

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL. APPEAL NO.29/2004**

Reserved on : 4th December, 2008

Date of Decision : 16.01.2009

SHAKALU

..... Appellant

Through: Ms.Charu Verma, Amicus Curiae.

Versus

STATE

..... Respondent

Through: Mr. M. N. Dudeja, APP for the
State.

CORAM :

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE V.K.SHALI

1. Whether reporters of local papers may be
allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

J U D G M E N T

V.K.SHALI, J:

1. This is an appeal filed by the appellant against the judgment dated 28th July, 2003 and the order of sentence dated 31st July, 2003 passed by the learned Additional District & Sessions Judge, Karkardooma Courts, Delhi convicting the appellant for offences under Sections 377/302 IPC and sentencing him to life imprisonment and a fine of Rs. 10,000/- for an offence under Section 302 IPC and rigorous imprisonment for a period of 10 years

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and a fine of Rs. 5000/-. In the event of default of payment of fine of Rs. 10,000/- and Rs. 5000/- he is further directed to undergo imprisonment of 2 years and one year respectively.

2. Briefly stated the prosecution case against the appellant is that on 16th September, 2001 PW 1 Rameshwar s/o Badri Prasad resident of Village Kadgi, PS Kasdol, District Raipur, Chattisgarh lodged a complaint with the police station of New Ashok Nagar that his son Viren aged about 5 years was missing since evening. On the basis of the aforesaid information a DD entry No. 59 B Exhibit PW 1/B was recorded by the police. It is further the case of the prosecution that on 19th September, 2001 PW 1 Rameshwar again visited the police station and lodged a fresh complaint Ex.PW1/A about the suspicion that his son might have been kidnapped/enticed by someone. On the basis of the said report a DD Entry No. 10A, exhibit PW 4/1 was recorded. Endorsement was made on the said statement by the police which is exhibit PW4/1 and an FIR Ex.PW4/2 was registered and the same was given to ASI Surender Pal Singh, PW4. The said FIR was registered under Section 363 IPC and the same was given to ASI PW4 for the purpose of investigation. It is alleged that PW-4 ASI Surender Pal Singh, as a consequence of this, visited the spot, made enquires and found the dead body of Viren lying in a room on the ground floor of a multistory building of SFS Flats which was under

construction. It was found that on the dead body of the deceased Viren one cement pillar was lying on the head and face. On the basis of the detection of the dead body the FIR was converted from Section 363 to 377/302/201 IPC and investigations were carried out. A dog squad was summoned to the spot which had a dog by the name 'Don' who had taken a smell of the stone which was purported to be found lying on the deceased and thereafter the dog is purported have taken the police party on to the first floor of the same building to a room where accused Sukalu was staying. The dog took the rounds of the said room and thereafter stood by the side of the appellant indicating as if the appellant was the person who is purported to have committed the crime. Then, the accused was arrested. The investigating officer collected and seized the blood stained pillar, blood stained earth and the same was sealed in a pullanda with a seal of G. S. vide seizer memo Exhibit P1. The dead body of the deceased was sent to Lal Bahadur Shastri Hospital for the post mortem. Statements of the witnesses under Section 161 Cr.PC were recorded. The appellant Sukalu, Davender, Salam Kumar and Sushil Kumar were living in the room in the same building under construction. They were interrogated and thereafter the accused is purported to have made a disclosure statement Ex.PW12/C admitting his crime as a consequence of which he was arrested. On the next day, the appellant was taken to Lal Bahadur Shastri Hospital where Dr. L. C. Gupta, PW-5

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collected his blood sample and examined him physically as to whether he is fit to perform the sexual intercourse. It is also alleged by the prosecution that on the date of examination by Dr. Gupta, the appellant is purported to have made an extra judicial confession before the Dr. Gupta that he had committed the unnatural sex with five boys and six girls apart from subjecting the deceased Viren to unnatural sexual intercourse. After investigation the challan was prepared and filed in the competent court.

3. On 13th March, 2002 the charges under Sections 377/302 IPC was framed against the appellant, which were read over and explained to him to which he pleaded not guilty.

