was not mentioned by him in the initial Post-Mortem reports , to which he replies that the findings of private parts were "non-specific' and "very-strange"[36]

2. **Injuries on Aarushi's Body**:

There are mysterious discrepancies about Aarushi's injuries between what her postmortem says and what the CBI's closure report says. The postmortem report found four injuries: two

[33] The house we blew down | Tehelka.com - Part 9, http://www.tehelka.com/the-house-we-blew-down/9/ (accessed February 28, 2014

[34] http://www.scribd.com/doc/122349170/Aarushi-original-autopsy , last accessed , 28/02/2014 , 6 pm

[35] http://www.scribd.com/doc/122348870/Aarushi-postmortemSept09-pdf#download , last accessed , 28/02/2014 , 6:15 pm

[36] Supra

incised wounds and two lacerations. The closure report states only two — a blunt one and an incised wound. [37]

Closure Report:[38]

As per doctors who conducted postmortem there were two types of weapons during assault/murder, with one weapon being a heavy blunt weapon and the other being very sharp and light instrument.

The blunt injury was caused first and was sufficient to cause death. The incised wound on the neck was caused later.

The blunt injury in respect of Aarushi was on the front side of her face on her forehead and on the occipital region.

Post Mortem and Judgment:[39]

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

Lacerated wound 4 cm. x 3 cm. 1 cm. above left eye brow on frontal region. This injury was entering into skull cavity.

i. Incised wound 2 cm. x 1 cm. on left eyebrow
ii. Lacerated wound 8 cm. x 2 cm. on left parietal region
iii. Incised wound 14 cm. x 6 cm. on neck, above thyroid cartilage.
iv. Trachea partially incised. This wound was 3 cm. away from left ear and 6 cm. away from right ear and 4cm. below chin.
v. Left carotid artery was slit. On internal examination, there was fracture in left parietal bone. Hematoma 8 cm. x 5 cm. was present below parietal bone.

The closure report also mentions a "U/V-shaped injury" horizontal to the body but doesn't connect to it being a typical injury the notch in a khukri inflicts.[40] But again CBI leaves ambiguous as to what could have been the murder weapon. They state in their closure report that the wound could have been made by a trained medical professional, hence putting the needle of suspicion on the parents. On 7th June 2008 , a report in the Indian Express ,

[37] The house we blew down | Tehelka.com - Part 9, http://www.tehelka.com/the-house-we-blew-down/9/ (accessed February 28, 2014)
[38] Closure Report , Dated 29/10/2010 , pg 15
[39] Present : S.LAL , H.J.S – Ghaziabad , http://www.ghaziabad.nic.in/court_new/arushi1.pdf (accessed February 28 , 2014).
[40] The house we blew down | Tehelka.com - Part 9, http://www.tehelka.com/the-house-we-blew-down/9/ (accessed February 28, 2014)

professionals at AIIMS upon examination of the Post Mortem Report , suggest that the wound was too deep to be inflicted by a surgical scalpel , it was probably committed by a Sharp edged knife with a wooden handle to inflict the blunt injuries. CBI also found a Khukri in possession of Krishna, but did not admit it as evidence as it apparently could not find Human Blood on the same. For the Blunt wound, CBI could not find any evidence, but 17 months after the incident, the CBI, tries to put forward that the shape Golf Club No. 5 matched with the blunt injuries found on Aarushi's head. They also claim that the Golf Club found on the Loft of Hemraj's room (No.5) is extraordinarily cleaner than others.[41]

3. **The door of Aarushi's room** :

The CBI claimed in its closure report that the parents used to lock the bedroom of Aarushi during the night.[42] As a matter of fact, the parents' room, Aarushi's room and the main door of the house all had self-locking Godrej locks — the kind that locks automatically when the door closes. These locks could be opened from the inside by turning the lever, but could be opened from outside only with a key.[43] According to Dr. Rajesh Talwar and Dr. Nupur Talwar, they had found the door to the bed room of Aarushi unlocked and slightly open in the morning of 16.5.2008. They could not explain as to whether they had locked the room of Aarushi in the night of 15.5.2008, and why the key was not traceable in the morning of 16.5.2008. The room of Aarushi therefore, could have been opened only either by Aarushi herself from inside or by the parents of Aarushi from outside by using the keys.[44]

While Nupur Talwar maintains, start she probably made the mistake of leaving the key hanging in Aarushi's door when she left her child on 15th night after switching on the internet router — she claims to have stated this to the investigating authorities and answered this specific question in the several lie detector, brain mapping and narco-analysis tests she's successfully passed for the CBI.[45]

4. Body of Hemraj was deliberately moved from the scene of Murder.

[41] Closure Report , Dated 29/10/2010 , pg 17
[42] Closure Report , Dated 29/10/2010 , pg 26
[43] The house we blew down | Tehelka.com - Part 9, http://www.tehelka.com/the-house-we-blew-down/9/ (accessed February 28, 2014)
[44] Closure Report , Dated 29/10/2010 , pg 27
[45] The house we blew down | Tehelka.com - Part 9, http://www.tehelka.com/the-house-we-blew-down/9/ (accessed February 28, 2014)

CBI states that according to KK Gautam, he witnessed the a few drag marks on the stairs leading to the terrace and upon breaking open the terrace doors, he found a body under the advanced state of putrefaction and with dragging marks.[46] Hence it was concluded that Hemraj was murdered and then the assailants dragged his corpse to the terrace.

The CBI's own UV light testing team could not find Hemraj's blood, anywhere except on the terrace. No blood of Hemraj was found on the bed sheet and pillow of Aasushi. There is no evidence to prove that Hemraj was killed in the room of Aarushi.[47] Again the CBI made self-contradicting remarks in its own investigation.

Upon examination of the report it can be realized that the commission of the murder by grave and sudden provocation is never substantiated. As the closure report itself admits, it is unable to actually establish a chain of events linking Rajesh Talwar or the domestic servants to the assault or its grave and sudden provocation.

The closure report submitted by the CBI's second team made it clear about the hostile investigation against the Talwars , as the went on to claim that Rajesh Talwar was the prime suspect but they did not have enough evidence to prosecute him. Once again, insinuating that Rajesh Talwar found his young daughter having sex with his manservant took a golf club and killed his daughter. Then cleaned the golf club and left it in Hemraj's room. Or maybe he left it in the loft. Or he cleaned the murder weapon and one more random golf club and left these extra clean ones in the garage.

Some unanswered questions following the trial and the verdict:

i. If the Talwars were guilty, why did they file a petition in January 2011, against the closure of the case?[48]
ii. If there indeed was dressing up of the crime scene by the Talwars, why did they not bother to hide the Whisky bottle, which had fingerprints on it?[49]
iii. Why was the first CBI team changed, especially after announcing that they were about to charge sheet the culprits?[50]

[46] Closure Report , Dated 29/10/2010 , pg 13
[47] Closure Report , Dated 29/10/2010 , pg 29
[48] Present S.LAL , H.J.S – Ghaziabad , http://www.ghaziabad.nic.in/court_new/arushi1.pdf (accessed February 28 , 2014).
[49] Present S.LAL , H.J.S – Ghaziabad , http://www.ghaziabad.nic.in/court_new/arushi1.pdf (accessed February 28 , 2014).

iv. Why does the Closure report state that Aarushi had an injury on the back of her head while the Post Mortem Report stated that her injury was on the front of her head?[51]

v. Why will CBI not resort to touch DNA testing, knowing that it can yield results even after contamination?[52]

I. EVIDENCIARY ANALYSIS

SCIENTIFIC TESTS AND ANALYSIS

The Logical Lapse made in admittance of Tests as evidence

The CBI court in its judgment took into consideration the medical and scientific tests conducted on the accused, erstwhile accused, and the houses of the Talwars and the erstwhile accused. These tests were:

1. On 09.06.2008, psychological tests of Krishna were done in A.I.I.M.S, new Delhi.
2. Subsequently, on 12.06.2008 other tests such as Brain-mapping, Narco-analysis and polygraph tests were conducted in Forensic Science Laboratory of Bangalore.

