

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

(1) Murder Reference No.3 of 2016
Date of decision:11.7.2016

State of Haryana
...Appellant

Versus

Sandeep
...Respondent

(2) CRA-D-302-DB of 2016

Sandeep
...Appellant

Versus

State of Haryana
...Respondent

(3) CRA-S-1136-SB of 2016

Narender
...Appellant

Versus

State of Haryana
...Respondent

**CORAM : HON'BLE MR.JUSTICE T.P.S. MANN
HON'BLE MR.JUSTICE GURMIT RAM**

Present: Mr. Ashok S. Chaudhary, Addl. Advocate General, Haryana
for the appellant in Murder Reference No.3 of 2016 and
for the respondent in CRA-D-302-DB of 2016 &
CRA-S-1136-SB of 2016.

Ms.Anju Arora, Advocate (Legal aid counsel)
for the respondent in Murder Reference No.3 of 2016 and
for the appellant in CRA-D-302-DB of 2016.

Mr. K.S. Malik, Advocate
for the appellant in CRA-S-1136-SB of 2016.

GURMIT RAM, J.

The above noted Murder Reference No.3 of 2016 has been forwarded by the learned District & Sessions Judge, Rohtak for the confirmation of death sentence awarded to the convict/respondent - Sandeep son of Nafe Singh, resident of village Paprabat, Najafgarh, Delhi vide judgment dated 26.2.2016 passed by the learned Additional Sessions Judge, Rohtak in a criminal case bearing FIR No.535 dated 12.9.2013, u/Ss 363, 366-A, 376-A, 302 and 201 of the Indian Penal Code (for short – 'IPC') and u/S 4 of the Protection of Children from Sexual Offences Act, 2012 (for short – '*the Act*'), Police Station, Civil Lines, Rohtak.

2. The above noted CRA-D-302-DB of 2016 has been preferred by appellant – herein (accused) – Sandeep against the judgment of conviction and order of sentence dated 26.2.2016 passed by the learned Additional Sessions Judge, Rohtak in above mentioned criminal case vide which he was held guilty for the offences punishable u/Ss 363, 366 and 302 of the IPC and u/S 6 of the Act and was awarded the sentences as detailed below:

Under Section 363, IPC.	To undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.10,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of fifteen days.
Under Section 366, IPC.	To undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.20,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of one month.
Under Section 302, IPC.	Convict - Sandeep was sentenced to death. He was ordered to be hanged by neck till he is dead. He was also sentenced to pay a fine of Rs.50,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of two months.

Under Section 6 of the Act.	To undergo imprisonment for life and to pay a fine of Rs.50,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of two months.
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Whereas the above noted CRA-S-1136-SB of 2016 has been preferred by appellant – herein (accused) – Narender against the above-said impugned judgment of conviction and order of sentence vide which he was held guilty for the offence punishable u/S 212 of the IPC and was awarded the sentence as detailed below:

Under Section 212, IPC.	To undergo rigorous imprisonment for a period of four years and to pay a fine of Rs.10,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of fifteen days.
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3. The above noted Murder Reference and criminal appeals have been taken up together for the purpose of disposal since these emanate from one and the same judgment of conviction and order of sentence in order to avoid repetition as well as conflict of judgments.

4. The case of the prosecution, in brief, as presented before the learned trial Court was that on 12.9.2013, on receipt of information that dead body of a small girl has been recovered from the area of Agriculture Department, Sector – 14, Rohtak, the Investigating Officer SI – Har Narain, Incharge, Police Post, Model Town, Rohtak, Police Station, Civil Lines, Rohtak reached at the spot. There he came across complainant Dinesh son of Gandwa, resident of Bala Doomare, Police Station Karara, District Ranchi (Jharkhand), at present Labourer in Officers' Colony near

Sector-14, Rohtak. He made his statement Ex.P1 before the Investigating Officer, the main substance of which was as under:

“That he has been working as a labourer for constructing new quarters of Officers' Colony, Sector-14, Rohtak for the last about one year, wherein he has been residing along with his children. He has three daughters and one son. Sumanti is his eldest daughter aged about 18 years, younger to her is his daughter Pooja, younger to her is his son Soni and Chandni aged about three years is his youngest daughter. On 11.9.2013, they all took meal at about 3:00 p.m. and he and his wife Phulo started doing their labour work. At that time, his children were playing in front of Government quarters. When they came back in the evening at about 5:00 p.m. after doing their labour work, then his youngest daughter Chandni was not found present there. He along with his family members started searching his daughter Chandni, but all in vain. They remained busy in her search throughout the night but they could not get any clue about her whereabouts. Today i.e. on 12.9.2013 at about 12 O'clock (noon time), he along with his wife and associates reached near the building of Agriculture Department and found that his daughter was lying in dead condition near the wall towards the inner side with her mouth downwards. On their telephonic call, police party reached at the spot. On making enquiry at his own

level, he learnt that Sandeep son of Nafe Singh, resident of village Paprabat, Najafgarh, Delhi, who was their co-worker had called his daughter Pooja and gave her Rs.20/- and further asked her to accompany him to his house by alluring her that he will provide her cake, which she utterly refused. Thereafter, they found their youngest daughter Chandni missing. He has fulsome suspicion that said Sandeep had enticed away his daughter Chandni, carried her on that place and committed rape upon her. Thereafter, he murdered her by inflicting injuries on her person and threw her dead body there. There were injury marks on her body, forehead, mouth, left hand and left eye. Even her left eye was also found missing. Request was made to take legal action against said Sandeep.”