4. The prosecution in support of its case had examined 13 witnesses, PW1 Rameshwar S/o Badri Prasad the father of the deceased/ complainant who lodged the missing report about his son originally on 16th September, 2001 which was recorded by DD No. 59 B Exhibit which is PW1/B. It is further stated by him in his testimony that his son Viren who was aged five years, his body was found in a room on the ground floor in a building which was under construction in Kondli. This fact was informed to him by one Phool Singh whereupon he went to the said room and found his dead body lying with a three foot cement slab on his neck. He, thereafter, approached the police once again and lodged a fresh

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report with the police on the basis of which an FIR originally under Section 363 IPC was registered which is Exhibit PW 4/1 and the same was handed over to ASI Surender Pal Singh who came to the spot and thereafter got the said FIR converted from 363 to 377/302 IPC. Rameshwar has also testified to the effect that after detection of the dead body of his son, the appellant was interrogated. He is purported to have made a disclosure statement and also pointed out to the place of having committed the unnatural act on the deceased son. The appellant pointed to the place where this heinous act was committed by him exhibit PW 1/D, it is also stated by him that the police party had brought a dog squad, on 19th September, 2001 itself who had smelled the place where the dead body of the deceased was found and thereafter the dog took the lead and went to the room where the appellant was living. The police interrogated the appellant and other occupants of the said room whereupon the appellant is purported to have been arrested. He has proved various documents identification of the dead body of his son, receipt of dead body after postmortem which are Ex.PW1/F and Ex.PW1/G respectively. He has also identified slab Ex.P-1. The witness was cross examined but nothing has been brought about in his cross-examination which could discredit his testimony except that there is variation in the account furnished by him as to how the body of the deceased was detected as against the version given by

given by PW-1 is more plausible whereas the version given by the IO seems to be concocted one.

5. PW 2 Godge Bai is the wife of Rameshwar who has also deposed on the lines of the husband though her examination is very short. She was subjected to cross examination but nothing has been brought about which could discredit her testimony.

6. A perusal of the testimonies of the PW 1 and 2 only prove the fact that the dead body of the deceased Viren was found on the ground floor of multistory building under construction in Kondli where the pillar of cement was lying on his face. On 19th September, 2001 it has also come in their evidence that they identified the dead body of their deceased son apart from the fact that the local police had brought a dog squad who had smelled the place where the dead body was found and thereafter taken the police party to the first floor by the side of the appellant so as to indicate as if the appellant has something to do with a commission of crime. This is not a case where PW 1 or PW 2 have seen the unnatural sex being committed by the appellant or the murder of their son being committed by the appellant.

7. PW 3 Raju is a public witness who has turned hostile and has denied that he had seen anything pertaining to this case. He resiled from previous statement made before the police and he was

declared hostile and he was subjected to extensive cross examination by the prosecution and in his cross examination he stood very firm having denied that he had seen the incident. Therefore, his testimony is of no help to the prosecution.

8. PW 4 Surender Pal Singh was posted as ASI at PS New Ashok Nagar who was given DD No. 59 B which is exhibit PW 1/B for the purpose of making a search to find out the deceased son of the complainant PW 1. He has also proved the statement Exhibit PW1/A of PW 1 on the basis of which an FIR, on which he has made endorsement Exhibit PW 4/1 and thereafter FIR was registered under Section 363 IPC vide FIR 290/2001 at PS New Ashok Nagar. It is stated by him that after registration of the FIR he went to the spot where he found near DDA MIG flats, Mayur Vihar Phase-III the dead body of the deceased lying in a room on the ground floor with a piece of pillar (made of cement and iron sariyas) lying on the dead body. It is also stated by him that the complainant Rameshwar also met him and identified the dead body of his son Viren. The dead body is stated to have a kaccha and a shirt. The dead body was seized and sent for post mortem to the hospital and the slab of iron sariyas which is Exhibit PW4/B was taken into custody and seized. This witness was not subjected to any cross examination. A comparison of the testimonies of PW1 and PW 4 will show that there is a glaring disparity in the versions of the two witnesses as to