As per the judgment, similar psychological and medical tests were conducted on Dr. Rajesh Talwar but "no incriminating evidence" was found in these tests. Lie Detector Test, Brain Mapping Test and Narco Analyses Test at F.S.L. Bangalore and the aforesaid tests indicated that Krishna had revealed crucial information leading to the double murders and his complicity is found; as per application dated 14.06.2008 of C.B.I. not only Krishna but other persons were also involved.

The police half-heartedly pursued the information revealed by the erstwhile accused during the tests. They did find the Khukri along with sheath and purple color pillow cover from his room as revealed by Krishna during tests.

The C.B.I team and its report submit that the Khukri, which was one of the most influential and the most important piece of evidence being the murder weapon, were found as per exhibit-92. Even though the team found the evidence from Krishna's house after it was itself disclosed by Krishna in the psychological tests, but the team submits that they found the evidence by relying on exhibit-92,

[50] "CBI official handling Aarushi case moved".*Hindustan Times*. 2009-05-09.
[51] http://www.scribd.com/doc/122349170/Aarushi-original-autopsy , last accessed , 28/02/2014 , 6 pm
[52] Srivastav, M "The Survivors" http://www.openthemagazine.com/.

http://www.openthemagazine.com/article/nation/the-survivors (accessed February 28 2014).

thus, giving the court the room to impliedly assume that it was not on the basis of the tests because of which they reached the evidence of utmost importance. There seems to incongruity in the line of argument as submitted by the court and as accepted by the judge. How can the team have proper and such detailed knowledge of the khukri and its presence in Krishna's house but still claim the only evidence through which they are wanting the court to consider for admittance is only exhibit-92 and totally excludes Narco Analysis, Polygraph and Brain Mapping tests. It appears that the C.B.I forcible excluded the tests as evidence and the court wrongly interpreted the case of Smt. Selvi v. State of Karnataka[53] in support of the facts and evidence submitted by the C.B.I.

Improper Interpretation and Application of Smt. Selvi v. State of Karnataka

I. The court, besides admitting the finding made by the police in furtherance of the tests, also has cited the case of Smt. Selvi v. State of Karnataka as the case which limits and doesn't allow the admittance of tests reports of Krishna, Rajkumar and Mandal as material evidence.

The court has only been partially correct in its application of the case law propounded by the Apex Court in Smt. Selvi v. State of Karnataka. It has to be also brought into notice that the case of Selvi is greatest importance when we analyse the trial and the judgment from the point of view of the various Psychological and medical tests conducted because it is the only judgment by the Supreme Court of India which delves into the intricacies of such tests, talks about their validity with respect to Indian laws, and provides the state agencies with guidelines regarding the procedure to be adopted when such tests are being conducted and the degree of their admissibility if the investigating agencies find further evidence on the basis of the information disclosed during such tests by the people on whom the tests were conducted.

The Hon'ble judge of the C.B.I court cited the case of Selvi without delving into various crucial aspects of the judgment, which could have led to a great debate regarding the admittance of the psychological and medical tests during the trial, as the only 'crucial' piece of evidence was found because of these tests. The case of Selvi does not overtly reject the admittance of these tests but also provides that if the investigating agencies further investigate on the basis of the information revealed during such tests and they find crucial evidence, then they would be acting in accordance with **Section 27** of the Indian Evidence Act, 1872. Such evidence can be admitted as material evidence.

The law regarding Section 27 with respect to Narco-Analysis and similar such tests is that that if the investigating agencies make discoveries in pursuant of the statement then the evidence found is material and shall be taken into admittance. However, a recovery under Section 27 will not be admissible if compulsion has been used in obtaining the information leading to it. But, in the case at

[53] AIR 2010 SC 1974

hand no such compulsion was made by the C.B.I or the Police. The accused and the erstwhile accused, both, became a part of these tests voluntarily, with no sort of coercion or compulsion involved anywhere, and tests were done in furtherance of finding the truth in the matter. Here, two lapses can be seen with respect to investigation and admittance of the tests.

i) Lapse made by the Hon'ble C.B.I Judge: The first one is the logical lapse, as discussed earlier. This was made by the Hon'ble C.B.I. Judge in admitting and relying on the logic provided by the C.B.I

ii) Lapse made during the investigation: The investigating agencies did act upon the disclosure and revelations made by Krishna, and arrest the other two erstwhile accused as accomplices but no further evidentiary build up was done. This build-up might have led to some important finding which could have proved material in the case, as it is the case had nothing substantial but only circumstantial evidences which could be presented in the court.

II. The Narco-analysis tests, polygraph tests and the lie-detector tests being such an important point in a case which lacked any other substantial evidence or disclosure has not been meticulously dealt with the Hon'ble C.B.I judge.

In the case of ***Dinesh Dalmia v. State of Tamil Nadu***[54], the High Court held that the police agencies need to complete their investigation in a reasonably brisk pace. If accused fails to co-operate with the investigation process undertaken during custodial interrogation, to unravel the mystery surrounding the crime, scientific investigation methods may have to be carried out to find the truth.[55] In another Judgment, ***Shailendra Sharma v. State of New Delhi***[56], the New Delhi High Court pronounced that tests such as Narco-Analysis are an essential step in aid to investigation.

Though both the judgments are from High Courts but their persuasive value, logic and ratio are of great consideration, especially, in light of the week jurisprudence of the courts with respect to such newly emerging psych-logical tests which are of great help in adducing crucial evidence and information in the age of ever increasing criminal litigation.

Foreign Jurisprudence on the point

"Where the discovery of the fact confirms the confession – that is, where the confession must be taken to be true by reason of the discovery of the fact – then that part of the confession that is confirmed by

[54] Crl. R.C. No. 259 or 2006
[55] Math, B.S. , *Supreme Court judgment on polygraph, narco-analysis & brain-mapping: A boon or a bane*. (n.d.). Retrieved from http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3171915/
[56] Crl. W.P. No. 532 of 2008

the discovery of the fact is admissible, but further than that no part of the confession is admissible… It is therefore permissible to prove in this case the facts discovered as a result of the inadmissible confession. . . If he does or says something that indicate his knowledge of where the articles are located, and that is confirmed by the finding of the articles, then that is a fact and must be admitted."[57] This is an established law of the land in Canada and was iterated by McRuer (C.J.H.C.) in ***R v. St. Lawrence.*** This position has received judicial approval in a lot many subsequent decisions by Canadian courts.[58]

Similarly, in the case at hand, this judicial position can be adopted and it would prove to be quite useful given the insubstantiality of any evidence and the lack of witnesses.

Ignorance of the Sound Test Report

In light of any lack of any real time witnesses and any corroborative material evidence, established scientific tests can prove to be of great benefit in carrying out investigation and reaching to conclusions. It is quite surprising to see why the C.B.I, as well as the Hon'ble judge, did not place any reliance on the Sound Test conducted on 10.06.2008. In the sound test it was found that accused sleeping in their bed-room with air-conditioner switched on could not have heard the opening and closing/bolting of entry- exit door. This has been submitted by the C.B.I and accepted by the court. But this report has not been delved into any further and it can be said that it was a glaring error in ignoring to delve in the substantiality and importance of the report. In light of the facts of the case, it can be clearly seen that the fact that any sound was audible in the room of the Talwars can be crucial piece of fact. If the sound was not audible, what the report says, then it means the Talwars had no reason to go to Aarushi's room in an uncalled for manner at such an hour. This, directly, might add to the innocence of the Talwars.

It is to be made clear that it is not meant that the tests should have been admitted with a pro-Talwar mindset but their analysis should have been done with a mindset and effort to effectively eliminate the innocents from the trial.