Complainant put his left thumb impression on his above-said statement after admitting it to be correct. SI Har Narain made his endorsement Ex.P27 on the above-said statement of the complainant and sent ruqqa to the police station, on the basis of which the First Information Report (for short – *FIR*) Ex.P28 was recorded. Inquest report in respect of the dead body of deceased Chandni was prepared. Post-mortem on her dead body was got conducted. The above-said Investigating Officer also prepared the site-plan of the spot of occurrence after its inspection. He also lifted the blood from the spot with the help of cotton piece. Besides this, he also lifted one brickbat stained with blood

from the spot which was lying beneath the head of deceased. These articles were put into a plastic *dibba* (container) and took the same into his possession after preparing a packet thereof duly sealed with the signet bearing impressions 'HS'. He also recorded the statements of witnesses.

Appellant-herein (accused) Narender was apprehended in this case on 17.09.2013.

Appellant – herein (accused) – Sandeep was apprehended in this case on 19.9.2013 from his village Paprabat, Najafgarh, Delhi. His police remand was obtained. On his interrogation, he got demarcated the place of the occurrence on 19.9.2013 as per his disclosure statement. Then on the next day i.e. 20.9.2013, he got recovered his clothes i.e. pants and shirt which he was wearing at the time of the alleged occurrence from near Railway Station, Bahadurgarh. Further, he also got recovered his mobile phone from one shop situated in the area of Narela Pyaoo (Hand-pump), Maniyari Road. He was also got medically examined from General Hospital, Rohtak. On completion of investigation, challan in this case was presented in the Court of learned Illaqa Magistrate, who further committed this case to the Court of learned Sessions Judge, Rohtak for trial after making compliance of provisions of Section 207 of the Criminal Procedure Code (for short “Cr.P.C.”).

5. On finding a prima-facie case u/Ss 363, 366-A, 376-A, IPC read with Section 4 of the Act, 302 and 201 of the IPC against accused Sandeep and u/S 212 of the IPC against accused Narender, they were charge-sheeted accordingly vide order dated 3.12.2013, to which, they

pleaded not guilty and claimed trial.

Thereafter, charge was amended and accused Sandeep was charge-sheeted for the offences punishable under Sections 363, 366, 302, 201, IPC and also under Section 6 of the Act, whereas accused Narender was charge-sheeted for the offence punishable under Section 212 of the IPC vide order dated 12.2.2016, to which, they pleaded not guilty and claimed trial.

6. As per the record, joint statement of Public Prosecutor as well as of both the accused and their counsel as well was recorded on 12.02.2016 that evidence already recorded be read as evidence for the amended charge also. There is no necessity to record fresh statements of accused under Section 313, Cr.P.C. and their statements already recorded be read as the same statements after the amendment of charge.

7. During trial of the case, the prosecution examined as many as twenty two witnesses in total in order to prove its version and further to bring the accused to book according to law.

8. On the conclusion of the prosecution evidence, both the accused were duly examined as required under Section 313 of Cr.P.C. Entire incriminating evidence and other culpable circumstances as came on the file during the trial of the case against them were put to them, which they denied entirely and pleaded their innocence and false implication in this case. Further they also took the plea that the case got registered against them is false one and the witnesses have deposed falsely.

However, the accused did not lead any evidence in their defence.

9. The learned trial Court after hearing the counsel for both the parties and going through the record as well held accused Sandeep guilty for the offences punishable u/Ss 363, 366 and 302 of the IPC and u/S 6 of the Act whereas accused Narender was held guilty for the offence punishable under Section 212, IPC and awarded them sentences as detailed in para No.2 of this judgment.

10. Both the appellants – herein (accused) being not satisfied with the impugned judgment of conviction and order of sentence have approached this Court by way of instant appeals. Notice of the above murder reference as well as both the appeals, was given to the respondent. Record of the learned trial Court was also requisitioned.

11. We have heard the learned counsel for both the parties at length and given our thoughtful consideration to their respective contentions, besides analysing the record minutely with their able assistance.

