

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 485 OF 2012

Chandrabhan @ Aba Jagan Salunke

Age 25 years, Occ.

R/o. Baudh Wada, Chincholi

Tq. Yawal, District Jalgaon

...Appellant

versus

The State of Maharashtra

Through the PSO,

Yawal Taluka Police Station,

Yawal, District Jalgaon

...Respondent

.....

Mr. N.B. Suryawanshi, advocate for the Appellant

Mr. D. R. Kale, A.P.P. for respondent-State

.....

**CORAM : S. V. GANGAPURWALA AND
V. K. JADHAV, JJ.**

Date of Reserving

the Judgment

:

26.11.2015

Date of pronouncing

the Judgment

:

18.12.2015

JUDGMENT (PER V.K. JADHAV, J.) :-

1. In this appeal, the challenge is to the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Jalgaon, dated 8.6.2012 in Sessions case No. 183 of 2011, thereby convicting the appellant/accused Chandrabhan @ Aba Jagan Salunke, for the offence punishable under Section 363 of I.P.C. and sentencing him to suffer R.I. for seven years and to pay

fine of Rs.1000/-, i/d to suffer further R.I. for six months, for the offence punishable under Section 376 of I.P.C. and sentencing to suffer imprisonment for life and to pay fine of Rs.5000/-, i/d to suffer R.I. for one year, for the offence punishable under section 302 of I.P.C. and sentencing to suffer imprisonment for life and to pay fine of Rs.5000/-, i/d to suffer R.I. for one year and for the offence punishable under Section 201 of I.P.C. and sentencing to suffer R.I. for seven years and to pay fine of Rs.1000/- i/d to suffer R.I. for one year. The learned Additional Sessions Judge Jalgaon further directed that the substantive sentenced shall run concurrently.

2. The prosecution version, as unfolded during trial, is as under:-

The parents of victim Chandni were residing at Surat. Due to their poor financial condition, the victim Chandni alongwith her sister Pooja were residing with maternal grand father P.W.3 Prakash Tayade at village Chincholi, Tq. Yawal, District Jalgaon. On 10.3.2011, deceased Chandni was playing with her girlfriend P.W.2 Manisha Salunke. At that time, the accused came near them and offered gram to them on condition that if they accompany him. Thereafter, the accused lifted deceased Chandni in his arms and started proceeding towards the field. P.W.2 Manisha Salunke had also started following the accused for the said gram, however, the

accused drove her away. P.W.2 Manisha then returned to her house and reported the incident to P.W.4 Ashabai Kisan Salunke. At that time, P.W.3 Prakash Tayade also came there. P.W.4 Ashabai also gave him the above information. Consequently, they proceeded in search of deceased Chandni. During the course of search, they reached near the field of Vasant Shimpi. They saw the accused in frightened condition with no shirt on his person and he was running towards the village. The villagers were also in the searching team and they tried to catch the accused. However, the accused succeeded in running from that place. Dead body of deceased Chandni was found at about 2.00 to 2.30 p.m. in a well situated in the field of said Vasant Narayan Shimpi. Accordingly, the matter was reported to police station, Yawal.

3. P.W.8 P.I. Ramdas Patil of Yawal police station, after registering A.D. Exh.17 had rushed to the spot of incident and removed the dead body from well. He also drew inquest panchnama at Exh.12 in presence of Panch witnesses. The dead body was sent to rural hospital Yawal for postmortem. During the course of postmortem, the Medical Officer P.W.1 Dr. Vinayak Mahajan found that deceased Chandni was subjected to rape before her death. Cause of her death was asphyxia due to drowning. P.W.3 Prakash Tayade then lodged complaint Exh.13 on the same day. On the

basis of his complaint, Crime No. 25 of 2011 came to be registered for the offences punishable under Sections 302, 376, 363, 201 of I.P.C. P.W.8 - P.I. Ramdas Patil took over the investigation of crime.

4. On completion of investigation, P.W.8 P.I. Ramdas Patil has submitted charge sheet against the accused and since the offence alleged to have been committed by the accused are exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions. In order to substantiate the charges levelled against the accused, the prosecution has examined in-all eight witnesses. The learned Additional Sessions Judge, Jalgaon, by its impugned judgment and order dated 8.6.2012 in Sessions Case No. 183 of 2011, convicted the accused for the offences punishable under Sections 376, 363, 302, 201 of I.P.C. as detailed above.