An important Supreme Court case in this regard is ***Ritesh Sinha v. The State of Uttar Pradesh***[59]. The Supreme Court arrived at the decision that voice samples and such techniques can also be covered by the ambit of such examination as deliberated upon in Selvi but is not hit by 20(3) in any way. A sound

[57] Law Reform Commission of Canada (1984). *Investigative Tests*. Retrieved February 26, 2014, from http://www.ncjrs.gov/pdffiles1/Digitization/94235NCJRS.pdf

[58] R. v. Downey (1954), 20 C.R. 213 (B.C. C.A.); R. v. Briden (1960), 33 C.R. 159 (Ont. C.A.); R. v. Haase, [1965] 2 C.C.C. 56 (B.C. C.A.); R. v. Bird, [1967] 1 C.C.C. 33 (Sask. Q.B.); R. v. Armstrong (1970), 11 C.R.N.S. 384 (N.S. S.C.A.D.).

[59] AIR 2013 SC 1132

test is a similar test, which can be considered to under the ambit of the term 'other tests'. In the present case, the Hon'ble judge dismissed all the tests in-Toto by citing Selvi as a blanket argument and did not even deliberate upon the Sound Test conducted in the house of the Talwars on 10.06.08. This Sound Test should be admissible, it does not violate any law as interpreted in Selvi, and is not hit by Article 20(3) in any way, as the tests were not conducted on any of the accused but was a neutral test conducted to recreate the crime scene and confirm substantial factual question crucial to determine the course of the case. Selvi is appropriately applicable when the tests are conducted on the accused, which might amount to self-incrimination in any way.

The judgment is erroneous regarding this and can be said to be a lapse by the Hon'ble judge as well as not in accordance with the case law prevalent in India regarding such tests.

IMPROPRIETIES PRESENT IN THE JUDGMENT AND THE INVESTIGATION

1. How could Hemraj's blood have been found in Aarushi's room when a cloth tag attached to a blood stained pillow cover – the primary record of the seizure – read 'from servant's room'**?**[60]

The judgment states : "It has been written that one bloodstained pillow with pillow cover was recovered from the room of Ms Aarushi... and thus it becomes abundantly clear that Hemraj's DNA has been found on the pillow with pillow cover which was recovered from the room of Ms Aarushi as per letter dated 04.06.2008."

In an eyewitness account, for which the author has vouched through the article[61], that when the pillow with the pillow-cover was unsealed and displayed it originally carried the tag of "Servant's room". But ultimately it was admitted as recovered from Aaruhi's room. Dr. Mohapatra who had been present since June 1 in the 12 man team which made seizures in his cross-examination could not answer appropriately and said that he could not remember where the pillow was found. Admitting the pillow and the pillow cover being found Aarushi's room established motive in the mind of the parents, which led them to kill both the people.

2. The C.B.I has originally amassed a list of 141 witnesses. Many of the witness whose testimony was crucial for the defense were dropped.[62] Among them the most important ones were:

I) The Doctor who examined Aarushi's vaginal specimen and confirmed that there was no sign of semen

The constable who has allowed the cleaners to clean the crime scene hours after the incident. An **extremely crucial** point. Because, the Talwars were criticized by the media and the police on the point that they had mala fide motives as they were in a hurry to clean the crime scene and remove the evidences.

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[60] Sinha, Avirook. "Final Say." *Mumbai Mirror* (Mumbai), December 1, 2013.
[61] Ibid.
[62] Paradhkar , Shree. "Aarushi Talwar murder: Indian prosecutors say defence shouldn't use forensics or witnesses | Toronto Star." thestar.com. Last modified June 14, 2014. http://www.thestar.com/news/world/2013/06/14/aarushi_talwar_murder_indian_prosecutors_say_defence_shouldnt_use_forensics_or_witnesses.html#.

ii) Arun Kumar's testimony: Arun Kumar is a very high ranking C.B.I official, who headed the team which conducted extensive investigations and exonerated Rajesh Talwar. In his investigation he concluded that no evidence of Hemraj's murder can be found in Aarushi's room, which sub serves the contentions made by the defense. He had devised an alternate theory of "sexual harassment gone wrong"[63], where he as made Krishna Thadarai, and the other two domestic helps, that is, the erstwhile accused. But, he was taken off the case and this theory was not at all pursued further in any way.

[63] Ibid

TUTORING OF WITNESSES

Tutoring of witnesses that a particular has been taught what statement shall be delivered before police or magistrate. Tutoring is distinct from witness preparation. While in the latter the lawyer aids the witness by preparing what kind of questions could be asked, the pace of questions, language to be used and so on and so forth. In the former the witness is told what should be included in the testimony details of cases that could lead to acquittal or conviction. Tutoring of witnesses thus leads to falsification of testimony.

Consequence of tutored testimony has not been legislated but the Courts have time and again lain that such testimony should be discarded. Madras High Court in the year 1943 in the matter of *Re* v. *A Pleader*[64] not only discarded tutored testimony but also went a step ahead and held that tutoring a witness in the court or outside amounts to professional misconduct. In *Changan Dame* v. *State of Gujarat*[65] the Supreme Court held that the evidence of the witness is not reliable as the witness is under the influence of tutoring. In *Shyamlal Ghosh* v. *State of West Bengal*[66]in the case the conviction was not overturned as the witness was not tutored but the judges made it clear that had that been the case conviction would have been overturned.

Reading various judgments indicates that the Supreme Court has laid down guidelines in different judgments that could be considered as tests that could be applied in relevant fact situation. Some of the tests are:

1. The testimony of the witness should not contradict substantially when compared to that of other material witnesses. If so it would be assumed that the witness is tutored. Such testimony would be discarded[67].

2. If the statements are taken directly after the incident then there is less scope of confusion in the minds of the witnesses. This would indicate that the probability that the witness was tutored is less[68].

3. Lengthy cross-examination is demonstrates that the witness has not been tutored.[69]

[64] (1943) ILR 2 Mad 81; AIR 1942 Mad 701
[65] 1994 CrLJ 66(SC)
[66] AIR2012SC3539, 2013(3)AJR246, 2012CriLJ3825, 2012(3)Crimes97
[67] *Pratap Singh & Anr* v. *State of Madhya Pradesh* AIR 2006 SC 514; 2005 CrLJ310; (2005) 13 SCC 624
[68] *Ram Anup Singh and Ors* v. *State of Bihar;* 2003 (1) ACR 303 (SC); AIR 2002 SC 3006
[69] Tehal Singh and Ors. v. State of Punjab; AIR 1979 SC 1347; 1979 CrLJ 1031

In the present judgment the Honorable Judge Shyam Lal has recorded in the judgment that the testimony of Smt. Bharti Mandal was a result of the prosecution's tutoring. The legal consequence should be that such testimony is immediately invalidated and the witness be excused. Furthermore, the Court should have taken against the prosecution for tutoring a witness for swaying the opinion of the court. Quiet shockingly the Judge stated that the testimony should not be discarded, as she required some tutoring because she was from a lower economic stratum. This is a blatant violation of the doctrine of stare decisis. The judgments have to be followed by all the lower courts till such time the Supreme Court changes the position of law.

Facts and Inferences

It seems that Smt. Bharti Mandal testified that when she pushed the outer mesh door of the Talwars' apartment and it did not open. The logical consequence being that the door was locked from inside while Dr. Nupur said that this testimony is not true. Smt. Mandal only knocked the door and rang the doorbell. If Smt. Mandal's testimony is taken into consideration then the possibility of an outsider on the night of murder is ruled out.

INTERESTED WITNESSES

An interested or partisan witness is one who is related to either the victim or the accused. The term interested witness suggests that the person is not an independent witness as the witness might be interested in giving such testimony that would help the accused in getting an acquittal or framing an innocent believing the victims' side of the narrative.

The Supreme Court has in various instances declared that the mechanical rejection of the testimony of a witness related to the victim or accused is not logical. It must be determined whether the testimony is true after a sound cross-examination or not. If the testimony is independent and veracious then it should not be rejected. "*The truth of the evidence should be weighted pragmatically. The court would be required to analyze the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same. Conviction can be made on the basis of such*

evidence.[70]"

Even in the eventuality the witness is a friend or relative of the accused does not lead to the automatic conclusion that the witness is not independent. Even if the witness knows the accused and his testimony corroborates with other material evidences[71].