how the dead body of the deceased was recovered. PW 1 the father of the deceased states that he was informed by one Phool Singh on 19th September, 2001 in the morning at about 09.00 A.M. that there was a dead body lying on the ground floor in a DDA flats under construction whereupon he identified the dead body of his son and sent to the police station upon which the FIR was registered. As against this, the version of the ASI PW4 is that on 19th September, 2001 he made an endorsement on the Ruqqa of the complainant and got an FIR originally registered under Section 363 IPC and thereafter went to the spot where he detected the dead body and also met the father of the deceased who identified the dead body whereupon the FIR of 363 IPC was got converted into Sections 377/302 IPC. Thus, the version which has been given by both these persons is totally divergent. It seems that the version which has been given by the PW 1 father of the deceased that he was informed by one Phool Singh about the dead body of his son lying on the ground floor whereupon an FIR was registered on his complaint at the police station seems to be more reliable as against the version which is given by the ASI PW 4 Surender Pal Singh.

9. PW 5 Dr. L.C.Gupta, a Specialist of Forensic Medicines conducted the post mortem on the body of Viren son of Shri Rameshwar. The accused was taken to Lal Bahadur Shastri Hospital where Dr. L. C. Gupta physically examined the accused

and gave findings that the accused was capable of sexual intercourse. Dr. Gupta, PW-5, collected his blood sample and examined him physically as to whether he is fit to perform the sexual intercourse. On the date of examination by Dr. Gupta, the accused had made an extra judicial confession before him that he had committed the unnatural sex with five boys and sexual intercourse with six girls apart from subjecting the deceased Viren also to such an act of carnal and unnatural intercourse which resulted in his death.

10. PW 6 HC Gain Amba has testified that she was posted as Duty Officer at police station New Ashok Nagar on 19th September, 2001. She received rukka Exhibit PW 4/ 1 from SI Surender Pal Singh, she registered the FIR under Section 363 IPC. After registering the FIR the same was handed over to SI Surender Pal Singh PW-4 for the purpose of investigation. She proved the copy of the FIR Exhibit PW 4/A. She has identified her signatures at point A.

11. PW7 Gurmeet Singh was posted in the Dog Squad Cell of Crime Branch on 19th September, 2001. It was he who got the dog at about 1.45 P.M. to the place of occurrence in the capacity of the trainer of the dog, the dog smelled the spot and thereafter he went to the room of the appellant where he caught the appellant. It was he who testified that after smelling the stone slab which was lying on the deceased, the dog had taken the trainer, namely, PW7 to the

first floor to a room of Chowkidar where he started circling the appellant which was as indication that he is involved in the commission of crime. The dog had stopped by the side of the accused with his mouth towards the appellant. He also identified the slab Exhibit PW1.

12. PW 8 Constable Suresh Kumar took the photographs of the spot where the dead body of the deceased was recovered. These photographs were proved as Exhibit PW 6 to Exhibit PW 10 on the basis of negatives Exhibit P1 to P5.

13. PW9 Constable Sonu Kaushik, Assistant Draftsman, Crime Branch who prepared the rough sketch of the place of incident on the pointing out of Inspector Gian Singh and thereafter the site plan was proved by Exhibit PW 9/A.

14. PW10 Constable Ravinder Singh joined investigation on 19.9.2001 along with SI Jaswant Singh. It was he who along with SI Jaswant Singh who had taken the dead body of deceased Viren to Lal Bahadur Shashtri Hospital. It was he who got the dead body send for the post mortem and after post mortem he received one parcel containing underwear and T-Shirt and Banyan along with the sample seal from the concerned doctor which he handed over to the Investigating Officer which was seized vide memo Exhibit PW 10/A.

15. PW11 Constable Satender had recorded the DD No. 59B on 16th September, 2001 at police station New Ashok Nagar when the report was originally lodged by PW1. He informed the PCR and handed over the copy of the DD entry to ASI Surnder Pal Singh PW 4 which is exhibit PW 1/B.