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12. The learned counsel for the appellant (accused) Sandeep has contended that it was the case of prosecution that the dead body of the deceased was recovered on 12.09.2013 at about 12:00 O'clock noon time inside the boundary wall of the office of Agricultural Department. In this connection, it is her submission that this part of prosecution version is highly unreliable, doubtful and unsustainable for the reason that no

employee from the office of said Agricultural Department was joined in the investigation proceedings relating to the recovery of the dead body of the deceased from that spot. But in the case in hand, complainant-Dinesh was a poor labourer hailing from District Ranchi, Jharkhand. At the time of alleged occurrence, he along with his spouse and children including the deceased had been residing in Officers' Colony, Sector 14, Rohtak since the construction work of some new quarters in that colony was going on. He was having no association of any kind with the employees of that Agricultural Department. Then at the time of alleged recovery of dead body of deceased, complainant-Dinesh PW-1 was accompanied by his wife Phullo-PW5, Suresh-PW4 and others. Then on receipt of information regarding recovery of dead body of deceased, the police party of PW-22 SI-Har Narain (retired) along with ASI Harender Singh-PW-18 and other police officials also reached at that spot. It is an admitted fact that in our society, generally, the people of the place of alleged occurrence or of recovery as the case may be do not bother to consociate with the police in order to render their help in the investigation of the commission of the alleged crime for one reason or another. It is only the close associates and near and dear ones of the complainant/victim of the crime who dare to come forward to stand with him/her in his/her weal and woe. In this situation, it is the primary duty of the Court to scan their statements wistfully to find out the truth from their statements qua the alleged occurrence/recovery as the case may be.

13. Now let us see the facts of the case in hand and the evidence

on the file for the correct appreciation of the above point in issue. As abovesaid, it was the case of prosecution that Chandni aged about three years, youngest daughter of complainant-Dinesh (PW-1) had been missing from his house since afternoon of 11.09.2013. He along with his wife (Phullo) and his associates searched for her on that day but failed to get any clue regarding her whereabouts. On next day i.e. 12.09.2013, they again started their operation for the search of said Chandni and ultimately, they found her dead body lying inside near the boundary wall of Agricultural Department. At the relevant time, PW-4 Suresh was working as a mason in PGIMS Rohtak and he was associating complainant-Dinesh (PW-1) and his wife Phullo (PW-5). Then on getting information about recovery of dead body of deceased from the abovesaid area, PW-22 SI Har Narain (retired) along with members of his police party including PW-18 ASI Harender Singh reached at the spot in discharge of his official/lawful duty. The presence of abovesaid PWs at that spot at the abovesaid relevant time is held to be natural and expected one keeping in view the normal human conduct while exercising due diligence in the ordinary course. There is nothing on the record to suspect their bonafides. So non-joining of the employees of office of abovesaid Agriculture Department is held to be not fatal to the prosecution version on any score.

14. Then the learned counsel for the appellant (accused) Sandeep has further urged that in the vicinity of the alleged place of occurrence, which itself was a public place, there was Officers' colony and residence of Additional Deputy Commissioner and as such the prosecution version as

alleged does not have any element of credibility being highly improbable and doubtful. In support of her contention, she has referred to the rough site plan Ex.P37 and scaled site plan Ex.P10. In the rough site plan Ex.P37, Mark-A is shown as the place where the corpse of the deceased was found lying with her mouth downwards near the wall. On the northern side of this place, Officers' Colony, Additional Deputy Commissioner's residence and Commissioner's kothi are displayed. Towards the eastern-northern side of this place, some Acacia trees and rubbish are shown. Then towards southern side of this place, one shed was shown in between the place shown as Mark-A and the premises of said office of Agriculture Department. There is also shown to be metalled road, the height of which as recorded in scaled site plan Ex.P10 was 7' in between the place shown as Mark-A and Officers' colony. In this plan Ex.P10, one *Pipal* tree has been displayed at place Mark-A which was quite near to the abovesaid boundary wall from where dead body of deceased was stated to be recovered. Then place Mark-B in this site plan is depicted as the spot where the deceased was sexually assaulted by the appellant-herein (accused) Sandeep. As per the scale used in preparing this scaled site plan, the distance between these two places Mark-A and Mark-B is approximately 10 to 12 meters. Then near the place Mark-B some sheds are also shown. So, in the light of above description as recorded in the rough site plan Ex.P37 and scaled site plan Ex.P10, it is abundantly clear that the appellant-herein (accused) had committed rape on the deceased at a secluded place not visible to the general public and

then after committing her murder, threw her dead body at the place shown as Mark-A in both the rough site plan Ex.P37 as well as in the scaled site plan Ex.P10. So the plea of the appellant that Officers' Colony, residence of Additional Deputy Commissioner and of Commissioner were there near the place of alleged occurrence is not to serve the purpose of the appellant-herein (accused) in any manner either to prove his innocence or that he was ensnared in the instant case falsely.

15. The learned counsel for the appellant (accused) Sandeep has further contended that prosecution version regarding arrest of this appellant (accused) on 19.09.2013 from the area of Chhawala Bus Stand, Najafgarh, Delhi is also not free from the arena of suspicion being concocted and fabricated one. Herein she has argued that according to prosecution, the police got the secret information on 19.09.2013 that appellant (accused) Sandeep would come at Chhawala Bus Stand, Najafgarh, Delhi and in accordance thereto, the police party of (Retd.) SI Har Narain (PW-22) reached there. Anup, brother of this accused was joined in the police party for the purpose of identification of this appellant (accused). At about 4:00 a.m., the appellant (accused) came there who was identified by his said brother Anup and was formally arrested in this case. In order to further elaborate her above contention, she has submitted that infact, this accused was already along with complainant-Dinesh (PW-1) and his associates and had also accompanied them since the very beginning of this case and subsequently, he was fitted in this case by making a cock and bull story by the police in connivance with the

complainant. In support of her above contention, she has also referred to the cross-examination of PW-1, PW-5 and also statement Ex.P1 of the complainant which was initially made by him before the police.