This line of argument is necessary to demonstrate that the Supreme Court has decided on various occasion that the testimony of a relative or friend may be tainted. In the judgment the testimony of Arushi's gynecologist was rejected on the ground that the doctor knew Talwar and could have easily been tutored to change her testimony. The gynecologist was brought to prove that Arushi was not sexually active.

Dismissing the gynecologist's testimony solely because she knew the Talwars' is legally incorrect. Her testimony should have been subjected to close scrutiny and should have been discarded on the ground that her testimony is not consistent with other evidences.

[70] *Dinesh Kumar* v. *State of Rajasthan* 2008CriLJ4311
[71] *Ram Anup Singh and Ors.* v. *State of Bihar* 2003(1)ACR303(SC), AIR2002SC3006, 2002(2)ALT(Cri)242

BURDEN OF PROOF: WERE THE TALWARS GUILTY BEYOND REASONABLE DOUBT?

A very unusual feature of this judgment is that while solely analyzing on one issue and analyzing it, we find that there has been proper application of the law and there are no flaws in the judgment as such. But at the same time a complete reading of the judgment along with the background situation, especially with respect to non-admissible evidence creates a doubt in the mind that could the judge have erred in his decision.

This chapter, via an amalgamation of disputed facts, interpretation of various statutes and judicial precedents aims at analyzing the judgment of the Honorable Sessions judge and to find out as to how far be it successful in proving beyond a reasonable doubt that the accused were guilty as sentenced.

Trial on the basis of circumstantial evidence

The evidence presented by the prosecution though did not completely establish each and every event that took place that night, had the backing of two statutes that lead to the conviction of the Talwars i.e., section 106 and 114 of the Indian Evidence Act.

In the administration of justice it is a well-established principle that the burden of proving the guilt of an accused lies with the prosecution and that burden has to be proved beyond reasonable doubt. Section 106 is an exception to this principle as it shifts the burden of proof on the accused after a prima-facie case has been made out by the prosecution. At this juncture, the prosecutions burden is removed and it is assumed that the accused has, especially within his knowledge, certain facts that can be known only to him and is impossible or quite improbable for the prosecution to establish them. This contention if proved can lead to conviction on the basis of circumstances but at the same time can be negated by a show of preponderance of probabilities. The word 'especially' stresses that it means facts which are pre-eminently or exceptionally within the knowledge of the accused.[72]

In *State of West Bengal* v. *Mir Mohammad Omar & Ors.*[73], this Court held that if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for prosecution to prove certain facts particularly within the knowledge of

[73] AIR 2000 SC 2988

accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused.[74]

Although there is no hard and fast rule as to the cases where circumstantial evidence allows conviction, five principles have been laid down recently by the Supreme Court in the case of *Sathya Narayan* v. *State*[75]:

1. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances must be or should and not may be established;
2. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explained on any other hypothesis except that the accused is guilty;
3. The circumstances should be of a conclusive nature and tendency;
4. They should exclude every possible hypothesis except the one to be proved;
5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

After a thorough reading of the judgment and precedents surrounding circumstantial evidence, a dilemma is created as to whether the judgment stands legally and factually correct. The precedents with respect to circumstantial evidence (S. 106) and assumption of facts (S.114) in murder trials clearly establish that the conviction is correct but the possibility of alternative facts continues the dispute. The only undoubtedly proved fact is that the accused and the deceased were in the house on the night of the murder. The rest just seems to have been assumed or conveniently and very convincingly assessed.

[74] Prithipal Singh etc. v. state of Punjab and Ors.

Applying the above mention rules of the Sathya Narain we reach the following points of facts and possibilities not consistent with the guilt of the accused:

1. The possibility of outsiders was overruled just because the security guard did not observe any disturbances whereas in the closure report it had been stated that as the guards are mobile in the night it is difficult to ascertain whether some outsider was involved or not.
2. The murder weapon was never successfully established or recovered. Further, the earlier investigation team had constituted a board of experts who had opined that the possibility of a kukri still exists.
3. On 09.06.2008 psychological test of Krishna was undertaken in A.I.I.M.S, New Delhi. On 12.06.2008 Brain-mapping, Narco-analysis and Polygraph tests of Krishna were conducted at Forensic Science Laboratory, Bangalore. On 14.06.2008, the kukri was recovered from Krishna's house but the learned judge declined to accept that the recovery was made as a consequence of the disclosure made during the tests just because it had nowhere been written explicitly. It is sheer reason that speaks for itself and makes it evident that the kukri was recovered as a result of the tests and if such practices of disregarding evidence remain, then all the evidence recovered in such a way will be admissible only at the discretion of the judge and not on its merits.
4. The sound test conducted by the investigators clearly established that sound could not have passed through the walls of the room if the accused were sleeping with the air conditioner switched on. This makes the possibility of the 'grave and sudden provocation' charge very low.
5. The defense brought forward the possibility of Smt.
6. Mandal being a tutored witness which is a common practice in the CBI.
7. Dr. Dahiya's observations, including the theory of grave and sudden provocation are bound to founder as he has himself mentioned in his report Exhibit-ka-93 that perusal of photographs, CDs, postmortem examination reports etc. cannot be a substitute for a real site visit and hence the observation of his own report has its limitation. Also AGL Kaul in his closure report has mentioned that Hemraj's blood was not detected on Aarushi's pillow or bed sheet which further diminishes the possibility of the murder in the same room.
8. In the post-mortem report, the probability of a dentists' scalpel being used as the murder weapon was mentioned as a bleak possibility.

What arises now is a conflict between the judicial precedents which if applied in the instant case are tilted towards the conviction of the Talwars. For example:

1. In case of a murder, where the accused was last seen in the company of the deceased and there is reliable evidence of the witnesses that this fact was especially within the knowledge of the accused, the burden would be on him to explain the circumstances in which they parted company. Thus, it was held by the Bombay High Court that the failure of the accused to explain the said fact and blunt and outright denial of the above fact and of the incriminating circumstances appearing against him would be an additional link in the chain of circumstantial evidence.[76]

2. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in lying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain.[77]

3. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal

[76] *Ranjyot Singh Gurdayal Singh* v. *State of Maharashatra*, 2009 Cr.LJ 2530 (Bom)(DB)
[77] *State Of Rajasthan* v. *Kashi Ram*, AIR 2007 SC 144

trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.[78]

At the same time, when the facts are fused and properly analyzed without a previously established bias certain amount of reasonable doubt is created in the minds of any rational man, challenging the very fundamentals of this judgment as to why were the accused named as the accused in the very first place. A strict application of precedents does tantamount to conviction but in any murder trial, application cannot be so rigid as to outweigh the material facts and game-changing circumstances. This section should be applied with great care and caution in criminal cases, but it cannot be said that it has no application to criminal cases.[79] The prosecutions authorities are not entitled to rely upon this section save in very exceptional cases, and to a limited extent.[80]

Application of section 114

Moving towards the usage of section 114 the facts and inferences have not been correctly applied and it is as if the law was interpreted according to the conviction, rather the conviction according to the law.