5. The learned counsel for the appellant submits that the prosecution case rests merely on circumstantial evidence, most particularly, on the last seen theory. The learned counsel further submits that last seen theory come into play where time gap between the time when the accused and deceased were lastly seen alive and when the deceased is found dead is so small and the possibility of any person other than the accused being the author of the crime become impossible. The learned counsel thus submits that as per

the admission given by the child witness P.W.2 Manisha, she was playing with the deceased in the morning time on the day of incident and the incident allegedly happened in the afternoon. The dead body of deceased was found at about 2.30 p.m. in a well situated in the field of one Vasant Shimpi. Learned counsel further submits that there is long gap and the possibility of other persons coming in between exists. In absence of any other positive evidence to conclude that the accused and the deceased were last seen together before the death, it would be hazardous to come to the conclusion of guilt of the accused. The learned counsel further submits that dead body of deceased Chandni was found floating on water in the well at about 2.30 p.m. Even accepting the evidence of P.W.2 Manisha that she was playing with the deceased in the morning time, most probably in between 9.00 to 11.00 a.m., and thereafter the accused lifted deceased Chandni and went towards field, it is very unlikely on the part of the accused to remain in the field of said Vasant Shimpi till the body floats on water in the well.

6. Learned counsel further submits that the submerged body may take certain hours to come to the surface. In this backdrop, evidence of P.W.3 Prakash and P.W.4 Ashabai, who stated to have seen the accused at about 2.00 to 2.30 p.m. in a frightened condition without having shirt on his person running away from the field of Vasant

Shimpi, where the dead body of deceased was traced out in a well, loses its credence. Learned counsel thus submits that it is very unlikely on the part of the accused to remain in the same field where the well is situated till the body floats on water and then to leave that place in suspicious condition, inviting the attention of searching team. Learned counsel thus submits that the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. The learned counsel further submits that the circumstances relied upon by the Court below are not cogently and firmly established and the circumstances brought on record are having no definite tendency unerringly pointing towards guilt of the accused. Learned counsel further submits that there is no complete chain of circumstantial evidence to draw the conclusion that within all human probability, the crime was committed by the accused and none else.

7. Learned counsel for the appellant submits that though the accused was subjected to medical examination, medical certificate was not produced on record. Learned counsel further submits that the deceased Chandni was 7 years old and medical Officer P.W.1 Dr. Mahajan has noticed labial contusion on the genital of deceased Chandni and her hymen was ruptured. Learned counsel for the appellant submits that report submitted to the police on the basis of

which A.D. was registered initially, even though P.W.3 Prakash Tayade met the person who has submitted A.D. report to the police and disclosed to him about the presence of the accused near the spot and running away from the spot in suspicious condition, the same does not find place in the A.D. report. Learned counsel thus submits that since medical certificate is not produced on record it shall be presumed that there were no injuries on the male organ of the accused and it thus falsified the prosecution story about commission of offence of rape by the accused.

8. Learned counsel for the appellant, in support of his arguments, places reliance on the following judgments:-

- I) State of Maharashtra vs. Annappa Bandu Kavatage, reported in 1979 (4) SCC 715
- II) Jaharlal Das vs. State of Orissa, reported in AIR 1991 SC 1388
- III) Ashish Batham vs. State of Madhya Pradesh, reported in 2002 (7) SCC 317
- IV) State of H.P. vs. Amrish Kumar, reported in 2009 CRI.L.J. 2126
- V) Roop Singh alias Rupa vs. State of Punjab, reported in 2008 AIR SCW 4251

- VI) Ashok Baburao Kadam vs. State of Maharashtra, reported in 1991 (3) Bom. C.R. 95
- VII) Shankarlala Gyarasilal Dixit vs. State of Maharashtra, reported in AIR 1981 SC 765(1).

Learned counsel further submits that the accused is entitled for benefit of doubt and he may be acquitted.

9. The learned A.P.P. submits that the main circumstance pointing out involvement of the accused in the crime is last seen circumstance. The learned A.P.P. submits that P.W.1 Dr. Mahajan has noticed 7 abrasions over the dead body of deceased Chandni i.e. over forehead, over right elbow, over left elbow, over left side of back, over left side of wrist, over left knee joint and over right leg. P.W.1 Dr. Mahajan has made it clear that all above abrasions were reddish brown in colour and all abrasions probably were caused within 12 hours. P.W.1 Dr. Mahajan has also opined about sexual assault on the deceased. There was labial contusion and her hymen was ruptured. In his opinion, the cause of death is asphyxia due to drowning before 10 to 12 hours of the postmortem. The postmortem report is marked at Exh.6. The learned A.P.P. further submits that considering the time of conducting postmortem examination on the dead body, the probability of death of the victim was in the afternoon

on 10.3.2011 i.e. day of the incident.