PW-1 in his cross-examination admitted that appellant (accused) Sandeep came to them on the date of incident at about 11/11:30 p.m. and thereafter, he was with them while making search for Chandni and also when they went to police post.....

PW-5 in her cross-examination stated that appellant (accused) Sandeep was also making search for Chandni with them on 11.09.2013 and 12.09.2013 till the dead body of Chandni was found. Volunteered he left the place by making an excuse that he has to go because his father had met with an accident. He was not with them at the time of post-mortem of Chandni. He fled away from the spot when police came there.....

If the above discussed cross-examination of PWs 1 and 5 is read carefully then the necessary conclusion is that appellant (accused) Sandeep came to the complainant on 11.09.2013 at about 11/11:30 p.m. and daughter of the complainant namely Chandni (since deceased) was also missing from his house from this very date since about 3:00 p.m. He remained with the complainant and his associates while they were making search for Chandni. The moment, police reached at the spot on receipt of information of recovery of dead body of deceased, then he slipped away

from the spot on the plea that he had to go since his father had met with an accident. Had the above version of prosecution qua the arrest of this accused been not so, then he could have examined his brother Anup, who was allegedly joined in the police party and identified the appellant (accused) at the time of his arrest in order to disprove this version of prosecution qua his arrest.

Then as recorded in the statement Ex.P1 of complainant-Dinesh (PW-1), the dead body of deceased was recovered on 12.09.2013 at noon time i.e. 12 O'clock. This statement of complainant was recorded by the Police as per endorsement Ex.P27 at 3 p.m. on the date when dead body of the deceased was recovered. In this statement, the complainant raised a suspicion regarding the complicity of the appellant (accused) Sandeep in the commission of the alleged crime. But by the time when this statement Ex.P1 was recorded, this appellant (accused) had already left the spot by making an excuse as aforementioned and he was not available there at that time. Prior to this, he might be showing his sympathy and co-operation towards the complainant in order to display his bona fide and innocence qua the commission of the alleged crime, that is why he slipped away from the scene when the police came there.

16. Then the counsel for the appellant (accused) Sandeep has further argued that appellant (accused) was implicated in this case falsely as previously there was some dispute between him and the complainant party. In support of her contention, she has referred to the cross-examination of PW-5 wherein in answer to a question she stated that it is

incorrect to suggest that appellant (accused) has been implicated falsely in this case on account of previous dispute between them or that she has deposed against him for this reason. So in fact this witness has been denying the fact of there being any dispute between them prior to the present occurrence. Then in his statement recorded under Section 313, Cr.P.C., his simple plea was that he is innocent and that he has been involved in this case falsely. He did not take any plea of previous enmity between him and the complainant party in order to show that he has been implicated in this case falsely due to said previous dispute. Then even no evidence was led in the defence to prove the said previous dispute, if any, between him and the complainant party.

17. Then the learned counsel for the appellant (accused) Sandeep has further submitted that plea of prosecution that appellant (accused) had committed rape upon the deceased prior to her death is also not established on the file since the medical evidence which came on record does not justify this stand of prosecution. In support of her contention, she has referred to report Ex.P14 submitted by Forensic Science Laboratory, Madhuban, Karnal, Haryana after the necessary chemical analysis. As per the testimony of PW-14 Dr. Sunita Dhanias, she handed over three sealed packets to the police after post-mortem of the deceased i.e.:-

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4-A Sealed packet bearing three seals having vaginal swab and smears.

5-A A sealed packet bearing three seals having anal

swab and smears.

6-A A sealed packet bearing three seals having cloth of the deceased.

These three sealed packets along with some other articles were sent to the office of abvoesaid Forensic Science Laboratory. After the analysis of the contents of these three parcels, as per report Ex.P14, no human semen was found on any material contained in these parcels. Only blood was detected on Ex.3a (slides), Ex.4a (slides), Ex.4b (vaginal swab) and Ex.6b (shirt). Traces of blood were detected on Ex.3b (anal swab).

18. Then in this case, it is also to be noted that clothes of the accused i.e. pant and shirt which were got recovered by him as per his disclosure statement were also sent to the office of abovesaid Forensic Science Laboratory in sealed parcel and after making the chemical analysis thereof, human semen was detected on his trouser i.e. Ex.6a. It was the case of prosecution that after arrest of the appellant (accused) Sandeep, he suffered a disclosure statement Ex.P31 stating inter alia that after the alleged occurrence, he fled away from the spot. He went to the house of his cousin Pooja (i.e daughter of his *Massi*) who was residing near Railway Station, Bahadurgarh. On the same day, he kept concealed his clothes which he was wearing after putting off the same in a vacant place in front of that quarter after wrapping the same in a polythene bag. Then as per his said disclosure statement, he got recovered his said clothes which were also produced in the Court during trial of the case as Ex.P35 (shirt) and Ex.P36 (trouser). It was pant (trouser) Ex.P36 on which human semen was detected by the said laboratory during its

chemical analysis.