Sir James Stephen, while introducing the Bill, stated, in regard to sec. 114 as follows:

"The effect of this provision is to make it perfectly clear that courts of justice are to use their own common sense and experience in judging the effect of particular facts, and that they are

[78] *Trimukh Maroti Kirkan* v. *State Of Maharashtra*, 2007 CriLJ 20 (SC)

[79] *BN Chatterjee* v. *Dinesh Chandra Guha* AIR 1948 Cal 58

[80] *Yusuf Abdulla Patel* v. *RN Shukla* 72 Bom LR 575

to be subject to no particular rules whatever on the subject. The illustrations given are for the most part, cases of what in English law are called presumptions of law: artificial rules as to the effect of evidence by which the court is bound to guide its decisions, subject however, to certain limitations which it is difficult either to understand or to apply, but which will be swept away by the section (114) in question." [81]

We shall now take up the words "common course of natural events, human conduct and public and private business". The word 'common course' qualifies not only natural events but also the words 'human conduct' and 'public and private businesses. When the court is prepared to accept the direct evidence of a witness or an expert, sec. 114 does not come into play. It is only in their absence, that sec. 114 is resorted to. As to what is 'common course of natural events, human conduct and public and private business' depends upon the common sense of the Judge acquired from experience of worldly and human affairs, tradition or convention.

The most commonly applied rule in these scenarios is the deduction of an inference from a set of previously established facts. The burden of establishing these facts lies on the prosecution and they should at the same time make out a *prima facie* case against the accused so charged. Once this task is complete then such inferences can be made with due diligence of the judge acting as a moderator, to form a chain of events that could have occurred in the light of the given circumstances that leads to the accused being held guilty. Cautionary rules have also been laid down that prohibit one inference from another. Inferences can only be made from established facts.

Presumptions are indulged in only to supply facts and do not arise where the facts are known. They must be based on some necessity, and the court will not go into the domain of presumption where direct proof can be obtained.[82]

An analysis of the cases' facts and inferences is hereinafter made which sheds light on the fallacies of the judgment made and the application of section 114.

Facts:

[81] (Proceedings in Council, Gazette of India, 30th March, 1872, supplement, pp 234-35).

[82] Corpus Juris Secundum, vol. 31,pp 722-23

1. Both the accused and both the deceased were present in the house on the night of the murder.

2. White discharge was detected from the vagina of the deceased, i.e. Aarushi.

3. The lock on Aarushi's door could be opened only from inside.

Inferences:

1. Both the deceased were having an affair

2. The door was opened by Aarushi for Hemraj with the intention of performing sexual activities.

The flawed inference, drawn from the above-mentioned inferences:

Assuming the above inferences to be true, it is further assumed that the deceased were subsequently caught, which lead to sudden and grave provocation of the Talwars, and in this fit of rage both the deceased were murdered. No heed was paid to the sound test, the non-finding of Hemraj's blood and the possibility of an outsider. These inferences are per se erroneous and flawed to the core, not to say unethically biased.

Presumption of fact is nothing but logical inference of the existence of one fact drawn from other proved or known facts, without the help of any artificial rules of law, and they are always rebuttable. The legal consequence of drawing a presumption is to cast on the opponent the duty of producing contrary evidence. A presumption upon a matter of fact means that common experience shows the fact to be so generally true that courts may notice the truth. The presumptions of fact are in truth but mere arguments of which the major premise is not a rule of law. They depend upon their own natural force and efficiency in generating belief or conviction in the mind, as derived with those connections, which are shown by experience, irrespective of any legal relations. The effect of this provision is to make it perfectly clear that courts of justice are to use their own common sense and experience in judging of the effect of particular facts. Perhaps the most important rule as to presumptions is that they must be based upon facts and not upon inferences or upon other presumptions. No presumption can with safety be drawn from another presumption. The fact presumed should have direct relation with the fact from which the presumption is drawn; but when the facts are established from which presumptions may be legitimately drawn; it is the province of the Court to deduce the presumption or inference of fact. If the connection is too remote or uncertain, it is the duty of the court to exclude either the testimony from which

the presumption is sought to be deduced or to instruct the Court that the evidence affords no proper foundation for any presumption. Where the fact, giving rise to a presumption under Section 114, is undisputed and no explanation negating the presumption is offered, the Court is justified in laying the onus proper where, but for the presumption, the onus could not be laid.[83]

In connection with this specific use, not only must the fact from which the inference is drawn be established in evidence, and not rest on the accuracy of a reasoning process; but also the inference to which it gives rise should, in the majority cases, be strong and almost inevitable. A failure to comply with these requirements when announcing such a presumption has been severely criticized and the caution deserves attention, as it is on the legally recognized presumptions of fact that the true presumptions or assumptions of law are based. It follows from the nature of a presumption of fact that it is rebuttable. [84]

No doubt it is true that for bringing home the guilt on the basis of the circumstantial evidence the prosecution has to establish that the circumstances proved lead to one and the only conclusion towards the guilt of the accused. In a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn are to be cogently and firmly established. The circumstances so proved must unerringly point towards the guilt of the accused. It should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else. It has to be considered within all human probability and not in fanciful manner. In order to sustain conviction circumstantial evidence must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence. No hard and fast rule can be laid to say that particular circumstances are conclusive to establish guilt. It is basically a question of appreciation of evidence which exercise is to be done in the facts and circumstances of each case. With these faulty inferences the chain of circumstance pointing towards the guilt is destroyed leaving enough doubt for acquittal, especially when conviction has been based on nothing but circumstantial evidence.

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83 *Velakkayala Kumari* v. *General Manager, South Central Railway and Ors*., 2010(3)ALT318

84 Vide Corpus Juris Secundum, vol 31, pp 726-27

Further there are various assumptions with respect to the conduct of the talwars not hugging Aarushi, not crying when found by their maid Smt. Bharti Mandal and also that no outsider would dare drink wine after committing murders in the house. The Rajasthan High Court has very judiciously commented upon the inference of human conduct:

'The common course of natural events, human conduct and public and private business has its origin in the habit of man or other beings irrespective of the fact whether such habit is on account of the operation of law of nature or on account of the operation of law made by man or it is a habit developed on account of tradition or convention or is a result of volitional act of the individual. The characteristic of such common course is that in a given set of circumstances if certain event occurs or certain act or omission is performed by the individual or by large group of persons. In human society sometimes the common course of human conduct is determined by the manner in which an individual or group of individuals is treated by the State and its various functionaries or by the fellow beings or by the manner in which a certain conduct is rewarded or is punished or otherwise treated, indifferently. Under S. 114 of the Evidence Act the Court is not supposed to legislate as to the manner in which the human beings should conduct themselves in a given set of circumstances because the power given by S. 114 of the Evidence Act is only in respect of inferences which has to be drawn by the Court. Section 114 of the Evidence Act does not authorize the Court to legislate in any manner. If this limitation of the power given by S. 114 of the Evidence Act is kept in view, before a common course of conduct is used for the purpose of arriving at a decision, it is necessary that such common course of conduct must be established. The alleged course of conduct unless established cannot be made use of by the Court for the purpose of arriving at decision under S. 114 of the Evidence Act.'[85]

In the light of these flawed applications of the law there still exists a reasonable doubt as to whether the Talwars were the perpetrators of the crime, or were they just a by-product of faulty investigation by the CBI, a media trial causing wide scale bias that possibly extended to the courtrooms of Delhi Sessions Court causing injustice to be delivered and unjust application of the law, determined to convict the accused.

The evidence appeal of the Talwars

[85] *State of Rajasthan* v. *Bhera* 1997 CriLJ 1237 (Raj HC) (DC)

This part assesses the appeal of the Talwars on the basis of Section 233(3) of the Criminal Procedure Code to procure documents pertaining to scientific tests undertaken during the investigation.

The Talwars approached the Court for procuring these documents at the stage of final arguments that is one of the final stages of the trial and they had no plausible explanation justifying the same. They took four months to produce 7 of their witnesses and also moved application for sending the khukri abroad for re-examination. After considering the judgment of the Honorable Supreme Court, it is evident that the tactics used by the accused were to delay the trial with respect to the procuring the documents and the court stands correct in denying them the documents examination.