16. PW12 Jaswant Singh, Sub Inspector is the person who along with Inspector Gian Singh Meena was on petrol duty near main market, Mayur Vihar Phase-III, when a wireless message was received from PW4 Surender Pal Singh, ASI about the detection of a dead body of the missing child. He along with Inspector Gian Singh Meena went to the spot and participated in the investigation of the case. It was he who had called the dog squad from the Crime Branch and he was present at the time when the dog squad had taken the smell of the stone slab and proceeded on to the first floor where the appellant was pointed out to be connected with the commission of crime. He proved Exhibit PW 12/A (Blood smeared soil and sample soil from the place of occurrence), Ex.PW12/B (piece of pillar), Ex.PW12/C disclosure statement, Ex. PW1/D site of the room where he committed the crime and Exhibit PW 1/B (from the where the dead body was thrown) on which he has put his signature. He also identified the baniyan Exhibit PW1 and Lungi Exhibit PW 2 which belonged to the appellant. He testified that lungi was smeared with blood stains.

17. PW13 Gian Singh, Inspector is the Investigating Officer who has conducted the part investigation and after investigation he filed the charge sheet in court.

18. The entire incriminating evidence was put to the accused in the statement under Section 313 which was denied by him. The accused did not give any cogent explanation as to why the incriminating evidence was given against him. No witness was examined by the accused in his defence.

19. We have heard the learned counsel for the parties and have also gone through the record. The learned counsel for the appellant Ms. Charu Verma has submitted that the prosecution has not been able to establish the guilt of the accused beyond the reasonable doubt in as much as the complete chain of circumstances which will lead the Court to draw an irresistible conclusion against the appellant to the effect that he has committed the offence have not been fully established. It was, further, contended by the learned counsel for the appellant that only three circumstances have been dealt with by the learned Additional District & Sessions Judge, Karkardooma, Delhi on the basis of which the conviction has been handed down in respect of the appellant.

20. The first piece of evidence which has been relied upon by the learned Trial Court is to the effect that a dog squad was called and the sniffer dog after taking the smell of the stone which was purported to be lying on the deceased and thereafter, the said dog had taken the police party to the room of the appellant and started circling the appellant and sat by his side. It was contended that this circumstance could not be treated as evidence. The help of the sniffer dog could be taken only as a tool for the purpose of investigation and by no stretch of imagination it could be treated as a circumstantial evidence. For this purpose the learned counsel placed reliance on case titled **Dinesh Bharthakur Vs. State of Assam 2008 (4) SCALE 487.**

21. The second piece of evidence which has been relied upon by the learned Additional & Sessions Judge, Karkardooma, Delhi is the extra judicial confession purported to have been made by the appellant to Dr. L. C. Gupta, PW-10 who is purported to have examined the appellant on the next day of the arrest that is on 20th July, 2001. The appellant is purported to have admitted that he had committed sexual and carnal intercourse with minor girls and boys in the past also. He is also purported to have admitted that in respect of the deceased he has also done the same. As regards, this piece of evidence it was contended by the learned counsel for the appellant that the so called extra judicial confession was not put

to the appellant in his statement under Section 313 and, therefore, could not be referred to or relied upon by the prosecution. The learned counsel for the appellant in order to support her contention also placed reliance on the title **Latu Mahto & Anr. Vs. State of Bihar (Now Jharkhand)** [SC] 2008 [3] JCC 1800 wherein the Supreme Court has stated that the object of examination of the accused under Section 313 Cr.P.C. is to enable the accused personally to explain the circumstances appearing against him so as to benefit the Court in arriving at a final conclusion. This provision under Section 313 is enshrined in the Code of Criminal Procedure on account of the principles of natural justice enshrined in maxim audi alteram partem and since this incriminating evidence was not put to the appellant, therefore, it could not be read against him.

22. Thirdly, it was contended by the learned counsel for the appellant that the only independent witness cited by the prosecution was one Mr. Raju PW-3 who has turned hostile and has not supported the prosecution case. Thus, it was contended that the only remaining evidence against the appellant is a recovery of a lungi and a banyan belonging to the appellant from his room in pursuance to the disclosure statement purported to have been made by him. The lungi is stated to be soaked in blood while the report of the FSL Exhibit PW13/G and PW13/H does not give any

definite conclusion as to whether the said blood group matched with the blood group of the deceased or the appellant or is even the human blood at all. Therefore, these clothes were also not connected with the commission of the offence.