19. Then after the arrest of this appellant (accused), he was got medically examined from Dr. Narender Dahiya (PW-15). This witness tendered his duly sworn affidavit Ex.P21 as a part of his statement. After the medico legal examination of this appellant (accused), he gave the opinion that there is nothing to suggest that the person examined is unable to perform sexual intercourse.

20. Now let us see the statement of PW-14 Dr. Sunita Dhania, who conducted post mortem on the dead body of deceased-Chandni. She submitted in her statement her duly sworn affidavit Ex.P18 as a part of her statement. During post-mortem, she found the following injuries:-

- i. Three reddish abrasion varying linear to grazed in patron present over the right lower aspect of face 3.5 cm. lateral to right angle of mouth and 3 cm. medial to right ear lobule over an area of 5x5 cm.
- ii. A reddish abrasion .5x.5 cm present over the left cheek suited 1 cm lateral to left ala of nose.
- iii. Lacerated wound of size 2 cm x 1 cm present over the posterior region of scalp 2 cm below and lateral to vertex, 3 cm above the right mastoid process.

21. So if the above discussed evidence of prosecution is to be considered as a whole then it goes to suggest that appellant(accused) Sandeep was competent to perform sexual intercourse. He sexually assaulted the victim, who was of tender age (i.e. 3 years) at the time of

alleged occurrence in a brutal manner and committed rape upon her or attempted to commit rape upon her forcibly as far as possible in order to satisfy his lust.

22. The learned counsel for the appellant (accused) Sandeep has further argued that the investigating agency during investigation of the case failed to find out the nature of weapon allegedly used for causing injuries to the deceased as mentioned in the post-mortem report Ex.P16. *'In the column, information furnished by the police'* of this post-mortem report, the entry made is “*Naa Malum Hathiyar se*”, i.e. by some unknown weapon.

Then as per the case of prosecution, one cotton piece vide which blood lying at the spot was lifted and one brickbat piece/sand blood stained which was found lying beneath the head of the deceased were taken into police possession vide seizure memo Ex.P7. This piece of brick/sand was produced in the Court as Ex.P34 and it was also sent to the office of abovesaid Forensic Science Laboratory and on its chemical test, human blood was detected on it. PW-14 Dr. Sunita Dhania who conducted post-mortem on the dead body of deceased did not mention in her statement/affidavit regarding the weapon used for causing abovesaid injuries to the person of deceased nor the learned defence counsel put any question to this witness in this regard in her cross-examination. Then in the case in hand the important fact was that appellant (accused) Sandeep was of the age of 24 years, whereas the deceased was of the age of about 3 years at the time of occurrence. The alleged injuries to her person could

have been caused by using said brickbat Ex.P34 or by pulling her down by any person like the present appellant (accused) by applying full physical force. Then case in hand is not relating to injuries only, but it is a case of rape as well as of murder. So keeping in view these facts of this case, the above contention of learned counsel for the appellant does not carry any much weight to turn the scale of justice in favour of the appellant.

23. The learned counsel for the appellant (accused) Sandeep has further assailed the prosecution story on the ground that as per the testimony of PW-16, C.Vishnu, he visited the spot of occurrence on 19.09.2013 at the instance of (Retd.) SI Har Narain (PW-22) and prepared the videography only on the demarcation of the accused and did not prepare any photographs. Herein she has contended that the prosecution in the statement of PW-22 (Retd.) SI Har Narain has brought on the record certain photographs Ex.P38 to Ex.P67 which cannot be taken into account since as abovesaid it came in the statement of PW-16 that he did only videography of the spot of occurrence and not prepared any photographs. But in the statement of PW-22 it was made clear that photographs Ex.P38 to Ex.P52 of the spot were clicked by PW-22 himself whereas remaining photographs Ex.P53 to Ex.P67 were clicked by PW-16. So in this situation even if the photographs Ex.P53 to Ex.P67 are ignored for the reasons aforementioned, even then the remaining photographs Ex.P38 to Ex.P52 can be looked into to decide the matter in hand since these were clicked by PW-22 himself. Then it was also found recorded in the cross-examination of PW-22 that videography is a part of

official course of training.

24. Then the learned counsel for the appellant (accused) has further tried to cause a dent in the prosecution case on the ground that investigation in this case was conducted in a partial manner for which certain material facts of this case had remained in a mystery. In order to elucidate her contention, she has submitted that it has come in the statement of PW-5 Phullo that earlier while she was working, she had seen appellant (accused) Sandeep while taking her daughter Chandni towards the shop. She did not object it as accused was known to them. Then it also came on record in the statement of PW-2 Pooja, another daughter of complainant, that accused present in the Court gave her ₹20/- and asked her to accompany him to his house by alluring that he would give her cake therein to which she denied. The prosecution did not conduct any investigation qua the abovesaid shop to which the accused was allegedly taking Chandni (since deceased) and of the house of the accused. But in this case neither the alleged crime nor any of its parts had been committed in the abovesaid house of appellant (accused) Sandeep nor any fact had come to surface during investigation of the case as to whether this accused had ever reached at the shop along with Chandni (since deceased) as found mentioned in abovesaid statement of PW-5. Even name of that shopkeeper had not come in the statement of any person recorded during investigation of this case. So there was no need to hold any investigation qua the above aspect of this case as pointed out by learned counsel for the appellant (accused).