10. The learned A.P.P. further submits that the main witness on the point of last seen is P.W.2 Manisha Salunke. She has positively deposed that the accused came there when she was playing alongwith deceased Chandni and accused took away Chandni with him by offering her gram. Learned A.P.P. further submits that P.W.2 Manisha Salunke has deposed that accused took Chandni with him by lifting her and accused did not allow P.W.2 Manisha to accompany them. The accused drove her away. Learned A.P.P. further submits that the time gap when the accused and deceased were last seen alive and when the deceased is found dead is so small, that possibility of any other person other than the accused being the author of crime becomes impossible. Learned A.P.P. further submits that the period of floating of dead body on the surface of water depends upon various factors, such as, age, sex, condition of body, season of the year and water. The learned A.P.P. vehemently submits that the accused at about 2.00 to 2.30 p.m. found in frightened condition without having any shirt on his person running away from the field of Vasant Shimpi where the dead body of deceased was traced out in the well. The villagers accompanying the searching team tried to catch him, however, he succeeded in running away.

11. The learned A.P.P. submits that frightened condition of the accused running away from the spot supports the theory of last seen, as deposed by the child witness P.W.2 Manisha Salunke. The learned A.P.P. further submits that the accused was last seen with the deceased and it was for the accused to offer explanation as to how and when he parted the company of the deceased. The accused himself has to furnish explanation which should be probable and to the satisfaction of the Court and if he fails to offer such explanation on the basis of the facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. The learned A.P.P. thus submits that failing to offer reasonable explanation itself provides an additional link in the chain of circumstances proved against the accused in the present case. The learned A.P.P. further submits that the clothes of the accused, which consist of shirt and pant, came to be seized during the course of investigation under seizure panchnama Exh.24. In the light of C.A. report Exh.30, 31, and 32, there were human blood stains on the clothes of accused. The learned A.P.P. further submits that the prosecution has established a complete chain of circumstantial evidence. The learned Judge of the trial court has thus rightly convicted the accused and the appeal is therefore, liable to be dismissed.

12. Deceased Chandni, aged 7 years, was the victim of kidnapping, rape and murder. The sole appellant was convicted for the offences punished under sections 363, 376 and 302 of I.P.C. by the Sessions Court. The entire prosecution case depends on circumstantial evidence and the submission of learned counsel for the appellant is that the circumstantial evidence is insufficient to bring home the guilt of the accused. Learned counsel for the appellant places his reliance on the judgment of the Supreme court in the case of **Jaharlal Das vs. State of Orissa** (referred supra) wherein the Hon'ble Apex Court has referred the cases of appreciation of evidence of the prosecution case rests upon circumstantial evidence. It is observed that if the case rests upon circumstantial evidence, to sustain the conviction, it must satisfy three conditions; (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (iii) 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 it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.

13. In the leading case ***Hanumant vs. State of Madhya Pradesh***, reported in AIR 1952 SC 343, it is also cautioned thus:-

“ In dealing with circumstantial evidence there is always the danger that conjuncture or suspicion may take the place of legal proof. It is therefore, right to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency, and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

14. In the case in hand, the trial court has placed reliance on the following circumstances; (i) the accused and deceased Chandni were last seen together; (ii) the accused under pretext of offering gram (*Harbhara*) took deceased Chandni with him and asked P.W.2 Manisha Salunke, with whom deceased Chandni was playing, to go

away to her home and for that purpose driven out said P.W.2 Manisha Salunke; (iii) the accused lifted deceased Chandni and went away; (iv) thereafter at 2.30 p.m. dead body of deceased Chandni was found floating on the water in the well situated in the field of Vasant Shimpi, (v) the accused fled away from the field of Vasant Shimpi half naked i.e. without shirt upon upper half of the body in frightened and suspicious condition when a team consisting of grand father and other villagers was making search of deceased Chandni, (vi) the deceased Chandni was subjected to sexual assault, rape and her cause of death is "asphyxia due to drowning", (vii) there were human blood stains on the pant of accused and (viii) the accused has offered no explanation as to how and when he parted the company of deceased Chandni and he fails to offer such explanation on the facts within his special knowledge, which provides an additional link in the chain of circumstances against the accused.