23. On the basis of the aforesaid submissions it was contended by the learned counsel for the appellant that although the prosecution may have been able to create a suspicion against the appellant, but it has miserably fallen short of proof of the facts and the complete chain of circumstances so as to make any reasonable prudent person to draw an inference that appellant has committed the offence under Section 377/302 IPC.

24. As against this, Mr. M. N. Dudeja, learned APP appearing on behalf of the State has vehemently contended that the appellant has been rightly convicted by the learned Additional & Sessions Judge, Karkardooma, Delhi and the prosecution has proved the entire chain of circumstances beyond reasonable doubt which will show that the appellant is the only person who could have committed this offence in question. The following are the circumstances which have been referred to by the learned APP for the State in support of his contention which shows that the appellant alone is guilty of having committed the offence.

“A. Disclosure statement exhibit PW 12/C
purported to have been made by the appellant

on the basis of the recovery of a lungi which was smeared with blood and a banyan of the appellant was got recovered by the appellant.

B. The extra judicial confession made by the appellant before the Dr. L. C. Gupta, PW-10 which was free from the vice of any threat pressure coercion or inducement wherein he had not only admitted the commission of the offence of carnal intercourse qua the deceased, but also the fact that he had done the same in the past with number of other children both male and female also.

C. The factum of the place where the dead body was lying and recovered happen to be a room in a four storied building under construction where the appellant was living alone in another room on the first floor and it was within his exclusive knowledge as to how the dead body came to the ground floor and the onus was on him discharge the same by virtue of Section 106 of the Evidence Act, 1872 to explain under what circumstances the dead body of the deceased had been found there. In order to further support his argument the learned counsel for the State also referred to the factum of the body of the deceased being recovered after three days of missing and the fact that the postmortem report exhibit PW 5/A had shown that the body had putrified, therefore, foul smell must have been emanating from the room while as the appellant failed to notice this and this goes to show his complicity. The learned counsel for the State had also referred to the site plan exhibit PW 13/B in this regard.

D. The fourth circumstance which was referred to by the learned counsel for the State was the conduct of the appellant. With regard to this, the contention advanced by the learned counsel for the State was that even if the extra judicial confession of the appellant is not taken into consideration on account of certain provisions of the Evidence Act 1872 still the conduct of the appellant in admitting the

guilt after the incident before the Dr. L. C. Gupta PW-10 is admissible under Section 8 of the Evidence Act, 1872 and, therefore, this conduct also becomes an important point in the entire chain of circumstances to prove the guilt by the appellant.

25. It was contended by the learned APP that the point which was raised by the learned counsel for the appellant is to the effect that the extra judicial confession was not put to the accused under Section 313 Cr.P.C. is not fatal to the case of the prosecution on account the fact that the learned counsel had stated that it did not cause any prejudice to the accused. It was contended that if the appellant tries to take the benefit of any incriminating evidence having not been put to him it was incumbent on him to show that he has been seriously prejudiced in this regard and since the appellant has failed to show any serious prejudice having been caused to him, therefore, this argument of the appellant does not have any merit. With regard to the contention of the learned counsel of the appellant that the blood group of the blood stains appearing on the lungi has not been established, it was contended by the learned counsel that non establishment of the blood group on the lungi by the report of the FSL Exhibit PW13/G and PW13/H is also not fatal to the prosecution case as the appellant himself had produced the lungi which was found to be smeared with blood therefore, no doubt with regard to the recovery of the lungi could be entertained or taken advantage of by the appellant.

26. On the basis of the aforesaid facts it was stated by the learned APP that the prosecution has been able to establish the complete chain of circumstances so as to establish the guilt of the convict-appellant, and therefore, he has been rightly convicted both for Section 377 read with 302 of the IPC.

27. We have thoughtfully considered the submissions made by the learned counsel for the parties and gone through the record. At the outset, it is stated it is not disputed by either of the parties that the entire case of the prosecution is based on circumstantial evidence. In order to prove the guilt of an accused which is based on circumstantial evidence there are plethora of authorities which have been handed down by the Apex Court from time to time laying down as to what is required to be proved in a case which is based on circumstantial evidence. In this regard, it is pertinent to refer to some of the authorities in order to appreciate the facts of the present case.

C. In Chenga Reddy and others Vs. State of A.P., (1996) 10 SCC 193, it has been observed thus:

“In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be

consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.”