25. Then it was the case of prosecution that dogs' squad team was also called at the spot of occurrence to find out any clue or information about the commission of alleged crime. In this connection, it is the plea of learned counsel for the appellant (accused) that no report of the proceedings conducted by dogs squad team was brought on the record and as such there has been left a serious lacuna in the case of prosecution which makes the very genesis of the prosecution story doubtful. But the report of the said dogs' squad team was required to be brought on the record had any incriminating material been found by this team during inspection of the site of crime. If no such material was found at the spot at the abovesaid relevant time, then the question of bringing or non-bringing on record, the report of this dogs' squad team becomes quite immaterial.

26. Then it is also contended by learned counsel for the appellant (accused) Sandeep that the articles which were recovered/taken into custody by (Retd.) SI Har Narain, Investigating Officer (PW22) were deposited with the MHC of Police Station on next day i.e. 13.09.2013 and as such, these articles remained in the custody of the said I.O. for one day and hence possibility of tampering with the same cannot be ruled out. In support of her contention, she has referred to the statement of PW-22 (Retd.) SI Har Narain wherein he stated that he lifted the brick piece having bloodstains and the blood lying at the spot with the help of cotton piece and converted the same into a parcel in a plastic *dibbi* which was taken into police possession vide seizure memo Ex.P7 on 12.09.2013. Then she has also referred to affidavit Ex.P18 of PW-14 Dr. Sunita

Dhanial wherein it has been incorporated that three sealed packets containing vaginal swab, anal swab, smear and cloth of deceased were handed over to the police after post-mortem of the deceased along with some other relevant articles on 12.09.2013. Then in this connection lastly she referred to affidavit Ex.P9 of PW-11 EHC Jasbir Singh who was posted as M.M. of police station on 12.09.2013. In this affidavit Ex.P9, it has been recorded that the abovesaid all the articles were deposited with the deponent on 13.09.2013.

But so far as the abovesaid three parcels containing vaginal swab, anal swab, smears and cloth of deceased are concerned, these were bearing three seals of Doctor each and as such there was not even any remote possibility of tampering with the same. So far as the parcel containing a piece of brick bearing blood stains and the blood lifted from the spot is concerned, it was not containing any extra ordinary exceptional material which could have prompted the IO to tamper with the same to secure conviction of appellant (accused).

27. Then in answer to a question put to PW-5 in cross-examination, it also came on record that at about 1:00 p.m. from the site itself this witness had noticed appellant (accused) while taking her daughter Chandni (since deceased) towards the shop. So, it establishes the fact that appellant (accused) was last seen in the company of deceased on 11.09.2013 at about 1:00 p.m. Then as above noticed the deceased was also found missing from her house from this very date afternoon and her dead body was found on the next day i.e. 12.9.2013 noon-time.

28. Then in this case, the alleged occurrence took place on 11.09.2013 and the appellant (accused) was apprehended in this case on

19.09.2013. He remained absconding for about a week in order to escape himself from the reach of law. This act and conduct on his part also goes against him.

29. Then it was the case of prosecution that on 13.09.2013, PW-19 Vinod and PW-21 Siri Bhagwan were returning from Delhi after doing their private work and they were present at bus stand Bahadurgarh. There came appellant (accused) at 5:30 p.m. and confessed his complicity in the commission of the alleged crime before them and requested them to produce him before the police. But this theory of extra judicial confession propounded by these two PWs qua the involvement of the appellant (accused) in the alleged crime does not seem to be on sound footing as some material substance had come on the record in their cross-examination which shattered the veracity of their depositions. For instance, PW-19 (Vinod) in his cross-examination deposed that appellant (accused) met them at 5:30 p.m. at Bahadurgarh on the abovesaid date who was in the company of police officials who were 4/5 in number. It is the settled law that any confession made before any public person in the presence of police is quite meaningless in the eyes of law. Then in this connection, PW-21 (Siri Bhagwan) in his cross-examination stated something different that appellant (accused) came across them at bus stand Bahadurgarh at about 11:00 a.m. who was alone at that time. Police of Rohtak reached there at about 12:00 noon-time. Then it is a matter of common sense and prudence that a person will not make any confessional statement before any person at a public place as in the case in hand at bus

stand during busy day hours when the rank and file are used to be present therein in routine. Then both the PWs are also found to be quite in conflict with each other regarding the time at which the appellant (accused) had met them at bus stand, Bahadurgarh since PW-19 (Vinod) in this connection stated that appellant (accused) met them at 5:30 p.m. whereas PW-21 (Siri Bhagwan) disclosed this time at about 11:00 a.m.. Hence this theory of extra judicial confession has no substance for its sustainability, resultantly the same is declined.

30. The evidence of prosecution as available on the file in brief is that PW-1, Dinesh-complainant supported the prosecution version on the same lines as narrated by him before the police on 12.09.2013 vide his statement Ex.P1.