15. P.W.2 Manisha Salunke is a child witness. In the case in hand, the competency of P.W.2 Manisha Salunke as a witness is not challenged. It also appears that the learned Judge of the trial court has recorded his opinion after putting questions to test whether P.W.2 Manisha Salunke is competent witness. The learned Judge of the trial court has recorded opinion that P.W.2 Manisha Salunke is giving rational answers and in his opinion, she is competent witness

to depose. Even the learned Judge has recorded that the witness understood the sanctity of oath and therefore, the oath is administered to her. No doubt, the evidence of child witness is to be taken with great caution. Real test for accepting or rejecting the testimony is how the consistent story is narrated by the child witness, how it stands the test of cross examination and how far it fits with rest of evidence and circumstances of the case. We must state here that nothing was brought in the cross examination of the witness that she being a child witness, there was infirmity in her understanding of the facts perceived and her ability to narrate the same correctly.

16. We have carefully scrutinized the evidence of P.W.2 Manisha Salunke. Her evidence is consistent and she has deposed that on the day of the incident at about 9.00 a.m. she was playing with deceased Chandni after Chandni returned from the school. She has further deposed that she knows the accused, who also resides in village Chincholi. She further states that the accused came on the spot, where they were playing and accused thereafter asked Chandni to accompany with him as he would offer her Harbhara (gram). She has further deposed that accused asked her to go away to her house. Accused took deceased Chandni with him and she was driven out. The accused lifted deceased Chandni and went away. P.W.2 Manisha Salunke thereafter went to P.W.4 Ashabai and

informed her that the accused had taken Chandni with him. The evidence of P.W.2 Manisha does not give any expression of being tutored and her statement was corroborated by two other witnesses. P.W.4 Ashabai has deposed that P.W. 3 Prakash Tayade resides adjacent to her house. She deposed that on the day of incident when she was present in her house P.W.2 Manisha informed her that when P.W.2 Manisha and deceased Chandni were playing in front of their houses, the accused came there and took deceased Chandni with him. P.W. 3 Prakash Tayade has deposed that P.W.4 Ashabai and P.W.2 Manisha informed him that accused had taken away deceased Chandni with him and he went towards the field. On the basis of this information, P.W.3 Prakash Tayade, P.W.4 Ashabai and other villagers started taking search of deceased Chandni. We find that P.W.2 Manisha stood to the test of cross examination successfully and there is absolutely no infirmity in her evidence. Her evidence is fully corroborated by P.W. 4 Ashabai and P.W.3 Prakash Tayade on material points. The evidence of P.W.2 Manisha Salunke is cogent and clear and there appears no exaggeration in her evidence. The name of P.W.2 Manisha @ Ranu is also mentioned in the complaint Exh.13 to the effect that she had informed the complainant Prakash Tayade that accused took deceased Chandni and went towards the field and she was driven out.

17. P.W.2 Manisha Salunke was studying in 2nd standard at the relevant time. In view of this, much importance cannot be given to the timings given by this witness during her examination. Furthermore, even though the school timings are up to 5.00 p.m. it is not expected from the children studying in 1st or 2nd standards to attend the school till its closure. P.W.2 Manisha has deposed that at about 9.00 a.m. she was playing with deceased Chandni. It is thus possible that deceased Chandni might have returned back from the school after morning time and started playing with P.W.2 Manisha. There is no time gap as such between deceased last seen together with the accused and the death of deceased Chandni. Dead body of deceased Chandni was found floating on the water of well at about 2.30 p.m. As per the postmortem report Exh.6, the postmortem was carried out during the period from 8.00 p.m. to 10.00 p.m. on 10.3.2011 itself. P.W.1 Dr. Vinayak Mahajan has deposed that victim might have died before 10 to 12 hours prior to post mortem. Thus, the time gap when the accused and deceased Chandni were seen last alive and when the deceased Chandni is found dead is so small, the possibility that any person other than the accused being the author of the crime becomes impossible.

18. P.W.3 Prakash Tayade and P.W.4 Asha Jadhav have deposed that they have seen the accused at about 2.00 to 2.30 p.m. in

frightened condition having no shirt on his person running from the field of Vasant Shimpi, where the dead body of deceased was traced out in the well. The learned counsel for the appellant has assailed this circumstance on the ground that it is unlikely on the part of the accused to stay in the land of Vasant Shimpi or near the well till floating of dead body on the water of the well and inviting attention of the villagers. Learned counsel further submits that one Anil Pralhad Solunke has given information to the police at Exh.17. On the basis of his report A.D. No. 18 of 2011 came to be registered at 16.15 hours, wherein no reference has been given to the fact that accused was seen by the witness in suspicious condition running away from the land of Vasant Shimpi. Learned counsel further submits that said Anil Salunke met P.W.3 Prakash Tayade before submitting report Exh.17.