In “**Padala Veera Reddy Vs. State of A.P. and others (AIR 1990 SC 79)**”, it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

“(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointed towards guilt of the accused;

(3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

In “**State of U.P. Vs. Ashok Kumar Srivastava (1992 Crl. LJ 1104)**”, it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.”

28. The learned Trial Court has essentially considered three pieces of evidence against the appellant for the purpose of his conviction. The first piece of evidence in the chain of circumstances which has been taken against him is the fact that immediately after incident dog squad was brought to the spot who took the smell of the place of incident and that of the stone slab and thereafter led the police party on to the first floor of the building under construction where the said dog circled and pointed towards the appellant. No doubt, the dog has an extreme power of smell and can lead on the basis of the smell to the trail of commission of crime but at best it is a tool for a purpose of helping during the course of investigation. The factum of the dog leading a trail and standing by the side of the accused or catching hold of the accused through his dress cannot be considered to be a substantive piece of evidence nor it can be a link in the chain to convict the accused. Reliance in this regard is placed on the judgments titled **Dinesh Bharthakur Vs. State of Assam 2008 (4) SCALE 487** wherein the Supreme Court has observed that the identification by the dog of a accused or leading the trail of commission of crime to a particular place at best is a tool in the investigation and it may not be considered to be a substantive piece of evidence for the purpose of conviction of accused in a given case. In **Gade Lakshmi Mangraju Vs. State of Andhra Pradesh,** AIR 2001 (SC) 2677 case supra it

was observed by the Apex Court as under:

“The uncanny smelling power of canine species has been profitably tapped by investigating agencies to track the culprits. Trained dogs can pick up scent from the scene of any object and trace out the routes through which the culprits would have gone to reach their hideouts. Developing countries have utilized such sniffer dogs in a large measure. In India also the utilization of such tracker dogs is on the increase. Though such dogs may be useful to the investigating officers, can their movements be of any help to the court in evaluating the evidence in criminal cases?

There are basically three kinds of police dogs - the tracker dogs, the patrol dogs and the sniffer dogs. Recent trends show that hounds belonging to certain special breeds sheltered in specialised kennels and imparted with special training are capable of leading investigating agency to very useful clue in crime detection and thereby help detectives to make a breakthrough in investigation. English courts have already started treating such evidence as admissible. In Canada and in Scotland such evidence has become, of late, admissible though in United States the position is not uniform in different States.

The weakness of the evidence based on tracker dogs has been dealt with in an article "Police and Security Dogs". The possibility of error on the part of the dog or its master is the first among them. The possibility of misunderstanding between the dog and its master is close to its heels. The possibility of a misrepresentation or a wrong inference from the behavior of the dog could not be ruled out. The last, but not the least, is the fact that from a scientific point of view, there is little knowledge and much uncertainty as to the precise faculties which enable police dogs to track and identify criminals. Police dogs engage in these actions by virtue of instincts and also by the training imparted to them.

That criminal courts need not bother much about the evidence based on sniffer dogs due to the inherent frailties adumbrated above, although we cannot disapprove the investigating agency employing such

sniffer dogs for helping the investigation to track down criminals.

Investigating exercises can afford to make attempts or forays with the help of canine faculties but judicial exercise can ill afford them.”

29. In the light of the aforesaid observation of the Apex Court this piece of evidence of the appellant being caught by a dog or being barked at by the dog has to be omitted, cognizance of which had been taken by the learned Trial Court. No adverse inference against the appellant on the basis of this can be taken.

30. The second piece of evidence which is said to be forming a part of the chain of the evidence is the confession purported to have been made by the appellant before the PW-5, Dr. Gupta on 20th September, 2001 when he was produced for the purpose of physical examination who has stated as under:

“On that day also I have also examined Sakalu son of Ramba which was referred to me by CMO for expert examination Patient was brought to me for examination by IO Gian Singh SHO. No body injury seen as per version of accused under examination, he had sex through analcanal with a male child on 16.9.2000 and child became dead. Before of he performed sex also with male and female child with (five male and six female) of age group of 5 to 9 years, and first sex he had made six years back when he was of age about 13 years old. After local and general sexual examination I have opined there was nothing which can suggest that person under examination Sakalu was not capable of performing sex. The said MLC of Sakalu is Ex.PW5/B and bears my signatures at point B.”