PW-5 Phullo was the wife of the complainant and she also corroborated prosecution version by lending support to the statement of PW-1.

PW-2 Pooja was one of the daughters of the complainant who deposed to the effect that appellant-accused gave her ₹20/- and had asked her to accompany him to his house where he would give her cake. This version was also supported by PW-3 Sumanti who was another daughter of complainant PW-1 Dinesh.

PW-4 Suresh identified dead body of Chandni (since deceased) at the time of preparing the inquest report and proved the same as Ex.P3.

PW-6 C. Prem Kumar delivered the special report in this case to the higher authorities and his affidavit in this regard was Ex.P4.

PW-10 EHC Kuldeep Singh tendered in his statement his duly sworn affidavit Ex.P8 to the effect that he deposited the case property of this case in intact condition in the office of FSL, Madhuban.

PW-11 EHC Jasbir Singh was the Moharrir Malkhana, Police Station Civil Lines, Rohtak on the date of the occurrence. He tendered in his statement a duly sworn affidavit Ex.P9. His affidavit was to the effect that case property of this case was deposited with him in intact condition and he sent the same as such to the office of FSL, Madhuban for its necessary chemical test.

PW-12 HC Sumit Kumar was the Draftsman. He visited the spot of occurrence at the instance of SI Har Narain and prepared scaled site plan Ex.P10.

PW-13 ASI Ram Phal took appellant (accused) Sandeep to General Hospital, Rohtak where he was got medico-legally examined.

PW-16 C. Vishnu prepared the videography of the spot of occurrence and proved one CD in this regard as Ex.P26.

PW-17 ASI Veer Bhan recorded formal FIR Ex.P28 on receipt of ruqa Ex.P27.

PW-22, (Retd.) SI Har Narian was posted as SI/In-charge Police Post, Model Town, Rohtak on 12.09.2013. On receipt of information regarding recovery of dead body of a female child in the area of office of Agriculture Department, he went to spot wherein he recorded the

statement Ex.P1 of complainant-Dinesh (PW-1) and sent ruqa to the police station for registration of the case. Further he prepared rough site plan Ex.P37 of the spot of occurrence. He also proved the memo Ex.P7 vide which a brick-bat piece bearing blood stains and the blood recovered from the spot after preparing a parcel thereof in a plastic box was taken into police possession. Then he also proved the inquest report prepared in respect of dead body of deceased Ex.P17. Further he also proved the memo Ex.P30 vide which three sealed packets along with other articles which were handed over by the Doctor to the Police after post-mortem of deceased were taken into police possession. He recorded the supplementary statement of complainant-Dinesh (PW-1) and statement of one Ajay on 16.09.2013 and added the offence under Section 216, IPC, in this case.

31. On 19.09.2013, he arrested appellant (accused) Sandeep at Chhawala bus stand, Najafgarh, Delhi on the basis of secret information. During interrogation, appellant (accused) suffered disclosure statement Ex.P31 whereby he offered to demarcate the place of occurrence and further to get recovered his clothes from the area near railway station, Bahadurgarh which were worn by him at the time of commission of the crime and also with regard to a cell phone which he had sold at a shop under the name and style of M/s Prem Communication on Kundli road near Pyau Maniyari. Thereafter, he led the police party headed by this witness (PW-22) and got recovered the said clothes i.e. pant and shirt having bloodstains from the disclosed place which were converted into a parcel

and taken into police possession vide memo Ex.P33. Prior to this, he also led the police party to the spot of the crime which was identified by him and a memo Ex.P32 was prepared in this connection. It was further in the statement of this witness that appellant (accused) also led to the abovesaid shop M/s Prem Communication where Monu Saini, the owner of that shop produced before the police a mobile phone which was sold by appellant (accused) to him and same was taken into police possession vide memo Ex.P5. The abovesaid clothes of accused i.e. shirt Ex.P35, pant Ex.P36 and mobile phone Ex.P6 were produced in the Court during trial of the case.

PW-9 HC Om Parkash and PW-18 ASI Harender Singh accompanied the police party of PW-22 (Retd.)SI Har Narain during investigation of this case and they both corroborated the statement of PW-22 as far as it relates to the investigation of the case and the recoveries got made during the investigation.

32. In the light of above discussion, it is held that no material worthwhile came on record during trial of the case on the basis of which the appellant (accused) Sandeep can be assoiled of the charges framed against him in this case, so as such his conviction in this case is upheld.

Murder Reference No.3 of 2016

33. Then the learned counsel for the appellant (accused) has also made submission with regard to the sustainability of sentence of Capital Punishment imposed upon appellant (accused) Sandeep.

In this regard, she has contended that appellant/convict-

Sandeep is the first offender and he is about 26 years of age, his parents are old and even his father is blind. He is the only earning member in the family. Further he belongs to poor family. Then she prayed that his sentence of Capital Punishment be commuted to life imprisonment. In support of her contention she has referred to certain case laws relevant to the case in hand which are as under:-

i. ***Purna Chandra Kusal vs. State of Orissa, 2012(1) R.C.R. (Criminal) 596.***

It was a case of rape and murder of five years old minor girl. Accused was convicted on the basis of last seen evidence and recovery of bloodstained clothes of the appellant. It was held as under:-

“There is no flexible rule that a death sentence cannot be awarded in a case resting on circumstantial evidence but courts are as a matter of prudence, hesitant in awarding this sentence, in such a situation. It is true that the crime was indeed a heinous one as the victim was only five years of age and daughter of neighbour of accused. On a cumulative assessment of the facts, we are of the opinion that the death sentence should be commuted into one for life.”