This right of the accused is a very valuable right which cannot be curtailed in any way. If the accused applies for issue of any process for procuring the attendance of any witness or for production of any document or thing, the Judge has to issue such process invariably. The prayer for issuing any such process can be dismissed only when the Court is satisfied that the prayer has been made for the purpose of vexation, delay or for defeating the ends of justice. In other words, if the prayer for issue of a process to any witness or for production of any document or the thing, has been made by the accused not with the object of defending his case and bringing on record relevant material necessary for establishing his defense, but has been made merely to delay the trial or to defeat the ends of justice or is vexatious, the Court has to discard such prayer. Therefore, a heavy duty is cast upon the Court to see as to whether or not the defense evidence sought to be summoned, is necessary for defending the charge leveled against the accused. If it is so, the trial Judge has to summon the defense evidence. Therefore, the trial Judge has to adopt a reasonable approaching such matter and should not reject the prayer for summoning defense evidence except on the grounds provided in sub-section (3) of Section233 of the code.[86]

With respect to the witnesses not being allowed for examination, we find that in the light of the whole trial based on circumstantial evidence the defense witnesses could have given a deeper insight into the case and could have helped establish the disputed facts further. Thus in the light of justice they should have been given a chance for a fairer trial to be conducted and a better judgment to be passed.

[86] *Dinesh Chandra Srivastava* v. *State of UP*, 2011(2)ACR2080,

Language of the Judgment

> It is difficult to take seriously a judgment that uses archaic British words so bombastic even Conrad Black would hesitate to use them, and combines them with American slang so casual teenagers would blush to use it in essays.

"The cynosure of judicial determination is the fluctuating fortunes of the dentist couple Dr. Rajesh Talwar and Dr. Nupur Talwar, who have been arraigned for committing and secreting as also deracinating the evidence of commission of the murder . . ." begins the judgment.

It refers to Aarushi as a "beaut (sic) damsel and sole heiress" and is peppered with statements such as:

"Punish Tandon (a neighbor) had come to her house on hearing boohoo."

"He (Rajesh) has also admitted that Hemraj was average built but he has no knowledge as to whether his wily was turgid."

" . . . swelling of the pecker of Hemraj."

It was observed by the Supreme Court in Jiwan Kumar Lohia and another Vs Durgadutt Lohia and others AIR1992SC188 that remarks and the language made by the judge should not be uncalled for and should be in consonance with the dignity and decorum on a court. The court observed:

On going through the judgment of the High Court, we were disturbed to find that the learned Judge, while commenting on the conduct of the arbitration proceedings by the arbitrator, has made observations which are highly disparaging. Apart from the fact that the said remarks were completely uncalled for, we are of the view that the language used docs not behave the dignity and judicial decorum of the court.

In the *State of Madhya Pradesh and Ors*. v. *Nandlal Jaiswal* and Ors[87] , the Supreme Court has observed:

We may observe in conclusion that Judges should not use strong and carping language while criticising the conduct of parties or their witnesses. They must act with sobriety, moderation and restraint. They must have the humility to recognise that they are not infallible and any

[87] [1987]1SCR1

harsh and disparaging strictures passed by them against any party may be mistaken and unjustified and if so, they may do considerable harm and mischief and result in injustice.

In light of these precedents by the Apex Court, such colloquial and improper language and vocabulary can be highly criticized. Such phrases and remarks are totally unbecoming of a courtroom, especially, that of a Judge. It should not appear that the Judge pronounced the decision by not keeping in mind all the judicial principles, facts and evidences but keeping one eye on a Thesaurus.

II. MEDIA ATTENTION

Media Trial

Through this section of the paper, we aim to discuss the role media played in the judgment of the Arushi Talwar Case. There are many deaths which take place in the country every hour. But for some reason, or possibly pure chance, this case caught the limelight. It became the topic of dinner table discussions, and the news was filled with facts, debates, evidence and the impact of this case. Once, the case was out in the media, it was discussed so much that it could have led to distortion of the initial information and facts.

A case has been built on questionable circumstantial evidence without giving the parents of the murdered girl the benefit of doubt. This, despite the fact that at one point the investigators were forced to admit in their closure report that they could not build a convincing story from their findings. It is not a case of "this definitely happened", but one riddled with a slew of maybes. Over five years and a half, the public has been treated to such a dizzyingly befuddling spectacle of conspiracy theories, insinuations, display of cavalier approach by the investigative agency that "justice" as per law remains, perhaps, a residue which everybody would like to consciously shun

However, in that process, every norm of respecting privacy was overstepped. Aarushi Talwar became a household name, for all the wrong reasons. Those who had never known her sat in public forums to discuss her character, her personal life, the unpardonable folly of having a boyfriend at that age, her relationship with her parents, everything down to her e-mails and even her text messages. As more and more details of the forensic evidence were dug out and splashed all over the media- how dilated was her vagina, or the whitish discharge found therein, the speculation got only more lurid. Aarushi was as normal as any fourteen-year-old girl she was an intelligent, funny, warm person with a huge circle of friends who will never forget her presence. Aarushi could have been your daughter, sister or friend and then her loss would have meant much more than just having her relegated to the folds of what is now known as India's most sensational murder mystery. In the process of forming critical impressions of issues that acquire public glare, we tend to forget the human core of sensitivity and empathy. The murder of a child, and that of even Hemraj, the domestic help of the Talwars, cannot be objectified or depersonalized to represent any kind of stereotype that would justify the act. To pass a judgment on the character of someone we have not had a

single personal interaction with, especially when doing so has colossal implications, is almost like a metaphorical murder, its deeply disturbing, enraging even to have her discussed in a completely wrongful manner on platforms where the least that can be done is to denounce the unceremonious, unanticipated and absolutely unnecessary sequence of events that followed her death.[88]

Media

Media is touted as the fourth "Pillar" of democracy. It plays a vital role in shaping public opinion and also acts as a trendsetter. A Free and healthy press is indispensable to a democracy. Hence media's role is essential.

Trial by media is a phrase popular in the late 20th century and early 21st century to describe the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of Law.[89] Freedom of press stems from the right of the public in a democracy to be involved on the issues of the day, which affects them.

People cannot adequately influence the decisions that affect their lives unless they can be adequately informed on the facts and arguments relevant to the decisions. Much of the fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument. This is also the justification for investigative and campaign journalism.

Media has now reincarnated itself into a public court (Janta Adalat) and it completely overlooks the vital gap between accused and convict. The golden principles of "presumption of innocence until proven guilty" and "guilt beyond reasonable doubt" are overlooked. The media is there to report facts or news and raise public issues; it is not there to pass judgments.

Now, what we observe is media trial where the media itself does a separate investigation, builds a public opinion against the accused even before the court takes cognizance of the case. By this way, it prejudices the public and sometimes even judges and as a result the accused, that should be assumed innocent, is presumed as a criminal leaving all his rights and liberty un-redressed.

[88] Blog-I-Know-Aarushi-Talwar/NDTV.com.webarchive
[89] legally india/uncut: legallyindia.com

Trial is essentially a process to be carried out by court and trial by media is sometimes regarded as an undue influence. Problems arises when the media ultra vires its legitimate jurisdiction and does what it must not do. Rights and liberties of accused jeopardized and separate opinion prejudices the public.

In *Y.V. Hanumantha Rao* v. *K.R. Pattabhiram and Anr* [90]where in it was observed by the learned judge that:

"When litigation is pending before a Court, no one shall comment on it in such a way there is a real and substantial danger of prejudice to the trial of the action, as for instance by influence on the Judge, the witnesses or by prejudicing mankind in general against a party to the cause. Even if the person making the comment honestly believes it to be true, still it is a contempt of Court if he prejudices the truth before it is ascertained in the proceedings. To this general rule of fair trial one may add a further rule and that is that none shall, by misrepresentation or otherwise, bring unfair pressure to bear on one of the parties to a cause so as to force him to drop his complaint or defense. It is always regarded as of the first importance that the law that we have just stated should be maintained in its full integrity. But in so stating the law we must bear in mind that there must appear to be 'a real and substantial danger of prejudice'.