31. It was contended by the learned counsel for the State that the admission of extra judicial confession made by the appellant clearly leaves no room for the innocence of the accused. It was further submitted by the learned APP that the appellant's contention that the confession cannot be taken as a circumstances against the appellant because this extra judicial confession was not put to the accused while his statement under Section 313 Cr.P.C. was recorded is unreliable in law. It was stated that the appellant has not shown any prejudice having been caused. The learned counsel for the appellant has also relied upon the case title **State of Goa Vs. Subhash Ghogle 2008(14) Scale 75** wherein it has been held that in case there is an incrementing evidence which is not put to the accused in his statement under Section 313 Cr.P.C. then it causes serious prejudice, and therefore, such an evidence cannot be read against the accused. As against this Mr, Dudeja, learned APP for the State has placed reliance in case title **State (Delhi Administration) Vs. Dharampal AIR 2001 SC 2924** wherein in a case of food adulteration the Supreme Court has observed that non putting of the contents of the certificate of food of laboratory while recording the statement of the accused under Section 313 Cr.P.C. does not ipso facto result in acquittal of the accused.

32. So far as the case relied upon by Mr. Dudeja, learned APP for the state is concerned the facts of the case are under Prevention of

Food Adulteration Act which certainly are distinguishable from the facts of the present case. The reported case was a case under Prevention of Food Adulteration Act whereas in the instant case the allegations are of very serious nature. Thus, the said judgment is not applicable to the facts of the present case. On the contrary the judgment cited by the appellant and the proposition laid down thereunder is more appropriate to be applied to the facts of the present case and conclude that since that the confession purported to have been made by the appellant is not put to him it cannot be read against him. It has caused serious prejudice to him.

33. There is another aspect to this extra judicial confession purported to have been made by the accused. This extra judicial confession is a confession which is essentially recorded while appellant is in police custody. There is no denial of the fact that the accused appellant was taken into police custody on 19th September, 2001 and was produced for the purpose of medical examination in police custody for the doctor PW-5, L C. Gupta on 20th September, 2001. No doubt, Dr. L C. Gupta, PW-5 in his MLC has recorded that at the time this confession was recorded, nobody from the police including the IO or the policemen who had brought him to the hospital were present, but that does not digress from the fact that the appellant was in the custody of the police and Section 26 of the Evidence Act, 1872 makes any confession made by any

accused while he is in police custody is inadmissible. Therefore, this confession purported to have been made by the appellant accused to the Dr. L. C. Gupta, PW-5 is also hit by the Section 26 of the Evidence Act as the appellant was in police custody. Thus, this confession is also not a piece of evidence which can be taken against the appellant as this inadmissible.

34. The learned counsel for the State has contended that even though his confession may be inadmissible as such, still it is also a post commission conduct of the appellant which become relevant under Section 8 of the Evidence act. No doubt, it may be relevant under Section 8 of the Evidence Act, but the mere conduct of the appellant in this regard is only small and insignificant part of the entire chain which must be fully established in order to lead to proof of the guilt of the accused on the basis of circumstantial evidence.

35. The third circumstance which has been considered by the learned Trial Court is the recovery of Lungi and Banyan of the appellant from the room of the appellant himself and the fact that the Lungi was having blood stains. This circumstance is also not a circumstance which would take the case of the prosecution even an inch further. So far as the recovery of these two pieces of cloth in pursuance to the so called disclosure statement purported to have been made by the appellant is concerned, even if it is admitted to be correct at best it says that these two pieces of cloth have been

recovered from the room of the appellant himself. Both these pieces of cloth belonged to the appellant himself and what is so sacrosanct about the recovery of these cloths of the appellant from the room of the appellant itself. A person who is living in a room is bound to keep the cloths which belong to him and therefore much importance to such a recovery cannot be attached. The prosecution has sought to connect the appellant through these cloths to the commission of crime by urging that Lungi was soaked in blood and these pieces of cloth was examined by the forensic laboratory and the reports of the forensic laboratory are Ex.PW13/G and PW13/H. These reports show that there were blood stains on the Lungi but the group of blood has not been matched either with the blood group of the appellant or of the deceased. Therefore, this evidence regarding blood on the Lungi is also inconclusive and incomplete and does not in any manner whatsoever connect the appellant with the commission of the crime.