2. ***Ram Deo Prasad vs. State of Bihar, 2013(4) R.C.R. (Criminal) 198.***

It was also a case of rape and murder of a minor girl of four years old. In this case, the appellant did not have sufficient resources to engage a lawyer of his own choice and

got himself defended upto his satisfaction.

“While confirming the conviction of the accused under Sections 376 and 302, IPC, the Hon'ble Apex Court set aside the death sentence awarded to him and substitute it by imprisonment for life that should not be less than actual imprisonment for a period of 18 years. The case of the appellant for any remission under the Code of Criminal Procedure may be considered only after he has served out 18 years of actual imprisonment.”

34. In the case in hand also, the appellant (accused) could not engage any counsel of his own choice due to lack of funds/poverty and his interest was defended by a legal aid counsel throughout.

So the facts of the case in hand and the facts of above discussed case laws are found to be identical to each other to a considerable extent and as such, we feel no hesitation to follow the law laid down in said both the case laws.

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35. Initially the name of the appellant-herein (accused) Narender did not figure any where in this case of prosecution. He was named as an accused in this case when complainant-Dinesh (PW-1) and Ajay Dass (PW-7) visited the house of this appellant in village Sannauth near Narela, Delhi where he along with his co-accused (now co-appellant/Sandeep) was found sitting on a cot in his house. When complainant-Dinesh (PW-1) asked his co-appellant(co-accused)/Sandeep

to surrender before the police, since he had raped and murdered his daughter-Chandni, then the present appellant (accused) Narender induced him (co-appellant/Sandeep) to run away from the spot after giving him a sum of ₹500/-. Both PW-1 and PW-7 during trial of the case supported the aforesaid version of prosecution.

36. The learned counsel for the appellant (accused) Narender has contended that all the ingredients as prescribed under Section 212, IPC, are not fulfilled in this case and as such, conviction of this appellant Narender for this offence is not tenable. In support of his contention, he has referred to the cross-examination of both the aforementioned PWs and has also cited the case law as laid down in ***Sanjiv Kumar vs. State of Himachal Pradesh 1999(1) R.C.R. (Criminal) 717***, wherein it was held that:-

“In order to attract the provision of Section 212, IPC, it is necessary to establish commission of an offence, harboring or concealing the person known or believed to be the offender, and such concealment must be with the intention of screening him from legal punishment”.

37. Abovesaid co-appellant (co-accused/Sandeep) was the first offender with no criminal background. Then the evidence led by prosecution is found to be not so convincing to hold that the appellant (accused) Narender was having knowledge at the time when both aforementioned PW-1 and PW-7 approached him that his co-appellant (co-accused) Sandeep was an offender. As per version of PW-1 and PW-

7, he (appellant-Narender) directed his co-accused/Sandeep to run away from there by offering him monetary help.

38. Then in the cross-examination of PW-1, it came on record that appellant (accused) Narender was not known to him earlier. They remained there in the house of the present appellant Narender for about 5/7 minutes. They did not try to catch hold appellant-Sandeep, when he fled away. Similar material has also come on record in the cross-examination of PW-7/Ajay Dass. Both PW-1 and PW-7 identified the present appellant for the first time, thereafter in the Court during trial of the case. So in this situation, the test identification parade of this appellant was required to be done in order to establish his identity to bring him to book and to rule out any other possibility suggesting his innocence.

Hence the ingredients which are ineluctable in order to constitute the offence under Section 212 of the IPC are held to be missing in this case.

39. In the light of above discussion, the murder reference made by the learned trial Court is declined. The sentence of death imposed upon convict (appellant) namely Sandeep under Section 302 of IPC is set-aside. Instead, he shall undergo imprisonment for life and pay a fine of ₹50,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of two months. However, he shall not be entitled to be released on parole or furlough or for any remission, till he serves out the actual sentence of twenty years. His conviction and

sentences of imprisonment and fine alongwith their default clauses for the offences under Section 6 of the Protection of Children from Sexual Offences Act and Sections 363 and 366, IPC, as awarded by the learned trial Court are upheld. The above substantive sentences of imprisonment shall run concurrently.

So the criminal appeal No.CRA-D-302-DB of 2016 mentioned above is partly allowed to the extent indicated above.

CRA-S-1136-SB-2016 filed by appellant-Narender, who is on bail vide this Court's order dated 02.06.2016, is accepted. The conviction as well as sentence of imprisonment and fine imposed upon the appellant (accused) Narender are set-aside. He is acquitted of the charge against him. He and his surety are also discharged from their liability of bail and surety bonds, respectively.

11.7.2016
Brij/Gaurav Sorot

(T.P.S.MANN)
JUDGE

(GURMIT RAM)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No