If media projects a suspect or an accused as if he has already been adjudged guilty well before the trial in court, there can be serious prejudice to the accused. Even if ultimately the person is acquitted after the due process in courts, such an acquittal may not help the accused to rebuild his lost image in the society. Excessive publicity in the media characterizing him as a person who has indeed committed the crime, it amounts to undue interferences with the "administration of justice" calling for contempt of court against the media. Hostile witness may arise, media pressure on witness.

Even Judges and Court are not immune to influences, may unconsciously get affected especially in high publicity cases. Judges watched by the world, their statement or decision is not just for themselves but for their society or family at large, verdict reaches to a level beyond evidence.

State of Maharashtra v *Rajendrajawanmal Gandhi* [91] Supreme Court has held that trial by press , electronic media or by way of a public agitation is the very anti-thesis of rule of law

[90] AIR 1975 AP 30

and can lead to miscarriage of justice. In this case there has been the lynching by the media. It has been a prolonged open season- for reporters, columnists and politicians to indulge in every conceivable form of theorizing, moralizing, feeding voyeurism, and even calumny. It begs the question- how far should the media go as "crusaders for justice"? Does the zealous execution of this self-appointed role always yield positive results as in the Jessica Lal case, or does it, more often than not bring about a travesty of justice? It forces us to ponder if this is not "yellow justice"

Fair trial

Democracy works on fair play and transparency. Hence curtailment of this freedom puts democracy on stake. Prejudicial publication affects public, judges and other persons involved.

The law relating to contempt of Court is well settled. Any act done or writing published which is calculated to bring a Court or a Judge into contempt, or to lower his authority, or to interfere with the due course of justice or the lawful process of the Court, is a contempt of Court. [92]Contempt by speech or writing may be by scandalizing the Court itself, or by abusing parties to actions, or by prejudicing mankind in favor of or against a party before the cause is heard. It is incumbent upon Courts of justice to preserve their proceedings from being misrepresented, for prejudicing the minds of the public against persons concerned as parties in causes before the cause is finally heard has pernicious consequences. Speeches or writings misrepresenting the proceedings of the Court or prejudicing the public for or against a party or involving reflections on parties to a proceeding amount to contempt.

In this case, the media reinforced the prosecution claim that nobody but the parents could have been the killer. Shohini Ghosh, media academic, believes that despite the intense media glare on the case, there is little of what may be called an informed public opinion. "So convinced are some about the guilt of the parents that they see the trial not as a judicial examination of evidence to determine the facts but a legal formality that must necessarily culminate in conviction,"

Going by how the Supreme Court has gone in the present case- castigating the Talwars for adopting dilatory tactics, or disallowing the examination of more witnesses (it is a criminal

[91] 1997(8) SCC 386
[92] R. v. Gray, [1900] 2 Q.B.D. 36 at p. 40

trial, no less and every accused has to be allowed the fullest extent to defend himself. Even in the 26/11 attacks case, the Court had not clamped down on the defense's right to examine as many witnesses as it wanted to), one cannot help wondering if complete justice has indeed been delivered.

In the days to come, there shall undoubtedly be a rehash of the entire spectacle by journalists believing themselves to be the "*connoisseurs of certainty*" (Janet Malcom, again.) and a battery of "legal experts" proffering opinions a dime a dozen . But unless these phenomena are put to robust scrutiny, justice, in the short as well as the long run, shall remain a mirage.

The constitution on India and the contempt of court act 1971[93] contain provisions aimed at safeguarding the right to fair trial.

The Contempt of Court Act defines Criminal Contempt as the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which

(I) scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court;

Or

(ii) Prejudices, or interferes or tends to interfere with, the due course of any judicial

Proceeding; or

(iii) Interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;

Also the Contempt of Court Act specifies that

(1) A person shall not be guilty of contempt of Court

on the ground that he has published (whether by words spoken or written or by signs or by visible representations or otherwise) any matter which interferes or tends to interfere with, or obstructs or tends 40 to obstruct, the course of justice in connection with any civil or criminal proceeding pending at the time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending.

[93] http://chdslsa.gov.in

(2) Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, the publication of any such matter as is mentioned in sub-section (1) in connection with any civil or criminal proceedings which is not pending at the time of publication and shall not be deemed to constitute contempt of Court.

Constitution

Restrictions are imposed on the discussion or publication of matters relating to the merits of a case pending before a Court. The subject of trial by media or prejudice due to pre trial publications by the media is closely linked with Article 19 1(a) which guarantees the fundamental right of freedom of speech and expression.

The extent to which that right can be reasonably restricted under Article 19(2) by law for the purpose of contempt of court and maintaining due process to protect liberty under Article 21.

The basic issue is about balancing the freedom of speech and expression and undue interference with administration of justice within framework of the Contempt of Court Act, 1971 as permitted by Article 19(2).That it should be done without unduly restricting the rights of suspect/accused under Article 21 of Constitution of India for a fair trial.

Law Commission 200th report [94]

Given by Justice M.Jagannadha Rao august 2006 where the primary concerns were:

To address the damaging effect of sensationalized news reports on the administration of justice. Prohibiting publication of anything that is prejudicial towards the accused –a restriction that shall operate from the time of arrest. The high court can be empowered to direct postponement of publication or telecast in criminal cases and to restrain the media from resorting to such publication or telecast.

Starting point of a criminal case should be from the time of arrest and not from the time of filing of the charge sheet, such an amendment would prevent media from prejudging or prejudicing the case.

[94] http://lawcommissionofindia.nic.in/reports/rep200.pdf (last accessed on 15th February, 2014)

Media has a wide reach, fourth pillar of democracy; faithful reflection of its mood should be done. Media trial is nowhere legal. Facts should be presented in proper context and both pros and cons should be discussed so that people grab significance adequately and get informed views. Aarushi case teaches us that we need efforts to upgrade quality of policing need to improve judicial performance.

The time period of 5 and half years, this happened not just due to judicial lethargy but also due to other external factors. The ideal proportion would be not disallowing the media but allowing a controlled media.

COMPARISON WITH FOREIGN JURISPRUDENCE

In the U.S., the fair trial/free press debate presents fundamental concerns about newsgathering as well as publication, the use of reporters themselves as sources, the ethical and legal obligation to protect confidential sources, and the extent and limits of judicial powers to punish disobedience or disruption of its proceedings, similar to what we see in or country.

Though there is no direct law about media trials there either. The debate continues to be one of fair trial vs. free speech. Or say Sixth Amendment Right vs. The First.

Media coverage of crime often includes details about the crime scene, evidence, arrests, the character and criminal history of the defendant, and the charges. Some of the information presented in the news may be incorrect or may not be admissible in court. Although the media have a First Amendment right to publish this information, such pretrial publicity may undermine the defendant's Sixth Amendment right to a fair trial. A fair trial requires impartial jurors and an impartial judge. Media exposure may cause potential jurors to form fixed ideas about the guilt of the defendant before a trial begins. And hence, the U.S. courts struggle with the effect of media on court processes. The U.S. Supreme Court ruled that judges must not take part in a case whenever there seem to be a situation where they might be biased.

The Sixth Amendment to the U.S. Constitution guarantees criminal defendants the right to a speedy and public trial before an unbiased jury to be held in the district where the crime was committed. The U.S. Supreme Court has determined that the right to an open public trial belongs to the public as well as the defendant. To protect these important components of

justice, courts take care in composing juries and in protecting the court's fair process from external influences, including media. The careful selection of jurors includes both the drawing of a fair cross-section of the community and the detailed questioning of potential jurors through void dire. Judges also use admonitions, instructions and sequestration to encourage jurors to consider only the evidence presented in court in rendering a verdict. Judges use both civil and criminal contempt citations to force participants in the trial to comply with their orders. On occasion, judges will delay or relocate a trial to overcome impediments to fairness. These remedies are rare because they are expensive and interfere with the right to a speedy trial.