36. It was next contended by the learned counsel for the State that the appellant has not given any reasonable explanation as to how dead body came to the building which was under construction as he was a Chowkidar of the said building and it was essential for him to explain. The learned counsel for the State has also referred to the site plan and the post mortem report of the child

which was done after three days which showed that child was physically assaulted before being done to death.

37. We must also deal with certain observations which have been passed by the Additional District Judge while convicting the appellant. A perusal of the impugned judgment shows that the learned Additional District Judge has observed that the post mortem report Ex.PW5/A of Dr.L.C.Gupta shows that the deceased was first sodomized and thereafter killed. Learned Additional District Judge has observed that since on behalf of the appellant there is no cross examination, therefore this evidence of the doctor regarding the cause of the death has gone totally un rebutted.

38. No doubt this evidence of the PWs goes un rebutted but still the appellant is to be connected with the commission of crime. The guilt of the appellant is to be proved beyond reasonable doubt. In this regard, the only evidence which has come on record is the so called extra judicial confession made to PW5 Dr. L. C. Gupta which, in our view, cannot be the basis of connecting the appellant with the commission of crime for two reasons. Firstly, the confession has been made by the appellant while in police custody and, therefore, hit by Section 26 of the Indian Evidence Act and hence inadmissible. Secondly, this confession, assuming it for the sake of argument, is admissible, still cannot be relied because it is not

put to the appellant in his statement recorded under Section 313 Cr. P.C. and thereby has caused serious prejudice to him.

39. The observation by the learned ADJ that the confession of the appellant is voluntary and is not hit by Section 24 of the Indian Evidence Act, 1872 is only a presumption drawn by the learned ADJ for which there is no basis. The prosecution has not adduced any evidence in this regard. On the contrary the very fact that the appellant is in custody shows that the confession was not voluntary. Similarly, the observation of the learned ADJ that the appellant has a previous history of committing sexual acts both natural and unnatural and, therefore, must have committed the present offence also is only presumptuous. Section 54 of the Indian Evidence Act, 1872 clearly makes the bad character of an accused irrelevant in criminal trial unless and until he tries to be proved his good character. Further had character of an accused would be relevant only for the purpose of getting an enhanced punishment on the appellant.

40. No doubt, it is really very unfortunate that a young life has been lost after being subjected to sodomy but sympathy with the family of the victim, cannot take the place of proof although there is suspicion that the appellant might have committed the aforesaid offence.

41. We are of the considered opinion that the prosecution has failed miserably to prove the commission of the offence of sodomy and murder punishable under Section 377/302 of the IPC by the appellant. We are of the view that the learned Trial Court has fallen into grave error in taking these aforesaid pieces of evidence which have been dealt with hereinabove so as to form part of the chain of circumstances and to hold the appellant guilty for an offence under Section 377 and 302 IPC and sentence him.

42. For the foregoing reasons, we are of the considered opinion that the prosecution has not been able to prove the guilt of the accused beyond reasonable doubt and accordingly the judgment dated 28th July, 2003, convicting the appellant for an offence under Section 377 and 302 IPC and sentencing him to undergo rigorous imprisonment for life and fine of Rs.10,000/- and in case he fails to pay the fine, sentencing him to further undergo imprisonment for two years for the offence under Section 302 IPC and further sentencing him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.5000/- and in default, further sentencing him to undergo imprisonment for 1 year for offence under Section 377 IPC vide order dated 31st July, 2003, is set aside and the appellant is acquitted of all the charges because the prosecution has failed to prove the commission of offence by the appellate beyond reasonable doubt. The appellant be accordingly set at liberty if he is not

required in any other case. A copy of this judgment be sent to the concerned Superintendent Central Jail for the purpose of information and compliance and a copy also be made available to the appellant.

(V.K.SHALI)
JUDGE

(ANIL KUMAR)
JUDGE

January 16th, 2009
KP/RN/RS