19. On perusal of report Exh.17, it appears that said Anil Salunke received information in the village and accordingly he went towards well, where the dead body of deceased Chandni was floating on the water in the well. Thereafter, he alone went to police station as the mental condition of P.W.3 Prakash was not good and accordingly informed the police about the incident. Said Anil Salunke was not member of searching team and he had not personally seen the accused running away from the land of Vasant Shimpi, as noticed by

the members of the searching team. He has merely informed the death of deceased Chandni to the police and accordingly the said information was reduced into writing. On the basis of said information, A.D. came to be registered. Only after the complaint Exh.13 lodged by P.W.3 Prakash Tayade crime came to be registered against the accused.

20. So far as the period of flotation of dead body on the surface of water is concerned, the same depends upon age, sex, condition of body, season of year and water. P.W.1 Dr. Mahajan on external examination of dead body, found 7 injuries on the person of deceased Chandni. All injuries were anti mortem in nature. There was also labial contusion and her hymen was ruptured. According to P.W.1 Dr. Mahajan, there was sexual assault on deceased Chandni. P.W.1 Dr. Mahajan has opined that victim may fall unconscious due to sexual assault, as the victim of a tender age of just 7 years old, could not have in a position to resist the assault by adult culprit of 25 years.

21. We have already observed that the time gap between the deceased last seen alive in the company of accused and when the deceased is found dead is small. There is no reason for P.W.3 Prakash Tayade and independent witness P.W.4 Asha Jadhav to

depose falsely that they saw the accused having no shirt on his person running towards village in frightened condition when they went to the field of Vasant Shimpi in search of deceased Chandni. They have stated that the villagers in the searching team, had tried to catch the accused but he ran away. Their evidence is consistent on material aspects and there is nothing in their cross examination to disbelieve them. There is no substance in the submission that it is unlikely on the part of accused to remain in the field of Vasant Shimpi till the dead body floats on water of well and after inviting the attention of searching team, flee away from the spot. There is chain of events starting from the point that the accused took away deceased Chandni while lifting her in his arms from play ground till her dead body was found floating on the water of well. The learned Judge of the trial court has rightly concluded on the basis of the above circumstances that after lifting the deceased from play ground the accused must have committed rape upon her and committed her murder by throwing away deceased Chandni in the well. The medical evidence shows that deceased Chandni was subjected to sexual assault and rape.

22. The prosecution has proved the seizure panchnama Exh.24 through P.W.7 Laxman Thosre. In the light of C.A. report at Exh. 30, 31 and 32, it is clear that there were human blood stains on the pant

of accused near zip. It is true that the marks of external injuries have not been found on the person of the accused but that by itself does not negate the prosecution case. Even in case of child victim being ravished by grown up person, it is not necessary that there should always be marks of injuries on the penis in such case. The accused was arrested on the next date of the incident and thus the minor injuries even if caused might have been filled up in the meantime.

23. The accused has offered no explanation as to how and when he parted the company of deceased Chandni. The accused has failed to offer such explanation on the facts within his special knowledge. It was for the accused to explain as to what happened when he lifted deceased Chandni and took her towards the field. The accused must furnish explanation which appears to the court to be probable and satisfactory. Since the accused has failed to offer explanation in discharge of burden cast on him, that itself provides additional link in the chain of circumstances proved against him and that completes chain of circumstantial evidence established against the accused. On the contrary, as it appears from the evidence of P.W.2 Manisha that accused was intending to take deceased Chandni alone with him and he just drove away P.W.2 Manisha. He did not allow P.W.2 Manisha, who is of same age of deceased Chandni, to accompany him. In the light of this circumstance, it was

incumbent on the part of the accused to offer explanation as to why he wanted to take away deceased Chandni alone with him and as to when he parted her company.

24. In our considered opinion, the circumstances from which inference of guilt is sought to be proved are cogently and firmly established in this case. The circumstances proved are unerringly point towards guilt of the accused and chain is 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.

25. In the circumstances, we find no fault in the impugned judgment and order of conviction and sentence passed by the learned Sessions Judge, Jalgaon in Sessions Case No. 183 of 2011. There is no merit in the appeal, the appeal thus liable to be dismissed.

26. We appreciate the able assistance rendered by Mr. N.B. Suryawanshi, the learned counsel, appointed to prosecute the cause of the appellant and we quantify his legal fees for Rs.7,000/- (Rupees Seven thousand only) for the same.

27. In the light of above, we pass the following order.

O R D E R

Criminal appeal No. 485 of 2012 is dismissed.

(V. K. JADHAV, J.)

(S. V. GANGAPURWALA, J.)

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