Our first case, Sheppard v Maxwell, relates to a sensational murder trial that was widely believed to have inspired the television series and movie, The Fugitive. Convicted twelve years earlier of killing his young wife Marilyn, Dr. Sam Sheppard wins a new trial after his attorney, F. Lee Bailey, succeeds in convincing the Supreme Court that the massive publicity surrounding his original trial constituted a violation of his right to a fair trial. [95]

The First Amendment bans the federal government from imposing adherence of a Code on the media. But still, there does exist a code which specifies the responsibilities of responsible journalists.

A case which draws very similar base to the Arushi Talwar case is the Casey Anthony case of the U.S.A mother, Casey Anthony was accused of first-degree murder of her two-year-old daughter Caylee Anthony. The case caught immediate media attention and stories of how brutally a mother killed her daughter started soaring around. Casey pleaded not guilty.

The trial lasted for six weeks and eventually the jury found out Casey to be not guilty. [96]This created a large uproar in the society among all those people who had been following the case. They had all seen pictures of mothers who were dancing in a club, carefree and a young innocent child. Their opinions were formed. We observe that drawing a comparison between India and the U.S., there is an absence for fixed laws. But the war always is between free press and fair trial. Now the outcomes varies from case to case, though in the case above, we

[95] http://law2.umkc.edu/faculty/projects/ftrials/conlaw/fairtrialissues.htm (last accessed on 21st February, 2014)
[96]http://www.lawteacher.net/commercial-law/essays/effect-of-trial-by-media-before-courts-law-essay.php (last accessed on 27th February)

see the presence of a courageous jury, which was able to go against the public at large which had developed an opinion about the case from what they saw and heard in the newspapers and on television.

DEFAMATION

They are their child's murderers. They are wife-swappers. Rajesh was having an affair. Aarushi was not their real child. They didn't cry enough. They looked too composed. They had dressed the scene of crime. They had acted on sudden and grave provocation. They had found their 13-year-old daughter in a compromising position with their 45-year-old servant. They had interfered with the post-mortem report. They had cleaned out the evidence.

The basic essentials required for defamation is that statement must be defamatory and it must damage the plaintiff's reputation among right thinking members of society. Also it may expose the plaintiff to disgrace, humiliation, ridicule or contempt.

However, intention to defame is not necessary, the media in this case propagated theories believing them to be true, how so ever genuine their intentions may be.

Also Defamation of a deceased person is a criminal offence if it causes damage to the reputation of his family or near relatives. How abnormal is it for an urban, public school educated fourteen-year old of the twenty first century to own a cellphone, use it to text a friend of the opposite gender and put up a few harmless pictures of a birthday party on a social networking website? Does the presence of a male servant in the house inevitably allow perverse minds to suggest that Aarushi was having illicit sexual relations with him? Does the gruesome murder of a young girl and the subsequent invasion of the privacy of her family by media units automatically grant license to anyone to assume the authority to dissect her character in front of an entire public that is inherently attracted to any kind of scandal?

Must be published: should be known to people other than the plaintiff and defendant. In the case of *Radheshyamtiwari* v. *Eknata*[97]. Any fact published without solid evidence cannot be warded off under the guise of freedom of press secured under art 19(1) (a) of the constitution of India.

In the case of Salendandari v. *Gajjalamalla reddy,*[98] was in defense of raping a woman, an article was published in a Telugu daily without substantial proof with exaggerated versions, several deviations and improvement from the original event. Also that article stated that the plaintiff who was a legal professional should discontinue his profession.

[97] AIR 1985 BOM 285
[98] AIR 2009 (NOC) 299 (AP)

Thus the Andhra Pradesh High court ruled that recording a statement of facts as reflected by a record was different from making a publication giving exaggerated versions with several deviations and improvements. Such reporting reduces true episode to its lowest bottom and the public might not be able to draw a distinction between that portion which is true and that portion which is not.

Reporting of distorted or deviated versions with comments without proper justification might not fall under the umbrella of protective journalism. If the defenses available for defamation are considered then Fairness of comment and truth are the available defenses and none of these apply in this case.

It should be a comment and not a statement:

A comment should be fair and not biased and should be issued in public interest. Here the intention of the interest of public remains questionable. Truth is a defense; however there was no guarantee that the facts published were true! As there was no evidence to prove the facts.

But in the Aarushi Talwar murder case, the electronic media has been uniformly guilty. They scaled new heights of irresponsibility by confounding speculation and facts, spreading canards and defamatory stories. In show after show, article after article, the Talwars were demonized as decadent, immoral, unfeeling, unrepentant, scheming and resourceful.

On the face of it, this could seem an indulgence: why should the tragedy of two people count for much in a country of 1.2 billion? Ordinarily perhaps, it wouldn't. But this is no ordinary story. It exemplifies what can happen when an entire system goes deaf on you. It exposes the tectonic damages irresponsible media can do. It encapsulates the cold, impervious heart of our democracy. It typifies the mess of our criminal jurisprudence and forensics.

OPINIONS OF THE SOCIETY ON THE JUDGMENT

The judgment has been severely criticized with circumstantial evidence being the basis of conviction. Media which played a crucial role in the entire trial process and also went to the extent of framing the Talwars took a different stand altogether as the judgment was passed putting forth a display of sheer hypocrisy. News channels and journalists who had earlier assumed that the Talwars were guilty switched sides and questioned the very basis of conviction in the entire trial process. Several articles and newspaper reports have come out which have severely criticized the judgments. The media is criticizing the media i.e. the same fraternity for its involvement in the case that significantly affected its outcome.

However the media had exercised its influence on the minds of the common people who believed it to be a case of honor killing and appreciated the decision taken by the court that went well against the apparent culprits i.e. the Talwars. The intellectual class that comprised of writers, legal professionals had a divided opinion but mostly went against the judgment. The Talwars were defended by the former solicitor-general Harish Salve, Mukul Rohatgi and Rebecca John, all of whom worked pro bono which was a major factor in influencing the minds of legal professionals as eminent lawyers supported the Talwars. There were questions raised, as it was believed that the judgment was taken in haste and was biased and hence sufficient proof was not considered for arriving at it. Even the involvement of media in a negative way was criticized. The general conclusion was that the judicial mechanism was flawed and as a result of which the judgment delivered was not satisfactory or in the interests of justice.

CONCLUDING REMARKS

At the beginning of this research project most of the members were of the opinion that the Talwars' have not killed their daughter. At the conclusion we all are certain of one thing that the Judge has not done his duty to the laws of our country. The careful legal perusal of the judgment would leave anyone of the opinion that there have been lacunae in the application of the laws laid in statutes and the doctrine of stare decisis.

If we compare the closure report filed by the CBI a premier investigation agency of this country with the statements of the witnesses and the judgment glaring discrepancies emerge that leave the reader astounded as to whether the police or the Judge themselves were fully aware of the factual matrix or not. Few of the highlights are:

(i) Discrepancies in the injuries documented in the post mortem report and the injuries recorded in the judgment.

(ii) Whether Hemraj's body was removed from the crime of the scene and planted on the terrace?

Moving on the evidentiary analysis of the judgment the reality is not too good either. There are at least six points on which the Talwars' can approach the Allahabad High Court for an appeal. These are the following:

(i) Testimony of tutored witness was admitted as good evidence.

(ii) Testimony of interested witnesses whose testimony corroborated with all the material evidences was rejected.

(iii)Testimony of witnesses that does not corroborate with their own testimony as been relied upon heavily.

(iv) The crucial findings that emerged on the brain mapping and narco-analysis of the erstwhile accused were not accorded to his testimony. (Krishna admitted that there was a khukri in his room confirmed by CBI's investigation erred in documenting how the khukri was found and later the judge refused to realize that the khukri was found as a result of the scientific tests conducted and not on the basis of exhibit-92).

(v) Crucial report of the sound test conducted by initiation of CBI was dismissed by the judge without recoding the reasons as to why the report has been dismissed.

(vi) S. 114 of the Indian Evidence Act, 1872 has not been properly relied upon.

Careful analysis done by the authors indicates that the Special CBI Judge has erred in the application of precedents laid down by the Supreme Court on each of the instances.